

VAN RIETMANN

IBLA 76-103

Decided June 14, 1976

Appeal from decision of the Oregon State Office, Bureau of Land Management, rejecting applications for a water pipeline right-of-way (OR 10884) and for an electrical distribution line right-of-way (OR 10885).

Set aside and remanded.

1. Rights-of-Way: Act of February 15, 1901--Wild and Scenic Rivers Act

It is not necessary to reject an application filed pursuant to the Act of February 15, 1901, for a right-of-way in an area adjacent to but outside of the boundaries of an area designated as a potential addition to the Wild and Scenic Rivers System, unless it is determined that the project would invade the area or diminish the scenic, recreational, and fish and wildlife values present within the potential wild, scenic, or recreational river area, or there are other justifiable grounds for rejection.

APPEARANCES: Van Rietmann, pro se, and as a Director of the Columbia Basin Electric Co-op., Inc.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Van Rietmann, pro se and as Director of the Columbia Basin Electric Co-op., Inc., has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated June 12, 1975, rejecting their respective applications for a water pipeline right-of-way and an electrical distribution line right-of-way across certain lands in sections 19 and 20, T. 2 S., R. 19 E., W.M., Oregon.

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1/ These applications had been rejected once before by the Oregon State Office, which had based its evaluation on the premise that appellant planned to build a road. When appellant stated that he did not plan to build a road, this Board remanded the case for consideration of the application for a right-of-way without a road. Van Rietman, 18 IBLA 30 (1974). The State Office again rejected the application and this appeal resulted.

The application filed pursuant to the Act of February 15, 1901, as amended, 43 U.S.C. § 959 (1970), for the water pipeline right-of-way is for a four-inch pipeline to transport water from a spring on privately-owned property in the bottom of Ferry Canyon across public land up Buck Hollow Canyon, turning eastward over the canyon wall to applicant's ranch headquarters and cattle feed lot. The application filed pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970), for a powerline right-of-way is for an overhead 7.2 kv. transmission line to provide electricity to the pump at the lower end of the pipeline. The route will generally parallel the pipeline. The powerline will serve no other customer.

The proposed right-of-way lies 1-1/2 miles from the John Day River, which has been designated as a potential addition to the Wild and Scenic River System. 16 U.S.C. § 1276(a)(41) (Supp. IV, 1974). The decision rejecting appellant's applications is based on the view that the pipeline route involves land which is part of the environment of the John Day River, and that the proposed project would be a significant intrusion degrading the scenic and aesthetic qualities of a primitive area.

The designation as a potential addition to the Wild and Scenic River System pertains only to the John Day River and not Ferry Canyon. 2/ Mr. Rietmann correctly points out that only public land within one-quarter mile of the John Day River was withdrawn by its designation as a potential addition to the Wild and Scenic River System. 16 U.S.C. § 1279(b) (1970). However, the Wild and Scenic Rivers Act recognizes the need to protect river areas designated as potential additions to the system from impacts resulting from projects beyond the boundaries of the designated area. 16 U.S.C. § 1278(b) provides in part:

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2/ Except as indicated below, nothing in the Wild and Scenic Rivers Act indicates that the phrase "river area" is intended to include land beyond the one-quarter mile boundary. 16 U.S.C. § 1271 mentions "rivers with their immediate environments." Section 1273(b) refers to a "river area eligible to be included in the system," but section 1274(b) defines the limits of such eligible areas by stating that a component of the system "shall include an average of not more than three hundred and twenty acres per mile on both sides of the river" or an area having a boundary that would average one-quarter mile from the river.

\* \* \* [N]o department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river might be designated, as determined by the Secretary responsible for its study or approval \* \* \* [during the period provided by statute for study of the river]. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a potential wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or diminish the scenic, recreational, and fish and wildlife values present in the potential wild, scenic or recreational river area on the date of approval of this chapter. [Emphasis added.]

While we refrain from deciding whether the phrase "water resources project" as used above embraces a project like appellant's proposed pipeline (so that rejection of the application would be mandatory if the project would have the prohibited effects), 3/ standards modeled on the above provisions nevertheless may be used to determine whether an application shall be granted where the Department has the discretion to reject or approve the application. Cf. Solicitor's Opinion, M-36777 (February 7, 1969).

[1] We have held that oil and gas lease offers for land adjacent to a potentially included river may be rejected on the basis of the Secretary's discretionary authority to refuse to issue leases where oil and gas operations would threaten scenic or recreational values. See, e.g., Rosita Trujillo, 21 IBLA 289 (1975). Issuance of the proposed right-of-way is similarly

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3/ If we determined Mr. Rietmann's proposed project to be a "water resources project," the decision below would still provide no basis for holding that rejection of appellant's applications is mandatory. The Act only prohibits projects which would affect values present in the John Day River in 1968 when the Wild and Scenic Rivers Act was passed. While the decision cites the threat to existing and future values, we would have no basis for concluding that the project would diminish values existing in 1968, without support in the record that present values existed then.

within the Secretary's discretion and a right-of-way application will be rejected if contrary or inconsistent with the public or Government interest. See William A. Lester, 2 IBLA 172 (1971). We hold that a right-of-way application may properly be rejected where it is determined that the project would invade the area or diminish the scenic, recreational, and fish and wildlife values present in the potential wild, scenic or recreational river area. The difficulty with the decision below is that while it indicates that the project would to some degree adversely affect the scenic and aesthetic values of Ferry Canyon, the decision does not establish that the scenic values of the area within one-quarter mile of the John Day River itself would be affected. If the State Office wishes to protect the scenic values of Ferry Canyon at a point more than one-quarter mile from the John Day River, it must rely on some basis affording justifiable grounds for rejection other than the designation of the John Day River as a potential addition to the Wild and Scenic Rivers System, unless it can show that the values of the John Day River area would be substantially and unreasonably affected.

The following paragraph from the decision below, if actually representing the potentiality of water drawdown and the consequent impact on recreational and fish and wildlife values of the John Day River, conceivably might be a cogent factor in determining the merits of the applications at bar:

The newly revised Management Framework Plan for the John Day River Planning Unit is nearing completion and it contains a recommendation that states "Strive to increase minimum flows and improve water quality in the John Day River." Part of the rationale in support of this recommendation states, "The extreme drawdown of the river level and the quality of the water either directly or indirectly affects every other recreational activity in the canyon." The allocation of water from the river has reached the point where there isn't enough water to support warm water fisheries in much of the river during the summer months. \* \* \*

The quoted paragraph indicates that the recreational and fish and wildlife values of the John Day River would be affected by any action resulting in the withdrawal of water from any tributary of the John Day River. However, the decision below indicates that the State Office also deems the availability of alternative sources of water to appellant to be an appropriate factor to be considered in the exercise of the Department's discretion. To the extent that this is deemed a relevant consideration, it must have some factual

basis, and the factual basis for the State Office's determination about the availability of alternative sources of water is contravened by Mr. Rietmann's argument that the proposed alternative of drilling to 1,700 feet is not viable in view of its costs.

Because the State Office has properly considered the availability of water as a relevant factor in the exercise of its discretion, and because the information upon which the State Office relied appears to be incomplete, it is necessary to remand this case so that the State Office may make its decision after consideration of the data tendered on appeal.

Mr. Rietmann has indicated a willingness to undertake measures which would reduce the scenic and aesthetic intrusion of the project and to try to limit construction damage as well. It seems that Mr. Rietmann has adopted a pattern of proposing modifications to his project in his statements of reasons on appeals from decisions rejecting his applications. The State Office has based its decision on a variety of factors, and because we feel that the State Office should determine the weight given to each factor involved in its decision in this case, Mr. Rietmann's proposed modifications on appeal necessitate the remand of this case and the consequent delay in reaching a final decision. We therefore urge appellant promptly to bring to the attention of the State Office any modifications of the proposed project, hopefully prior to that Office's decision resulting from the remand of this case. 4/

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4/ Although appellant asserts that he has been granted the right to draw water from Ferry Canyon, the case record contains only an application for such a right. Upon remand, the State Office should determine whether appellant has met the requirement of 43 CFR 2802.1-5(b) which provides as follows: "Evidence of water right. If the project involves the storage, diversion, or conveyance of water, the applicant must file a statement of the proper State official, or other evidence, showing that he has a right to the use of the water. Where the State official requires an applicant to obtain a right-of-way as a prerequisite to the issuance of evidence of a water right, if all else be regular, a right-of-way may be granted conditioned only upon the applicant's filing the required evidence of water right from the State official within a specified reasonable time. The conditional right-of-way will terminate at the expiration of the time allowed."

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 set aside and the case remanded for further action consistent with this opinion.

Frederick Fishman

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Administrative Judge

We concur:

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Joseph N. Goss  
Administrative Judge

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Joan B. Thompson  
Administrative Judge

