

Appeal from decision of Idaho State Office, Bureau of Land Management, rejecting an application for a desert land entry, I-5953.

Affirmed.

1. Desert Land Entry: Applications--Desert Land Entry: Water Right

A desert land entry application is properly rejected where the applicant proposes to irrigate his entry from groundwater sources, but fails to show at the time of filing his application that he has acquired a right from the State to appropriate groundwater or that he has taken appropriate steps, as far as then possible, looking to the acquisition of such a right.

APPEARANCES: Gene L. Morrison, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Gene L. Morrison appeals from the rejection of his desert land entry application, I-5953, by an August 10, 1983, decision of the Idaho State Office, Bureau of Land Management (BLM).

Morrison filed his application and petition for classification for 320 acres described as: E 1/2 NE 1/4, E 1/2 SW 1/4 sec. 26 and NW 1/4 sec. 35, T. 1 S., R. 5 E., Boise meridian, Idaho. The application was held for rejection in a December 11, 1972, decision because of deficiencies therein. The requested information was satisfactorily furnished and the lands applied for were scheduled for examination and classification.

On May 7, 1981, the Idaho Department of Water Resources (IDWR) issued an order establishing the Cinder Butte Critical Groundwater Area, wherein it stated: "[T]he records of the department indicate potential withdrawal and use of groundwater pursuant to the outstanding permits \* \* \* would exceed the reasonably safe supply." This critical area includes the lands applied for by Morrison. In a March 9, 1983, letter IDWR notified BLM that "[s]ince the designation, the department has not approved new permits for appropriation of groundwater for consumptive uses within the boundaries [of this critical area] and does not anticipate that it will." Based on these circumstances and

Morrison's statement that groundwater would constitute his source of water for irrigation, BLM issued a decision dated March 15, 1983, holding his application for rejection. It declared the application deficient in its evidence of a water source as required under 43 CFR 2521.2(d) and gave notice of 30 days allowance for the applicant to submit proof of a permanent and sufficient source. Morrison requested additional time to acquire an acceptable source; however, satisfactory evidence was not received and BLM rejected the application in its August 10, 1983, decision.

In his statement of reasons, Morrison suggests that the water depletion as termed "critical" by IDWR is "possibly a temporary condition," and also claims that he may possibly be able to acquire current water rights sufficient to meet his needs. He argues that, in light of BLM's unreasonably long delay in processing his application, rejection should be postponed in order to prevent "unreasonable haste," and to preserve his rights under the Desert-Land Entries Act.

[1] Section 1 of the Desert-Land Entries Act, 43 U.S.C. § 321 (1976), provides for the entry of desert lands for the purpose of reclaiming them "by conducting water upon the same \* \* \* Provided, however, that the right to the use of water by the person so conducting the same \* \* \* shall depend upon bona fide prior appropriation." (Emphasis added.)

The pertinent regulation, 43 CFR 2521.2(d), provides that no desert land entry application will be allowed unless accompanied by evidence satisfactorily showing that the intending entryman has acquired the right to 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, so far as then possible, appropriate steps looking to the acquisition of such a water right.

In Patricia K. Scher, 59 IBLA 276 (1981), the Board addressed the requirements of this regulation as follows:

Evidence of water rights i.e., the "right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought," is a vital prerequisite to approval of a desert-land entry application. See, e.g., Dixie L. Bjornestad, 27 IBLA 201 (1976); Arthur J. Donford, A-29307 (Mar. 26, 1963).

In order to constitute a valid appropriation of water "there must be an actual diversion of it, with intent to apply it to beneficial use, followed by an application to such use in a reasonable time." In re Manse Spring and Its Tributaries, 108 P.2d 311, 314 (1940), quoting Walsh v. Wallace, 67 P. 914, 917 (1902). Pursuant to 43 CFR 2521.2(d), an applicant for a desert land entry must, at the time of application, provide evidence that he has "already acquired by appropriation" or is taking steps to acquire a right to the permanent use of sufficient water to reclaim his entry.

The Department has consistently held that a desert land entry application without evidence of a water right must be rejected. Janet Pearson, 73 IBLA 220 (1983); James R. Hardcastle, 69 IBLA 341 (1982); Patricia K. Scher, *supra*.

Morrison merely suggests without proof that water rights may be available for acquisition. 43 CFR 2521.2(d) requires written assurances, if contracts for water rights have not been entered into prior to application. While he submitted data regarding a well capable of delivering adequate quantities of water, appellant fails to show that steps have been taken to acquire the rights to such water. We find that because he failed to provide the necessary evidence, BLM's action to reject this desert land entry application was proper.

Appellant charges BLM failed to afford him enough time to comply with the requirement. The requirement is indeed explicit as to the need for a valid appropriation of water for a valid desert land entry. He has had ample time since the filing of his application to consider sources for such appropriation. The rejection of his application is due to his own inaction, not that of BLM. This rejection, however, is not prejudicial to his right to file a complete application when he has evidence of an adequate and sufficient water right.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Gail M. Frazier  
Administrative Judge

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Bruce R. Harris  
Administrative Judge

