

THE CITY OF ST. GEORGE

IBLA 90-62

Decided October 16, 1990

Appeal from decision of Area Manager, Dixie Resource Area, Utah, Bureau of Land Management, denying request for extension of right-of-way for culinary water well and related facilities within wilderness study area.

Affirmed.

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

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory non-impairment criteria.

APPEARANCES: T. W. Shumway, Esq., City Attorney, St. George, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The City of St. George, Utah (the City), has appealed a decision of the Area Manager, Dixie (Utah) Resource Area, Bureau of Land Management (BLM), dated October 5, 1989, denying its request for an extension of its right-of-way (U-51380) for a culinary water well and related facilities situated in the Cottonwood Canyon Wilderness Study Area (WSA) (UT-040-046).

On December 8, 1982, the City filed an application for a right-of-way for a culinary water well and related facilities to be situated in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 26, T. 41 S., R. 15 W., Salt Lake Meridian, Washington County, Utah, 700 feet north of the southern boundary of the 11,300-acre Cottonwood Canyon WSA. The well was intended to supply potable water to the City and used an existing well which the City had drilled previously pursuant to a prior temporary use permit allowing exploration. The City initially requested that the right-of-way be granted "in perpetuity, so that the availability of water to the City of St. George will always be in evidence." Sometime after submission of the right-of-way application, the City agreed to accept a temporary right-of-way, during the term of which it

would develop the Quail Creek Reservoir as a permanent source of water by building transportation and treatment facilities to meet growing municipal demands.

In response to the filing of the right-of-way application, BLM prepared a draft environmental assessment (EA) to assess the impact that granting the right-of-way would have on the human environment. BLM analyzed whether granting the right-of-way would satisfy the non-impairment criteria governing development within a WSA in accordance with section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1988), as set forth in BLM's Interim Management Policy and Guidelines for Lands under Wilderness Review (Wilderness IMP). 44 FR 72014 (Dec. 12, 1979).

WSA's are those areas identified "as having wilderness characteristics" pursuant to the inventory process recognized in section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988). Under section 603(a) of FLPMA, WSA's must be reviewed by the Secretary of the Interior "[w]ithin fifteen years after October 21, 1976," so that he may make recommendations to the President "as to the suitability or unsuitability of preservation of each such area * * * as wilderness." 43 U.S.C. § 1782(a) (1988); Sierra Club, 53 IBLA 159, 160 (1981). Section 603(c) of FLPMA further requires that, "[d]uring the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness" (emphasis supplied). 43 U.S.C. § 1782(c) (1988); see Utah v. Andrus, 486 F. Supp. 995, 1003-05 (D. Utah 1979); Ralph E. Pray, 105 IBLA 44, 46 (1988), and cases cited. As stated in the Wilderness IMP, management in accordance with the non-impairment mandate is intended to protect "Congress' right to make the [wilderness] designation decision by preventing actions that would pre-empt that decision." 44 FR 72016 (Dec. 12, 1979).

The non-impairment criteria were developed by BLM in order to ensure its compliance with the section 603(c) non-impairment mandate. See Rocky Mountain Oil & Gas Association v. Watt, 696 F.2d 734, 739 (10th Cir. 1982); California Department of Transportation, 111 IBLA 251, 253 (1989). Under the criteria, BLM may not allow an activity within a WSA that would cause an impact that could not be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make his recommendation to the President on the suitability of the area for preservation as wilderness. They also provide that BLM may not allow an activity within a WSA that, after termination of the activity and any needed reclamation, would degrade the wilderness values in the area so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness. See 44 FR 72018 (Dec. 12, 1979). "Water resource projects" are expressly subject to the non-impairment criteria. See 44 FR 72021 (Dec. 12, 1979). BLM established

a deadline of September 30, 1990, to complete reclamation, slightly more than 1 year prior to the deadline imposed by FLPMA for the Secretary to make his recommendations to the President. 1/

After submission of public comments to the draft EA, BLM prepared a final EA. As stipulated in the final EA, the culinary water well and related facilities proposed in the City's right-of-way application were to be removed and the well site reclaimed by December 31, 1989. 2/ The final EA specifically analyzed whether, after reclamation, the proposed right-of-way would impair the suitability of the WSA for preservation as wilderness, considering BLM's non-impairment criteria.

BLM concluded that the impact of the proposed right-of-way could readily be reclaimed to the point that it would be substantially unnoticeable:

The site is located in a canyon and is topographically screened from the majority of the WSA. The area involved represents .013 percent of the WSA. The pumphouse and transformer pad would be placed on a sandbar adjacent to the Washington Hollow Wash which traverses this canyon. The water and power lines would be buried in the bottom of the wash. Reclamation would

1/ "Reclamation" is described in the Wilderness IMP as including "the contouring of the topography to a natural appearance (not necessarily to the original contour), the replacement of topsoil, and the restoration of plant cover at least to the point where natural succession is occurring." 44 FR 72018 (Dec. 12, 1979), as amended at 48 FR 31856 (July 12, 1983). The IMP further states that the "reclamation schedule will be based on conservative assumptions with regard to growing conditions, so as to ensure that the reclamation will be complete, and the impacts will be substantially unnoticeable in the area as a whole, by the time the Secretary is scheduled to send his recommendations to the President." 44 FR 72018 (Dec. 12, 1979).

"Substantially unnoticeable" is defined in the IMP as "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or man-caused because of age, weathering, or biological change." 44 FR 72034 (Dec. 12, 1979).

2/ In its reclamation plan attached to the final EA, BLM required the City to remove all above-ground facilities, cap the well two feet below the ground surface, resculpture the well pad and access ramp, and seed the disturbed area such that seeding occurred after Nov. 1, 1989, but "no later than the Dec. 31, 1989, deadline" so as "to take advantage of winter moisture to promote germination."

It is anticipated that, following this decision, the City will be able to take advantage of winter moisture to promote reclamation, so that the area will be reclaimed prior to the Secretary's recommendation deadline.

consist of pulling the above-ground production facilities, cutting off the well casing and capping it at least two feet below the ground surface, and resculpturing the well pad and ramp to deter motorized access and to resemble a partially stabilized sand dune. To supplement the native seed source and assure a stabilizing soil cover until browse species reoccur naturally, the disturbed area would be reseeded with a mixture of red brome and cheatgrass. Some revegetation has taken place since completion of the exploratory operation * * *. The first thunderstorm would erase all signs of activity in the bed of the wash.

BLM also concluded that the proposed right-of-way, if reclaimed, would not degrade the wilderness values in the area so far as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness:

The two wilderness values associated with the well site are naturalness and outstanding opportunity for primitive and unconfined recreation, primarily hiking. The project area lacks outstanding opportunity for solitude because of the absence of superior topographic screening. * * * The 1.54 acres involved in the project represents an inconsequential .013 percent of the 11,300 acres of naturalness and .086 percent of the 1,774 acres of outstanding opportunity for primitive and unconfined recreation found in the WSA. The relationship of wilderness values to other values in the WSA would not be altered by this action.

On April 14, 1986, the Area Manager approved issuance of the proposed right-of-way subject to the requirement that the right-of-way be terminated and the well site reclaimed by December 31, 1989, as well as certain mitigating measures. He concluded that the proposed right-of-way would not significantly affect the human environment, and that, given termination of the right-of-way grant and reclamation of the well site by December 31, 1989, the proposed right-of-way would fulfill BLM's non-impairment criteria.

BLM issued the right-of-way effective May 6, 1986. It was intended to accommodate a 1-acre well site situated next to the Washington Hollow Wash in the Mill Creek drainage area, as well as buried water and power transmission lines within a 35-foot wide and 673.24-foot long (0.54-acre) easement extending down the wash from the well site to the WSA boundary. The well site was to encompass a well pad, pump and associated well facilities housed in a small cinderblock building, and a transformer, with access to the site along the bed of the wash.

The right-of-way grant expressly provided that it would terminate on December 31, 1989. With respect to renewal of the grant, the grant provided: "In the event abandonment of the well is not required, the Holder may apply for grant renewal. Renewal would require extension of the Secretary's report date beyond the current September 30, 1990 deadline or

enactment of designation/release legislation prior to the December 31, 1989 rehabilitation date." 3/ The reclamation deadline has not been extended.

Thereafter, according to the record, the City, subject to periodic monitoring by BLM, prepared the existing drill hole, installed the other necessary facilities and began pumping water from the well.

According to un rebutted statements by the City, it had originally intended to use the well in the WSA as a source of water only until it could complete a facility for the treatment of water taken from the Virgin River and impounded at the Quail Creek Reservoir. However, on December 31, 1988, a reservoir dike burst, and the reservoir was rendered useless for its intended purpose of supplying water to the City. 4/

By letter dated May 17, 1989, the Area Manager reminded the City that the subject right-of-way would terminate on December 31, 1989: "By that time the above ground facilities should be removed and the required reclamation completed."

On September 25, 1989, 3 months before the expiration of the right-of-way, BLM received a letter from the City requesting that the right-of-way be extended until September 1, 1990, because the subject well was regarded as "critical to [the City's] water supply at least through next summer." The City explained:

3/ As noted above, the "Secretary's report date" is actually not Sept. 30, 1990, but is actually slightly more than 1 year later. However, BLM's deadline was evidently to allow a certain margin of safety to ensure that reclamation would be complete prior to the deadline imposed by FLPMA for the Secretary to make his recommendations to the President. See Wilderness IMP, 44 FR 72018 (Dec. 12, 1979), quoted above at note 1.

4/ As of November 1989, it was not expected that reconstruction of the dam would be completed "for at least another year" (SOR at 2). The City anticipated that it could not "get through" the summer of 1990 without using the facility, stating: "In a normal year, the City could perhaps get through another summer even without the Virgin River water, but a series of unusually dry years has diminished supplies to the point that the water from the well site * * * is critical to the needs that will exist in the summer of 1990." Id. at 2-3.

Water is evidently being diverted successfully directly from the Virgin River to the City's treatment facility, thereby bypassing the Quail Creek Reservoir. It further appears that the output capacity is presently equivalent to four of the City's wells, and that, by the summer of 1990, the City hoped to build the output to a six well equivalent.

The summer of 1990 has now passed. On Sept. 24, 1990, the City filed a request for expedited consideration of its appeal, which we have granted. The City indicates that capping the well "would have a material adverse effect," but does not indicate that the well remains critical to its needs.

As you are aware, last summer was one of the driest summers we have experienced in many years. Forecasters are indicating that the summer of 1990 will likely be as dry if not drier. In addition, the Quail Creek dike disaster last Winter caused us to [lose] an expected major source of culinary water for the City. While we have made provisions to take water directly from the Virgin River, we expect with the dry conditions forecasted, we will still not be able to meet the total City water demand next summer.

In her October 1989 decision, the Area Manager denied the City's request for extension beyond the agreed-upon December 31, 1989, termination date:

The 31st of December was selected to allow time for seeding establishment and natural processes to occur on the reclaimed area prior to September 30, 1990, thereby meeting the reclamation standards specified in the Interim Management Policy and Guidelines for Lands Under Wilderness Review. Postponement of the required reclamation until September 1, 1990, would not allow time for this to occur.

The record indicates that the District Manager, Cedar City District, Utah, BLM, concurred in the Area Manager's October 1989 decision. The City has appealed from that decision.

In its statement of reasons for appeal (SOR), the City concludes that BLM should extend the right-of-way "for one year, or at least until September 1, 1990." As a basis for this conclusion, the City argues that extension represents a proper balancing of the critical need of the City for continued use of the subject well as a source of water during the summer of 1990, especially given certain unforeseen circumstances, and the short-term impact of delaying reclamation of the subject right-of-way, considering the public's interest in preservation of the wilderness values in that area of the WSA.

Noting that it is willing to accept "any and all measures" imposed by BLM to minimize the effect of its continued intrusion into the WSA, the City argues that the short-term impact of delaying reclamation for one year, or at least until September 1, 1990, does not outweigh this critical need for water.

Before addressing the merits of the present appeal, it is necessary to clear up an apparent misconception evident in the record. In an October 16, 1989, memorandum to the file, the District Manager related an October 10, 1989, conversation he had had with the Manager and the Director of the City's Water and Power Board, following service of the October 1989 BLM decision on them. The District Manager reported in the memorandum that the representatives of the City stated that, along with appealing the decision, they would request a "stay" pending the final decision of Congress

as to what areas would become wilderness. According to the memorandum, the District Manager responded that "if a 'stay' was not granted, BLM must issue a Notice of Trespass in January, 1990 if the well had not been removed and the site restored." 5/

What is clear from the conversation related in the memorandum is that both parties at that time incorrectly believed that a "stay" could be issued that would preclude the termination of the subject right-of-way on the December 31, 1989, expiration date. In reality, in accordance with 43 CFR 4.21(a), no action by the City was necessary to specifically request the Board to grant a stay, because the appeal of the October 1989 BLM decision itself operated as an automatic stay. However, the automatic stay invoked by 43 CFR 4.21(a) does not preclude termination of the subject right-of-way. Rather, the regulation provides that "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." 43 CFR 4.21(a) (emphasis added). All that was automatically stayed by the City's appeal was the effect of the October 1989 BLM decision denying the City's request for an extension of the subject right-of-way. Such stay does not thereby operate as a favorable interim adjudication of that request. Accordingly, regardless of the appeal, the subject right-of-way has terminated effective December 31, 1989.

The issue before us is whether BLM erred by declining to extend the subject right-of-way past its December 31, 1989, expiration date because of the purported critical need for water obtained via that right-of-way. On September 24, 1990, the City filed a request for expedited consideration of its appeal, noting that BLM had advised it that criminal trespass charges will be filed against it for its failure to reclaim the lands. This request is granted.

[1] We accept the City's representation that the subject well has been a critical source of water for the City as a result of the "Quail Creek dike disaster." However, we cannot say that BLM improperly denied the City's request for an extension of the subject right-of-way because such extension would mean that the right-of-way would fail to satisfy BLM's non-impairment criteria and, thus, BLM would violate the section 603(c) non-impairment mandate.

In denying the City's extension request, BLM concluded that extending the subject right-of-way past the December 31, 1989, expiration date would mean that reclamation could not proceed to the point that the right-of-way would satisfy BLM's non-impairment criteria by September 30, 1990. The record supports BLM's determination that extending the right-of-way would

5/ The City did request such "stay" from us on Mar. 26, 1990. This request was denied sub silentio, but, in recognition of the September 30 reclamation deadline and the impending deadline for the Secretary to make his recommendations to the President, the case has been advanced on our docket.

impair the area's suitability for preservation as wilderness, and the City has not challenged that determination or that, at that time, the area would not have been degraded to such a point that the Secretary would be significantly constrained in recommending the area as suitable for preservation as wilderness. BLM's decision is therefore properly affirmed. See Golden Triangle Exploration Co., 76 IBLA 245, 248-49 (1983).

In general, the City contends that, in deciding whether to extend the subject right-of-way, the Department should balance the City's need for water against the short-term impact of the well and related facilities on the wilderness values in the area affected by the right-of-way. However, that is not the Department's function during the review mandated by section 603(a) of FLPMA. Rather, the Department is required by that section to manage WSA's during the review period so as not to impair their suitability for preservation as wilderness. In conformance with that mandate, BLM may well be required to disallow a requested use even where there is need and the impact is minimal where that use would impair the suitability of the affected area for preservation as wilderness.

The Department's duty to fulfill its obligation to prevent impairment during the review period is independent from the Secretary's authority to consider whether to recommend an area as suitable for preservation as wilderness. It is during that recommendation phase that the Secretary considers preservation of wilderness values with other uses to which the land could be put, including development of a water source for a local municipality. See Utah v. Andrus, *supra* at 1003; Keith R. Kummerfeld, 72 IBLA 1, 3-4 (1983); Ruskin Lines, 61 IBLA 193, 198 (1982); Union Oil Co. (On Reconsideration), 58 IBLA 166, 170 (1981). At that time, the Secretary may determine that the need for water outweighs the desirability of preserving the area as wilderness and, thus, may decide not to recommend the area as suitable for preservation as wilderness. ^{6/} Nevertheless, these facts do not mean that BLM is not required by FLPMA to ensure satisfaction of the non-impairment criteria while the area is still subject to review.

In support of its assertion that the public's interest in preservation of the wilderness values in the area affected by the subject right-of-way does not outweigh the City's critical need for water and, thus, the right-of-way should be extended, the City notes that the President is authorized by section 4(d)(4) of the Wilderness Act, as amended, 16 U.S.C. § 1133(d)(4) (1988), to permit the location of water resource development facilities in a designated wilderness area. That statutory provision was made applicable to public lands outside the national forests which are designated as wilderness areas by section 603(c) of FLPMA. See also 43 CFR 8560.4-8.

However, the fact that the President could permit a water resource development facility in the area were it designated a wilderness area does

^{6/} Indeed, the record indicates that BLM has made a preliminary determination not to recommend the area affected by the subject right-of-way for preservation as wilderness precisely "because of the large developable ground water aquifer" (Final EA at 4).

not mean that BLM has the authority to extend the right-of-way for the subject well where so doing would impair the suitability of the affected area for preservation as wilderness before the Secretary has a chance to consider recommending wilderness designation. We reiterate that, during the review period, BLM is required to manage that area pursuant to the non-impairment mandate of section 603(c) of FLPMA, not the Wilderness Act. ^{7/} As determined by BLM and not challenged by the City, to extend the subject right-of-way would violate that mandate.

In the same vein, the City also cites certain portions of 43 CFR Subpart 8560 applicable to the management of wilderness areas to support its assertion that BLM should extend the subject right-of-way. See 43 CFR 8560.0-6(b) and 8560.4-3. At best, these regulations permit human use in and access to wilderness areas. However, such use and access are required to be consistent with maintenance of the wilderness character of the affected areas. We regard this proviso as an implicit reference to BLM's responsibility to maintain the non-impairment standards as dictated by FLPMA.

Therefore, we conclude that the Area Manager properly denied the City's request for an extension of the subject right-of-way, as BLM concluded that the extended right-of-way would fail to satisfy BLM's non-impairment criteria, and as the City has not overcome that conclusion by a preponderance of the evidence. California Department of Transportation, *supra* at 253-54; Eugene Mueller, 103 IBLA 308, 311 (1988); L. C. Artman, 98 IBLA 164, 168 (1987).

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 affirmed.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

^{7/} The preeminence of the section 603(c) non-impairment mandate during the review period was recognized in the IMP: "[S]ome uses that are explicitly permitted by the Wilderness Act of 1964 in wilderness areas * * * (such as mining and mineral leasing) must be restricted under the Interim Management Policy because their impacts clearly could disqualify the area from satisfying the wilderness definition, and thus would impair wilderness suitability. During the wilderness review it is the later and more explicit FLPMA, and not the Wilderness Act, that dictates what is permissible." 44 FR 72016 (Dec. 12, 1979).