

IDAHO DEPARTMENT OF WATER RESOURCES  
(ON RECONSIDERATION)

IBLA 77-106

Decided August 12, 1980

Appeal from decision of the Idaho State Office, Bureau of Land Management, rejecting in part application I-8654 for segregation of land for development under the Carey Act.

Affirmed.

Idaho Department of Water Resources, 32 IBLA 89 (1977) is vacated.

1. Act of August 18, 1894 (Carey Act) – Withdrawals and Reservations: Generally

The Carey Act does not give a state an absolute entitlement to select and reserve desert land acreage regardless of whether or not it has been withdrawn for other purposes. Rather, the Act does not prevent the Secretary from committing such land for any authorized use, including use as a stock driveway. Moreover, the Department has broad discretionary authority to reject Carey Act applications for lands not withdrawn from selection, subject to normal judicial restraints against arbitrary and capricious administrative actions.

2. Act of August 18, 1894 (Carey Act) – Act of March 15, 1910 – Withdrawals and Reservations: Generally – Withdrawals and Reservations: Reclamation Withdrawals – Withdrawals and Reservation: Temporary Withdrawals

Applications filed for segregation of land for proposed development under the Carey

Act must be rejected where the lands have previously been withdrawn or classified for other Federal purposes.

APPEARANCES: Josephine P. Beeman, Esq., Deputy Attorney General, Idaho Department of Water Resources, for appellant; William G. Kelly, Jr., Esq., Office of the Solicitor, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On November 17, 1976, the Idaho Department of Water Resources filed with the Idaho State Office, Bureau of Land Management (BLM) a letter requesting that 8,237.09 acres of public lands be segregated under the Act of August 18, 1894 (the Carey Act), 43 U.S.C. § 641 (1976). <sup>1/</sup> On December 13, 1976, BLM issued a decision rejecting this application in part, in that approximately 4,040 acres were withdrawn in the Saylor Creek Range and Experimental Pasture Research Area (P.L.O. 4561) and for stock-driveway No. 231 (Secretarial Order of July 8, 1932). The Idaho Department of Water Resources (appellant) appealed this decision insofar as it concerned these 4,040 acres.

On September 2, 1977, we issued a decision in this matter, Idaho Department of Water Resources, 32 IBLA 89 (1977), which affirmed BLM's decision in part and remanded it in part. This decision relied in part on the holding in Idaho v. Kleppe, 417 F. Supp. 873 (D. Idaho 1976) on several issues. On March 17, 1978, BLM, through the Office of the Solicitor, filed a petition for revision of this opinion, noting that these issues were presently in litigation before the Court of Appeals for the Ninth Circuit. Accordingly, on June 2, 1978, we issued an order granting reconsideration and setting aside our decision, pending final judicial resolution of these issues. <sup>2/</sup>

On April 16, 1980, the United States Supreme Court issued its opinion in Andrus v. Idaho, 48 U.S.L.W. 4418 (1980) which disposed of these issues. Inasmuch as our holding in Idaho Department of Water Resources, *supra*, was based in part on the District Court's holdings

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<sup>1/</sup> The lands had previously been temporarily withdrawn for 1 year by BLM's decision of November 19, 1975, pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970) (repealed by the Federal Land Policy and Management Act of 1976 (FLPMA)). The repeal of this Act by FLPMA and the resulting loss of authority to make such temporary withdrawals apparently necessitated the application for "segregation" under the Carey Act in lieu of an application simply to continue the temporary withdrawal.

<sup>2/</sup> The Ninth Circuit affirmed the District Court without opinion (Idaho v. Andrus, 595 F.2d 524 (1979)), and the Supreme Court granted the Department's petition for certiorari.

in Idaho v. Andrus, supra, which have been clarified and overruled by the Supreme Court, we hereby vacate it in its entirety, and it shall be of no further force or effect.

[1] The sole issue presented in this appeal is whether BLM may properly deny appellant's request for segregation of these 4,040 acres under the Carey Act, supra, because they have been withdrawn for other purposes. Appellant has argued that it has an absolute entitlement under the Carey Act to develop up to 2.4 million acres of public desert lands in Idaho and that it may choose any such lands despite their having been withdrawn for other purposes.

The Supreme Court has made it clear that the Department, through BLM, may deny a Carey Act selection where the lands selected are withdrawn for other purposes, saying:

[W]e conclude that Congress did not intend to reserve any specific number of acres of desert land for any State under the Carey Act and that the Act does not prevent the Secretary from committing otherwise available parts of the public domain for any of the uses authorized under the various statutes relating to the use and management of the public lands, such as the Taylor Grazing Act under which part of the lands that Idaho sought in this case have been withdrawn. [Emphasis supplied.]

Andrus v. Idaho, supra at 4419. Thus, the Carey Act did not prevent the Secretary from withdrawing those lands for use as a stock driveway or for other uses. <sup>3/</sup>

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<sup>3/</sup> The District Court had also so held previously, noting that "the State may not perfunctorily select acreage previously withdrawn for other purposes such as in this case, a withdrawal for stock-driveways." Idaho v. Kleppe, supra at 881. Thus, the Supreme Court affirmed the District Court on this question.

However, the Supreme Court reversed the District Court's favorable statements concerning states' general entitlement to lands not withdrawn for other purposes, sanctioning instead the exercise by the Department of broad discretionary authority to reject Carey Act applications for such lands, subject to normal judicial restraints on arbitrary and capricious administrative action. Thus, the Supreme Court clearly rejected the notion that the states have an "entitlement" under the Carey Act:

"As finally adopted, the Act does not oblige the Secretary automatically to contract for lands chosen by the State even if its application otherwise conforms to the statute. Hence, even though a

[2] An application under the Carey Act for segregation of land which has been withdrawn for other Federal purposes must be rejected. 43 CFR 2091.1; Idaho Department of Water Resources, 49 IBLA (1980); see Idaho Department of Water Resources, 21 IBLA 210 (1975), aff'd Andrus v. Idaho, supra. BLM accordingly properly rejected appellant's application insofar as it concerned the 4,040 acres which were withdrawn.

The questions of whether BLM should grant appellant's application as to the remaining unwithdrawn acreage and whether BLM should reclassify the withdrawn lands are not before us, as no adverse decisions have been made by BLM on these questions. 4/

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.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Joseph W. Goss  
Administrative Judge

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James L. Burski  
Administrative Judge

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State's selection has not been withdrawn for other uses, as is the case with part of the land that Idaho applied for in this case, the Secretary need not always approve the application." (Footnote omitted; emphasis supplied.) Andrus v. Idaho, supra at .  
4/ As of May 21, 1980, regulations for administration of the Carey Act were published in the Federal Register (45 FR 34230).

