

INTERIOR BOARD OF LAND APPEALS

Thomas L. Watson, et al.

129 IBLA 18 (March 15, 1994)

Title page added by:  
ibiadecisions.com

Appeal from a decision of the Phillips Resource Area Manager, Montana, Bureau of Land Management, rejecting right-of-way application M-73496.

Affirmed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-Way: Applications

A BLM decision to reject a right-of-way application calling for removal of vegetation and shaping the banks of a stream because the contemplated activity would conflict with BLM's riparian management policy will be affirmed when the record supports a finding that the decision was based upon a reasoned analysis of all relevant factors and made with due regard for the public interest.

APPEARANCES: Thomas L. Watson, Marlyn Orahood and Wesley Orahood, pro sese.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Thomas L. Watson, Marlyn Orahood, and Wesley Orahood (appellants) have appealed a November 6, 1991, decision issued on behalf of the Bureau of Land Management (BLM) by the Manager, Phillips Resource Area, Montana, rejecting right-of-way application M-73496.

On October 1, 1990, appellants filed a right-of-way application seeking issuance of a right-of-way for cleaning and reshaping a portion of Sage Creek to facilitate the flow of water to their hay fields. Sage Creek flows across public land in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of sec. 5 and the E $\frac{1}{2}$  SE $\frac{1}{4}$  SE $\frac{1}{4}$  of sec. 6, T. 25 N., R. 32 E., Principal Meridian, Phillips County, Montana. The contemplated project would involve removal of vegetation, primarily willow, vertical reduction of the north bank to the depth of the channel bottom, and widening of the stream bed.

In letters dated August 20, 1991, the Area Manager notified the appellants that removal of willows and shaping of the stream channel could not be authorized because that action conflicted with BLM riparian protection and management policy. The Area Manager noted that BLM personnel and the

applicants had discussed the project at length, and stated that there were other options for improving delivery of Sage Creek water to their fields. He then asked the appellants to submit proposed changes to the project, a location map and drawings for proposed structures, and a cultural (archeological) inventory of the area to be disturbed before November 1, 1991.

An environmental assessment (EA) was undertaken and it was determined that there would be no significant impact if BLM issued a decision rejecting the right-of-way application because the contemplated project was incompatible with BLM's riparian management policy. In the decision on appeal, the Area Manager summarized the facts and noted that appellants had submitted no changes or alternatives as recommended in his August 20, 1991, letters. He then denied the application, citing 43 CFR 2802.4(a)(1), which authorizes denial of a right-of-way application if the right-of-way "would be inconsistent with the purpose for which the public lands are managed," as the basis for his denial.

On appeal, the appellants contend that rejection places their ranching operations in jeopardy because they need water for their hay fields. They disagree with the finding in BLM's EA that Sage Creek is a "necessary riparian habitat" because the vegetation is so sparse. Appellants also assert that if the creek remains as it is, it will become silted and no water will be available to sustain the vegetation BLM seeks to preserve.

[1] Section 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), authorizes the Secretary of the Interior to grant a right-of-way for "ditches \* \* \* and other facilities \* \* \* for the transportation \* \* \* of water." This authority has been committed to the discretion of BLM. Daryl Richardson, 125 IBLA 132, 134 (1993). A BLM decision exercising its discretion will be affirmed on appeal if the record supports a finding that the decision was based upon a reasoned analysis of all relevant factors and made with due regard for the public interest. Richardson, *supra*; Coy Brown, 115 IBLA 347, 356 (1990).

The EA states that a total of 1.5 acres would be affected by cleaning and sloping. Willows would be removed from 0.2 acres and "grass-brush" vegetation from 1.3 acres (EA at unnumbered 7). <sup>1/</sup> Essentially, the EA recommends no action because removal of the willows is incompatible with BLM's stated riparian management policy. A written evaluation of the proposal by the Lewistown District hydrologist is attached to the EA. He describes the channel as having abundant sandbar willow growth, a few boxelders, and some silver sage. He notes that the "riparian vegetation is reducing the velocity of flow and acting as a sediment trap throughout most of the 2200' of channel." He states that, according to Watson and the Orahoods, between the 1950's and the 1970's, Sage Creek delivered sufficient water to flood irrigate 450 acres of Watson land and 150 acres of Orahood land, but the volume of water has dwindled to the point that only 140 acres

<sup>1/</sup> The EA is not paginated.

of Watson land and 50 acres of Orahood land can be irrigated. The hydrologist appraised the proposal as follows:

The volume of water gained by the proposed action may or may not reach the intended hayfields. No survey was conducted on the hay lands and no elevations of the land surface are available. A conversation with Mr. Watson indicated that the surface elevations of his hay fields may have risen from years of sediment accumulation forcing water around rather than over the fields.

The proposed action will certainly increase the amount of sediment delivered to Watson's and Orahood's hay fields. The present vegetation is reducing velocities of the water, causing sediment to deposit and thereby acting as a sediment trap. The proposed action will result in 2200' of bare bank thereby increasing velocities. Even though the channel has only a 11% slope, velocities will increase from 2 to 4 times present conditions. A doubling of velocity will quadruple the erosive power of water and increase its sediment carrying capacity 64 times. The slight gradient in the present channel may prevent erosion from lowering the depth of the channel significantly, but it will certainly cause erosion to proceed laterally. The channel will probably respond by increasing its sinuosity, becoming either a "more meandering" stream or a braided channel. The proposed action will convert a sediment trap into a sediment producer.

The amount of sediment produced annually cannot be predicted due to lack of documented historical data.

\* \* \* \* \*

If Mr. Waton's [sic] and Mr. Orahood's claims are correct, they are experiencing a loss of 490 to 560af of water from historical deliveries of Sage Creek. The current drought cycle, existing retention structures in the drainage, and the elevated county road are responsible for at least a portion of this loss. The proposed action will not correct these losses.

The data collected and reviewed does not support the proposed action. The most logical approach to the problem [increasing the flow of water to the hay fields] appears to be the repair and maintenance of [an old dike in sections 6 & 7 west of the county road] (Report, 2-4). [2/]

Appellants allege that rejection of the proposed right-of-way denies them water necessary to their ranching operations. The record indicates, however, that appellants hold water rights entitling them to specific volumes from Sage Creek. These water rights do not entitle them to divert more water (increase their flow rate or volume over previous amounts), move or

2/ The hydrologist's report is not paginated.

enlarge their points of diversion, or adversely affect the rights of other water rights holders. 3/

BLM's rejection was based on a reasoned analysis of relevant factors and was made with due regard for the public interest. The hydrologist's evaluation indicates that decrease in rainfall and increase in the elevation of appellants' fields contributed to the inability to deliver water to those fields in the volume previously enjoyed. There is also evidence that the project, as contemplated by appellants, would not increase the water flow to their fields, and they did not respond to BLM's suggestion that there were alternative methods for increasing the amount of water to their fields or demonstrate that those alternatives would not accomplish what they seek to do. BLM's rejection of the project was well within the proper exercise of its discretion.

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.

R. W. Mullen  
Administrative Judge

I concur:

John H. Kelly  
Administrative Judge

3/ See Oct. 11, 1990, memorandum from State of Montana Water Resources Specialist to BLM Realty Specialist.