

DIXIE L. BJORNESTAD ET AL.

IBLA 76-704

Decided October 6, 1976

Appeals from four separate decisions of the Wyoming State Office, Bureau of Land Management, rejecting desert land entry applications, W-38556, W-48911, W-50208, W-50684, respectively.

Set aside; hearing ordered.

1. Desert Land Entry: Generally -- Desert Land Entry: Water Supply -- Rules of Practice: Hearings

Rejection of a desert land entry application because the applicant has failed to supply satisfactory evidence of a right to the permanent use of sufficient water to irrigate and reclaim the irrigable portion of the entry will be set aside and the applicant's request for a Hearing granted where there is conflicting evidence in the record concerning the sufficiency of the water supply and where the applicant has alleged facts which, if proved, would result in a different conclusion.

APPEARANCES: Elmer J. Scott, Esq., Scott & Shelledy, Worland, Wyoming, for appellants Dixie L. Bjornestad, Dale D. Bodtke and Harold D. Cogdill; Eugene R. Ilg, Manderson, Wyoming, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Dixie L. Bjornestad et al. 1/ have appealed from four separate decisions of the Wyoming State Office, Bureau of Land Management

1/ Dixie L. Bjornestad's desert land entry application was designated W-38556. The other appellants and the applications are as follows:

Eugene R. Ilg W-48911
Harold D. Cogdill W-50208
Dale D. Bodtke W-50684

(BLM), rejecting appellants' applications for desert land entries in Wyoming. Each decision dealt with a separate application, but each application was rejected for the same reason. The reason was that each applicant had failed to supply satisfactory evidence to show a right to the permanent use of sufficient water to irrigate and reclaim all the irrigable portion of the land sought, as required by 43 CFR 2521.2(d). Each applicant had proposed a sprinkler irrigation system using water from the Nowood River.

The basis for the BLM decisions is a memorandum dated February 19, 1976, from a staff hydrologist to the area manager, Washakie Resource Area, concerning the water supply for the four above-mentioned desert land entries. The staff hydrologist made certain assumptions for the purposes of the analysis. They were:

- 1) That all adjudicated water rights on the Nowood are exercised.
- 2) That all persons, groups, etc., diverting water from the Nowood have an adjudicated water right.
- 3) That surface return flows would average 30 percent of the adjudicated rights, and this return flow would be available to downstream users.
- 4) The natural processes or conditions such as precipitation, runoff, infiltration relationships, drainage area size, etc., which have controlled streamflows in the past will remain relatively constant.

The stream flow data for the purposes of the analysis were obtained from the Water Resource Research Institute computers. All the data supplied were collected by the United States Geological Survey.

The memorandum concluded:

When discussing the water supply of the Nowood in terms of a permanent water source, it appears that the Nowood is already over adjudicated, and that no further DLEs which require a permanent, adequate supply of water could be allowed without provisions for off-season storage.

On appeal appellants assert that the BLM decisions were not supported by substantial evidence because there is sufficient water for the months of April, May, June, and part of July and that a grain crop could be raised during such a period. Appellants further contend that the decisions are arbitrary and capricious in that the

Wyoming State Engineer is the official who determines whether or not water is available for appropriation. In addition, it is claimed that direct flow appropriated rights have been denied water only once in 30 years because of shortage, 2/ and each applicant proposes the use of a sprinkler irrigation system which allegedly requires less water than conventional ditch irrigation. Each appellant claims that he or she is not totally dependent on production from the land included in the entry to conduct a financially successful operation.

The regulation governing the type of evidence of water rights required to be filed with a desert land entry application, 43 CFR 2521.2(d), states in part:

* * * No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman 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 portion of the 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. * * *

Herein, all the applicants, except Dale D. Bodtke, have received permits from the Wyoming State Engineer's office to divert water from the Nowood River. Dale D. Bodtke had filed a petition for change of point of diversion and means of conveyance and an application for permit; however, the State Engineer informed BLM that formal approval of the petition and application was being delayed until such a time as the lands were classified as suitable for desert land entry. 3/

2/ In his statement of reasons Eugene R. Ilg maintains that for the past 48 years he has farmed and ranched in the immediate area of the lands sought in his DLE application and that he has personal knowledge that the stream flow has been and is at all times during the irrigation season sufficient to irrigate the lands under his application.

3/ On April 30, 1976, a proposed classification decision for Dale D. Bodtke's entry, W-50684, was issued pursuant to 43 CFR 2450.3(a). The proposed decision stated that the land sought was suitable for agricultural entry under the desert land laws and that "BLM analysis based on review supplied by the Wyoming State Engineer and evaluation of

Contrary to appellants' argument, the United States makes its own determination in matters relating to the disposition of the public lands, and although BLM may refrain from making a particular disposition because of an objection by the State, an agricultural entry will not be allowed merely because the State has granted or will grant a water permit. D. Ray Hovatter et al., Arizona 031999 (May 2, 1963, approved by the Assistant Secretary, May 20, 1963).

[1] According to the study by the BLM staff hydrologist, the water supply of the Nowood River is presently overadjudicated. However, examination of the records in the cases herein reveals a contrary opinion expressed by the Wyoming State Engineer. He stated in a letter dated March 31, 1976, to the BLM District Manager, Worland, Wyoming, that:

This is in response to your letter of February 27, 1976, questioning the water available to proposed desert land entries on the Greybull River and Nowood River. We submitted the maps and material you provided to our Planning Division to check the possibilities of water supply on the basis of USGS information and water studies available in their files.

It would appear from the information available that there is a water supply during the irrigation season for the proposed desert land entries on the Nowood River. There could be times, of course, when regulation for senior water rights, particularly in drought years, could result in water shortages. This would apply particularly to the two entries above Tensleep, Wyoming. It does appear, however, that these two entries would have sufficient water to meet your criteria.

It would seem that if BLM's conclusion is correct, *i.e.*, that the Nowood River is presently overadjudicated, there should be shortages; however, appellants assert a sufficient amount of available water and no past shortages. Assuming appellants are correct, it

fn. 3 (continued)

Geological Survey streamflow records indicates that the unregulated Nowood River flow provides an adequate and dependable source of water within the meaning of the desert land laws."

On June 16, 1976, the proposed classification decision was vacated because of "questions concerning an adequate and permanent water supply, wildlife and recreation values, and suitability of soils."

may be possible that one or more of BLM's assumptions, supra, are incorrect.

In addition, in a memorandum from the Worland District Manager to the Wyoming State Director, dated May 18, 1976, in which the staff hydrologist's report was analyzed, the District Manager stated:

The above analysis indicated that there would be sufficient water for the Ilg, Bjornestad, and Bodtke DLE's for the months of April, May and June. However, there would not be sufficient water for July and August. The water available in April, May and June would allow production of at least one cutting of alfalfa or other hay crop.

The District Manager indicated that there was not adequate data to indicate conclusively a permanent supply of water for the Cogdill DLE. There was apparently sufficient water in April and May, not enough in July and August, and June was questionable.

The land report completed on April 8, 1976, for the Bodtke DLE concludes with regard to water supply on page 10 that Bodtke's appropriation of water "will not interfere with any previously approved water rights on the Nowood River between Ten Sleep gauging station and its mouth."

While appellants have presented no direct evidence on appeal to establish that sufficient water exists, they have made allegations which, if proved, would result in a conclusion that sufficient water does exist to irrigate these DLEs.

These allegations, coupled with the conflicting evidence in the case records, impels us to the conclusion that the factual issue of whether or not appellants have a right to the permanent use of sufficient water to irrigate and reclaim the irrigable portions of their entries can only be resolved by a hearing.

The type of evidence of water supply which is required was outlined in Ezra M. Carter, Harry Fogliatti, A-26165, A-26191 (October 5, 1951), where it was stated:

At the time of filing of desert-land applications, conclusive evidence of a statutory supply is not required, but only plausible presumptive evidence of the supply's activity, adequacy, and constancy. [Footnote omitted.]

The Acting Solicitor continued:

In affording to individuals an opportunity to obtain patent to valuable lands by reclaiming

them, the Congress is inviting the adventurous to a precarious enterprise. The regulations warn the applicant that the reclamation effort is full of risks, but beyond putting the applicant on guard they do not protect him. They leave it to him to calculate the risks and take or reject them, as he chooses. The regulations are liberal toward the applicant in allowing him to enter the land if there is plausible presumptive evidence that he will have an adequate and constant water supply for its reclamation. But the rules are not tender towards him at the time of final proof if before then some unforeseen eventuality shall have occurred to make reclamation seem impossible. [Footnote omitted.]

Appellants have requested a hearing before an administrative law judge pursuant to 43 CFR 4.415. Their request is granted and the case will be referred to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge.

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 a hearing ordered.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Newton Frishberg
Chief Administrative Judge

