

Editor's note: Reconsideration granted; decision set aside (pending judicial action) by order dated June 2, 1978 -- See 32 IBLA 92A & B below; Reconsideration granted; decision vacated -- See Idaho Department of Water Resources (On Reconsideration), 49 IBLA 221 (Aug. 12, 1980)

IDAHO DEPARTMENT OF WATER RESOURCES

IBLA 77-106

Decided September 2, 1977

Appeal from the decision of the Idaho State Office, Bureau of Land Management, rejecting application I-8654 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: Temporary Withdrawals

Applications filed 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of land for proposed development under the Carey Act of 1894 must be rejected where the lands have been previously withdrawn for other purposes.

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

The Bureau of Land Management should suspend consideration of the applications under the Carey Act pending Departmental action to revise and recodify previously deleted regulations which provide guidance for the administration of the Carey Act.

APPEARANCES: Josephine P. Beeman, Esq., Legal Counsel, Idaho Department of Water Resources, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Idaho Department of Water Resources appeals from a decision dated December 13, 1976, of the Idaho State Office, Bureau of Land Management (BLM), rejecting State application I-8654. This application sought the temporary withdrawal of some 8,237.09 acres for proposed development by the "Narrows Water District Project," under the Carey Act of 1894, as amended, 43 U.S.C. § 641 *et seq.* (1970). ^{1/} The basis of the BLM's decision to reject this application was that approximately 4,040 acres of the land included therein had been withdrawn by Public Land Order No. 4561, in the Saylor Creek Range and Experimental Pasture Research Area, and also by order of the Secretary of the Interior, dated July 8, 1932, for Stock-driveway No. 231.

In its statement of reasons, appellant argues that the Carey Act is an absolute grant of Federal desert lands to the public lands states and that the Secretary of the Interior is obligated, by its terms, to transfer desert lands to it. Appellant maintains that the State's right to desert lands under the Carey Act supersedes any federal withdrawals of such lands made subsequent to the Act. Appellant asserts that this interpretation of the Carey Act was confirmed by the United States District Court for the District of Idaho in State of Idaho ex rel. Andrus v. Kleppe, 417 F. Supp. 873 (D. Idaho 1976).

[1] Both appellant's interpretation of the Carey Act and its assertion that this interpretation was confirmed by the District Court of Idaho are incorrect. Its argument seems to assume that the Act granted rights to desert land to the states *in praesenti*, for future selection, and that the Secretary therefore could not withdraw desert land for any other purposes without establishing a conflict with a state's potential right to select it. The District Court in State of Idaho, supra, held, as we did when the dispute therein was before us, ^{2/} that "[t]he wording of the statute seems quite clear

^{1/} We note that the Secretary's authority under 43 U.S.C. § 641 to make regulations concerning temporary withdrawals, has been repealed by section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.* (Supp. 197_), as was his authority under 43 U.S.C. § 643 to temporarily withdraw land for Carey Act purposes. However, this authority is available to the Secretary pursuant to FLPMA, under which this application may be adjudicated.

^{2/} Idaho Department of Water Resources, 21 IBLA 210 (1975), concerning which the court commented as follows:

"The decision of the Interior Board of Land Appeals (21 IBLA 210) is AFFIRMED as stated in Part I of this decision." Id. at 885.

and it is readily apparent that an in praesenti grant was not made to the States." Id. at 877. Further: "That an in praesenti grant of title did not occur under the Carey Act seems quite clear from the language of the Act, the legislative history Administrative interpretations, and court interpretations, albeit dicta." Id. at 881.

Furthermore, the Court unequivocally indicated that the Secretary was not obligated to preserve all desert land pending state selection, and was not prevented from withdrawing desert land for other purposes: "[T]he State may not perfunctorily select acreage previously withdrawn for other purposes such as in this case a withdrawal for stock-driveways." Ibid. We hold that, insofar as it challenges the power of the Secretary to withdraw lands for purposes other than disposition under the Carey Act and asserts that such past withdrawals are invalid, appellant's argument is without merit.

Prior to the filing of its application for withdrawal on November 17, 1976, some 4,040 acres of the land sought by appellant was withdrawn by the Secretary both for range and pasture research and, as in State of Idaho, supra, for use as a stock driveway. Inasmuch as 4,040 acres of the land applied for by appellant was withdrawn from disposition, appellant's application for temporary withdrawal of this amount was properly rejected. 43 CFR 2091.1(a).

[2] Appellant's statement of reasons points out correctly that the Court in State of Idaho, supra, observed that "[t]he Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act." Id. at 881. In order to meet this obligation, the BLM may not refuse to allow selection by the states of suitable land not reserved for other purposes. There is nothing in the record to indicate that there are withdrawals which affect the balance of the land encompassed by appellant's application for temporary withdrawal, and no reason is given in the BLM's decision as to why appellant is not entitled to such a withdrawal for this unreserved land. We accordingly modify the BLM's decision as to this unwithdrawn land.

Regulations pertaining both to the Carey Act and 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). Further action on the application shall be temporarily suspended pending the recodification of regulations providing guidance for administration of the Carey Act and the Act of March 15, 1910. Idaho Department of Water Resources, 27 IBLA 303, 305 (1976); 25 IBLA 27, 32-33 (1976); 24 IBLA 314, 319 (1976).

State of Idaho v. Kleppe, supra, sets out the proper procedure by which to challenge the propriety of withdrawing desert lands for purposes other than disposition under the Carey Act. The Court noted that "[t]o the extent the land has been withdrawn for other purposes by the Secretary and [to the extent] the State remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry." Id. at 881. Thus, the question of the propriety or necessity of continuing these withdrawals is not properly before the Board, and we need not remark on appellant's allegation concerning the necessity of continuing the experimental pasture withdrawal, other than to observe that the land may still be valuable as a stockdriveway.

As the Court has noted, it is not impossible for the State eventually to gain patent under the Carey Act to lands which are currently withdrawn for other purposes. However, the proper procedure to do so is to petition for reclassification of these withdrawn lands for the desired purpose.

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 affirmed in part and remanded in part.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Martin Ritvo
Administrative Judge

June 2, 1978

IBLA 77-106	:	32 IBLA 89
	:	
IDAHO DEPARTMENT OF WATER	:	I-8654
RESOURCES	:	
	:	Petition for Reconsideration
	:	
	:	Petition granted; Decision
	:	set aside

ORDER

On March 17, 1978, the Bureau of Land Management (BLM) by and through the Office of the Solicitor, Department of the Interior, petitioned for reconsideration of the Board's decision of September 2, 1977, in the above-captioned case. Idaho Department of Water Resources, although duly served with a copy of this petition, has not filed a response.

Reconsideration may be granted only in extraordinary circumstances, where, in the judgment of the Board, sufficient reason appears for doing so. 43 CFR 4.21(c). Petitioner has shown that another case, State of Idaho ex rel. Andrus v. Kleppe, 417 F. Supps. 873 (D. Idaho 1976), involving the parties to the present dispute and containing controlling issues of law, is presently on appeal before the U.S. Court of Appeals for the Ninth Circuit. State of Idaho, et al. v. Cecil D. Andrus, No. 77-1300. Our holding of September 2, 1977, was made in reliance on the decision of the United States District Court for the District of Idaho without knowledge that this decision was on appeal to the Ninth Circuit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, BLM's petition for reconsideration is granted, the Board's decision of September 2, 1977, styled Idaho Department of Water Resources, 32 IBLA 89 (1977), is hereby set aside, and further consideration of this matter is suspended pending final judicial action in the related dispute. Upon completion of the litigation, the parties will be allowed

32 IBLA 92A

thirty (30) days in which to submit pleadings reopening consideration of this matter.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Martin Ritvo
Administrative Judge

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