

IDAHO DEPARTMENT OF WATER RESOURCES

IBLA 76-340, IBLA 76-401, IBLA 76-468

Decided May 5, 1976

Appeal from decisions of the Idaho State Office, Bureau of Land Management, rejecting in full or in part applications for temporary withdrawals of land for proposed development under the Carey Act.

Affirmed in part; remanded in part.

1. Act of August 18, 1894 (Carey Act)--Act of March 15, 1910--State Selections--Withdrawals and Reservations; Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Stock-driveway Withdrawals--Withdrawals and Reservations: Temporary Withdrawals

Applications filed by the State of Idaho under the Act of March 15, 1910, for temporary withdrawals of land for proposed development under the Carey Act of 1894, must be rejected where the lands have been previously withdrawn for reclamation, stock-driveway, agricultural research or military purposes.

2. Act of August 18, 1894 (Carey Act)--Act of March 15, 1910--Regulations: Force and Effect as Law-- Withdrawals and Reservations: Generally--Withdrawals and Reservations: Temporary Withdrawals

In the absence of pertinent statutory directives or regulatory criteria for the processing of temporary withdrawal applications for unreserved lands [**2] filed by a state under the Act of March 15, 1910, for proposed development under the Carey Act, the Bureau of Land Management should suspend consideration of the applications pending Departmental action to revise and recodify previously deleted regulations which provide guidance for the administration of the Carey Act and the Act of March 15, 1910.

APPEARANCES: Nathan W. Higer, Legal Counsel, Idaho Department of Water Resources, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Idaho Department of Water Resources has appealed from separate decisions of the Idaho State Office, Bureau of Land Management (BLM), rejecting in full or in part State applications I-9974, I-9977 (IBLA 76-340), I-9934, I-9975 (IBLA 76-401), and I-10249 (IBLA 76-468), filed pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970), for the temporary withdrawal of lands for proposed development under the Carey Act of 1894, as amended, 43 U.S.C. § 641 et seq. (1970).

All of the lands applied for in applications I-9975 and I-9977 had previously been withdrawn under the Bureau of Reclamation's withdrawal for the Mountain Home Project. All but 80 acres of the lands described in application I-9974 were also included within the Mountain Home Project withdrawal. With regard to the withdrawn lands, the BLM held that:

Applications for temporary withdrawal under the Act of March 15, 1910 must be rejected where the lands are withdrawn * * *. Idaho Department of Water Resources, 21 IBLA 210 (1975) * * *

As for the 80 acres which remained unreserved, the BLM stated that:

Because of the unlikelihood that a Carey Act project would be considered for approval on only 80 acres, the State should give consideration to withdrawing the whole project proposal for the present.

Application I-9934 was filed by the State on behalf of the Palo Verde Carey Act Company. The application described 7,205.76 acres in secs. 2 through 18, T. 7 S., R. 7 E., B.M., and 1,120 acres in sec. 29 and the W 1/2, W 1/2 NE 1/4, W 1/2 SE 1/4 sec. 32, T. 6 S., R. 7 E., B.M., Idaho. The BLM rejected all of the lands in T. 7 S., R. 7 E., because they had previously been withdrawn by Public Land Order No. 1027, issued November 2, 1954, for

use by the Department of the Air Force in connection with the Saylor Creek Bombing and Gunnery Range. 19 F.R. 7271 (1954). This order withdrew the lands from all forms of appropriation under the public land laws. The BLM also informed appellant that the lands in the W 1/2 sec. 29 and the W 1/2 sec. 32, T. 6 S., R. 7 E., were included within a prior application, I-8728, of the State of Idaho for a temporary withdrawal under the Act of March 15, 1910, filed on behalf of the Mesa Del Rio Water Company. The BLM rejected these lands on the basis that:

The filing of application I-8728 segregated the lands from subsequent settlement, application, entry or other filings on the lands. Our regulations require that all subsequent applications filed on these lands be rejected.

Accordingly, with the exception of the 480 acres in the E 1/2 sec. 29 and the W 1/2 NE 1/4, W 1/2 SE 1/4 sec. 32, T. 6 S., R. 7 E, B.M., appellant's application was rejected.

Application I-10249 encompassed 4,380 acres in T. 6 S., R's. 8 and 9 E., B.M., Idaho. All but 40 acres had been previously withdrawn for the Saylor Creek Range and Experimental Pasture Research Area by Public Land Order No. 4561, 33 F.R. 200 (1968), and for stock-driveway No. 231 by order of the Secretary of the Interior, dated July 8, 1932. Accordingly, for the same reasons as stated above, the BLM rejected the application with respect to the 4,340 acres of withdrawn land. As for the unreserved 40 acres, the BLM determined:

By itself [the subdivision] cannot be considered as an economic unit for agricultural development under the Carey Act. Therefore, this subdivision is also rejected from the application.

The Carey Act of 1894, as amended, 43 U.S.C. § 641 (1970), reads in 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 * * * 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 * * * 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; * * *.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved.

The Act of March 15, 1910, 43 U.S.C. § 643 (1970), provides for temporary withdrawals to aid in carrying out the purposes of the Carey Act. It states:

To aid in carrying out the purposes of section 641 of this title, it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: Provided, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made.

[1] The Idaho Department of Water Resources contends on appeal that the Department of the Interior has no authority to prohibit the use of withdrawn lands for Carey Act projects. Appellant urges that:

As long as the lands are owned by the United States and regardless of any withdrawal classifications placed thereon, the State has the unrestricted right to cause their settlement under the Carey Act.

This position is identical to the one presented by appellant in an earlier appeal to the Board and which we rejected as having no merit. Idaho Department of Water Resources, 21 IBLA 210, 214-15 (1975). Appellant has not submitted any arguments which persuade the Board to deviate from its prior holding and, therefore, we abide by our earlier position and affirm the decisions below to the extent that they require applications for temporary withdrawal under the Act of March 15, 1910, to be rejected when the lands applied for have been previously withdrawn for other purposes.

Other matters on appeal, however, necessitate further comment. To begin with we note that the bases for the BLM's rejection of application I-9934 have been mooted. In its statement of reasons, appellant indicates that "The Idaho Department of Water Resources herewith withdraws its appeal of the decision of the Bureau of Land Management with regard to the lands withdrawn by the Department of the Air Force." Accordingly, the BLM's decision with respect to these lands has become final. Idaho Department of Water Resources, supra at 212 n. 2. As for the remaining rejected lands in this application, appellant states:

This land is not included in a previous Carey Act application. These lands were relinquished from the previous filing of the Mesa Del Rio project, and the Bureau of Land Management office was so notified by letter dated October 2, 1975. Upon the relinquishment of these lands from the Mesa Del Rio project, the Palo Verde Carey Act Company applied for them. This application was therefore timely and the reason the Bureau of Land Management gives for rejecting these lands does not exist.

Assuming the correctness of this statement, at present there may be 1,120 acres of unreserved and unsegregated land available for temporary withdrawal under application I-9934.

[2] Next there is the apparent disparity between the BLM's partial acceptance of application I-9974 with a recommendation that the State withdraw the application because of the unlikelihood of a Carey Act project being approved for only 80 acres, and its decision to reject application I-10249 with respect to the unreserved 40-acre subdivision. The Board holds that, in the absence of a request by the State of Idaho to withdraw its temporary withdrawal applications, and to the extent the applications describe unappropriated, unsegregated and unreserved public lands, further action on the applications should be temporarily suspended. Our decision is predicated upon the fact that regulations pertaining to the Carey Act as well as those pertaining to temporary withdrawals under the Act of March 15, 1910, were deleted from Title 43 of the Code of Federal Regulations in 1970. 35 F.R. 3072 (1970). See Idaho Department of Water Resources, supra at 212 n. 1. The directives within the deleted regulations were not thereafter included within any newly codified regulations. Upon inquiry to the BLM, Washington, D.C., the Board was informed that the deleted regulations are presently being revised and will be recodified in the near future. However, in the interim, there are no specific regulatory guidelines for administering the Carey Act or the Act of March 15, 1910. Accordingly, as an initial finding we conclude that no regulatory scheme presently exists which would justify the BLM's decision to reject application I-10249 with respect to a 40-acre subdivision, while accepting application I-9974 for the withdrawal of 80 acres. We do not believe that it is proper for the BLM to either reject or approve these temporary withdrawal applications without adequate guidance on the matter. Therefore we direct the BLM to withhold action on applications I-9974, I-9934 and I-10249 in accordance with the Board's discussion in Idaho Department of Water Resources, 24 IBLA 314, 319 (1976), where we stated:

[A]cceptance of appellant's applications for temporary withdrawal is not mandated by the statutes [Carey Act and Act of March 15, 1910]. In view of the absence of regulatory criteria to evaluate Carey Act applications, we conclude that appellant's applications for temporary withdrawal should be suspended pending recodification of the deleted regulations. We reach this decision on the basis that a temporary withdrawal granted under the Act of March 15, 1910, must be terminated after one year in the absence of submission by the state of its application for segregation. Without regulatory criteria to guide the State through the requirements for compliance with the Carey Act it is conceivable that the State would not be able to effectively develop its plans during the one-year period. Furthermore, in the event the State were to submit a plan after a withdrawal but before recodification of the pertinent regulations, the BLM

would be without criteria to determine whether the State's plan adequately conformed to the requirements of the Carey Act. Under these circumstances, we conclude that both the State of Idaho and the Department of the Interior will be in a better position to effectuate their individual responsibilities with regard to the Carey Act if the status quo were maintained until recodification of regulations providing guidance for administration of the Carey Act and the Act of March 15, 1910. Cf. Energy Partners, 21 IBLA 352, 356-58 (1975). Accordingly, we direct the BLM to suspend action on appellant's applications for temporary withdrawal. [Footnote omitted].

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions below are affirmed to the extent of rejection of applications for lands previously withdrawn, and the decisions accepting or rejecting applications for unreserved lands are set aside and the cases remanded for action consistent with the views expressed herein.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

