Editor's note: 88 I.D. 258

EUGENE V. VOGEL

IBLA 79-411 Decided February 9, 1981

Appeal from decision of the Oregon State Office, Bureau of Land Management, rejecting application for right-of-way for water diversion project. OR 18527.

Set aside and remanded.

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

   The standard of review in the case of a right-of-way application for a water diversion project is whether the decision demonstrated a reasoned analysis of the factors involved, with due regard for the public interest. A decision to reject such an application will not be affirmed where the record lacks sufficient reasons to support it.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way

   Rejection of a right-of-way application for a water diversion project will not be

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BLM must have a record that supports its decision and demonstrates that proposed water use would be detrimental to natural resource values on public lands.

affirmed where the record does not support a finding that approval would be incompatible with BLM's timber management plan; that it would adversely affect wildlife; or that it would result in a cumulative adverse impact contrary to the public interest.

APPEARANCES: Eugene V. Vogel, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Eugene V. Vogel has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated April 26, 1979, rejecting his application for a 10-foot right-of-way, OR 18527, for a water diversion project to be located on lot 7, sec. 29, T. 38 S., R. 7 W., Willamette meridian, Josephine County, Oregon. Appellant filed his application pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (1976).

The project, intended to provide water in the amount of 0.085 cubic feet per second (cfs) for irrigation and domestic use, 1/ would consist of a dam in the bed of a small unnamed spring tributary of the McMullin

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1/ The original water rights permit from the State of Oregon entitled appellant to appropriate 0.080 cfs for irrigation and 0.005 cfs for domestic use. However, appellant has advised the Board that he is abandoning his right to appropriate irrigation water, and is having his permit changed to allow only 0.005 cfs for domestic use.

Creek 2/ and a collection pool connected by approximately 530 feet of 1-inch diameter underground plastic pipe to a 1,000-gallon concrete storage tank. Approximately 400 feet of pipe would lead from the storage tank to the edge of appellant's property, situated in sec. 32, T. 38 S., R. 7 W., Willamette meridian, Josephine County, Oregon.

BLM's reasons for rejection of appellant's application were that the project (1) would conflict with its timber management plan because it would require extra cost and care to protect appellant's facilities, (2) would result in a lack of water for wildlife during the summer months, and (3) might establish a precedent contrary to the public interest in view of the potential for newly constructed homes on adjacent private land and associated increased water consumption. These reasons were based on an Environmental Assessment Record (EAR) and a land report prepared by BLM resource specialists.

In his statement of reasons for appeal, appellant contends, in regard to timber management, that an underground 1-inch diameter pipe would present "little or no obstacle to timber management" and that the storage tank would be situated in such a way as to present "the least

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2/ In appellant's permit from the State of Oregon, and in his application to the Department, the source of water is described as a spring. We assume for the purpose of this decision that the spring does not fall within the scope of the withdrawal by Executive order of April 17, 1926, preserving for general public use and benefit unreserved public lands containing springs or waterholes needed or used by the public for watering purposes. 43 CFR 2311. A determination that land is not embraced within the withdrawal would be necessary before any right-of-way could be granted affecting a spring on public lands.

obstacle to road building and logging." Furthermore, he indicates a willingness to release BLM in writing from any liability for injury to his pipe or tank caused by BLM authorized logging operations. In regard to wildlife, appellant contends that there is adequate water in the area for wildlife in the form of several springs and the East Fork of the McMullin Creek, but he states that he would be willing to design the project so as to provide "a preliminary tank for wildlife before the water flows into my holding tank or else a second tank for wildlife which catches the overflow."

With respect to water use by other homeowners he indicated he had no knowledge whether others would apply for similar installations, but he felt most of the other private property in the area had the East Fork of the McMullin Creek running through it.

[1, 2] The Secretary or his duly authorized representative has the discretion to accept or reject a right-of-way application for a water diversion project filed under section 501 of FLPMA, supra. Stanley S. Leach, 35 IBLA 53 (1978). The standard for review of a decision rejecting an application is whether the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Where no sufficient reason exists to disturb such a decision, it will be affirmed. Stanley S. Leach, supra; Jack M. Vaughan, 25 IBLA 303 (1976). In this case there is sufficient reason.

The record does not support a finding that appellant's proposed water diversion project is incompatible with BLM's timber management plan. The land report states that the timber management plan for this area called for a three-stage partial cut program. The first entry was made in 1973, when logging roads were built into the area. The second cutting "is not in the Medford District's five year timber sale plan at this time, but will probably be made within ten years." A logging road which ends near the proposed site of the storage tank may be extended to cross the site in order to reach land to the east. Although the land report states that "plans for timber management in the area * * * would require extra cost and care to protect [appellant's] facilities," that remark is neither substantiated nor explained. A 1-inch plastic pipe buried a foot underground should not pose any significant problem. Also, the storage tank could be placed at a point along the route of the pipe, including on appellant's land, so as not to conflict with any future logging operations. Moreover, appellant has declared his willingness to locate his storage tank so as to present the least obstacle to road building and logging and to release BLM in writing from any liability. There does not appear to be any reason why such a release could not be accepted.

The area, identified as part of crucial deer winter range, supports populations of black-tailed deer, and a variety of small mammals such as squirrels and rabbits, and birds. Both the EAR and land report concur that appellant's proposed project would probably result in a

lack of water for such wildlife during the summer months, although the impact to their habitat would be minimal. However, as pointed out above, appellant has offered to devise a project to provide adequate water for wildlife. There is no evidence that a system could not be set up which would be compatible with wildlife use. In addition, the entire stream flow is not to be diverted to appellant's exclusive use. He now intends to use only 0.005 cfs for his domestic use.

BLM stated in its decision that allowance of the right-of-way will "set a precedent contrary to the public interest in that the cumulative effect of granting similar applications in the area would be significant and adverse." The basis for that statement appears to be the Board decision in Stanley S. Leach, supra, in which we held that BLM properly rejected a right-of-way application for a pipeline to convey water from a spring on public lands to private lands where it had determined that the overall effect of granting similar applications in a given area would be adverse to the public interest and allowance of one application might establish a precedent contrary to the public interest.

However, in the Leach case the State Department of Fish and Game had filed a protest with the State Water Board objecting to Leach's request to appropriate 1,200 gallons of water per day from a spring on public land. In this case the State had approved appellant's water appropriation with no apparent objection. In addition, in Leach there was no offer to take steps to attempt to insure adequate water for wildlife. There was mention of overflow from Leach's tank. Overflow does

not guarantee water for wildlife, especially in times of shortage. On the other hand, appellant's offer to build a preliminary tank for wildlife indicates a willingness to put a priority on wildlife use. Also the EAR indicates there would be no significant impact on water quality from construction of this facility; there are no rare or endangered species known to exist in the area; no cultural or historic resources; and no public interest in the proposal.

Given the facts in this case, the Leach rationale is not dispositive. BLM cannot reject a request for use of the public lands solely on the basis that the granting of a right might result in a deluge of similar applications by others. See East Canyon Irrigation Co., 47 IBLA 155, 169 (1980). Under that reasoning, no one would ever be allowed to make any use of Federal land or its resources, no matter how innocuous the effect of such use, because the cumulative effect of numerous people making the same use of the same land would be undesirable and contrary to the public interest.

Each application for a discretionary use deserves to be treated on its own merits. The record of this case plainly establishes that it will not have any significant adverse effect on the land or any of the resource values. The allowance of this application does not by any means mandate the allowance of every similar future application regardless of the consequences. FLPMA declared that it is the policy of the United States that management of the public lands be on the basis of

multiple use. Section 102(a)(7), 43 U.S.C. § 1701(a)(7) (1976). The granting of this application would be in keeping with this stated policy.

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 set aside and the case remanded to BLM for issuance of the right-of-way with appropriate stipulations.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge