

EDWARD L. BUTTERWORTH

IBLA 75-196

Decided December 23, 1975

Appeal from decision of the Bakersfield, California, District Office, Bureau of Land Management, rejecting in part applicant's request for a special land use permit, 0401-1873.

Reversed and remanded.

1. Public Lands: Special Use Permits--Special Use Permits

The issuance of a special land use permit by the Bureau of Land Management is clearly discretionary, but the Bureau may not issue a permit when the provisions of existing laws may be invoked to provide for the proposed use. However, if a withdrawal of the lands in issue precludes the invocation of such provisions, a permit may be granted if consistent with the public interest. Where the land has been withdrawn by Executive Order No. 6206 of July 16, 1933, for the protection of the water supply of the City of Los Angeles, and the City objects to the issuance of a permit for agricultural purposes, but does not show why it objects, the case will be remanded to develop the facts and for further appropriate consideration.

APPEARANCES: Edward L. Butterworth, Esq., Los Angeles, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Edward L. Butterworth has appealed from a decision of the Bakersfield, California, District Office, Bureau of Land Management (BLM), dated September 6, 1974, which denied in part appellant's

request for a 5-year special land use permit on public land adjacent to his 80-acre ranch in Owens Valley, Inyo County, California. Appellant sought permission to use the land, consisting of 40 acres, for production of alfalfa and for permanent pasture. He was offered a 1-year permit for some 15 acres to expire on April 15, 1975.

In October 1961 appellant informed BLM that with the consent of the grazing permittee who had the authorized grazing use of a 40-acre parcel of public land adjacent to appellant's ranch, appellant had fenced and cross-fenced certain portions of the 40 acres. Appellant requested a special land use permit for such acreage. On December 29, 1961, BLM issued appellant a Notice to Remove Unauthorized Structures from the land. <sup>1/</sup> On February 19, 1962, BLM rejected appellant's application for a special land use permit, stating that such permits are not issued where the provisions of other public land laws might be invoked. On June 12, 1962, that decision was affirmed by BLM's Branch of Land Appeals, Division of Appeals. During the hiatus between those two decisions, appellant filed a petition on April 9, 1962, to have the land restored to public entry, the land having been temporarily withdrawn by Executive Order No. 6206 dated July 16, 1933, pursuant to the Act of June 25, 1910, 43 U.S.C. § 141 (1970), as amended by the Act of August 24, 1912, 43 U.S.C. § 142 (1970), for the protection of the water supply of the City of Los Angeles. The land has never been restored to entry.

In March 1964 the Assistant Director, Lands and Minerals Management, BLM, telegraphed the Bakersfield District Office that:

We know of no (repeat no) objection to the issuance of SLUP to Butterworth for irrigated pasture and fence.

On May 5, 1964, the Bakersfield District Office issued a 5-year special land use permit to appellant for some 15 acres adjacent to appellant's ranch. The permit for the purpose of production of alfalfa and permanent pasture was renewed for another 5-year period on April 30, 1969.

When appellant applied for a 5-year renewal of the permit in 1974, the District Office refused the 5-year renewal and offered, instead, a 1-year non-renewable use permit for approximately 15 acres to expire on April 30, 1975, to allow appellant the opportunity to utilize the land for that year's alfalfa cutting. The District Office found that the lands involved were "in a category for which a Special

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<sup>1/</sup> Appellant was notified by letter dated June 14, 1963, that he had satisfied the requirements of the Notice by removing his improvements from the land.

Land Use Permit is not appropriate." The BLM stated that the permit could not be issued because "there are existing land laws which may be invoked to acquire unreserved unappropriated national resource lands for agricultural purposes (43 CFR 2520)." 2/ The District Office stated that even though the subject land was withdrawn from entry, a permit could not be issued.

Appellant makes the following contentions:

1. The subject land does not affect the water usage or water supply of the City of Los Angeles. Water for the subject land comes from wells on appellant's privately owned parcel.
2. Appellant has complied fully with BLM requirements during the 10 years he has held a permit and no substantive changes have been made in applicable federal statutes or regulations which would require a refusal to renew the permit.
3. The original permit and renewal in 1969 were within BLM's authority to issue; therefore, BLM is estopped to deny that authority, absent a change in the controlling law.
4. The property is indispensable to the operation of appellant's small ranch. Without the adjacent land the ranch is not an economic unit.
5. The acreage is used to store hay, 3 holding areas have been constructed thereon, and, most importantly, it has become highly productive alfalfa land through the expenditure of substantial sums of money for rock removal, installation of a main line booster-pump system, purchase of a sprinkler system and the application of substantial quantities of phosphate.
6. The refusal to grant the permit is not in the best interests of the United States or the City of Los Angeles. There will be no injury to the public land as a result of issuing the permit.
7. Appellant cannot be deprived of his right to have his permit renewed.
8. The BLM decision to deny the request for the permit was arbitrary and capricious.

[1] A special land use permit is not explicitly authorized by any statutory provision. However, such a permit is provided for by regulation 43 CFR 2920.0-2(a):

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2/ The regulations cited by the District Office are those relating to desert land entries made pursuant to 43 U.S.C. § 321 et seq. (1970).

It is the policy of the Secretary of the Interior, in the administration of the lands under the jurisdiction of the Bureau of Land Management, to permit the beneficial use thereof, where practical, for special purposes not specifically provided for by existing law. Permits for such special use will not be issued, however, in any case where the provisions of any law may be invoked. Permits will not be issued where such issuance would be inconsistent with the objectives of the regulations in this chapter or would be in conflict with any Federal or State laws.

Therefore, a permit may be issued in order to authorize a use not otherwise specifically provided for by existing law. Walt's Racing Association, 18 IBLA 359, 364 (1975); Wyoming Highway Department, 14 IBLA 258, 260 (1974). The issuance of such permits is clearly discretionary. Desert Outdoor Advertising, Inc., 2 IBLA 344 (1971); Allen M. Boyden, 2 IBLA 128 (1971).

Appellant should realize that the refusal to issue him a special land use permit did not deprive him of any right guaranteed by law. Merely because a special land use permit was issued in the past does not mean that it will be renewed. The permit is, as it states, a permit allowing appellant the privilege of using a part of the public domain for a special purpose. It does not invest appellant with any rights. In fact, the terms of the permit itself, as well as the regulations, state that the permit is revocable for a breach of its conditions or "at the discretion of the authorized officer" when, in his judgment, the lands should be devoted to some other use. 43 CFR 2920.3(a).

For that reason, the fact that appellant may have expended large sums of money in converting the land to his use is immaterial if it is determined that such use is not consistent with BLM's objectives concerning programs involving the public use of the land. See Walt's Racing Association, supra.

The field report for the special land use permit renewal application herein was approved by the Bakersfield District Manager on September 5, 1974. The land report section of the field report stated at p. 6:

The existing use of the land is for the production of alfalfa. The land has proven itself valuable for such use. Other potential uses such as grazing, wildlife habitat, outdoor recreation, watershed protection, public purposes and occupancy are either very slight or there is no immediate need or demand. In my opinion the best use of the subject land for now and

the near future is irrigated agriculture. Such use would not take away from the land any values attaching to other potential uses in the future.

The conclusion of the land report was that:

If authority was vested in the Bureau of Land Management to lease lands for agricultural purposes, I would recommend such action. However, as explained in detail under Part IA. above, it is my opinion that the provisions of 43 CFR 2920 regulate that a Special Land Use Permit cannot properly be granted in the instant case for the reasons cited. I therefore recommend that the subject application (0401-1873) be rejected. \* \* \*

We disagree. We believe that BLM does have the authority to issue a permit to allow the use of the subject lands for the production of alfalfa.

The opinion expressed in the conclusion of the report is based on an assessment that because the Desert Land Law, 43 U.S.C. § 321 et seq. (1970) and/or the Homestead Law, 43 U.S.C. § 161 et seq. (1970) are existing laws which provide for the proposed use, a special land use permit cannot be properly issued. This opinion was reached despite a knowledge that the provisions of those laws could not be invoked because of the temporary withdrawal of the subject land.

The analysis in the field report is erroneous because the subject lands are withdrawn from entry under the cited laws. Were the lands not withdrawn, the analysis would be correct. The report is, in effect, saying that since A and B are available to appellant, BLM will not grant him C, while in reality appellant is foreclosed from availing himself of A and B because of the withdrawal. This is a classic case where the provisions of the land laws cannot be invoked and special relief, i.e., a special land use permit, could be granted. See Guy S. Way, A-23738 (March 29, 1944).

The September 6, 1974, decision is erroneous for the same reason. The decision on the one hand stated that there were existing authorities, citing the desert land entry regulations, for making entry for agricultural purposes, while on the other hand, it recognized that such entry could not be made because of the withdrawal. Yet, the conclusion was that "the applicability of the regulations still stands" and "the lands involved are in a category for which a Special Land Use Permit is not appropriate."

Although the City of Los Angeles opposes the granting of such a permit, it has not specified any reasons for its opposition. Should the City, in fact, show a need for reevaluating the use of

the land, the authorized officer may always revoke the permit, if after consideration he concludes that the lands should be devoted to the use proposed by the City.

The record indicates, as manifested by the field examination, that the continued production of alfalfa on these lands would appear to be in the public interest and in the best interests of BLM as it seeks to promote the wise use and management of the public domain. The use is a practical, beneficial use and within the policy of the Secretary under 43 CFR 2920.0-2(a), quoted above.

Since there is legal authority to issue the permit, and the grounds of the City's objections are not manifest, we deem it appropriate to remand the case.

Accordingly, 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 reversed and the case remanded for further appropriate action.

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Frederick Fishman  
Administrative Judge

We concur:

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Joseph W. Goss  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

