

JACK W. MAYS
GARY L. HARRELL

IBLA 81-1107

Decided August 16, 1982

Appeal from decision of the Idaho State Office, Bureau of Land Management, rejecting right-of-way application I-17304.

Affirmed.

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

The standard of review in the case of a right-of-way application for a water diversion project is whether the decision demonstrates a reasoned analysis of the factors involved, with due regard for the public interest. A decision to reject such an application will be affirmed where there is insufficient basis in the record to disturb it.

APPEARANCES: Jack W. Mays and Gary L. Harrell, pro sese.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is taken from a decision dated August 21, 1981, by the Idaho State Office, Bureau of Land Management (BLM), which rejected right-of-way application I-17304.

The application for a diversion ditch was originally filed under the Act of March 3, 1891, 26 Stat. 1101, repealed, section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793. The application was refiled on March 18, 1981, pursuant to section 501(a) of FLPMA, 43 U.S.C. 1761(a) (1976). 1/

1/ Appellant Mays had also filed an application for a permit to alter a stream channel with the Idaho Department of Water Resources. This application does not indicate that the Department of Water Resources took any action thereon.

Appellants sought the right-of-way for construction of a ditch across lots 3 and 6, sec. 21, T. 7 N., R. 28 E., Boise meridian, to divert all the water from Warm Springs Creek across public lands to Fallert Creek. 2/ The decision states the reason for the proposed diversion is that Warm Springs Creek is very mossy and heavily vegetated, restricting the flow of water to appellants' farmlands. In the past appellant Mays mechanically removed the aquatic vegetation from the stream. He alleges he can no longer remove the vegetation because of the existence of sprinkler systems across the lower reaches of the channel. The decision gives the following reasons for rejecting the application:

1. Warm Springs Creek is an important stream for fisheries and wildlife. The stream supports fish, muskrats, mink and waterfowl, and is the only source of free water east of the Howe-Goldburg Road in that area. Water should be maintained in Warm Springs Creek for its value to wildlife.
2. The stream has value to the public because of the variety of fish it supports: rainbow trout, brook trout, and Dolly Varden trout.
3. The moving of the channel would only be a temporary solution to the aquatic vegetation problem. The warm water and minerals present in Warm Springs water would quickly produce the same situation of abundant vegetation in the new channel, and at the expense of the present valuable aquatic and riparian habitat.

The decision also cites section 102(a)(8) of FLPMA, 43 U.S.C. § 1701(a)(8) (1976), which provides:

(a) The Congress declares that it is the policy of the United States that--

* * * * *

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

The rationale of the decision is based on a land report prepared by BLM. The report recommended against the granting of the right-of-way, stating that

2/ Appellant Harrell has a water right of 0.7 cubic foot per second of the water of Warm Springs Creek.

the Idaho Department of Fish and Game, a BLM fishery biologist, and the Big Butte Resource Area Wildlife biologist concurred in the negative recommendation. The report of the fishery biologist contains most of the conclusions mentioned in the decision. It further states:

Warm Springs Creek starts near the highway about 10 miles north of Howe. The spring and adjacent stream had abundant aquatic vegetation, both submergent and emergent, and had little or no free-flowing water. Open water stretches began about 1/4 mile downstream and good flows were found about 3/4 mile downstream. This vegetation was in marked contrast to the surrounding sparse saltbrush vegetation type. The stream and riparian zone were obviously very important to big game, small mammals and fur bearers, raptors, game birds, and non-game birds. In our brief visit, we noted use of the area by antelope, jackrabbits, beaver, doves, hawks, and a variety of non-game birds. An earlier range fire had killed or damaged willows in one segment of the riparian, but had almost no effect on the value of the area to wildlife.

We saw a lot of fish activity in the stream and the fish were considerably larger than those in Horse Creek. Trails along the stream indicated the area is popular for fishing. The Little Lost-Birch Creek EIS stated that Warm Springs Creek contains rainbow trout, brook trout, and Dolly Varden trout at the rate of 25 fish per mile. Our observations would indicate that present populations are considerably higher than that.

* * * * *

The downstream water-user had problems with getting enough water last summer and believes that the heavy vegetation caused the water use. In earlier years, he had mechanically removed vegetation, but sprinkler irrigation systems now cross the channel in the lower reach and he no longer can use his equipment for vegetation removal. He proposes digging a canal from near the spring to a dry channel between Warm Springs Creek and the Little Lost River. ^[3/] Water would be diverted from Warm Springs Creek into the new channel where it would either be used by him or enter the Little Lost River. Little Lost irrigators have expressed concern that this warm water might cause winter flooding problems in the area, and the water-user is considering diverting the water back into the original channel each winter. The water-user may also have winter flooding problems.

Idaho Department of Fish and Game considers this stream as very important fish and wildlife habitat and is opposed to its loss through diversion. Based on my limited observations, I would agree with them in opposing the diversion. The amount of vegetation in the channel may be partly due to the mild winters the

^{3/} The application for the right-of-way states that the ditch would go to a "tributary to Little Lost Run."

last two years with little winter kill of sensitive plants. The lack of flow last summer was probably due to near-drought conditions in Southern Idaho. Past mechanical removal of aquatic vegetation may have actually contributed to water loss by making the stream bottom more porous.

The file contains a letter from an official of the Idaho Department of Fish and Game opposing the project. In their statement of reasons appellants contend that the diversion ditch would actually benefit fish by providing an additional spawning ground. They indicate also that they could keep the new channel clear of vegetation. They point out that their water rights were purchased by their fathers in 1926, and contend that the decision is unfair in that it prevents them from putting the water to beneficial use. They assert that if they had access to 85 percent of the water they could conserve energy by turning off one of their deep well pumps.

[1] The Secretary or his duly authorized representative has the discretion to accept or reject a right-of-way application for a water diversion project filed under section 501 of FLPMA, *supra*. Eugene V. Vogel, 52 IBLA 280 (1981); Stanley S. Leach, 35 IBLA 53 (1978). The standard for review of a decision rejecting an application is whether the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Where no sufficient reason exists to disturb such a decision, it will be affirmed. Stanley S. Leach, *supra*; Jack M. Vaughn, 25 IBLA 303 (1976). We find that the record supports BLM's rejection of the right-of-way application. There is no indication that either of the appellants will be without the benefit of water from Warm Springs Creek if the status quo is maintained. Nor have appellants demonstrated that the ecological, wildlife, and recreational interests sought to be protected by the BLM action--interests endorsed by the State --are contrary to the public good. We conclude that BLM properly rejected the right-of-way application.

Therefore, 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.

Gail M. Frazier
Administrative Judge

We concur:

Bruce R. Harris
Acting Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

