JAMES CHAMBERLAIN

173 IBLA 100 Decided November 29, 2007

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
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JAMES CHAMBERLAIN

IBLA 2006-197 Decided November 29, 2007

Appeal from a decision of the Challis, Idaho, Field Office, Bureau of Land Management, cancelling Desert Land Entry application IDI-33650.

Set aside and remanded.

1. Desert Land Entry: Applications--Desert Land Entry: Lands Subject To--Federal Land Policy and Management Act of 1976: Land-Use Planning

   The obligation imposed by 43 C.F.R. § 2521.2(c)(2) that a desert land entry application be dated no more than 10 days before its filing is regulatory only and, therefore, eligible for cure.

2. Desert Land Entry: Applications--Desert Land Entry: Lands Subject To--Federal Land Policy and Management Act of 1976: Land-Use Planning

   When lands sought under the Desert Land Act of 1877, *as amended*, 43 U.S.C. § 321-339 (2000), have been classified as suitable for desert land entry and that classification has not been revoked or modified, a BLM decision canceling a desert land entry application on the basis that a subsequently approved resource management plan does not designate the lands as subject to disposal under the Desert Land Act may be set aside and the case remanded to BLM for further consideration.

APPEARANCES: Travis L. Thompson, Esq., and Paul L. Arrington, Esq., Twin Falls, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

James Chamberlain (Chamberlain) has appealed from an April 28, 2006, decision of the Challis, Idaho, Field Office, Bureau of Land Management (BLM), cancelling Desert Land Entry (DLE) application IDI-33650 because it was not received within the 10-day period set forth in 43 C.F.R. § 2521.2(c)(2),[1] and because it did not comply with the Challis Resource Management Plan (RMP), dated July 29, 1999, which provided that a DLE application must meet the criteria of the Desert Land Act of 1877, *as amended*, 43 U.S.C. §§ 321-339 (2000), and "be within the adjustment area(s) identified on Map A," appended to the RMP. For the reasons that follow, we set aside BLM's decision and remand this matter to BLM for action consistent with this opinion.

I. BACKGROUND

Chamberlain's DLE application was dated May 15, 1998, and bears a date-stamp indicating it was received by BLM on June 30, 1998. He sought to enter about 79.07 acres of public lands described as Lots 3 and 4, sec. 6, T. 13 N., R. 20 E., Boise Meridian, Custer County, Idaho, under authority of the Desert Land Act. The subject lands are directly adjacent to Chamberlain's successful farming operation. The application asserted a water right to "5/8 miners inches per acre" from Challis Irrigation Company (CIC).

A number of documents critical to our review appear in the record because Chamberlain submitted them in connection with his filings with BLM and this Board, but they do not otherwise appear in the administrative record submitted by BLM.[2] A

[1] This regulation provides: "An application to make desert-land entry is not acceptable if dated more than 10 days before its filing at the land office."

[2] The Board addressed a similar concern in *Silverado Nevada, Inc.*, 152 IBLA 313, 322 (2000), stating:

> Upon receipt of an appeal, BLM is required to forward to the Board "the complete, original administrative record . . . , including all original documentation involved in the matter" and a decision "may be set aside and remanded if it is not supported by a case file providing information upon which the Board may conduct an independent, objective review of the basis of the decision." *Save our Cumberland Mountains, Inc.*, 108 IBLA 70, 84, 96 I.D. 139, 147 (1989); *see Utah Chapter Sierra Club*, 114 IBLA 172, 174-75 (1999).

With some misgivings, we conclude that the record, as supplemented by Chamberlain in his filings with BLM and the Board, is sufficiently complete to warrant our review

(continued...)

primary example is Attachment A to Chamberlain's February 6, 2006, letter to BLM formally requesting that the Challis RMP be amended to classify Lots 3 and 4 as suitable for DLE. Attachment A comprises documents showing that the Idaho State Office, BLM, issued an Initial Classification Decision, pursuant to 43 C.F.R. Part 2450, classifying Lots 3 and 4 as open to DLE on December 28, 1981, pursuant to a petition filed by Gene Westergard in connection with his DLE application for 277 acres, including Lots 3 and 4. Joan Chamberlain also filed a DLE application for these lands in 1981, but Westergard was considered to have a preference right to entry based upon his first-in-time application. Neither of these two applications was perfected.

BLM's adjudication of Chamberlain's DLE application spans nearly 8 years. BLM indicated that Chamberlain would need to request that the Challis RMP designate Lots 3 and 4 as suitable for DLE. Chamberlain requested in writing, as directed by BLM, that the Challis RMP classify Lots 3 and 4 as suitable for DLE. *See* May 22, 1998, Letter from Chamberlain to BLM date-stamped as received May 26, 1998. BLM failed to address this request in the RMP, and proceeded as if the land were suitable for entry. Chamberlain responded to several BLM requests for additional information. By letter dated January 6, 2000, BLM itemized the information it needed from Chamberlain in order to complete its review, including the cost of a water pump and related operating costs, the crop rotation schedule, and the interest rate for the irrigation system, and by letter dated April 6, 2000, Chamberlain responded with the requested information. Chamberlain's letter was received by BLM on April 10, 2000.

The record contains a January 31, 2002, letter to Chamberlain from the Idaho Department of Water Resources (IDWR) stating that CIC had requested a transfer of water rights to add the subject DLE land to CIC's irrigation service area. The IDWR explained that "the company could irrigate new ground, inside their new designated service area, as long as an increase in diversion from the river, or an increase in the

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[2] (...continued)
and disposition of the case, as discussed *infra*. However, in the absence of Chamberlain's filings, we would be unaware that the Idaho State Office had issued an Initial Classification Decision granting a request that Lots 3 and 4 be classified as suitable for DLE, which stated that it would become final within 30 days. In the absence of evidence to the contrary, we now assume that such classification decision became final and has not been revoked or modified. "It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision." *Silverado Nevada, Inc.*, 152 IBLA at 322-23, *quoting The Navajo Nation*, 152 IBLA 227, 228 (2000).

actual number of irrigated acres did not occur." Jan. 31, 2002, Letter from IDWR to Chamberlain at 1. IDWR stated that the land subject to Chamberlain's DLE application "can be irrigated with Challis Irrigation Company water, and be in compliance with the company's water rights, as long as the diversion rate and acre limitations . . . are not exceeded." *Id.* at 2. By letter dated February 19, 2002, Chamberlain provided BLM with another list of expenses projected for the "complete irrigation system" related to the DLE application.

The file also includes a July 1, 2003, e-mail to Fred Price, Idaho State Office, BLM, from Alan Bittner, Natural Resource Specialist, Salmon Field Office, BLM, stating that Chamberlain "claims to have a water right through the Challis Irrigation Co." Bittner assumed that such water right "means shares in the company adequate to irrigate the 79 acres." He suggested that "the irrigation water needs to be in [BLM's] name during the application period" and asked whether Chamberlain's water rights should be transferred "into our name."[3]

In a December 19, 2003, e-mail message to Price concerning Chamberlain's water right, Tim Vanek, Realty Specialist, Idaho State Office, stated:

> Some time ago Alan and I talked about my one and only (thank goodness) on-going DLE. Alan had told me that I needed to inform the applicant that the water right he had (or was going to get) to use on the parcel in the DLE application had to be in the BLM's name while the application was being processed.
>
> I referred to CFR sec. 2520 and it was very clear about the applicant having to have a water right to use on the proposed DLE parcel. However, I could find no mention of the right needing to be in the BLM's name during the application process.

Vanek asked for a citation to the authority for the requirement that the water right be transferred into BLM's name during the application process.

In response, Price referred to Instruction Memorandum (IM) ID-96-014, dated October 26, 1995, captioned "Water Right Requirements: Rights-of-Way (R/W) Grants; 2920 Land Use Permits and Leases (LUPs); and Sikes Agreements." Price questioned whether an agricultural permit issued under 43 C.F.R. § 2920 "may be different from a DLE in terms of possessory, proprietary and exclusionary interests"

[3] Price responded with some surprise that "[s]omeone filed a recent application for DLE," stating that he "didn't think those were possible anymore." July 1, 2003, e-mail from Price to Bittner.

and stated that he would provide further information as to "whether DLEs should be treated differently than is expressed in IM-ID-96-14." He was clear that "[t]he CFR requires a water right because all states have requirements regarding the use of waters belonging to the state," and that "[f]or DLE purposes, BLM would also need to ensure that the water obtained is dedicated to the lands involved in the DLE and is not temporary water (i.e. leased or transferred temporarily)." However, Price was aware of no authority requiring that water rights for DLE purposes be assigned to the Government.

Nevertheless, by letter dated March 8, 2004, the Field Manager, Challis Field Office, BLM, advised Chamberlain as follows: "This letter is to inform you of your responsibility to assign in the name of the United States, the water right you intend to apply to the public lands [covered by your DLE application]." The Field Manager included a copy of IM ID-96-014, which, according to the Field Manager, "states this requirement." The Field Manager stated that in order for BLM to continue processing Chamberlain's DLE application, he would have to provide evidence that he has met this requirement by assigning the water right for the DLE to the United States.

An unidentified handwritten memorandum to the record dated March 23, 2004, reflects the on-going uncertainty about whether IM ID-96-014 required Chamberlain to transfer his water right to the United States. That memorandum states:

> Jim Chamberlain wanted to know how to assign his water right to the United States to comply with (IM)-ID-96-014 even though he noted that nowhere in the (IM) did it mention Desert Land Entries (DLE). . . . Mr. Chamberlain further added that he did not have an actual water right for the parcel listed on his DLE application but he did own shares in a water company that he could transfer. I told him that I could not give him a definitive answer, but it was my understanding that <u>THE APPLICANT</u> needed to possess a valid water right to make the DLE application valid. I told Mr. Chamberlain that if he was able to meet the requirement of having a valid water right for the DLE selection parcel and assign it to the United States he seems to have met the other requirements for the DLE application. Therefore I could continue processing it.

By letter dated May 6, 2004, Chamberlain responded to the Field Manager's March 8, 2004, letter, stating that he could "find no requirement that [he] must transfer [his] water rights to the United States," and contending that IM ID-96-014 "is not a basis to require a transfer of [his] water rights to the United States as part of [his] Desert Land Entry application (IDI-33650)." Further, he asserted that nothing

in the Department's regulations at 43 C.F.R. Part 2520 requires such a transfer, but that 43 C.F.R. § 2521.2(d) only requires that "evidence" of a water right accompany the application, not that those rights be transferred to the United States. He stated that he had "acquired the necessary shares of Challis Irrigation Company stock representing water to apply to the land subject to [his] Desert Land Entry Application," and that he "presume[d] this request was just a minor oversight" that would be corrected by BLM. May 6, 2004, Letter from Chamberlain to the Challis Field Manager at 2.

BLM did not respond to Chamberlain's May 6, 2004, letter. Rather, by letter dated September 1, 2005, the Challis Field Manager informed Chamberlain that "[i]t is apparent that the RMP does not identify this parcel for disposal," stating as follows:

> According to Goal 2: Paragraph 4 on page 34 . . . of the RMP it states "Desert Land Entry applications would not be considered on lands determined to be non-suitable for agricultural purposes. Lands suitable for transfer under agricultural authority must meet the following criteria (Desert Land Act of 1877) **and be within the adjustment area(s) identified on Map A[.]** . . .
>
> Since the public land described in your DLE application is not identified for disposal in the RMP, I am obligated to cancel your application. I wish we could have caught this earlier and I sincerely apologize for the oversight on our part. [Emphasis in original.]

By letter dated February 6, 2006, Chamberlain, through counsel, formally requested that BLM amend the Challis RMP, in accordance with 43 C.F.R. § 1610.5-5, to include the DLE lands within the "adjustment area" identified on Map A of the RMP. He reviewed the history of his application, noting that on December 28, 1981, the Acting State Director of the Idaho State Office, BLM, had issued a classification decision for approximately 277 acres, including Lots 3 and 4, determining that the 277 acres were found suitable for DLE, and classifying the land for entry under the Desert Land Act. Chamberlain argued that because neither Westergard nor Joan Chamberlain ever perfected their respective DLE applications, the land remained so classified at the time of his DLE application. He stated that BLM had yet to completely process his DLE application, and requested that BLM formally amend the Challis RMP to include Lots 3 and 4 in the "adjustment area" on Map A. He stated further that "the land is directly adjacent to [his] successful farming operation which has been in place for over 35 years," and that he "has acquired the necessary water rights for the land, has made a substantial investment in pipe and wire for the irrigation system, and is eager to begin farming Lots 3 and 4." Feb. 6, 2006, Letter from Chamberlain to BLM at 4.

On April 28, 2006, the Challis Field Manager issued the decision subject to this appeal. BLM later requested the Board to consider this decision as its answer to Chamberlain's statement of reasons (SOR). That decision, which we now set aside, states as follows:

> After review of your Desert Land Entry (DLE) application, it is confirmed that you did not comply with 43 CFR § 2521.2(c)(2) which states "an application to make desert land entry <u>is not acceptable if dated more than 10 days before its filing</u> at the field office." Your application is dated May 15, 1998, and was received at the Bureau of Land Management on June 30, 1998. Because your application was received after the required 10 day submission period, your application for Desert Land Entry is invalid. . . .
>
> Additionally, the application for DLE was not perfected prior to the implementation of the Challis RMP on July 29, 1999. . . . A letter dated January 6, 2000, confirms that your DLE application was still insufficient as of this date.
>
> Lastly, after further review of your DLE application, I have determined that it does not comply with the Challis Resource Management Plan (RMP). According to Goal 2: Paragraph 4 on page 34 of the Challis Resource Management Plan it states "Desert Land Entry applications would not be considered on lands determined to be non-suitable for agricultural purposes. Lands suitable for transfer under agricultural authority must meet the following criteria (Desert Land Act of 1877) **and be within the adjustment area(s) identified on Map A:**" (Exhibit C).

(Emphases in original.) To summarize, BLM ruled that Chamberlain's DLE application was invalid because (1) it was not filed within 10 days of its date, as required by 43 C.F.R. § 2521.2(c)(2); (2) it was not perfected when the Challis RMP was implemented on July 29, 1999; and (3) Lots 3 and 4 were not within those areas identified in the RMP for disposal under the DLE process.

II. CHAMBERLAIN'S ARGUMENTS ON APPEAL

A. The 10-Day Requirement of 43 C.F.R. § 2521.2(c)(2)

In his SOR, Chamberlain contends, with regard to the 10-day rule of 43 C.F.R. § 2521.2(c)(2), that he in fact filed his application within 10 days but that BLM failed to date-stamp it until June 30, 1998; that even assuming, *arguendo*, he missed the

10-day filing period, BLM by its subsequent actions waived the requirement; and that under *Topaz Beryllium Co. v. United States*, 649 F.2d 775, 778 (10th Cir. 1981), and *Mrs. Otis Teaford*, 56 IBLA 367, 368 (1981), the 10-day requirement is regulatory, rather than statutory, and is subject to curative action.

Chamberlain argues that "[c]ontrary to BLM's contention, [he] did file his application on time and within the requisite 10 days of signing the application." SOR at 13. In support of the factual basis for this argument, as well as others, Chamberlain submits his own affidavit and those of Gary Chamberlain, his father, and Travis I. Thompson. He deems it "illogical that [he] would sign his application, comply with [BLM's] requests regarding soil classification and the Challis RMP, and then wait almost two months before filing his application." *Id.* at 14. He asserts that "it is likely the application was physically received but not officially filed, or date stamped, until some time after [he] delivered it to" the BLM employee who communicated to him regarding the application in May 1998. *Id.*[4]

Chamberlain contends that "BLM's continued processing of the application for seven years after the application was filed, further constitutes a waiver of the '10-day rule.'" SOR at 18. Quoting *Keith L McCann, Jr.*, 81 IBLA 314, 315 (1984), he argues that a DLE "application should [not] be summarily rejected for error unless the error or omission related to information expressly and specifically required to be furnished is **of such significance that it would preclude favorable consideration."** (Emphasis added by Chamberlain.) Such is not his case, he claims. He likens his case to that in *William J. Hart*, 30 IBLA 138, 140 (1977), in which the Board stated: "The practice of rejecting desert land entry applications, with the consequent loss of the applicant's priority, for such 'deficiencies' as an obvious typographical error, or a minor arithmetical error in the hypothetical projection of anticipated farm income, or the omission of some detail of information not specifically required, is unwarranted." He points to the fact that it took BLM over 7 years to "discover" the disputed fact that his application was date-stamped more than 10 days after its filing date as evidence

[4] The record contains a memorandum to the file by Gloria (Romero) Jakovac, Idaho State Office, BLM, dated May 20, 1998, regarding Chamberlain's DLE application; a letter dated May 19, 1998, to Jakovek from Rulon Winward, Soil Survey Project Leader, U.S. Department of Agriculture, providing the results of soil testing on Lots 3 and 4; and Chamberlain's letter dated May 22, 1998, requesting that the Challis RMP classify Lots 3 and 4 as suitable for DLE. While these documents do not conclusively confirm Chamberlain's assertion that he filed his application on or near May 15, 1998, they do indicate that BLM was processing an application prior to BLM's June 30, 1998, date-stamp. Given our disposition of this case, we need not resolve this factual question.

that the error was insignificant and that BLM did not perceive it to "preclude favorable consideration." SOR at 18-19.

Chamberlain claims that "BLM waived its right to enforce the '10-day rule' when it failed to reject [his] application but instead continued to process the application." *Id.* at 19. Quoting *Mrs. Otis Teaford*, 56 IBLA at 368, he asserts that while the "failure to comply with express *statutory* requirements, both punctually and punctiliously, cannot be waived by the Department . . . ***[w]here the failure to comply is with requirements imposed only by regulation, the deficiency is subject to curative action***." (Emphases added by Chamberlain.) Chamberlain supports his argument that failure to comply the 10-day rule is subject to curative action with the following analysis from the Tenth Circuit's decision in *Topaz Beryllium Co. v. United States*, 649 F.2d at 778:

> We conclude that the Secretary has not ignored 1744(c)[[5]] which assumes that even defective filings put the Secretary on notice of a claim, and ***we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by section 3833[[5]] and not by the statute are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect***.

(Emphasis added by Chamberlain.) Chamberlain notes that the Board applied *Topaz Beryllium Co.* in *Mrs. Otis Teaford*, holding that BLM should have provided Teaford notice that her claim may be considered abandoned if she failed to file the requisite notice of intent to hold in a timely manner. "Only then, 'should compliance not . . . occur, the millsite may properly be declared abandoned and void.'" SOR at 20, *quoting Mrs. Otis Teaford*, 56 IBLA at 368.

Chamberlain objects to BLM's cancellation of his DLE application "based on a procedural technicality that the agency never raised before." SOR at 22. He asserts that had "BLM acted in a reasonable and timely manner" by informing him of the deficiency, he "could have rectified any alleged error by re-signing the application." *Id.* He states that "[r]egardless of any deficiency, in light of the facts of this case, Chamberlain's alleged violation of the '10-day rule' is a 'minor' and 'insignificant' violation that should not lead to the rejection of [his] application." *Id.* at 23.

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[5] This is a reference to section 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (2000).
[6] This is a reference to 43 C.F.R. § 3833.

B. BLM's Classification of Lots 3 and 4

Chamberlain challenges BLM's decision to cancel his DLE application on the related bases that it was not perfected prior to implementation of the Challis RMP on July 29, 1999, and that it does not comply with the Challis RMP. He states that BLM is using the Challis RMP as an "excuse to cancel the DLE application, despite actively processing the application for six years after the RMP was implemented." *Id.*

Chamberlain argues that assuming, *arguendo*, his application was filed on June 30, 1998, when it was date-stamped, "it is obvious from BLM's actions, including the processing and consideration of the application for over seven years that the application was accepted by BLM." *Id.* at 14. He states that by "accept[ing] a desert land entry filing, continu[ing] to process the application, requir[ing] the applicant to submit additional information, tell[ing] the applicant that it is sufficient, and then eight years later formulat[ing] a post-hoc reason to claim it is technically 'invalid'" amounts to an "administrative 'gotcha' [that] epitomizes arbitrary and capricious action." *Id.* He provides details, consistent with our own statement of the factual background of this case, demonstrating that as of May 2004 BLM was continuing to process his DLE application for approval. The only outstanding question related to whether ownership of the water right should be transferred to the United States, with Chamberlain questioning BLM's position on that issue. He states that "[t]his seven year history unequivocally demonstrates that BLM accepted Chamberlain's DLE application and had no issues of his actual compliance with a regulation requiring an application to be filed within 10 days of signing." *Id.* at 17. He asserts that he "relied upon this express acceptance of his application by providing information to BLM, making arrangements to procure the necessary irrigation equipment, and continuing to work with BLM personnel to process his application." *Id.* He states that "BLM has no rational basis in law or fact to . . . claim the application that it previously accepted and processed is 'invalid.'" *Id.*

III. ANALYSIS

A. Failure to Comply with the 10-Day Rule is Subject to Curative Action

[1] Section 1 of the Desert Land Act, *as amended*, 43 U.S.C. § 321 (2000), provides for the entry of up to 320 acres of desert land for the purpose of reclaiming "by conducting water upon the same . . . [p]rovided, however, that the right to the use of water by the person so conducting the same . . . shall depend upon bona fide prior appropriation." *See Bruce G. Perkins*, 150 IBLA 378, 381 (1999); *Glen H. Wharton*, 125 IBLA 165, 167 (1993). "Evidence of water rights, *i.e.*, the 'right to the permanent use of sufficient water to irrigate and reclaim all the irrigable portion of the land sought,' is a vital prerequisite to the approval of a desert-land entry

application." *Patricia K. Scher*, 59 IBLA 276, 278 (1981). An applicant must therefore demonstrate that, at the time of making application, he

> has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right.

43 C.F.R. § 2521.2(d); *Glen H. Wharton*, 125 IBLA at 167; *Wesley A. Painter*, 98 IBLA 69, 71 (1987).

We have no difficulty with the inherent logic of the rule requiring that a DLE application be dated no more than 10 days before its filing. 43 C.F.R. § 2521.2(c)(2). Such certification assures BLM that circumstances are as they are stated on the DLE application and that the applicant has met the statutory and regulatory requirements. Hence, as long ago as 1938, the Department's regulation included the 10-day rule. *See* 43 C.F.R. § 232.13 (1938). That regulation appears to have derived from a Departmental Circular, dated September 8, 1914, that provided:

> On and after October 1, 1914, as directed in a recent departmental decision (*Race v. Larson*, 43 L.D. 313), you will reject all applications to make entry which are executed more than ten days prior to filing.
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> *Such rejections should be subject to the usual right of appeal; also subject to the right to file a new and properly-executed application, or to re-execute the rejected application, prior to the intervention of any valid adverse claim.*

Sept. 8, 1914, Circular, 43 L.D. 378 (emphasis added). Thus, since at least 1914, while the Department has imposed a 10-day filing requirement, rejection of a DLE application for noncompliance was subject to curative action on the part of the applicant, prior to the intervention of another claim .[7]

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[7] Although this Board has not had occasion to consider application of 43 C.F.R. § 2521.2(c)(2), we did observe its impact in *Glen H. Wharton*, 125 IBLA at 166:

(continued...)

We have noted Chamberlain's argument that assuming, *arguendo*, he failed to file his DLE application within 10 days of its date, that requirement is not statutory but is imposed only by regulation, a deficiency that is subject to curative action under the rationale of *Topaz Beryllium Co.*, 649 F.2d at 778, as applied by the Board in *Mrs. Otis Teaford*, 56 IBLA at 368. We agree with his reasoning that, in applying *Topaz Beryllium Co.* to his DLE application, BLM should have provided him notice that his DLE application would be held for cancellation in the absence of curative action.[8] At a minimum, BLM should have timely advised Chamberlain of the problem to allow him either to (a) supply evidence of the sort we find in this record that BLM's date-stamp post-dated its receipt of the application, or (b) submit a new timely signed application.

We see no justifiable reason for BLM's uncompromising application of the 10-day rule in this case. Moreover, for the reasons advanced by Chamberlain, we question BLM's cancellation of Chamberlain's DLE application, after having spent over 7 years processing it, based on a procedural defect that was apparent on the face of the application from the beginning. The record shows that Chamberlain made every effort to comply with BLM's numerous requests for additional information, even signaling a willingness to transfer his water rights to the United States despite BLM's failure to provide a legal basis for requiring him to do so. We are hard-pressed to disagree with his assertion that had "BLM acted in a reasonable and timely manner" by informing him of the deficiency, he "could have rectified any alleged error by re-signing the application." SOR at 22.[9] BLM should have timely notified Chamberlain

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[7] (...continued)
"Wharton's original application was dated August 20, 1989, more than 10 days prior to filing with BLM. In accordance with 43 CFR 2521.2(c), BLM found the application 'not acceptable' by decision dated November 8, 1989. Therefore, on December 6, 1989, Wharton filed an identical DLE application for the same land." Thus, Wharton was allowed to file an application that complied with the regulation.

[8] Providing DLE applicants in Chamberlain's predicament with a right to cure is consistent with this Board's recent decision in *Hector Santa Anna*, 171 IBLA 103, 106 (2007), in which the Board stated that the failure under 43 C.F.R. § 3835.15(a) to make an annual filing, in the form of a notice of intent to hold a mining claim, is a regulatory, and not a statutory, requirement subject to curative action. *See also Larry G. Andrus, Jr. (On Reconsideration)*, 169 IBLA 353, 354 (2006). Such reasoning is consistent with the Department's long-standing position on the 10-day rule presently embodied in 43 C.F.R. § 2521.2(c)(2).

[9] Chamberlain's assertion that he in fact filed his application within 10 days of its date but that BLM failed to date-stamp it until June 30, 1998, runs counter to the
(continued...)

that his filing was not in compliance with the 10-day rule embodied in the regulation, providing him with the opportunity to correct the technicality.

B. Lots 3 and 4 Were Classified for DLE Under the Challis Management Framework Plan

[2] We further question BLM's decision to cancel Chamberlain's DLE application because it was not perfected prior to implementation of the Challis RMP and otherwise does not comply with the Challis RMP. In *Dona Jeanette Ong and Carie L. Nash (Ong & Nash)*, 165 IBLA 274, 277 (2005), this Board made "clear that applications for the transfer of lands that are designated for retention in Federal ownership in the applicable RMP must be rejected." The Board further made clear that the State Director has no "duty to review appellants' applications following the procedures of 43 CFR Part 2450." *Id.* However, the ruling in *Ong & Nash* bears no applicability to Chamberlain's case, since, at the time he filed his DLE application, Lots 3 and 4 already had been classified as suitable for DLE under 43 C.F.R. Part 2450, consistent with the then extant Challis Management Framework Plan (MFP). *See* Ex. A to Thompson Affidavit (Letter from Idaho State Office, BLM, to Westergard, with attached Initial Classification Decision, classifying lots 3 and 4, *inter alia*, as suitable for DLE). The record contains no indication that this initial decision did not become final; nor does it contain evidence that an authorized officer revoked or modified the classification pursuant to 43 C.F.R. § 2450.6(a).

Unlike in *Ong & Nash,* where the governing RMP had designated the lands sought as "not available for transfer out of public ownership," Chamberlain filed his DLE application a year before issuance of the Challis RMP. BLM was actively engaged in preparing the Challis RMP concurrent with its review of Chamberlain's application, and in fact considered and addressed classification requests other than Chamberlain's. Not until its September 1, 2005, letter did BLM inform Chamberlain that Lots 3 and 4 had not been identified for disposal in the 1999 RMP. The fact that

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[9] (...continued)
general rule that a presumption of regularity, albeit rebuttable, supports the official acts of public officers in the proper discharge of their official duties. *See United States v. Chemical Foundation*, 272 U.S. 1, 15 (1926); *Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985); *Legille v. Dann*, 544 F.2d 1, 8-9 (D.C. Cir. 1976); *H. S. Rademacher*, 58 IBLA 152, 155, 88 I.D. 873, 875 (1981). Application of the presumption of regularity on the facts here, however, reopens the question of whether BLM in fact possessed the application it was directly addressing over a month before the date-stamp. Given our ruling that the 10-day rule is regulatory and subject to curative action, we need not resolve this issue.

BLM continued to process his application demonstrates that BLM deemed the land suitable for DLE under the management plan applicable at the time of application.[10]

We agree with Chamberlain that BLM should have processed his application consistent with the land use plan provisions that were in place when he filed his application. In response to comments on the Challis RMP, BLM stated: "DLE applications received prior to signing of the Record of Decision for the Challis RMP/EIS will be processed consistent with the land use plan provisions in place at the time the application was received." Ex. O to Thompson Affidavit (BLM Response to Letter No. 17, 17-8). We perceive no reason for BLM's deviation from that statement in this case. Further, BLM had no basis for directing Chamberlain to submit a written request that the Challis RMP be amended to classify Lots 3 and 4 as suitable for DLE, when, based upon the record, it is apparent that the land use plan still in place when Chamberlain filed his application in 1998 recognized Lots 3 and 4 as appropriate for DLE. Moreover, Chamberlain had requested that the RMP identify the land as subject to disposal during the RMP process. May 22, 1998, Chamberlain Letter to BLM. BLM does not explain why Chamberlain should be required to seek amendment of the completed RMP when BLM never considered Chamberlain's request during the process of developing the RMP.

Chamberlain emphasizes that his 1998 request was "identical in substance to other letters filed with the BLM," and that "BLM readily accepted similar requests filed by other landowners and included various tracts within the Challis RMP's 'adjustment area,' even though those tracts had not been filed on for purposes of a DLE application and had yet to be classified." SOR at 26; *see* Exs. P and Q to Thompson Affidavit. In fact, as Chamberlain notes, Letters 21 and 43 in the Challis RMP comments contain requests to BLM to make lands available for disposal under the DLE statute. In response to those letters, BLM stated that certain parcels were added to the proposed RMP as adjustment areas on Map A, making them available for disposal through exchange or DLE. *See* Exs. P and Q to Thompson Affidavit. The response to Letter 21 stated that BLM had determined not to include two parcels in the RMP as adjustment areas on Map A, because the areas did not meet the soils or

[10] The record demonstrates that BLM in fact processed Chamberlain's DLE application as if the lands were suitable for DLE. In a May 18, 1998, memorandum, Rulon responded to a request to check "a field on BLM property east of Challis by Chamberlain's property." Rulon determined, consistent with the Idaho State Office's classification of Lots 3 and 4 as suitable for DLE in 1981, that "the LLC for this soil is 3S irrigation and 7S nonirrigated." As noted by Chamberlain, in October 1998, "BLM conducted its own soil assessment . . . which further confirmed these prior classifications and determined that Lots 3 and 4 were suitable for agricultural development." SOR at 5; *see* Ex. C to Thompson Affidavit.

slope criteria for DLE. Ex. P to Thompson Affidavit. Chamberlain asserts that his request, filed more than a year before the Challis RMP was issued, was not even acknowledged in the comments to the RMP, even though Lots 3 and 4 had already been determined to meet the soils and slope criteria for DLE. *See* Exs. B and C to Thompson Affidavit. He states that Lots 3 and 4 are "adjacent to [his] father's private farmland and [have] been designated as Class III irrigated under separate soil classifications conducted in 1981 and again in 1998." SOR at 27; *see* Exs. A and B to Thompson Affidavit. Chamberlain claims that BLM's failure to consider his request that Lots 3 and 4 be added to the Challis RMP as adjustment area lands, whether deliberate or as a matter of oversight, is arbitrary and capricious.

Chamberlain objects to the fact that "BLM never notified [him] that the application did not comply with the Challis RMP or that the lands were not available for disposal," but "continued to process the application, requested information, and represented that delay in approving the application was due to work on other land matters, primarily the Custer County landfill." SOR at 29. He states that during the nearly 8 years during which BLM continued to process his application, "he had no way to know that his application would be considered 'deficient' for any reason, since the BLM did not inform him that the application did not comply with the '10-day rule' or that it was inconsistent with the Challis RMP." *Id.* at 30. "At a minimum," he asserts, "BLM had the obligation to promptly notify [him] of any deficiencies so that they could have been cured." *Id.*, *citing Keith L. McCann, Jr.,* 81 IBLA at 314 (entryperson advised that his application was deficient and would be rejected unless the deficiencies were corrected within 90 days of receipt of the decision).

The record confirms that, in BLM's view, the only remaining issue to be resolved in 2004 was whether Chamberlain was required by IM ID-96-014 to transfer his water rights, already obtained from CIC, to the United States. Chamberlain had acquired an interest in 46 shares of CIC stock, which represented 1,380 miner's inches of water, and was deemed "adequate for the irrigation of the proposed Desert Land Filing." Ex. D to Thompson Affidavit. In his March 8, 2004, letter, the Challis Field Manager informed Chamberlain of his "responsibility to assign in the name of the United States, the water right you intend to apply" to Lots 3 and 4, citing IM ID-96-014 as authority for this requirement. As recently as March 23, 2004, a memorandum to the file stated: "I told Mr. Chamberlain that if he was able to meet the right of having a valid water right for the DLE selection parcel and assign it to the United States he seems to have met the other requirements for the DLE Application. Therefore I could continue processing it."

In his letter dated May 6, 2004, he rightly questioned BLM's statement that he was required by IM ID-96-014 to provide evidence that he had assigned his water

rights to the United States. In reviewing that IM, we see that by its terms it does not purport to apply to DLE applications. Moreover, we find no such requirement in the Desert Land Act or the regulations at 43 C.F.R. Part 2520. BLM has yet to address Chamberlain's objection to this requirement.

IV. CONCLUSION

While we stop short of finding that BLM's actions in this matter were arbitrary and capricious, and amounted to bad faith, we see the validity in Chamberlain's argument that the reasons given by BLM for cancelling his application appear unrelated to issues of stated concern to BLM during its extended review of his application. We rule that even if Chamberlain's application was filed more than 10 days from its date, that requirement is regulatory, not statutory, and subject to curative action consistent with *Topaz Beryllium Co.*, 649 F.2d at 778, and *Mrs. Otis Teaford*, 56 IBLA at 368; that it was incumbent upon BLM to process Chamberlain's DLE application consistent with the Challis MFP, which was in place when Chamberlain filed his application and which BLM expressly represented would control processing of DLE applications filed prior to finalization of the RMP; that if its determination in the Challis RMP was to revoke or modify the classification of Lots 3 and 4 so as to deny Chamberlain's application, it should have done so explicitly; and that BLM was without authority to require Chamberlain to assign his water rights to the United States as a condition of continuing to process his application.

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 appealed from is set aside and the case is remanded for action consistent herewith.

/s/
James F. Roberts
Administrative Judge

I concur:

/s/
Lisa Hemmer
Administrative Judge