

U.S. TUNGSTEN CORPORATION

IBLA 74-162

Decided September 23, 1974

Appeal from decision (A-5338) of Arizona State Office, Bureau of Land Management, dismissing protest against approval of a right-of-way for water pipeline.

Affirmed.

1. Rights-of-Way: Generally--Rights-of-way: Act of February 15, 1901--
Water and Water Rights: Generally

Except where the United States itself asserts an interest, the Department does not adjudicate water rights and will not deny an application for right-of-way to transport water to a millsite upon the basis of a protest of the amount of water to be used under a State water permit or on the basis of an alleged conflict with the protestant's own water rights where it appears the protestant has a remedy at law to protect its interests.

APPEARANCES: Gerald L. Diddy, Esq., of Wickenburg, Arizona, for appellant; Jon S. Cohen, Esq., of Snell and Wilmer, Phoenix, Arizona, for permittee.

OPINION BY ADMINISTRATIVE JUDGE GOSS

U.S. Tungsten Corporation has appealed from a decision of the Arizona State Office, Bureau of Land Management, dated November 16, 1973, which dismissed its protest against the granting of a water pipeline right-of-way to Bagdad Copper Corporation 1/ through public lands in sections 20 and 28, T. 15 N., R. 9 W., and sections 1, 12,

1/ Cyprus Mines Corporation has succeeded to the interest of Bagdad Copper Corporation.

13, 24, T. 16 N., R. 10 W., GSR Mer., Arizona. The purpose of the right-of-way is for a water pipeline is connection with the Francis Creek Springs millsite.

The application was filed under the Act of February 15, 1901, as amended, 43 U.S.C. § 959 (1970). The Act authorizes the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights-of-way through public lands for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits used to promote mining or quarrying.

Right-of-way A-5338 was granted to Bagdad Copper April 25, 1972, by decision of the Arizona State Office. Tungsten Corporation and John Philip Zannaras 2/ filed a protest to the decision October 4, 1973. The State Office rejected the protest stating that Bagdad had complied with the governing regulation and if any rights of protestors were impaired then their redress was through the courts.

Tungsten contends on appeal, in part, that the right-of-way has been erroneously granted because Bagdad does not have the right to divert water at the applied-for point of diversion nor does it have the right to divert the quantities specified in the June 30, 1970 letter from the Assistant State Land Commissioner for Water, which letter was attached to the right-of-way application. Appellant further claims the right-of-way violates 30 U.S.C. § 51 (1970), and is a destruction of its vested rights. Appellant contends the right-of-way violates two court decisions involving water rights of the parties.

In response Bagdad argues that it has complied with 43 CFR 2802.1-5(b), the governing regulation under the Act of February 15, 1901, by submitting a statement of the Assistant State Land Commissioner for Water of the State of Arizona that Bagdad has the necessary authorized use of water. It also responds that the remainder of the issues raised are not relevant.

Department regulation 43 CFR 2802 sets forth both the required application procedure and the obligation to act on a proper application:

§ 2802.1-5 Documents which must accompany application.

* * * * *

2/ John Phillip Zannaras did not personally appeal from the decision dismissing protest.

(b) Evidence of water right. If the project involves the storage, diversion, or conveyance of water, the applicant must file a statement of the proper State official, or other evidence, showing that he has a right to the use of the water. Where the State official requires an applicant to obtain a right-of-way as a prerequisite to the issuance of evidence of a water right, if all else be regular, a right-of-way may be granted conditioned only upon the applicant's filing the required evidence of water right from the State official within a specified reasonable time. The conditional right-of-way will terminate at the expiration of the time allowed.

§ 2802.2-1 Completed application and reports.

(a) Where an application is complete and in conformity with the law and regulations and all required reports have been obtained and it is determined that the approval of the right-of-way will not be contrary to the public interest, including that of the Government, the manager will approve the right-of-way.

This is the only requirement for documentation of water right required of a prospective permittee for a water pipeline right-of-way under the 1901 Act. The Departmental regulations for applications for rights-of-way for canals, ditches, and reservoirs under the Act of March 3, 1891, as amended, 43 U.S.C. § 946 et seq. (1970), found in 36 L.D. 567 (1907), are not applicable. The requirements of the 1891 Act are not involved in this case and are only applicable to pipelines where the water is conveyed primarily for irrigation or drainage purposes. See 43 CFR 2871.0-3(5).

[1] From our review of the record it appears that the permittee has complied with both the intent and the letter of the regulation by submission of the June 3, 1970 letter from the Assistant State Land Commissioner for Water. The whole tenor of the protest takes issue with the amount of water and diversion point to which permittee is entitled and the impending conflict with the protestant's own water right. Except where the United States itself asserts an interest, the Department has long held that questions involving the control and appropriation of the waters of a State cannot be adjudicated under an application for right-of-way privileges over the public land. Howard C. Brown, 73 I.D. 172 (1966); Jack A. Medd, 60 I.D.

83 (1947); Surface Creek Ditch and Reservoir Co., 22 L.D. 709 (1896). As in Brown, "appellant is seeking to have the Department do indirectly -- by denial of the right-of-way application -- what appellant can do directly in the * * * courts." Page 178. Such matters are properly left for determination between the parties, or by State authorities or the courts.

Appellant's other arguments have been reviewed, but are not of sufficient substance to change the decision herein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

