

DESERT SURVIVORS

IBLA 86-228, IBLA 86-1503

Decided March 19, 1987

Appeal from a decision of the California Desert District Office, Bureau of Land Management, approving water diversion pipelines proposed by mining plan of operations on unpatented mining claim CA MC 15924-26 located inside a wilderness study area.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way --
Rights-of-Way: Generally -- Rights-of-Way: Applications --
Rights-of-Way: Federal Land Policy and Management Act of 1976

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

APPEARANCES: Salvatore Campagna, Vallejo, California, pro se; William F. Alderman, Esq., and W. Douglas Kari, Esq., San Francisco, California, for Desert Survivors.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On June 28, 1984, Salvatore Campagna filed a plan of operations with the California Desert District Office, Bureau of Land Management (BLM), proposing surface blasting and drilling to obtain soil and rock samples as well as the construction of two pipelines to divert water to three unpatented mining claims located in a wilderness study area in the Inyo Mountains in California. Campagna had previously filed an application with the California water resources Control Board to obtain rights from the state to appropriate water from the Keynot and Beveridge Canyons via a 4,000-foot pipeline from Keynot Canyon and a 10,000-foot pipeline from Beveridge Canyon for use on the claims.

Appellant, Desert Survivors, submitted written comments opposing Campagna's plan of operations. After several delays due to requests for additional data, the BLM Desert District Office, on March 18, 1985, issued a decision approving blasting and drilling on the claims which provided, however, that no diversion of water was authorized. Campagna appealed the water limitation to this Board.

On June 24, 1985, this Board issued an order (IBLA 85-683) which vacated the BLM Desert District Office decision and remanded the case to BLM for further proceedings. This was done in response to a motion filed by BLM stating that the inclusion of certain conditions in the BLM decision was not in accordance with "written policy of either BLM or the State of California." BLM moved that the matter be remanded for further negotiations concerning conditions to be imposed on Campagna's plan of operations. After remand, additional data was requested from Campagna, on August 7, 1985, regarding water diversion. On September 17, 1985, BLM approved Campagna's mining plan of operations without a requirement that he obtain a right-of-way for the water diversion, and the present appeal was taken from that decision. ^{1/}

In a statement submitted as Exhibit I to the statement of reasons, Desert Survivors states as follows:

^{1/} Thereafter, however, On May 27, 1986, Campagna submitted a revised mining plan of operations to the BLM Ridgecrest Resource Area Office in an attempt to conduct blasting and drilling while waiting for a decision whether he would be permitted to build the two pipelines following the adjudication of this appeal. On July 18, 1986, the Ridgecrest Resource Area Office approved the revised plan. Desert Survivors appealed that decision (IBLA 86-1503). In their statement of reasons for appeal, Desert Survivors contends that because the revised plan concerns the identical subject matter as the original plan that is under appeal to this Board in IBLA 86-228, BLM should not have approved the revised plan. By motion dated Sept. 2, 1986, BLM, through counsel, requested that its decision of July 18, 1986, be vacated.

Clearly, if the revised plan, which is the subject of IBLA 86-1503, concerns exactly the same subject matter as the decision under appeal in IBLA 86-228 it may not be maintained. It is settled law within the Department that upon timely appeal of a BLM decision, BLM loses subject matter jurisdiction of the appeal until it is decided. See Sierra Club, 57 IBLA 288 (1981); Utah Power & Light Company, 14 IBLA 372 (1974). See also 43 CFR 4.21(a). In these cases, it is not entirely apparent, however, that Campagna has attempted to avoid this rule by the simple expedient of refile another plan in order to continue his mining without interruption. Related, but different actions, such as may be involved in successive mining plans of operations, clearly would permit a miner to file successive plans until he achieves a satisfactory result. See, e.g., East Canyon Irrigation Co., 47 IBLA 155 (1980). Nonetheless, considering the result reached in this decision, BLM's motion to vacate the July 18, 1986, decision in IBLA 86-228 is granted. Should future amendments of the mining plan be proposed by Campagna, however, it should be kept in mind that, to the extent they are dissimilar, they must be treated as such for purposes of appeal to this Board.

On December 6, 1985 and again on December 18, 1985 I spoke by telephone with * * * BLM's California Deputy State Director for Mineral Resources, regarding the State Office's position about the applicability of Title V of the Federal Land Policy and Management Act of 1976 to diversion of water across public land in a wilderness study area. [The Deputy State Director] stated that he believed that the 1872 Mining Law's "implied right of access" precluded regulation under Title V, and that only the regulations at 43 C.F.R. § 3802 applied.

In the statement of reasons for appeal, Desert Survivors argues that the BLM decision of September 17, 1985, was in error because it concludes that Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761-1771 (1982), does not apply to diversion of water for use in mining, and because the BLM decision sent the case back to the Desert District Office for reconsideration under Interior Department regulations governing mining. Rather, Desert Survivors contends, FLPMA repealed statutes that previously governed rights-of-way used to divert water for use in mining, and consolidated prior law governing rights-of-way into the comprehensive provisions of Title V. Desert Survivors further contends that BLM failed to comply with "the [43 CFR] 3802 regulations governing mining in wilderness study areas, when it approved the proposed pipelines" and that "[u]nder either set of standards the BLM's decision is erroneous and must be reversed."

In answer to the statement of reasons, Campagna states that he has an approved plan of operations and the Desert Survivors has effectively shut down his operation by three successive appeals. Campagna states that he has attempted to work the claims since 1961 and that four veins of ore were exposed since before 1976. He asserts he has been told that he can get development financing if he can show similar ore at a depth of 50 feet. Because BLM does not allow roads to the claims and because of his age and the claims' elevation, Campagna states that he has to save enough money to hire a helicopter to obtain access to the claims, at a cost of \$375 to \$450 an hour. Explaining that it cost him \$1,059 to bring 60 gallons of water to the claim to cool his drill bits and to provide 10 gallons for domestic use, Campagna states that he needs water from the canyon if he is to proceed as planned.

The contested provision of BLM's September 7, 1985, decision dealing with the water diversion question, states:

7. A water diversion system must be designed so as to take no more than 500 gallons per day. Water will be recycled as much as possible. Water will not be wasted downslope from the operation. The water issue is further discussed after point No. 10.

* * * * *

Regarding point No. 7, I understand that you visited the Ridgecrest Resource Area on August 20, 1985, to submit and discuss your plans for water diversion in either Keynot or Beveridge Canyon. In your discussions with Jerry Boggs, Chief of Resource Operations, you agreed to divert no more than 500 gallons per day

through a 3/4"-1" pipeline system. Your plan presently calls for an indeterminate amount of pipeline, an uncertain fall in elevation, and an unknown diversion point. These uncertainties make it impossible for us to do an environmental assessment on the impacts of your proposed water diversion. Therefore, please note that the above approval is contingent upon you supplying specific information on the point of diversion, amount of pipeline, and fall. When we have that information, we will conduct our assessment and assist in the design of your water diversion system, if you so desire, so as to assure that your operational and our environmental water needs are met. Further, a representative from Ridgecrest Resource Area will have to accompany you or your representative during installation of your water collecting device so as to assure lateral water flow past your collection device.

Thus, the September 7 decision by the Desert District Office continued the limitation imposed by the earlier March 18, 1985, BLM decision which had approved Campagna's mining plan of operations but which did not authorize access to or diversion of surface water sources. The September decision, however, indicated the action that could be taken to obtain approval of a water diversion plan, without the necessity of obtaining rights-of-way under Title V of FLPMA.

[1] Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to the transportation of water across public land for mining purposes. See 43 U.S.C. § 1761 (1982). As was the case prior to passage of Title V of FLPMA, however, approval of such an application remains a discretionary matter and the Secretary has broad discretion regarding the amount of information he may require from an applicant for a right-of-way grant prior to accepting the application for consideration. Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982). A decision approving a right-of-way application must be made upon a reasoned analysis of the factors involved in the right-of-way, with due regard for the public interest. See East Canyon Irrigation Co., 47 IBLA 155 (1980).

BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited.

The implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. § 51 (1970) and 43 U.S.C. § 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see § 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. § 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

Nor does 43 CFR Subpart 3802 imply otherwise, as suggested by the State Office. The fact that these regulations require consideration of impacts generated by access to mining claims in an environmental assessment of a mining plan of operations has no bearing on the question whether rights-of-way must be obtained. These are clearly independent questions. Thus, Campagna must obtain a right-of-way and BLM is required, prior to approving a plan of operations, to consider the effect of the right-of-way together with the pipeline to be conducted on the claim. We perceive no conflict between these requirements.

Further, Desert Survivors correctly states that Title V of FLPMA and Departmental regulations implementing FLPMA require a right-of-way applicant to submit a plan of construction, operation, and rehabilitation. See 43 U.S.C. § 1761(b)(1) (1982); 43 CFR 2802.3 and 3802.1-4. Desert Survivors contends also correctly, that FLPMA and implementing regulations require that each right-of-way grant contain terms and conditions to minimize damage to scenic and esthetic values and fish and wildlife habitats and require mitigation measures, and, to that end, BLM must prepare an environmental assessment.

The casefile contains no right-of-way application filed by Campagna. Since Title V of FLPMA requires that such an application be filed prior to transporting water across public lands for mining, the September 17, 1985, BLM decision which approved the mining plan of operations, CA MC 15924-26, is reversed and the matter is remanded so that Campagna can file the required application to conform to requirements of regulations at 43 CFR Part 2800 and Subpart 3802. At that point BLM can conduct an assessment and "assist in the design of [the] water diversion system * * * so as to assure that [the] operational and * * * environmental water needs are met" in the manner indicated by the BLM decision of September 17, 1985.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision of September 17, 1985, is reversed and remanded.

Franklin D. Arness
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

James L. Burski
Administrative Judge.

