Editor's note: Appealed -- reversed Civ.No. 1-76-173 (D. Idaho Sept. 8, 1977); rev'd, No. 78-1134 (9th Cir. Jan. 30, 1981), 638 F.2d 100; cert. denied S.Ct. No. 81-236, 102 S.Ct. 505, 454 US 965 (Nov. 2, 1981), rehearing denied 102 S.Ct. 1042, 454 US 1165 (Jan. 11, 1982); See also Grindstone Butte Project, 24 IBLA 49 (Feb. 23, 1976).

GRINDSTONE BUTTE PROJECT

IBLA 74-313 Decided November 7, 1974

Appeal from decisions by the Idaho State Office, Bureau of Land Management, imposing stipulations for right-of-way applications I-7365 and I-7366.

Remanded.

1. Applications and Entries: Generally -- Rights-of-Way: Act of March 3, 1891 -- Rights-of-Way: Applications

   A right-of-way under the Act of March 3, 1891, does not vest until the Secretary of the Interior has approved the application. The Secretary may withhold his approval if the grant is not in the public interest.

2. Applications and Entries: Generally -- Rights-of-Way: Act of March 3, 1891 -- Rights-of-Way: Applications -- Rights-of-Way: Conditions and Limitations

   The Secretary of the Interior may condition the grant of a right-of-way under the Act of March 3, 1891, to ensure that the public interest will be protected.

3. Rights-of-Way: Act of March 3, 1891 -- Rights-of-Way: Conditions and Limitations

   An irrigation right-of-way under the Act of March 3, 1891, does not give the grantee exclusive use and control of the right-of-way area and the Secretary of the Interior may condition the right-of-way grant with reasonable environmental stipulations designed to protect the public interest.

APPEARANCES: William F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellant; Riley C. Nichols, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Grindstone Butte Project, a tenancy in common organized for the purpose of delivering water to a number of desert land entries, has appealed from two decisions by the Idaho State Office, Bureau of Land Management, dated May 16, 1974 (I-7365), and April 23, 1974 (I-7366), granting rights-of-way pursuant to the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. §§ 946 et seq (1970). Appellant objects to the fact that the rights-of-way were granted subject to certain stipulations. See Appendices A and B.

Application I-7365 is for an irrigation pipeline and pump base right-of-way. Its purpose is for the expansion of an existing pumpsite and penstock granted under right-of-way I-6530. The pump base will be situated on the Snake River, near Glenns Ferry, Idaho, and will occupy a surface area of 20,000 square feet. The site will consist of high lift pumps mounted on a concrete base. Water will be lifted about 400 feet through a 48-inch pipeline and will then spill into an earthen canal. The pipeline right-of-way will be 50 feet wide and run through 3,856 feet of public land. Part of this area is included within Power Site Classification No. 435, dated August 16, 1955.

Application I-7366 is for irrigation pipelines and a canal right-of-way. The canal will be 100 feet wide and 6 feet deep and is an extension of an existing canal constructed by appellant under right-of-way I-6530. The canal will cross 6 miles of public land and will have a road constructed on its bank. Lateral buried pipelines will extend from the canal to service desert land entries. The several pipelines will cross a total of 18.7 miles, 16.7 of which cover allowed desert land entries.

The applications were filed on October 23, 1973 (I-7365), and December 17, 1973 (I-7366). In both applications appellant agreed that if the rights-of-way were approved, they would be subject to the terms and conditions of the applicable regulations in 43 CFR 2800. 1/ Following receipt of the applications, the Bureau of Land

1/ 43 CFR 2801.1-5(h) reads as follows:

"An applicant, by accepting a right-of-way, agrees and consents to comply with and be bound by the following terms and conditions * * *:

* * * * * *

(h) To comply with such other specified conditions, within the scope of the applicable statute and lawful regulations thereunder, with respect to the occupancy and use of the lands as may be found

Management's staff prepared field reports and environmental analyses for the areas affected by the rights-off-way. In addition to the reports developed by the Bureau's staff of realty, resource, wildlife, recreation and conservation specialists, further information was obtained from the Bureau of Sport Fisheries and Wildlife, the Conservation Division of the U.S. Geological Survey, the Idaho Department of Fish and Game, the Saylor Creek Planning Unit for Intensive Agriculture Development, and the Federal Power Commission. Based upon a review of all the relevant information, the Bureau staff recommended that the rights-of-way be approved subject to conditions for the protection of hydroelectric, environmental and other interests of the public. Thereafter, the Idaho State Office issued its decisions granting the rights-of-way to appellant subject to the stipulations listed in Appendices A and B, respectively.

On appeal, the Grindstone Butte Project objects to those portions of the BLM decisions which impose upon the right-of-way grants the terms and conditions contained in the stipulations. Appellant asserts three major points in its brief as a basis for having these stipulations declared invalid and removed from the grants. First, appellant maintains that rights-of-way under the Act of March 3, 1891, are legislative grants in praesenti with title vesting in the grantee upon approval of the maps by the Secretary of the Interior. Appellant argues that if the map is in proper form and the land is public land, the Secretary must give his approval. Second, appellant argues that assuming approval by the Secretary is discretionary, he has no authority to impose upon right-of-way grants conditions, such as those at issue, which are not specifically authorized or required by the Act. Finally, appellant argues that the conditions being imposed are unreasonable as they prevent appellant from having exclusive use and control of the land surface, and are burdensome, thus substantially impairing the full enjoyment of the rights-of-way. Appellant requests a hearing on the issue of the reasonableness of the stipulations.

[1] Appellant's initial argument was disposed of in a recent case before the Board. Zelph S. Calder, 16 IBLA 27, 33, 81 I.D. 339, 342 (1974). In the Calder case, the appellant also argued that under the 1891 Act rights vested upon the filing of a proper map. In response we stated the following:

> [T]he right-of-way does not vest until all requirements have been met and the Secretary of the Interior has approved the application. The Secretary's approval is a prerequisite to the vesting of the grant of a right-of-way under the 1891 Act. United States ex. rel.

(Fn. 1 Cont.)
by the agency having supervision of the lands to be necessary as a condition to the approval of the right-of-way in order to render its use compatible with the public interest."

Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 231 (D.C. Cir.), cert. denied, 229 U.S. 562 (1936); United States v. Rickey Land & Cattle Co., 164 F. 496, 500 (C.C.N.D. Cal. 1908); Rimrock Canal Co., 9 IBLA 333, 343, 80 I.D. 197, 200 (1973). 2/

In the Ickes case, the court upheld the Secretary's refusal to approve a right-of-way under the Act of March 3, 1891, for a ditch and reservoir system. The court denied that there was an absolute right to the grant stating:

> The contention that the grant is one in praesenti, and therefore vests title in the applicant, irrespective of the approval by the Secretary of the Interior, cannot be sustained. So long as the exercise of the power of approval by the Secretary is not unreasonable, or contrary to statutory mandates governing the allowance of rights of way for canals and reservoirs, the jurisdiction of the Secretary to act under reasonable regulations respecting such grants cannot be controlled by the mandatory orders of the courts.

84 F.2d at 231. Accordingly, we find that appellant's first argument is without merit.

[2] Appellant's second argument must also be rejected. In Calder, supra, we not only held that Secretarial approval was discretionary, but, in addition, stated that the Secretary could "condition the grant to ensure that the public interest will be protected. Solicitor's Opinion, M-36500 (May 5, 1958)." The issue in Solicitor's Opinion, M-36500, was whether the Bureau of Land Management could require an applicant for a right-of-way under the 1891 Act to enter into stipulations assuring the public of access for wildlife and recreation purposes. The Solicitor concluded that the right-of-way under the Act was in the nature of an easement which the Secretary could grant in his discretion and which could be qualified by conditions deemed by the Secretary to be in the public interest. Cf. Great Northern Ry. Co. v. United States, 315 U.S. 262, 271 (1942).

Appellant suggests that we reject the reasoning of the Solicitor as it was not developed in an adversary proceeding and has no support in the case law. We decline such a suggestion. The Solicitor's reasoning is sound. In view of the fact that we have held that the Secretary may reject a right-of-way application which would adversely affect the public interest, it is no less reasonable to hold that the Secretary may qualify his approval by requiring that the grantee stipulate to conditions for protection of the public interest. Furthermore, this reasoning is supported by case law. In Verde River Irriga-

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2/ See also James D. Perkins, 13 IBLA 74, 76 (1973).

tion & Power District v. Work, 24 F.2d 886 (D.C. Cir. 1928), cert. denied, 279 U.S. 854 (1929), plaintiff filed an application for a right-of-way pursuant to the Act of March 3, 1891. The application was opposed by another irrigation association. Both parties sought damsites for the storage of water. Following discussions between the two parties and the Department, contracts were executed by the Secretary of the Interior with both parties, pursuant to the Act of June 17, 1902, 32 Stat. 388, as amended, 43 U.S.C. §§ 523 et seq, 3/ to provide for cooperative construction and use of reservoirs, canals and ditches subject to stipulations set forth therein. Following execution of the contracts, plaintiff again filed an application for a right-of-way under the 1891 Act. The court stated that it was permissible for the Secretary to approve the applications.

> [p]ursuant to the provisions of the Act of March 3, 1891, * * * and in further pursuance of contracts executed by [the Secretary] * * * and subject to the stipulations therein set forth * * * [and subject] to all the terms, conditions, and covenants of the stipulation executed * * * for the protection of the Indian interests involved. (Emphasis by court.)

24 F.2d at 888. Thus, the court approved the Secretary's authority to condition the grant of a right-of-way under the 1891 Act upon acceptance by the grantee of stipulations for the benefit of the public interest. See also Solicitor's Opinion, 60 I.D. 477, 478-79 (1951).

[3] In its final argument on appeal, appellant urges that the stipulations are unreasonable as they prevent appellant from having exclusive use and control of the right-of-way areas, and are burdensome, thus substantially impairing enjoyment of the grants. The grant of a right-of-way under the 1891 Act does not include exclusive possession and control of the area. In United States v. Big Horn Land & Cattle Co., 17 F.2d 357, 366 (8th Cir. 1927), the court held that a right granted under the 1891 Act, which included use of a natural lake as a reservoir, did not carry with it exclusive fishing rights in the lake. The right was held subject to access and privileges by United States citizens. See Zelph S. Calder, supra at 39, 81 I.D. at 345. In the present case, the Bureau of Land Management, for the protection of the public, deemed it necessary to condition appellant's right-of-way grants with stipulations concerning the use of poisonous substances, reseeding of disturbed lands, removal of refuse, prevention of water pollution, protection of fish, protection of archeological sites, assurances of livestock mobility, and protection for

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3/ The Act authorizes the Secretary of the Interior, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water for irrigation use.

hydroelectric development. Appellant argues that these stipulations are unreasonably burdensome and requests a hearing to develop evidence on the issue. In its appeal brief, appellant has not demonstrated that the stipulations are either inconsistent with or tend to unreasonably encumber the proposed projects. Furthermore, a hearing in this instance is a matter of discretion with the Board. 43 CFR 4.415. While we do not believe that a hearing is justified in this matter, further clarification regarding the compatibility of the stipulations with the proposed projects seems warranted. As was pointed out in Solicitor's Opinion, M-36500, supra at 4, while the Department can condition right-of-way grants under the 1891 Act, such conditions must not, as a matter of the factual circumstances involved, unreasonably impair the full enjoyment of the grant. Accordingly, appellant will be given the opportunity to present objections to the State Office regarding the alleged unreasonableness of the stipulations. Objections must be presented within 30 days following receipt of this decision. Thereafter, the State Office will issue a decision on the matter subject to appellant's right to appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are remanded to the State Office for action consistent with the view expressed herein.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

APPENDIX A

STIPULATIONS
BUREAU OF LAND MANAGEMENT
RIGHT-OF-WAY I-7365

1. The permittee agrees in all operations under this permit to comply with the applicable State and Federal laws and regulations concerning the use of poisonous substances, including insecticides, herbicides, fungicides, rodenticides and other similar substances. Prior to the use of such substances on or near the right-of-way, the permittee shall obtain from the District Manager approval of a written plan for such use. The plan shall state the type and quantity of material to be used, the pest to be controlled, the method of application and such other information as he may require. All use of such substances on or near the right-of-way shall be in accordance with the approved plan. If the use of a poison is prohibited by the Secretary of the Interior, it shall not be used. If use of a poison is limited by the Secretary of the Interior, it shall be used only in accordance with that limitation.

2. Permittee shall survey and clearly mark the exterior limits of the right-of-way. All activities directly or indirectly associated with the construction or maintenance of the pump site and pipeline must be conducted within the limits of the right-of-way.

3. All disturbed areas shall be reseeded to mixed grasses, in the manner directed by the District Manager.

4. The pipeline construction will be done in such a manner as to cause the least disturbance from the pumpsite to the top of the canyon rim.

5. The pumpsite will be kept clean at all times, either on or off the right-of-way grant where equipment has been operated or repaired, remove all garbage, remove all temporary structures, packing cases, trash, litter, fuel containers, oil cans, wire, discarded equipment or parts thereof, or other refuse resulting from construction or operations, and will be so maintained so as not to detract from the area.

6. No chemical treatment of the channel or bay for removal of vegetation will be allowed. The pumping installation will not be a source of water pollution from oil, paint, detergents, chemicals, etc. If such pollution occurs, it shall be stopped and cleaned up by the grantee.

7. The grantee will be responsible for all damages from construction, use and maintenance of all facilities, and from leakage or flow from the pipeline. Any damages from the above will be immediately corrected.

8. Screens or other measures shall be placed around the pumps to prevent small fish from entering.

9. The United States Government and State Government agencies are not responsible for any harm or actions of the grantees, their contractor, sub-contractor, or persons using the area.

10. A performance and payment of bond of $5,000 for the grantee will be posted and said bond maintained until proof of construction and compliance inspection by the agencies has been satisfied. This bond must be submitted to the Bureau within 30 days of the date of grant.

11. In the event the land withdrawn in Powersite Classification #435 is required for hydroelectric development purposes, any structures or improvements placed thereon found to interfere with such development shall be removed or relocated as necessary to eliminate such interference, at no cost to the United States, its permittees or licensees.

12. Any violation of these stipulations will result in cancellation of the right-of-way grant and forfeiture of the performance and payment bond.

13. Permittee shall notify the Department of Anthropology, Idaho State University, Pocatello, of proposed construction under this application in order that the University may negotiate with the permittee for the purpose of undertaking, prior to construction of the project, an archaeological survey and salvage excavation to be financed by the permittee.

    Should additional sites, ruins, or artifacts be discovered during construction activities, construction will immediately be suspended and the BLM District Manager shall be notified. If the District Manager finds the damage or destruction to historic or prehistoric remains or artifacts cannot be avoided as a result of planned construction activities, the permittee will be required to provide at his expense, proper scientific investigation. All investigation and salvage will be covered by an Antiquities Act Permit applied for by the agency doing the survey or salvage work.

APPENDIX B

STIPULATIONS
BUREAU OF LAND MANAGEMENT
RIGHT-OF-WAY I-7366

1. The permittee agrees in all operations under this permit to comply with the applicable State and Federal laws and regulations concerning the use of poisonous substances, including insecticides, herbicides, fungicides, rodenticides and other similar substances. Prior to the use of such substances on or near the right-of-way, the permittee shall obtain from the District Manager, approval of a written plan for such use. The plan shall state the type and quantity of material to be used, the pest to be controlled, the method of application and such other information as he may require. All use of such substances on or near the right-of-way shall be in accordance with the approved plan. If the use of a poison is prohibited by the Secretary of the Interior, it shall not be used. If use of a poison is limited by the Secretary of the Interior, it shall be used only in accordance with that limitation.

2. Permittee shall survey and clearly mark the exterior limits of the right-of-way. All activities directly or indirectly associated with the construction or maintenance of the irrigation facilities must be conducted within the limits of the right-of-way. Exterior boundaries will be identified by a one foot wooden stake every 200 feet.

3. All disturbed areas along the canal banks (as it crosses both private and national resource land) and the pipeline (as it crosses national resource land) will be seeded to a mixture of Acer Milkvetch, Ladak alfalfa, Eski Sainfoin, crested wheatgrass, and Russian wildrye at a rate of 15 lbs. per acre (3 lbs. per acre per species). Also, a portion of the canal bank, as chosen by an authorized Bureau of Land Management officer, will be planted with 300 shrub seedlings. The seed and seedlings will be supplied by the Bureau of Land Management. The seed application shall be done by broadcast, with a mechanical seeder. Seeding and planting shall be done in the fall by the grantee and will begin within one week after notice by the Bureau of Land Management.

4. The vegetation along the canal bank and pipeline shall not be chemically treated or burned, but will be maintained by mowing when necessary as determined by an authorized Bureau of Land Management officer. Such maintenance is the responsibility of the grantee.

5. If the construction uncovers any archaeological sites, the construction will stop and the Bureau of Land Management will be notified.

6. In the event future livestock management dictates livestock movement across the canal, the grantee will be responsible for providing a means for livestock to safely cross the canal.