

UTE WATER CONSERVANCY DISTRICT

IBLA 79-453

Decided April 21, 1980

Appeal from decision of the Colorado State Office, Bureau of Land Management, imposing conditions on grant of right-of-way pursuant to application C-26575.

Affirmed.

1. Rights-of-Way: Conditions and Limitations

An applicant for a right-of-way for a municipal water-supply reservoir may be required to open both this reservoir and another reservoir built pursuant to an earlier right-of-way grant to restricted public access as a condition to receiving the present grant, where the record shows that doing so is in the public interest and will not unduly burden the use of the lands as a water-supply reservoir.

2. Rights-of-Way: Conditions and Limitations

The Department may require an applicant for a right-of-way for a municipal water-supply reservoir to open all parts of this reservoir and another reservoir built pursuant to an earlier right-of-way grant to restricted public access, including the portion thereof not located on Federal lands, as a condition precedent to granting the right-of-way, provided that so doing is in the public interest and will not unduly burden the use of the land as a water-supply reservoir.

3. Rights-of-Way: Conditions and Limitations

BLM may properly require an applicant for a right-of-way for a municipal water-supply reservoir which will inundate Federal lands to bear the cost of mitigating damage to archaeological sites located thereon.

APPEARANCES: Sam P. Lockard, Esq., Grand Junction, Colorado, and Kenneth Balcomb, Esq., Glenwood Springs, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Ute Water Conservancy District (Ute) has appealed the May 9, 1979, decision of the Colorado State Office, Bureau of Land Management (BLM), offering it a right-of-way grant for use in connection with Ute's construction of the Jerry Creek No. 2 reservoir, pursuant to its application designated C-26575. BLM noted in this decision that it would be in the public interest to grant the right-of-way if Ute allowed restricted public access to and recreational use of both the Jerry Creek No. 2 reservoir and the Jerry Creek No. 1 reservoir, which had previously been constructed in 1964 by Ute following the grant of a right-of-way by BLM on June 17, 1963, pursuant to application C-0102696. Accordingly, BLM held that any right-of-way granted in connection with the Jerry Creek No. 2 reservoir will require restricted public access to and use of both of these reservoirs, and offered Ute a 30-year right-of-way subject to this and other specified conditions. BLM stated that it will manage the restricted use of the reservoirs and will prepare a "recreation management plan" within 90 days of the issuance of the grant. Ute has appealed the imposition of the access and use requirement as a condition to granting the right-of-way.

Upon completion Ute's Jerry Creek No. 2 reservoir will inundate both private and public land, and it presently stores water up to the boundary line between the private holdings and the public lands which Ute has applied to use here. ^{1/} BLM's decision to require Ute to open the No. 2 reservoir to limited public access and recreational use involves also requiring it to provide access to the portion of the reservoir which is privately owned as well as to the portion which will lie on Federal lands.

Moreover, BLM's decision requires that Ute entirely open its Jerry Creek No. 1 reservoir, which is also located on both private and

^{1/} A BLM land report dated April 23, 1979, indicates that Ute has actually expanded the reservoir and that it now inundates some public lands.

Federal lands, created by a right-of-way granted by BLM in 1963. Pursuant to Ute's application on January 16, 1976, BLM issued a decision on June 3, 1976, which amended this right-of-way by authorizing Ute to exclude the public from, and prohibit public use of, all lands within the right-of-way grant, to erect fences around the reservoir, and to inspect the reservoir and direct unauthorized persons to leave the premises. Thus, by now requiring Ute to allow restricted public access to the Jerry Creek No. 1 reservoir, BLM is rescinding this authority.

[1] The Department's present authority to grant rights-of-way upon the public lands for water-storage reservoirs is set out in section 501(a)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(1) (1976). No final regulations governing the granting of rights-of-way under FLPMA were in force when BLM issued its decision or have been promulgated since. However, section 310 of FLPMA, 43 U.S.C. § 1740 (1976), provides that lands shall be administered under existing rules and regulations to the extent practical until appropriate new regulations are promulgated. Issuance of rights-of-way is permissible under the terms of the existing regulations promulgated for use in connection with applications for rights-of-way, that is, those set out at 43 CFR Group 2800. David Smith Ranches, 33 IBLA 7 (1977).

It is clear that BLM was within the authority granted to it by these regulations in requiring that Ute allow restricted public access to and use of the Jerry Creek reservoirs as a condition of granting the right-of-way to inundate Federal lands with the Jerry Creek No. 2 reservoir. Under 43 CFR 2801.1-5 a right-of-way applicant may be required to comply with such specific conditions with respect to the occupancy and use of the lands as may be found by the agency having supervision over the lands to be necessary in order to render such use compatible with the public interest. The Department may impose stipulations as a condition precedent to granting a right-of-way where it is in the public interest to do so, provided that such conditions are not inconsistent with or do not unreasonably burden the objective of the proposed right-of-way. Grindstone Butte Project, 24 IBLA 49, 51 (1976); State of Alaska Department of Highways, 20 IBLA 261, 167, 82 I.D. 242, 244 (1975); Grindstone Butte Project, 18 IBLA 16, 19 (1974); Zelph S. Calder, 16 IBLA 27, 33, 81 I.D. 339, 342 (1974); see Verde River Irrigation & Power District v. Work, 24 F.2d 886 (D.C. Cir. 1928).

[2] Moreover, it is established that the Department may equally require the right-of-way applicant to take action relating to private lands as a condition of the grant of the right-of-way. Grindstone Butte Project, 24 IBLA at 52, n.3 (1976). Thus, BLM correctly required that all of these reservoirs, even those portions thereof situated on Ute's private holding, be opened to limited public access as a condition of granting the right-of-way, again provided that such

use does not unduly burden the use of this property as reservoirs and is compatible with the public interest.

The record shows that the motivation behind BLM's imposition of the limited-access requirement is in large part to open these reservoirs to public fishing. 2/ This decision is consistent with the terms of various land laws and the Departmental regulations, which mandate that the public lands be made available for public fishing.

Congress expressly provided in 1934 in section 1 of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), that nothing therein should be construed as in any way restricting the right to hunt or fish within a grazing district, or as vesting in any permittee the right to interfere with hunting or fishing in a grazing district. Under the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1976), Congress declared its purpose of recognizing the vital contribution of wildlife resources to the Nation, and accordingly authorized the Secretary to provide assistance in providing public fishing areas. Congress reaffirmed this policy in 1976 in section 102(a)(8) of FLPMA, 43 U.S.C. § 1701(a)(8) (1976), in which it declared that it is the policy of the United States that the public lands be managed in a manner that will provide for habitat for fish and for outdoor recreation and human occupancy and use thereof.

The Departmental regulations, 43 CFR 24.3(b), 3/ state unequivocally that BLM and the other Departmental agencies will permit public fishing, provided that they do so "in a manner compatible with the primary objectives for which the lands are administered." Thus, these

2/ The record also shows that BLM envisions opening the area to "aesthetic viewing."

3/ 43 CFR 24.3 provides as follows:

"The following procedures will apply to all areas administered by the Secretary of the Interior through the National Park Service, Bureau of Sport Fisheries and Wildlife, Bureau of Land Management, and Bureau of Reclamation (hereinafter referred to as the Federal agencies). These Federal agencies will:

* * * * *

"(b) Permit public hunting, fishing, and trapping within statutory limitations and in a manner compatible with the primary objectives for which the lands are administered. Such hunting, fishing, and trapping and the possession and disposition of fish, game, and fur animals shall be conducted in all other respects within the framework of applicable State laws, including requirements for the possession of appropriate State licenses or permits. The Federal agencies may, after consultation with the States, close all or any portion of land under their jurisdiction to public hunting, fishing, or trapping in order to protect the public safety or to prevent damage to Federal lands or resources thereon, and may impose such other restrictions as are necessary to comply with management objectives."

statutes and the regulations support the conclusion enunciated above that BLM may require limited public access for fishing, provided that so doing does not unduly block use of the lands as reservoirs, which is the primary objective of granting the right-of-way.

The basic issues on which Ute and BLM disagree are whether it is in the public interest to allow public access to these reservoirs, and whether so doing would be unduly burdensome to their use as reservoirs. We agree with BLM and conclude that the record supports its decision that allowing access is in the public interest and is not unduly burdensome as proposed.

On March 19, 1979, the Area Manager in BLM's Grand Junction Resource Area advised the District Manager, Grand Junction District, that his office had conducted a survey of nine authorities on water quality and three local authorities on municipal liability, and had also analyzed the public demand for establishing fisheries in the Jerry Creek reservoirs. The Area Manager concluded from these studies that there would be adequate public demand for fisheries there, owing to the reservoirs' convenient location to population centers, its long ice-free season, and its scenic beauty; that insurance against liability for damages to users of the reservoirs would impose on Ute an annual \$600 burden for additional premiums; ^{4/} and that high water quality could be maintained, provided that BLM imposed the following restrictions on use, or so-called "management guidelines":

1. No water/body contact sports should be allowed.
2. Day use only.
3. Walk-in access of 200 or more yards to the nearest shoreline, fenced parking area.
4. Signing emphasizing that the primary purpose of reservoir management is to provide high quality water for domestic purposes, list regulations.
5. Provide sanitary facilities.
6. Allow non-motorized boating.
7. No fires should be allowed.
8. No types of development that would tend to congregate shoreline use, such as a floating boat dock, shoreline shelters, etc.

^{4/} Ute states that its insurance will increase only \$400 per year. See discussion, infra.

9. No group picnics should be allowed, nor picnic facilities developed.

The information assembled by the Area Manager supports these conclusions, and as it comes from a variety of disinterested parties, is persuasive as to the accuracy thereof.

On March 29, 1979, the District Manager advised Ute that he effectively adopted this conclusion, adding that Ute's concerns about degradation of water quality did not seem warranted. He specified that auto parking would be approximately one-half mile from the shore and advised Ute that a "recreation management plan" would be developed concerning the overall aspects of the use of these reservoirs, presumably to set out specific restrictions on this use.

Subsequently, the Area Manager polled nine area water utilities, projects, and authorities, who described their experiences with allowing recreational use of their reservoirs. These statements generally further support the Area Manager's conclusion that there would be no adverse effects from the restricted use which he contemplated imposing. The opinions disfavoring recreational use identified "body contact" with the reservoir as undesirable. However, there will be no body contact with this water, presuming that the restricted use of them is properly controlled by the administrative agency in charge, as swimming in these waters apparently is to be forbidden. The restrictions proposed by the Area Manager on use of these reservoirs appear to take into account all of the problems encountered by the utilities who responded to this poll, and, if they are enforced, these restrictions ought to avoid these problems.

On April 23, 1979, the Area and District Manager prepared their final land report, accompanied by the final environmental analysis report (EAR). Both of these documents recommended that there be restricted public access to the reservoirs. The EAR, apparently prepared by Ute's engineers, contains the following suggested recreation management policy and restrictions on use:

There are several recreation management policies which appear to be common throughout the water supply industry. They are:

1. Recreation is a public service which should be provided for, consistent with management of water supply service requirements.
2. Recreational use and development should be administered by a responsible recreation management agency.
3. Where standard recreational development (campgrounds, boat docks, picnic areas, shoreline vehicle

access, etc.) might cause significant water quality problems the following restrictions should be considered:

a. No overnight use (a precaution against unsanitary practices, potential buildup of trash, fire danger, and overuse).

b. No motorboats. Oil and gasoline from boat motors is difficult to remove from water during treatment. This also helps prevent overuse.

c. No swimming (water/body contact sports invite unsanitary practices and may increase costs for treatment, also helps prevent overuse).

d. No shoreline fires (charcoal, partially burned debris, and other trash may get in the water, especially with fluctuating water levels).

e. No developments which would concentrate use (such as boat docks, concessions, home developments).

f. Insure that the reservoir area is not overused, (the chances for water supply management problems to develop increases as public use increases). Methods of limiting use include: 1) limiting types of use (such as no group picnics, no hunting); 2) restricting access (could involve walk-in access, with greater distance being a greater restriction); 3) no vehicle access to shorelines (except in special instances involving sportsmen with physical handicaps or as required for operation of the reservoir, etc.).

g. Sanitary facilities should be provided near shoreline use areas (sealed vault toilets, garbage cans).

4. If problems develop and recreation management cannot provide use constraints adequate to protect water supply management needs, the reservoir should be temporarily or permanently closed to public use.

These recommendations are clearly similar to those suggested by the Area Manager, with the added proviso that the reservoirs may be closed if use thereof cannot be managed effectively.

The EAR stresses that recreational use must be truly restricted if environmental harm is to be avoided:

Realistically, if recreational use were provided for on the Jerry Creek reservoirs, there should be major

constraints placed on public use and access because the primary purpose of these reservoirs is to provide a dependable storage of high quality water destined for domestic use. Standard types of recreational development have worked satisfactorily at other locations, but usually only on reservoirs larger than the Jerry Creek reservoirs. Managers of smaller water supply reservoirs which are open for public recreational use are almost unanimous in their desire to see the following restrictions placed on recreational use of their reservoirs: "no motorboating; no swimming; no shoreline vehicle access; an effective litter control program; measures to insure that heavy use does not develop; and provision of sanitary facilities."

However, the EAR states clearly that recreational use may be provided without reducing the quality of the water or increasing the cost of processing, if proper restrictions are imposed:

If the above restrictions were incorporated into a recreation management plan for the Jerry Creek reservoirs, including other restrictions deemed necessary, the reservoirs could provide valuable, needed recreational opportunities.

* * * * *

With more stringent restrictions on recreational use, it is doubtful that water quality degradation would occur. Less stringent control of recreational use could result in situations where water quality degradation could occur.

Additionally, the EAR concurs with the Area Manager's finding that these reservoirs would afford good fishing and scenic recreational resources and that there is significant demand for these resources, owing to their convenient location and long ice-free season, and to the growing population in the area.

On May 4, 1979, the State Director endorsed the report and EAR, but recommended only the imposition of a general stipulation, rather than the specific restrictions recommended therein. The general stipulation states:

There shall be restricted public access to and recreational use of Jerry Creek Reservoirs Number One and Two. This public use shall be in accordance with the Jerry Creek Number Two Recreation Management Plan (RMP). The RMP shall be developed by BLM with input from the Ute Water Conservancy District and the public. The plan shall

be completed 90 days after issuance of the grant. Any additional cultural resource evaluation resulting from the RMP shall be the responsibility of the BLM.

Presumably, the specific restrictions on use are to be formulated in this "RMP." On May 9, 1979, BLM issued the decision in question, with this general stipulation included.

The material presented by Ute opposing opening the reservoirs to access largely concerns problems associated with unlimited public access. As noted above, the restrictions on access proposed by BLM and in the EAR consider and effectively resolve these problems. BLM has not, as Ute alleges, ignored the problems which it points out, but has instead diligently attempted to solve them in order to achieve multiple use of these lands without undue degradation of the water resources to be stored there. We find that it has succeeded in this effort.

The thrust of Ute's opposition to BLM's decision to allow restricted public access is that so doing will unduly burden their use as water-supply facilities, owing to the increased cost of properly administering this use, and owing to pollution of their waters by users. BLM has agreed expressly in the decision appealed from to manage the restricted use of these reservoirs. Therefore, if BLM complies with this promise, there should be no administrative burden or expense whatever on Ute from this decision. The record clearly shows that use of the reservoir areas contemplated for fishing and hiking only, if properly controlled, will not prevent or unduly burden use of the land as reservoirs because of pollution. We reject as unsupported Ute's assertion that disastrous consequences to a large number of people may result from allowing restricted use, owing to contamination from human feces. It is clear that this problem may be avoided by providing sanitary facilities for those using the area and by closing the area at dark. In any event, the record shows that the proposed limited use will not be so great as to result in any appreciable fecal pollution by users.

Ute also objects to having to bear the burden of liability which might result if a user were injured at the reservoirs. The record shows that the additional cost of insuring against such liability will be approximately \$400 per year. In view of the benefit inuring to Ute from receiving this right-of-way grant and BLM's willingness to mitigate the effects of opening the reservoirs by shouldering the balance of the financial and administrative burdens involved therein, we cannot see that it unduly burdens Ute to pay this amount for additional insurance.

As Ute points out, it is impossible at present to conclude that BLM's demands are not burdensome, as BLM has not yet finally specified exactly what the restricted access will entail, or exactly how much of

the financial and administrative burden of management will fall on Ute. Another open question is whether ice fishing will be allowed on the reservoir, a matter of great concern to Ute, owing to the clear hazards posed to ice fishers by fluctuations in water levels, which leads Ute reasonably to fear possible liability in the event of a drowning.

BLM's "recreation management plan" will presumably resolve these questions, but its terms will not be known until 90 days after the grant is issued. Thus, if the terms of this plan do not adequately solve potential problems and provide for administration of the restricted use, or if the plan grants so much access that significant pollution or threat to human life might occur, the imposition of the requirement that the reservoirs be opened as a condition of the grant might be found unduly burdensome, and, therefore, subject to correction.

Accordingly, while we affirm BLM's decision to require the type of restricted access described in BLM's March 19, 1979, report and the EAR, we note that Ute may appeal the terms of the recreation management plan after its adoption if it feels that these restrictions on use have not been imposed or that undue burden is created thereby.

We reject appellant's argument that BLM is barred from requiring that the Jerry Creek No. 1 reservoir be opened to public access by reason of its June 3, 1976, amendatory decision authorizing Ute to prohibit and prevent such access. In the decision in question, BLM purported to amend Ute's right-of-way for this reservoir, which it had issued in 1963 under the provisions of the Act of February 15, 1901, as amended, 48 U.S.C. § 959 (1970) (repealed by FLPMA effective October 21, 1976), pursuant to application C-0102696. BLM's amendment of this right-of-way grant was therefore also made under the terms of this Act, which expressly provides:

That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation or park.

Thus, it was within BLM's power to revoke this permission, as it was granted under the terms of this statute, provided that there was just cause to do so. As discussed above the record reveals such just cause, in that the public interest would be benefited by the action.

The decisions granting the right-of-way to Ute and the amendatory decision both expressly refer to the section containing this provision, and the latter notes that "all previous terms * * * shall remain in full force and effect." Thus, Ute had ample notice that this permission to exclude the public from the reservoir was not permanent.

Furthermore, even in the absence of this provision, BLM is authorized to revoke its permission to exclude the public from the Jerry Creek No. 1 reservoir. A right-of-way grant to create a body of water does not carry with it exclusive piscatorial privileges. See United States v. Big Horn Land & Cattle Co., 17 F.2d 359, 336 (8th Cir. 1927); Zelph S. Calder, supra at 39, 345. Rather BLM retains the discretionary power to allow or prevent fishing. See 43 CFR 24.3(b). ^{5/} BLM exercised this power to prevent fishing when it authorized Ute to bar access to these reservoirs in June 1976, but has now determined that it is no longer in the public interest to continue to prevent access and, so, has effectively revoked the authority granted to Ute to do so. As Ute has no authority under this grant to exclude fishing access, and as BLM has revoked the authority granted to Ute pursuant to its plenary authority to do so, Ute is now without power to preclude public access. ^{6/}

In any event, BLM's permission to bar access was granted gratuitously, as an accommodation to UTE's request, without consideration by Ute. Therefore, there is no contractual bar to BLM's revoking this permission.

[3] Finally, Ute has appealed a decision by the Grand Junction District Office, BLM, requiring Ute to bear the costs of mitigating damage to archaeological sites on public lands which are to be flooded by Jerry Creek No. 2 reservoir. Ute has submitted a copy of this decision, which is undated, but the record does not contain a copy thereof, so that we are completely unable to ascertain when it was issued. We strongly doubt that Ute's appeal of this decision is timely, as BLM apparently confirmed the imposition of this requirement by telephone on March 27, 1978, more than a year before this appeal was filed. If there were any indication that Ute received written notice thereof prior to May 4, 1979, 30 days before it filed its notice of appeal, we would be compelled to dismiss the appeal. 43 CFR 4.411.

^{5/} See n.3, supra.

^{6/} In passing we note one unusual aspect of this matter. The record includes a statement by Ute's manager indicating that Ute had apprehended two fisherman using the Jerry Creek No. 1 reservoir in 1975 and pressed criminal trespass charges against them. This statement indicates that Ute dropped these charges because a BLM employee appeared at the trial and represented that he would testify on behalf of the defendants that Ute had no authority to bar public access to the reservoir. If this statement is true, we feel compelled to note that the action of this BLM employee was possibly improper, as there is no evidence indicating that the BLM employee or defense counsel complied with the express, mandatory provisions of 43 CFR 2.82(a) and (b) regarding testimony of Departmental employees in judicial proceedings.

In any event, we uphold BLM's decision requiring Ute to bear the cost of mitigating the loss of archaeological sites in the area to be inundated. BLM may properly require one who wishes to use public lands in a manner which may disturb archaeological sites thereon to take whatever action BLM may set forth to protect, preserve, or dispose of any sites or material discovered, and to bear the cost of such excavations. Western Oil Shale Corp., 41 IBLA 105 (1979); General Crude Oil Co., 28 IBLA 214, 83 I.D. 666 (1976).

The present record contains an adequate basis on which to resolve this appeal. Accordingly, we deny Ute's request for a hearing.

Therefore, 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.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Joan B. Thompson
Administrative Judge

