GRANT L. HACKING

IBLA 80-603 Decided September 30, 1980

Appeal from decision of the Utah State Office, Bureau of Land Management, rejecting water pipeline right-of-way application U-41828.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Repealers--Rights-of-Way: Applications--Withdrawals and Reservations: Springs and Waterholes

The repeal of sec. 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792, of certain statutory authority to reserve land as a water hole only prohibits future withdrawals or reservations of land under the repealed statues and does not affect known water holes withdrawn prior to the repeal. It was proper for the Bureau of Land Management to reject a water pipeline right-of-way application for land containing a water hole which was withdrawn prior to the Federal Land Policy and Management Act, and where the water is needed for a public use.

APPEARANCES: Grant L. Hacking, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Grant L. Hacking has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated March 29, 1980, rejecting his application (U-41828), filed pursuant to Title V of the Federal Land Policy and Management of 1976 (October 21) (FLPMA), 43 U.S.C. § 1761 (1976), for a 3-inch irrigation pipeline right-of-way

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BLM properly rejected application for ROW from PWR, because all water was needed for public purposes.

across public lands in sec. 12, T. 4 S., R. 20 E., Salt Lake meridian, Utah. The application was rejected for the following reasons:

> The above described land contains a waterhole or holes of the type contemplated by Executive Order 107 and the Act of June 16, 1934.
>
> By Executive Order No. 107, dated April 17, 1926, the President of the United States ordered that every smallest legal subdivision of the public land surveys which was vacant, unappropriated, unreserved, public land and which contained a spring or water hole be withdrawn and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916 (39 Stat. 865; 43 U.S.C. 300).
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> The Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 181), as amended by the Act of June 16, 1934 (48 Stat. 977; 30 U.S.C. 299a) provides for the reservation as a waterhole of lands upon which water is struck during oil and gas drilling operations.

BLM set forth two additional reasons for the rejection of appellant's pipeline application based upon its discretionary authority:

> 1. No excess water is available for use outside the Public Water Reserve. The water flowing on June 1, is below that which the Bureau has applied for, and decreases later in the season.
>
> 2. The water is used frequently by wildlife and should be retained for public use.

[1] BLM was correct in its ruling as to appellant's pipeline application. All water holes on public lands and the surrounding acreage were withdrawn by Exec. Order No. 107 of April 17, 1926, 43 CFR 2311.0-8, 30 CFR 241.5, n.1, pursuant to section 10 of the Act of December 29, 1916, 39 Stat. 865, 43 U.S.C. § 300 (1970). The Executive order was designed to preserve for general public use and benefit all unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. In the Executive Order, the President ordered that every smallest legal subdivision of the public land surveys which was vacant, unappropriated, unreserved, public land, and which contained a spring or water hole, be withdrawn and reserved for public use. Therefore, BLM acted within its authority to reject appellant's application. See Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 I.D. 553, 578-588 (1979).

In a memorandum dated July 15, 1958, by the State Supervisor, it was determined that the particular land involved here is a waterhole reserved under Executive Order No. 107, and by the Mineral Leasing Act as amended by the Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. § 229(a) (1970), which provided that land on which water is struck rather than oil and gas when a well is drill shall "be reserved as a water hole under section 300 of Title 43." The statutory authorities authorizing reserving land as a water hole been have repealed by section 704(a) of FLPMA, 90 Stat. 2792. The Solicitor of this Department in an Opinion of June 25, 1979, 86 I.D. 553, 578-588 (1979), however, has stated that where lands were known water holes and withdrawn prior to the enactment of FLPMA, they remain effectual. The repeal only prohibits future withdrawals or reservations of land under the repealed statutes. We agree. Therefore, it was proper to reject the application because the lands are reserved as a waterhole.

Furthermore, it was also proper for BLM to reject the application in the exercise of its discretion if the water is needed for a public use.

Therefore, pursuant to the authority delegated to the Board of Lands Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge