

BURNETT OIL COMPANY, INC.

IBLA 90-444

Decided March 11, 1992

Appeal from a decision of the Buffalo Resource Area Office, Wyoming, Bureau of Land Management, denying approval of the assignment of salt water disposal right-of-way grant W-101140.

Set aside and remanded.

1. Administrative Practice--Administrative Procedure: Decisions--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

Where BLM issues a decision denying the assignment of a salt water disposal right-of-way and such decision is merely conclusory in nature, the record is barren of any supporting rationale, and other unaddressed issues are presented, the decision will be set aside and the case remanded for BLM to reassess assignment of the right-of-way and determine what steps are necessary for the protection of the Federal mineral interest in the land in question.

APPEARANCES: Neil J. Short, Esq., Casper, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Burnett Oil Company, Inc. (Burnett), has appealed from a decision of the Buffalo Resource Area Office, Wyoming, Bureau of Land Management (BLM), dated June 6, 1990, denying approval of an assignment of right-of-way grant W-101140 from Farmers Union Central Exchange (CENEX) to Burnett.

BLM issued right-of-way W-101140 to CENEX, effective March 16, 1987, for a period of 10 years, granting the right to construct, operate, maintain, and terminate a salt water injection well on public lands located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 24 T. 48 N., R. 70 W., sixth principal meridian, Campbell County, Wyoming. Burnett applied to BLM for an assignment of the

grant on March 19, 1990, after having secured the agreement and approval of the transfer of operations to Burnett from the fee surface owner, Pickrel Land and Cattle Company.

In its decision, BLM denied the assignment stating:

After extensive review it was determined that the assignment would not be in the public interest. The intent of the original grant allowed for disposal of waters produced by a Federal Well (Fed 15-13). You are proposing to dispose of waters produced by a private well (Pickeral [sic] 44-13). This type of disposal is contrary to policy established by the Casper District Manager. Commercial disposal of waters produced from private sources, serve [sic] no public benefit and therefore are not encouraged, I am returning your Right-of-Way Surety Bond BND 212 13 89 in the amount of \$25,000.

In its statement of reasons (SOR), Burnett argues that BLM's decision is arbitrary and capricious in that it is "devoid of findings of fact upon which conclusions of law can be based and is devoid of any reference to applicable law or regulation supporting the denial" (SOR at 3). Burnett charges that it can only "guess and speculate as to the basis for the denial" (SOR at 4). Burnett contends that the decision is in direct violation of BLM Information Bulletin 89-192. ^{1/} Burnett further asserts that, if in fact there is a "policy established by the Casper District Manager," it has not been promulgated in accordance with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1988). Finally, Burnett claims that approval of assignment of the right-of-way grant is in the public interest and would provide a public benefit.

[1] BLM states in the decision that "after extensive review" it concluded that the assignment would not be in the public interest. The case

^{1/} That bulletin, dated Mar. 21, 1989, and entitled "Recent IBLA Decisions Concerning Water Disposal on Split Estate Land," briefly discussed two IBLA decisions, Mallon Oil Co., 104 IBLA 145 (1988), and Phillips Petroleum Co., 105 IBLA 345 (1988), and reached a number of conclusions, including:

"If a well is drilled on private surface/Federal minerals as a disposal well for water not produced on lease or unit (a commercial water disposal well) it is BLM responsibility to ensure that the disposal does not adversely impact Federal minerals. The Board stated that BLM's permitting authority under section 302(b) of FLPMA [Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b)(1988)] is not the appropriate means to protect the mineral resource. The Board stated that such protection can be achieved through coordination and cooperation with the Environmental Protection Agency or the primacy State with underground injection program responsibility."

Burnett states that in this case the salt water disposal well is on private surface/federal minerals.

file contains absolutely no record of any review of the assignment application, extensive or otherwise. If there were an "extensive review," as represented in the decision, evidence thereof should be contained in the case record, such as in the form of a signed and dated report. Second, the conclusion that the assignment would not be in the public interest

appears to be based, at least in part, on "policy established by the Casper District Manager." The decision gives no inkling of what that policy is or where it can be found. Nor is there any copy of such policy in the case record. ^{2/} Finally, there is no support in the decision or in the record

for the statement that commercial disposal of waters produced from private sources serves no public benefit.

As we have previously held, where BLM issues a decision, it must ensure that the decision is supported by a rational basis and that such basis is stated in the decision, as well as being demonstrated in the administrative record accompanying the decision. Eddleman Community Property Trust, 106 IBLA 376, 377 (1988); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). The recipient of a BLM decision is entitled to a reasoned explanation of the basis for the decision, such that the decision may be understood and accepted or, alternatively, appealed and challenged before the Board. Southern Union Exploration Co., 51 IBLA 89, 92 (1980), and cases cited. Where BLM's decision is merely conclusory in nature and the record is completely barren of any supporting rationale, the decision will be set aside and the case remanded to BLM for compilation of a complete record to support its action.

In addition to the lack of support in the record for BLM's action and the cryptic nature of its decision, this case raises other issues regarding authorization for salt water disposal. This Board has held that generally the surface owner owns the subsurface void for water disposal purposes. Mallon Oil Co., *supra* at 150. Also, we have concluded that BLM does not have authority under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and the regulations at 43 CFR Part 2920, to require a permit for salt water disposal into a dry well located on land where the surface is privately owned and the minerals are Federally owned. Therefore, since the surface owner of the land in question may own the void into which Burnett desires to inject salt water from the Pickrel 44-13 well, denial of the assignment of the right-of-way may not preclude Burnett from proceeding with its plans to utilize the salt water injection well. The interest of BLM should be in protecting the Federal mineral interest. In Phillips Petroleum Co., *supra* at 351-52, we suggested ways in which the Federal mineral interest may be protected. On remand, BLM should reassess Burnett's application for assignment of the right-of-way and determine what steps are

^{2/} We do not agree with Burnett's assertion that such a policy must be promulgated pursuant to the APA. BLM may make policy pronouncements in Instruction Memoranda or in the BLM Manual without following APA procedures. Such policy, however, is only controlling on subordinate officials in the agency and does not bind this Board or the public. Pamela S. Crocker-Davis, 94 IBLA 328 (1986). Unlike regulations, such policy pronouncements are not considered to have the force and effect of law.

necessary for the protection of the Federal mineral interest in the land in question. Any subsequent decision by BLM shall set forth with particularity the facts in the case, the applicable law, and provide a reasoned analysis such that Burnett is able to understand the basis for the action being taken.

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 for further action consistent herewith.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge