

Editor's note: Reconsideration granted; decision set aside by order dated March 30, 1981 -- See 51 IBLA 139A & B below

LENARD D. EASTERDAY
LORENE I. EASTERDAY

IBLA 79-364

Decided November 20, 1980

Appeal from decision of the Idaho State Office, Bureau of Land Management, denying applications for extensions of time and canceling desert land entries, I-2011 and I-2012.

Affirmed.

1. Desert Land Entry: Extension of Time

BLM properly denies a third extension of time to file final proof of compliance on a desert land entry and cancels that entry where there is no reasonable prospect that the entryman will be able to make final proof of reclamation, irrigation, and cultivation within the time required by law.

APPEARANCES: W. F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Lenard D. Easterday and Lorene I. Easterday appeal from separate decisions of the Idaho State Office, Bureau of Land Management (BLM), dated March 26, 1979, denying their applications for third extensions of time to make final proof for their desert land entries and canceling those entries, identified respectively as I-2011 and I-2012.

BLM originally approved a desert land entry for both appellants based on a plan of development which specified a well as the source of irrigation water. Both entries are located in T. 9 S., R. 13 E., Boise

meridian. 1/ Prior to his or her date for submitting final proof of reclamation, irrigation, and cultivation, both appellants filed an application for an extension of time. The area in which these entries are located had been declared a critical ground water area by the Idaho Department of Water Administration. Thus, the appellants had abandoned plans for a well and become stockholders in Canyon View Irrigation Company (CVIC) in order to obtain irrigation water. 2/ BLM granted appellants a time extension under 43 U.S.C. § 333 (1976) premised on abandonment of the plans for a well and the prospect that CVIC would be approved as a source of water and operating for delivery of water by the time of the extended proof dates.

Near the end of the extended periods, appellants filed applications for a second time extension asserting that he or she was unable to get water for the entry for reasons beyond his or her control. Specifically, CVIC had not yet finalized its water deliver system because of difficulties encountered in negotiating with a canal company for use of its facilities. BLM granted the extensions pursuant to 43 U.S.C. § 334 (1976). The final proof date for Lenard Easterday was then November 14, 1978, and for Lorene Easterday, September 25, 1978.

Appellants filed applications for a third extension of time asserting generally the same reasons as those justifying the previous extension; that is, the CVIC was still unable to deliver water. It is these applications which are the subject of the present appeals. BLM declined to grant another extension and canceled the entries. In its decisions, BLM conceded that the conditions preventing appellants from making final proof were still beyond their control and unavoidable without any fault on their part but found that there was no reasonable prospect that appellants could complete requirements for final proof within the time allowed by a third and final extension. BLM based this conclusion on the fact that CVIC is tied up in litigation with respect to development of its water system with little likelihood of a resolution before 1981 and CVIC would then require 1 or 2 more years to complete the system. This time frame extends far beyond the end of the requested 3-year time extensions and appellants would still be unable to timely submit final proof.

1/ Lenard D. Easterday's desert land entry, I-2011, was approved November 14, 1968. His initial date for submitting final proof was November 14, 1972. The entry is located at the S 1/2, SE 1/4 of sec. 34, SW 1/4 and S 1/2, NW 1/4 of sec. 35, T. 9 S., R. 13 E., Boise meridian.

Lorene I. Easterday's desert land entry, I-2012, was approved on September 25, 1968. Her initial date for submitting final proof was September 25, 1972. The entry is located at the NE 1/4, N 1/2 SE 1/4, and E 1/2 NW 1/4 of sec. 34, T. 9 S., R. 13 E., Boise meridian.

2/ CVIC was incorporated in Idaho in 1972 for the purpose of delivering irrigation water to its stockholders. It filed a petition (I-5966) to be approved and recognized as a source of irrigation water for desert land entries with BLM on December 22, 1972.

[1] The authority for granting a third time extension is found in 43 U.S.C. § 336 (1976). That statute provides:

The Secretary of the Interior may, in his discretion, in addition to the extensions authorized by sections 333-335 of this title or other law existing prior to February 25, 1925, grant to any entryman under the desert-lands laws of the United States a further extension of time of not to exceed three years within which to make final proof: Provided, That such entryman shall, by his corroborated affidavit, filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of the irrigation works intended to convey water to the land embraced in his entry, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor: And provided further, That the entryman, his heirs, or his duly qualified assignee, has in good faith complied with the requirements of law as to yearly expenditures and proof thereof, and shall show, under rules and regulations to be prescribed by the Secretary of the Interior, that there is a reasonable prospect that if the extension is granted he will be able to make the final proof of reclamation, irrigation, and cultivation required by law. Feb. 25, 1925, c. 329, 43 Stat. 982. [Emphasis added.]

Under the statute, grant of a third extension is within the discretion of the Secretary. Unlike the statutory authorities for the first two extensions, which require only a showing of unavoidable delay through no fault of the entryman, this statute imposes a second condition. The entryman must also show that there is a "reasonable prospect" that he will be able to make final proof if the extension is granted. BLM found that the justifications submitted with appellants' extension requests did not support a conclusion that the appellants have a reasonable prospect of making final proof in 1981. The BLM decisions fully explain the circumstances mitigating against such a conclusion. We have noted the BLM considerations earlier in this opinion and agree with the BLM evaluation. ^{3/}

^{3/} By memorandum dated October 17, 1980, the Idaho Associate State Director informed the Board that on September 9, 1980, the Idaho Supreme Court ruled on behalf of CVIC that it could bring condemnation proceedings against the Twin Falls Canal Company to obtain use of its facilities in transporting water. However, while CVIC may be able, at some time in the future, to provide water to these entries, there is absolutely no possibility that such will occur in sufficient time to permit cultivation prior to November 14, 1981.

In their statements of reasons, appellants assert that there is a "remote" possibility that the CVIC system will be available in time and thus this Board should overturn the BLM decision. However, they have not convincingly demonstrated that there is a "reasonable prospect" that the CVIC system will be ready and that BLM's evaluation is arbitrary. After examining the record, we conclude that BLM's denial of the applications for an extension is based upon a reasonable evaluation of the circumstances. Howard D. Marshall, 43 IBLA 271 (1979).

Appellants claim on appeal that they were not afforded any opportunity to rebut or explain the CVIC statements upon which BLM based its decisions prior to the decisions. As to the Easterdays' cases, the records indicate that this is true. However, one John Thomas, who also sought a third extension on the same basis, did receive a detailed letter before BLM issued a decision informing him that BLM proposed to reject his application and the reasons why. The letter concluded with the following:

If there is some other available source from which you could obtain water for your entry, we would certainly give this consideration in connection with an extension of time. However, you would have to submit a showing of evidence or other information to demonstrate the availability and feasibility of this source and that it would supply you with an adequate and permanent supply of water so that you could comply with the final proof requirements within the extension of time.

We would appreciate receiving any thoughts or comments you might wish to make on this situation within the next 20 days.

Thomas responded with a letter in which he made the following brief arguments:

I understand you are in receipt of information from Mr. Meyer concerning the status of Canyon View Irrigation Co., the proposed source of my water. The judgement from Judge Bellwood is still not final and, if it should go prejudicial to our interests, there appears to be a good chance of securing off-season conveyance rights through further litigation. Beyond this there is the added possibility of a new canal being constructed through a plan by the State Water Resources Board.

Following this exchange, BLM officials met with CVIC representatives to confirm the position of CVIC with respect to its prospects for resolving the litigation and the timetable for completing the water delivery system.

In Stickleman v. United States, 563 F.2d 413 (1977), a case involving a time extension under 43 U.S.C. § 334 (1976), the United States Court of Appeals for the Ninth Circuit indicated that an entryman should be given an opportunity to respond to adverse field reports and present contrary evidence. Stickleman further requires that when an entryman appeals to this Board "there must be an opportunity to rebut the deciding officer's findings, to respond to the reasons for the discretionary decision, and to answer any other new material." 563 F.2d at 417. Departmental appeal procedures provide that opportunity. See 43 CFR Part 4.

In this case, it would have been preferable if BLM had afforded the Easterdays the same opportunity given Thomas to respond to BLM's findings prior to the decision issuing. Nevertheless, we believe that the Easterdays' rights have been sufficiently protected by appeal to this Board since they have been able to rebut the BLM decision and present new information for our consideration. This Board has the complete authority to decide the case on the entire record as it now stands. United States v. Gassaway, 43 IBLA 382 (1979); United States v. Grediagin, 7 IBLA 1 (1972).

As we previously noted in their statements of reasons, appellants merely reassert that the CVIC system could possibly be operational in time, but they do not substantiate that assertion.

Appellants have also presented to the Board information on two additional sources of water for their entries and requested that the cases be remanded to BLM for further consideration. At the same time, appellants sent documentation to support these proposals directly to BLM and requested that BLM reconsider its decision. BLM has reviewed appellants' new proposals and has declined to reconsider its decision. A remand at this time would only serve further to diminish the time left to run on the requested time extensions. Suspension of the Board's consideration of these appeals, which appellant also requested, would neither lengthen the time in which irrigation must occur nor make more likely the timely application of water to these entries. We will review the proposals along with BLM's comments at this time.

In the statements of reasons, appellants describe their first proposal as follows:

The lands in Appellants' desert entries are located in the vicinity of Salmon Falls Creek, which is located in the canyon mentioned on page 2 of the Decision. The summertime flow of water in Salmon Falls Creek has been appropriated in large measure for use during the peak irrigation period, but substantial quantities of water remain in the creek during the winter and spring months and would be available for pumping and storage in reservoirs on or near the Appellants' entries. Also, there is water available in the stream during the early part of the irrigation season before the prior water rights require most of the flow of the stream.

There are pumping facilities presently installed which, with modifications and extensions, could deliver water from Salmon Falls Creek to reservoir sites which could serve Appellants' entries. The necessary modifications and extensions and reservoirs, as well as the distribution system on the Appellants' entries, could be constructed within a relatively short period of time, and almost certainly within the time period which a three-year extension would permit. [John Thomas] has discussed with one landowner in the area the possibility of using his system during the winter and early spring, and that landowner has agreed to analyze and consider the matter. [4/]

Appellants' submission to BLM included a letter containing a similar description, copies of applications for water permits which both of them have filed with the Idaho Department of Water Resources, and sketch maps depicting the proposed facilities. BLM reviewed the proposed plans and, in a memorandum to this Board dated December 7, 1979, indicated that

they are inadequate and lacking in sufficient showing of detail and information for this Bureau to evaluate and make an informed judgement as to their feasibility and reasonable prospect for implementation. We feel the proposed plans are, for the most part, speculative at this time as they are solely dependent upon approval of the water permit applications. At the present time there is no prospective assurance that the permits will be approved by the Department of Water Resources. We have been advised by that agency that the applications have been protested and a hearing was held on the protest on November 27, 1979. The matter is now pending a Decision by the department but no information was available as to when the Decision might be made. [5/]

4/ The State Office, by another decision of March 26, 1979, had rejected an extension application filed by John Thomas. Thomas pursued an appeal to this Board. While the appeal was pending Thomas arranged an alternative system of water pumping not using the CVIC facilities. By memorandum of October 17, 1980, the State Office informed the Board that the alternative system appeared feasible and requested that we vacate its earlier decision. By order of October 22, 1980, the decision was set aside and the case file was remanded for further action. The State Office memorandum, however, noted that the Easterdays were not involved in this arrangement and had not submitted any alternative proposal of their own.

5/ BLM provided the same information to appellants by a letter to their attorney, dated December 7, 1979, in which BLM declined to reconsider its previous decision and stated the reasons therefor.

While appellants suggest that this source of water could be made available within the time period of a 3-year extension, appellants stated on their water permit applications that the time required to complete the works and apply water to the proposed beneficial use (the desert land entry) is 5 years. Even if we assume that it will not take the entire 5 years to supply water to the entries, there is no other indication of the time frame for this project. We agree with BLM's assessment and find that the plans are not sufficiently definite for us to conclude that there is a "reasonable prospect" that water could be available by the time the requested extensions expired in 1981.

Appellants also report that their desert land entries lie within an area of Idaho proposed to be served by a State water development project on the Bruneau Plateau. With respect to that project, appellants also state:

We recognize that the time table contemplated in the Report projects construction to begin at a point beyond the expiration of the requested three-year extension on Appellants' entries. However, discussions with several of the parties interested in the project indicate that a strong effort will be made to expedite completion of the feasibility studies and initiation of construction and we feel that although the possibility is not great, there is enough of a possibility that Appellants' lands could be served by the proposed Bruneau Plateau Project to warrant an extension of time which would give the Appellants an opportunity to salvage their investment should the Bruneau Project materialize before expiration of the requested extension.

We note that the schedule included in the 1978 report for authorization and funding of a feasibility study for this project indicates that construction would not begin until 1982. In addition it has been reported publicly that the results of the feasibility study indicate that the project is not financially workable and additional study is being pursued in order to keep the project alive. Under these circumstances, we find that there is no likelihood much less a reasonable prospect that this project will meet appellants' needs in a timely manner. 6/

6/ We note that in its initial decisions, the State Office adverted to the possibility of relief under 43 U.S.C. § 182 (1979). Appellants correctly point out that section 182 had been repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787. In its transmittal of December 7, 1979, the State Office stated:

"At the time we issued our Decision of March 26, 1979, we were well aware that § 182 (part of the Homestead Laws) had been repealed by FLPMA. Since this was the same authority by which second entries could be granted under the Desert Land Act, a question arose as to whether or not the repeal of this law was intended to include second entries under the Desert Land Act. There is still a provision in the Regulations,

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

James L. Burski
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

fn. 6 (continued)

43 CFR 2521.1(b), for such second entries, albeit it is under this repealed authority. We included the observation of possible second entries in our Decisions of March 26, 1979 for the sole purpose and hope that the Board would address the matter in these cases and would provide guidance for future cases. In any event, it would not have altered our view in denying the extension of time." While we can understand the desire of the State Office to have the question of the continued validity of 43 CFR 2521.1(b) determined, this matter is not properly before us. This Board has no authority to render advisory opinions. Accordingly, we must decline passing on this question at the present time.

IBLA 79-364	:	I-2011, I-2012
	:	
LENARD D. and LORENE I. EASTERDAY (On Reconsideration)	:	Desert Land Entry
	:	
	:	Petition for Reconsideration
	:	
	:	Petition granted; decision set aside

ORDER

By decision dated November 20, 1980, reported at 51 IBLA 132, the Board affirmed the decision of the Idaho State Office, Bureau of Land Management, denying applications for extensions of time and canceling the above desert land entries. The basic predicate for this action was the inability of the entryman to show a reasonable prospect that they would be able to make final proof of reclamation, irrigation, and cultivation within the time required by law.

Subsequently, on December 15, 1980, appellants petitioned for reconsideration of the Board's decision, arguing, inter alia, that appellants had a new plan to appropriate the necessary water which would enable them to show a reasonable prospect of completing the required reclamation, irrigation and cultivation within the statutory period. This Board stayed action on this petition pending a review of appellants' proposal by the Idaho State Office.

By memorandum of March 11, 1981, the State Office informed this Board that it had considered the feasibility of the new proposal and determined that "there is a very reasonable prospect that final proof could be made on both entries if extensions of time were granted." Accordingly, they requested that this Board's prior decision be set aside and the case files remanded to the State Office for further consideration of the applications for extension.

In view of the good faith efforts of appellants to comply with the law, which was recognized in our original decision, and considering the State Office's belief that they have now shown a reasonable likelihood of completing final proof within the statutory period, our prior decision in the instant matter, reported at 51 IBLA 132, is hereby set aside and the case files are remanded for further consideration of appellants' application for extension of time.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

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