

INTERIOR BOARD OF LAND APPEALS

Clifford Bryden

139 IBLA 387 (July 30, 1997)

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CLIFFORD BRYDEN

IBLA 94-660

Decided July 30, 1997

Appeal from a decision of the South Douglas Resource Area Manager, Bureau of Land Management, denying right-of-way application OR-48877. EA OR-105-94-01.

Affirmed.

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

The grant of a right-of-way across the public lands for pipelines and other facilities for the storage, transportation, or distribution of water pursuant to section 501(a)(1) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(1) (1994), is within the discretion of the BLM. A BLM decision rejecting such an application because it would be inconsistent with the purpose for which the public lands are managed or because the proposed right-of-way would not be in the public interest will be affirmed when the record shows that the decision represents a reasoned analysis of the factors involved with due regard for the public interest.

APPEARANCES: Clifford Bryden, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Clifford Bryden has appealed from the June 9, 1994, Decision of the South Douglas Resource Area Manager, Oregon, Bureau of Land Management (BLM), rejecting his right-of-way application OR-48877 for a water diversion tank and pipeline. Appellant seeks to divert water from a spring on public lands in the SE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>, sec. 25, T. 29 S., R. 6 W., Willamette Meridian, Oregon, for use on his adjacent private land.

On September 8, 1992, Appellant filed his application pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994). He proposed to obtain water from a spring on public lands. Improvements proposed for the right-of-way included two screened box diversions, a 1,000-gallon storage tank, a fence around the diversion area, and a pipeline to carry the diverted water across the

public land boundary to supply domestic and stock water to his adjacent property, Linden Tree Farm, in sec. 30, T. 29 S., R. 5 W., Willamette Meridian. The application form did not specify the volume of water to be diverted. Approval of this proposal would legitimize a system that Appellant had previously constructed in trespass which BLM had disconnected prior to the filing of this application.

In reviewing the application, BLM prepared an Environmental Assessment (EA) to analyze the expected impacts of the proposal. The EA (OR-105-94-01) dated May 16, 1994, stated that Appellant's water right permit application with the State of Oregon requested a permit for a maximum of 51.6 gallons per minute (gpm). (EA at 1.) The spring flow is estimated by BLM at 13.9 gpm. The BLM Decision noted that the spring at issue is associated with a wetland area covering approximately 2.5 acres. Further, the Decision found that the spring drains wetland above it and contributes to the support of the wetland below and around it. The public lands encompassed in the proposed project are revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands (O&C lands) managed for timber production as well as for watershed and stream flow protection. <sup>1/</sup>

The June 9, 1994, BLM Decision was based in large part on the EA and the associated BLM Decision Record, dated May 19, 1994. The BLM Decision Record found, based on the EA, that Appellant's proposal to divert water from a spring which supports a wetland area would not be consistent with BLM wetland protection standards. For these standards BLM referred to Exec. Order No. 11990, Protection of Wetlands, 42 Fed. Reg. 26961 (May 24, 1977), and the BLM guidelines implementing that Executive order. Wetland-Riparian Area Protection and Management; Policy and Protection Procedures; Final Guidelines, 45 Fed. Reg. 7889-7895 (Feb. 5, 1980) (hereinafter cited as Wetland Guidelines). Also cited by the BLM Decision Record was objective 6 of the Aquatic Conservation Strategy. U.S. Department of Agriculture, Forest Service, and U.S. Department of the Interior, Bureau of Land Management, Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl, Final Supplemental Environmental Impact Statement (April 1994) at B-11. The BLM Decision articulated the agency's environmental concerns as follows:

The proposed spring development would result in a loss of water to the sub-drainage preventing protection of the natural

<sup>1/</sup> Section 1 of the Act of Aug. 28, 1937 (O&C Act), provides that O&C lands

"shall be managed \* \* \* for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities."

43 U.S.C. § 1181a (1994). Accordingly, the area is managed for timber. A 9-year-old replanted Douglas fir stand surrounds the spring area.

function including the existing ground and surface water elevation. There is no practical mitigation for this loss of water. The existing wetland-riparian drainage patterns would not be maintained to the maximum extent possible. The current spring flow and reservoir release would be reduced and affect the ability to maintain downstream wetland habitat. The down slope wetland/riparian habitat would be at risk of degradation. There could be an impact to federal candidate amphibian species.

(Decision at 1.) The Area Manager determined that the proposed project was inconsistent with the purpose for which the public lands are managed and was not in the public interest and, therefore, denied the application. 43 C.F.R. § 2802.4(a)(1), (2).  
2/

Appellant, in his Statement of Reasons (SOR) for appeal, disputes the volume of water to be diverted which was cited by BLM in its Decision. He asserts that BLM incorrectly assumed he would divert excessive amounts of water and objects to the use of the phrase, "large volume of water," in the EA. Appellant asserts that he would use less water on average: 6.92 gpm rather than the 51.6 gpm which BLM cited in its analysis. It is argued that the EA should be redone based on this rate of use rather than the erroneous BLM figures. Appellant challenges the potential environmental impacts of BLM projects and argues that BLM overlooks his own positive contribution to wildlife habitat in the area. He asserts that BLM has exceeded the terms of its own water permit in the area. 3/

Appellant applied for a water right from the State of Oregon Water Resources Department, which tabled his application until Appellant could establish authorization to transport the water. With his SOR Appellant includes a copy of an unnumbered application, dated July 27, 1994, to appropriate surface water. The application specifies a total of 44.8 gpm or 0.1 cubic foot per second from several sources on private land in addition to the BLM spring to be used for stock water and domestic uses. In his SOR, Appellant states that "[a]pplication 72565 now pending with the Oregon Water Resources Department requests not to exceed 0.025 cubic feet/second or 11.2 gpm from the spring."

[1] The BLM is authorized by section 501(a)(1) of FLPMA to issue rights-of-way across the public lands for pipelines and other facilities for the storage, transportation, or distribution of water. 43 U.S.C. § 1761(a)(1) (1994); 43 C.F.R. § 2800.0-7(a)(1). Approval of rights-of-way is a matter of discretion. C.B. Slabaugh, 116 IBLA 63, 65 (1990); Glenwood Mobile Radio Co., 106 IBLA 39, 41 (1988); Kenneth W. Bosley, 101 IBLA 52, 54 (1988); Edward J. Connolly, Jr., 94 IBLA 138, 146 (1986). A right-of-way application may be denied, however, if the authorized officer

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2/ The regulatory citation in the BLM Decision contained a typographical error. However, the Decision Record cited the appropriate regulation, 43 C.F.R. § 2802.4(a)(1), (2).

3/ It appears from the record that BLM holds a prior water permit for appropriation of water from the spring at issue.

determines that the grant of the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed or if the grant of the proposed right-of-way would not be in the public interest or would be inconsistent with applicable laws. 43 C.F.R. § 2802.4(a)(1), (2). A BLM decision rejecting such an application will be affirmed when the record shows that the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Stewart Hayduk, 133 IBLA 346, 354 (1995); Kenneth Knight, 129 IBLA 182, 183 (1994); C.B. Slabaugh, 116 IBLA at 65; Glenwood Mobile Radio Co., 106 IBLA at 41-42.

The BLM decision is based upon the policy articulated in the Executive order and the implementing Wetland Guidelines. The protection and preservation of wetlands is the focus of the Executive order. "[I]n order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative," the Executive order directed Federal agencies managing wetlands to, *inter alia*, maintain "natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity." 42 Fed. Reg. 26961, 26963 (May 25, 1977). The Wetland Guidelines outline BLM policy for the management of wetlands:

- A. Avoid the long-and short-term adverse impacts associated with the destruction, loss, or degradation of wetland-riparian areas.
- B. Avoid construction in wetland-riparian areas whenever there is a practical alternative.
- C. Preserve and enhance the natural and beneficial values of wetland-riparian areas which may include constraining or excluding those uses that cause significant, long-term ecological damage.
- D. Include practical measures to minimize harm in all actions causing adverse impacts to wetland-riparian areas.

45 Fed. Reg. at 7891 (Feb. 5, 1980). The record supports the decision of BLM that granting the right-of-way is inconsistent with the public interest. <sup>4/</sup>

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<sup>4/</sup> Appellant has asserted on appeal that his demand for water from the spring is now less than that originally believed by BLM. The amount (11.2 gpm) still represents most of the flow from the spring in question. Thus, we find no basis has been shown for remanding the case for further evaluation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of the South Douglas Resource Area Manager is affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur.

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R.W. Mullen  
Administrative Judge