

Editor's note: Appealed -- reversed Civ. No. 1-76-173 (D. Idaho Sept. 8, 1977); Dist Ct. reversed, 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)

GRINDSTONE BUTTE PROJECT

IBLA 76-166

Decided February 23, 1976

Appeal from decision of the Idaho State Office, Bureau of Land Management, dismissing objections to stipulations imposed as a condition for acceptance of right-of-way applications I-7365 and I-7366.

Affirmed.

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

The Department of the Interior may condition approval of right-of-way applications filed pursuant to the Act of March 3, 1891, by requiring acceptance of conditions for the protection of the public interest so long as such conditions are neither inconsistent with nor tend to unreasonably burden the proposed right-or-way projects.

APPEARANCES: W. F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

This case was previously treated by the Board in an earlier decision, Grindstone Butte Project, 18 IBLA 16 (1974), where we held, in part, that the Secretary of the Interior could condition the grant of a right-of-way under the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. § 946 et seq. (1970), with reasonable stipulations designed to protect the public interest. An adequate statement of the factual background of the case, and appendices listing the stipulations imposed by the Bureau of Land Management (BLM), are set out in our earlier decision.

In the previous appeal, appellant not only argued that the Secretary had no authority to impose conditions upon right-of-way easements, but also urged that the particular stipulations being imposed were unreasonably burdensome and requested a hearing on

the issue of their reasonableness. After rejecting the former argument and the request for a hearing, the Board remanded the case to give appellant an opportunity to present written objections to the State Office regarding the alleged unreasonableness of the stipulations.

On December 9, 1974, appellant filed its objections to the stipulations with the BLM. Thereafter, on August 5, 1975, the Idaho State Office, BLM, issued a decision dismissing all of appellant's objections with the exception of an objection to stipulation #6 under right-of-way I-7366, in which instance the BLM consented to modify the stipulation. ^{1/} The Board finds itself in agreement with the BLM decision, a copy of which is attached hereto. See Appendix. In response to additional issues raised by the appeal, the following is added.

In its statement of reasons on appeal, which adopts the objections to the stipulations filed with the BLM, appellant has not limited itself to points concerning the BLM's bases for dismissing appellant's objections. Appellant also reargues the issues adjudicated in our previous decision and requests that the Board reconsider its prior determinations. Appellant has not provided the Board with a sufficient basis for granting reconsideration and, therefore, the request is denied. 43 CFR 4.21(c).

In its statement of reasons, appellant maintains that any requirements not authorized by the 1891 Act are "unreasonable per se," and that:

[T]he statute grants the right of way in plain and simple terms without imposing any of the limitations which the BLM sets forth in its stipulations. Congress expressed its determination in the 1891 Act that the granting of rights of way for irrigation purposes was in the public interest and the Department of the Interior has no authority to negate or detract from that congressional determination by the imposition of requirements and limitations on the right of way grant and restrictions upon the use of the right of way.

The problem with appellant's argument is that it misconceives the role the Department must pursue with respect to administering the laws relating to the management of national resource lands. While, admittedly, the issuance of right-of-way easements for irrigation purposes is, at times, in the public interest, this activity cannot be viewed in isolation from other expressions by Congress of

^{1/} Stipulation #6 for application I-7366 required that appellant provide a means for livestock to cross the canal. The BLM has agreed to modify the stipulation by adding the clause, "where no other means of livestock crossing exists."

what is deemed beneficial for the nation. There are other aspects to the public interest which this Department has a duty to protect and foster, and the 1891 Act cannot be administered without regard to these other responsibilities.

[1] The Secretary of the Interior has directed the BLM to manage national resource lands in a way which will:

* * * attain the widest range of beneficial uses of the environment (including the land, water, flora, fauna, and other environmental elements), without undue environmental degradation, risk to health or safety, or other undesirable consequences.

43 CFR 1725.3-2(a). The regulations in 43 CFR Subpart 2800, promulgated pursuant to the right-of-way provisions of the law, represent the Department's efforts to balance the interests of right-of-way applicants with other beneficial interests requiring consideration by the Department.

In the present case, the stipulations required by the BLM concern construction and maintenance requirements, monitoring 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 of hydroelectric development. We find these interests to be of proper concern to this Department both directly and through the need to cooperate with other federal and state agencies. 2/ Therefore, we reject appellant's arguments that the BLM is not empowered to require these stipulations as a condition precedent to the approval of the right-of-way applications.

As for appellant's specific arguments respecting each individual stipulation, we find that appellant has not demonstrated that the stipulations are either inconsistent with or tend to unreasonably

2/ See National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (1970); Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 136, 136r(b) and (c) (Supp. III, 1973); Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251, 1314(j) (Supp. III, 1973); Fish and Wildlife Coordination Act of March 10, 1934, as amended, 16 U.S.C. § 661 et seq. (1970); Historic Sites Act of August 21, 1935, as amended, 16 U.S.C. § 461 et seq. (1970); Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315 et seq. (1970); Federal Power Act of June 10, 1920, as amended, 16 U.S.C. §§ 791, 818 (1970); 43 CFR 2801.1-5(a); 43 CFR Part 24; 43 CFR Part 3; 43 CFR Part 4110; 43 CFR Part 2340.

encumber the proposed irrigation projects. 3/ Therefore, we concur with the BLM's decision that the proposed stipulations are not unreasonably burdensome.

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

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

3/ Appellant insists that stipulation #3 for application I-7366 is impermissible because it dictates requirements for portions of the irrigation facilities that are not located on national resource lands. This argument is also without merit. Cf. Montana Power Co., 72 I.D. 518 (1965); Proposed Coal Mining Operating Regulations, 40 F.R. 41122, 41126 (1975) (proposed 43 CFR 3041.0-7).

APPENDIX

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RETURN RECEIPT REQUESTED

August 5 1975

DECISION

Grindstone Butte Project

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Rights-of-Way

Objections Dismissed

In response to the November 7, 1974 decision of the Interior Board of Land Appeals, 18 IBLA 16, a review of the stipulations imposed in the grants of rights-of-way I-7365 and I-7366 and the objections presented by the grantee on December 5, 1974 has been made.

The objections presented by the grantee as to the authority of the Secretary of the Interior to impose conditions to the grants to ensure protection of the public interest have been ruled on by the Interior Board of Land Appeals and will not be discussed further in this decision.

Stipulation 1 in both rights-of-way pertains to compliance with the applicable State and Federal laws and regulations concerning the use of poisonous substances. This stipulation is imposed on all authorizations licenses and permits on lands administered by the Bureau of Land Management to implement the Department of the Interior's policy on the use of pesticides. Any use of poisonous substances must be cleared through the Departmental Pesticides Working Group. The grantee must submit a written plan for use of poisonous substances. The Working Group contains the necessary expertise to approve or disapprove such programs.

Stipulation 2 in both rights-of-way pertains to the confining of all activities associated with the construction or maintenance within the limits of the rights-of-way. This is a Bureau-wide stipulation required to contain the use of the public lands to the area within the confines of the right-of-way permitted or granted. The law limits the width of right-of-way under 43 U.S.C. 946 to 50 feet on each side of the marginal limits of the canal or pipeline. Additional right-of-way may be approved only upon presentation of satisfactory showing of need.

Stipulations Under Right-of-Way I-7365

Stipulation 3 requires the reseeded to mixed grasses in the manner directed by the District Manager. Each right-of-way grant is issued subject to the regulation in 43 CFR 2801.1-5(c) which states:

"To take such soil and resource conservation and protection measures, including weed control, on the land covered by the right-of-way as the superintendent in charge of such lands may request."

The Bureau contends that worthwhile results can be obtained from artificially reseeding disturbed areas. Previous to disturbance there was a dense vegetative cover of sagebrush and cheatgrass indicating susceptibility of the soils to reestablishment of vegetation. However, until the extent and type of damage could be assessed, it was not practical to prescribe reseeding mixture rates, methods, etc. Appropriate soil and resource conservation and protection measures include the reestablishment of vegetative cover. Steep slopes can be reseeded by hand broadcasting and hand raking in a manner perpendicular to the slope. In this manner erosion will be stopped or minimized until soil holding vegetation is reestablished. This is good conservation practice.

Stipulation 4 requires that construction be done in a manner as to cause the least disturbance. Even though very strict quantitative guidelines for conformance were not included a certain amount of good judgement could be requested of the grantee. The right-of-way is clearly visible from the main traveled highway across this part of the state. The construction of Interstate 80N will soon be undertaken in the present location of the highway. Excessive material sidecasting would further degrade the visual impacts caused by the grantee's action. The aesthetic values of the vicinity are considerably less now than previous to the grantee's action on the right-of-way. We believe this stipulation is necessary to prevent further degradation of the aesthetic values.

Stipulation 5 requires the removal of garbage, debris, litter, trash, etc. and to maintaining of a clean pumping site. The terms and conditions in the regulations of 43 CFR 2801.1-5(b) require that the lands within the right-of-way be cleared and kept clear to the extent and in the manner directed by the superintendent in charge. We believe this stipulation conforms to the intent of these regulations.

Stipulation 6 prohibits the use of chemical treatment of the channel or bay and the pollution of the water. The Bureau has the responsibility to insure that all activities on National Resource Lands under specific authorization be undertaken in a manner to protect all resources, including water, from degradation and pollution. This stipulation is necessary to insure that all State and Federal laws pertaining to the degradation or pollution of the waterways are met and complied with.

Stipulation 7 places the responsibility on the grantee for any damages from construction, use and maintenance of all facilities and from leakage or flow from the pipeline. The regulations of 43 CFR 2801.1-5(f) requires the holder of every right-of-way grant to pay the United States the full value of all damages to the lands or other property of the United States. Every right-of-way grant issued by the Bureau of Land Management is subject to this condition.

Stipulation 8 requires the placement of screens or other measures around the pumps to prevent small fish from entering. The Bureau of Land Management has a responsibility and obligation to the State of Idaho to help in any way possible, assuring protection and preservation of the fish and wildlife resources. Our policy is to communicate freely with the Idaho Fish and Game Department in such matters. Their recommendations have been incorporated into this stipulation as a help to assure the least detrimental impacts to a fish resource that might occur by approval of this right-of-way on National Resource Land.

Stipulation 10 requires the posting of a \$ 5,000 performance and payment bond. The posting of a bond conditioned upon compliance with the regulations and the terms and conditions of a grant or permit is a standard operating procedure utilized by private industry, State governments and Federal agencies. Numerous other rights-of-way grants authorizing pumping facilities on the Snake River have contained the same requirement. No penalty is intended by this condition. A bond is an accepted means under which compliance with the terms and conditions of the grant is assured.

Stipulation 12 calls for cancellation of the grant and forfeiture of the performance and payment bond for violation of the stipulations. 43 CFR 2802.3-1 states:

"All rights-of-way approved pursuant to this part . . . shall be subject to cancellation for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way. No right-of-way shall be deemed to be cancelled except on the issuance of a specific order of cancellation." (Emphasis supplied.)

Cancellation of rights-of-way granted under the Act of March 3, 1891 (43 U.S.C. 946) can be accomplished by the institution of contest proceedings as provided by the Administrative Procedures Act. No arbitrary action can be or would be taken to cancel the grant. If it became necessary to institute cancellation proceedings, the grantee will not be deprived of any rights to a full and complete hearing on the matter. The grantee is also aware that any adverse action by the Department of the Interior is subject to review and action by the Federal District Courts.

Stipulation 13 of right-of-way I-7365 and stipulation 5 of right-of-way I-7366 pertain to the protection of archaeological values of the land. Such stipulations are completely in accord with the provisions of the Antiquities Act of 1906 (16 U.S.C. 431), Historic Sites Act of 1935 (16 U.S.C. 461), National Historic Preservation Act of 1966 (16 U.S.C. 470), Historical and Archeological Data Preservation Act of 1974 (16 U.S.C. 49 et seq.), Executive Order 11593 of May 13, 1971, and the regulations under 36 CFR 800.

Stipulations Under Right-of-Way I-7366

Stipulation 3 pertains to seeding of all disturbed areas along the canal banks, including private land, and the planting of shrub seedlings. The question raised by the grantee is whether or not BLM can dictate requirements on private lands influenced by a federally approved action. The Bureau believes that the impacts left unmitigated on private land would pose a threat to adjoining National Resource Lands. Artificial seeding on those portions of the canal that could possibly aggravate erosion can be accomplished by hand seeding or by using a cyclone seeder.

The question of detrimental effects shrub roots may or may not have on the canal bank is debatable. The species the Bureau will supply will not adversely affect the bank and will serve as a stabilizer.

Maintenance on the interior of the canal bank may inhibit plant growth, but there does not appear to be need for disturbing the outer slope of the canal banks when conducting maintenance.

Stipulation 4 pertains to maintenance of vegetation by mowing rather than by chemical treatment or burning. Mowing at appropriate times during the growing season should not create or aggregate weed problems. The use of chemicals without proper clearance has previously been discussed above under Stipulation 1. Burning without proper authorization or permit is prohibited.

Stipulation 6 requires the providing of means for livestock to safely cross the canal. This stipulation was included to assure that the canal does not serve as a permanent impassible barrier to livestock such as has happened in other project areas developed under the Desert Land Act. The granting of a right-of-way should not be at the expense or impairment of other recognized uses such as livestock grazing. Fast, intensive land development such as has occurred in the Grindstone Butte Project and other areas has not only taken land out of production customarily used by livestock, but has caused duress to the livestockmen.

The stipulation refers to "future" needs. At this time the Bureau cannot say what the demands for canal crossings are. The stipulation may be amended by adding "where no other means of livestock crossing exists."

The bureau believes these stipulations are necessary to protect against detrimental environmental and other impacts that the granting of the right-of-way may or will create.

For the reasons stated above the objections presented by the Grindstone Butte Project are hereby dismissed.

You have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4, (see enclosed information sheet). However, if an appeal is taken, the Notice of Appeal must be filed in this office (not the Board) within 30 days of receipt of this decision so that the case file can be transmitted to the Board. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations.

Vincent S. Strobel, Chief
Branch of L&M Operations

Enclosure

