

Editor's note: Appealed -- aff'd in part, sub nom. State of Idaho, ex rel. Andrus v. Kleppe, Civ. No. 1-75-22 (D.Idaho July 15, 1976), 417 F.Supp. 873; aff'd, (per curiam), No. 77-1300 & 77-1517 (9th cir. April 19, 1979), 595 F.2d 524; aff'd in part, rev'd in part, No. 79-260 (April 16, 1980) 445 U.S. 715, 100 S.Ct. 1450

IDAHO DEPARTMENT OF WATER RESOURCES

IBLA 75-357

Decided July 31, 1975

Appeal from the decision of the Idaho State Office, Bureau of Land Management, partially rejecting an application for a temporary withdrawal of lands for proposed development under the Carey Act of 1894.

Affirmed.

1. Act of March 5, 1910 -- Act of August 18, 1894 (Carey Act) -- State Selections -- Withdrawals and Reservations: Stock-driveway Withdrawals

An application filed by a State under the Act of March 5, 1910, for a temporary withdrawal of lands to aid in the selection of the lands for proposed development under the Carey Act of 1894 must be rejected where the lands are withdrawn for stock-driveway purposes, and cannot be suspended pending consideration of a petition for reclassification of the lands as suitable for selection under the Carey Act.

2. Act of March 5, 1910 -- Act of August 18, 1894 (Carey Act) -- State Selections -- Withdrawals and Reservations: Stock-driveway Withdrawals

A grant of lands to a State under the Carey Act of 1894 is not a grant in praesenti, vesting title to any particular lands as of the time of passage of the act or by relation back upon fulfillment of the conditions imposed by the act, but the allowance or rejection of an application by a State under

the Act of March 5, 1910, for a temporary withdrawal of lands to aid in the selection of the lands for proposed development under the Carey Act is a matter wholly within the discretion of the Department; and where the lands sought to be selected by the State are embraced within a stock-driveway withdrawal made by the Secretary of the Interior under authority of law, they are not, so long as such withdrawal remains in force, subject to any claim of the State under the Carey Act.

APPEARANCES: Nathan W. Higer, Esq., Office of the Attorney General, State of Idaho, Boise, Idaho, for appellant; Riley C. Nichols, Esq., Office of the Solicitor, U. S. Department of the Interior, Boise, Idaho, for appellee, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The State of Idaho through its Department of Water Resources filed an application pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970), for the temporary withdrawal of some 27,400 acres of land for proposed development under the Carey Act of 1894, 43 U.S.C. §§ 641 et seq. (1970), by the Lake Side Irrigation Project.

The Carey Act of 1894 reads, in applicable part:

To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is * * * authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the * * * [desert-land law, 43 U.S.C. §§ 321 et seq.] binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the said desert-land law, within ten

years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; * * *

The Act of March 10, 1910, supra, authorized temporary withdrawals upon application by the states to aid in carrying out the purposes of the Carey Act. 1/

By decision of January 24, 1975, the Idaho State Office, Bureau of Land Management (BLM), rejected the application in part because some of the lands are embraced in various withdrawals and are not available for selection under the Carey Act, including the following-described lands which are withdrawn for stock-driveway purposes under Stock Driveway No. 25 by order issued on August 18, 1955:

T. 9 S., R. 25 E., B.M.,
Secs. 13, 14, 15, 24, 25

T. 9 S., R. 26 E.,
Secs. 19, 20, 21, 22, 23, 24, 25

T. 9 S., R. 27 E.,
Secs. 27, 28, 29, 30

The Idaho Department of Water Resources appealed to this Board only from that part of the decision which rejected the above-described lands included in the stock driveway withdrawal. 2/ At the same time

1/ We note that the regulations pertaining to the Carey Act were last published in 43 CFR 2222.6-2222.6-6 (rev. January 1, 1970), those pertaining to temporary withdrawals under the 1910 act being 43 CFR 2222.6-2. These sections, among others, were deleted by an order in 1970 as unused or obsolete. See 35 F.R. 3072.

2/ Thus, the decision has become final as to its rejection of the following-described lands for the reasons given:

"Withdrawn for Reclamation Purposes for the Minidoka Project:

T. 9 S., R. 25 E.
Sec. 12, All;
Sec. 15, W 1/2 NW 1/4;
Sec. 23, NE 1/4 NE 1/4 SW 1/4.

T. 9 S., R. 27 E.,
Sec. 20, N 1/2.

"Withdrawn for the Minidoka National Wildlife Refuge by Executive Order 8600:

that it filed its statement of reasons for appeal, appellant also filed with the Board a petition by the Lake Side Irrigation Project Association under section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (1970), for reclassification of these lands in the stock-driveway withdrawal as suitable for use under the Carey Act.

[1] In its first point on appeal, the appellant argues that its application for a temporary withdrawal of the lands withdrawn for stock-driveway purposes should have been suspended, and not rejected, pending a decision on the petition filed with this Board for reclassification of the lands as suitable for disposition under the Carey Act.

Although this contention may seem plausible at first glance, it is not tenable under the regulations. 43 CFR 2313.1(c) of the stock-driveway regulations provides that:

Lands withdrawn for driveways for stock * * * are not subject to entry or disposition, and applications for the acquisition of lands so withdrawn will be rejected by the authorizing officer. * * *

Therefore, BLM properly rejected appellant's application. The rejection of the application was also mandated by general regulation 43 CFR 2091.1 which provides in pertinent part that:

* * * applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:

(a) Withdrawal or reservation of lands * * *

fn. 2 (continued)

T. 9 S., R. 27 E.,
Sec. 20, N 1/2.

"The following described lands are included in State Exchange application I-8154. In accordance with the regulations of 43 CFR 2091.2-3, these lands are segregated from appropriation under the public land laws:

T. 9 S., R. 25 E.,
Sec. 33, SE 1/4 NE 1/4, SE 1/4;
Sec. 34, S 1/2 SW 1/4, SE 1/4;
Sec. 35, S 1/2."

Furthermore, the Department has consistently held that an application for withdrawn lands must be rejected, and it is impermissible to hold the application in suspense until the land may become available. Juan N. Menchaca, 14 IBLA 212 (1974); Robert M. Ford, 4 IBLA 321 (1972); Reed F. Adams, A-30950 (October 16, 1968).

Accordingly, the application must be rejected and cannot be suspended pending consideration of the petition for reclassification of the lands as suitable for selection under the Carey Act.

With respect to appellant's second argument on appeal, appellee's answer to appellant's statement of reasons on appeal ably and correctly discusses the facts and the applicable law, with which we agree. Accordingly, we adopt appellee's discussion as hereinafter set out in toto.

[2] In Appeal Point No. 2, appellant argues, in effect, that the State's right to segregate and withdraw land under the Carey Act of 1894, as amended, vested at the time of passage of the Act and, therefore, takes precedence over subsequent withdrawals and other uses which the Secretary may consider more appropriate. The argument assumes that the Carey Act grant was a grant in praesenti and that the Secretary has no discretion in deciding whether or not to withdraw and segregate particular lands when requested to do so by a qualified State. These assumptions are contrary to the language of the statute and Departmental and judicial precedents.

Thus, the statute is couched in discretionary language, authorizing and empowering - not requiring - the Secretary to contract and agree with the states to donate, grant, and patent lands. The discretionary nature of the Carey Act was discussed in State of Wyoming, 36 L.D. 399, 399-400 (1908), as follows:

It is clear from the terms of the act of August 18, 1894, supra, under which the application of the State is filed, that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties thereto without a right in either to insist upon a proffer or acceptance by the other. It is equally clear that when the lands made the subject-matter of the proposed contract have been set aside for other purposes, the Secretary of the Interior, as the authorized representative of the Government in such

matters, is fully warranted in declining to enter into any contract with the State which would defeat the object for which the lands were set aside. The State has no right to insist that he should. As his discretion is not subject to control by the State, a hearing for the purpose of determining whether or not that discretion has been properly exercised can not be demanded by the State. So long as a withdrawal made by him under authority of law remains unrevoked the presumption, so far as third persons having no interest in the land withdrawn are concerned, that his discretion was properly exercised is conclusive, and so long as such withdrawal remains in force the land covered thereby is not subject to any claim of the State under the Carey Act.

With respect to the nature of the grant contemplated by the Carey Act, as amended, it is clear from the language of the Act that the grant was not intended as a grant in praesenti, vesting title to any particular lands as of the time of passage of the Act or by relation back upon fulfillment of the conditions imposed by the Act. Thus, the Act merely authorizes the Secretary to contract in the future with the various states to grant them a maximum quantity of desert lands upon the fulfillment of certain conditions. The Act does not use the phrase "hereby granted" which Congress would have inserted had it intended the grant to be one in praesenti. Furthermore, the courts and the Department have consistently held that the Carey Act was not intended as a grant in praesenti. ^{3/}

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 and the case is returned to the BLM for initial consideration of the petition for reclassification of the lands in the stock-driveway withdrawal, and for further action on the remaining lands in the application for temporary withdrawal.

Anne Poindexter Lewis
Administrative Judge

^{3/} E.g., McKinney v. Big Horn Basin Development Co., 167 Fed. 770 at 775 (8th Cir. 1909); State ex rel. Armington v. Wright, 44 Pac. 89 at 92 (Mont. 1896); Carey Act Selections, 48 L.D. 160 (1921). Cf. State of Wyoming, 36 L.D. 399 (1908).

We concur:

Frederick Fishman
Administrative Judge

Martin Ritvo
Administrative Judge

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