

RICHARD H. GREENER

IBLA 83-665

Decided February 29, 1984

Appeal from a decision of the Boise District Office, Bureau of Land Management, requiring evidence of water rights in support of an application for desert land entry.

Dismissed without prejudice.

1. Rules of Practice: Appeals: Standing to Appeal

A decision advising applicant of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature and, as a general rule, applicant lacks standing to appeal such a decision in the absence of a rejection of his application.

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

An application for desert land entry is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show that he has acquired a right from the state to appropriate underground water or that he has taken appropriate steps, as far as then possible, toward acquisition of such a right.

APPEARANCES: Fredric V. Shoemaker, Esq., Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Richard H. Greener from a decision of the Boise District Office, Bureau of Land Management (BLM), dated April 25, 1983, regarding his desert land entry application, I-10184. The decision stated that on May 7, 1981, the Idaho State Department of Water Resources issued an order establishing the Cinder Cone Butte Critical Groundwater Area based on information showing a serious decline in the water table in the area. BLM noted that land will not be classified for entry where it appears that irrigation of the land would endanger the water supply for existing users. The decision further recited that appellant's application was within the critical groundwater area, that the State of Idaho was currently denying applications to withdraw groundwater within the area, and that appellant's application was deficient under the regulations since it did not provide evidence that

appellant had obtained a source of water as required by 43 CFR 2521.2(d). The decision of BLM allowed appellant 30 days to show evidence of rights in a source of water "both permanent and sufficient to irrigate all the irrigable lands in [his] application." BLM held that: "Failure to take action or to comply with this requirement within the 30-day period will result in the final rejection of [the] application * * *."

Appellant contends in his statement of reasons for appeal that his application was in compliance with the regulations in effect when it was filed in 1975. He also argues that the designation of the critical groundwater area does not itself constitute a basis for rejection of the application. Further, he alleges that there has been well activity in the vicinity of the lands applied for which supports allowance of the entry.

Richard H. Greener's application for desert land entry was filed with BLM on December 19, 1975. The application describes certain lands in secs. 15 and 22, T. 3 S., R. 4. E., Boise meridian, Idaho. The application was accompanied by a petition seeking to have the lands applied for classified as suitable for desert land entry pursuant to appellant's application.

Appellant indicates on the application that he intends to irrigate the land with water from a well. The application also indicates that there is an adequate supply of water available for irrigation, but that appellant had not, as of the time of application, acquired a right to permanent use of sufficient water to irrigate the land. However, the application further discloses that the State of Idaho does not grant rights to appropriate water before land embraced in an application is classified as suitable for desert land entry or the entry is allowed.

Appellant has petitioned for classification of the tract applied for as suitable for entry under the desert-land entry law. Act of March 3, 1877, as amended, 43 U.S.C. §§ 321-339 (1976). Such a classification and opening to entry is a prerequisite to occupancy, settlement, and disposition of the land. 43 U.S.C. § 315f (1976). As noted in the BLM decision, lands may be classified as suitable for desert land entry if the lands are chiefly valuable for agricultural purposes and all provisions concerning irrigation water set forth in 43 CFR 2430.5(d) are met. This regulation provides, in pertinent part, that: "If it is determined that the irrigation of land otherwise suitable for homestead entry would endanger the supply of adequate water for existing users or cause the dissipation of water reserves, such land will not be classified for entry." Although the decision appealed from is somewhat vague, it does not appear that a final decision has been made on appellant's petition for classification of the land. In any event, to the extent that appellant purports to appeal such a determination, the appeal must be dismissed since this Board has no jurisdiction to entertain appeals from classification decisions. 43 CFR 2450.5(d); 43 CFR 4.410(a).

[1, 2] Further, to the extent appellant is appealing the allowance of 30 days to show evidence of rights in a source of water both permanent and sufficient to irrigate all irrigable lands in his application, the appeal is properly dismissed as interlocutory. Carl Gerard, 70 IBLA 343, 346 (1983). The decision below was, in effect, an interim determination allowing appellant an opportunity to cure a perceived deficiency. Id. We would note,

however, that the decision of BLM is merely applying the relevant regulation. 43 CFR 2521.2(d). It is well established that an application for desert land entry is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show that he has acquired a right from the State to appropriate underground water or that he has taken appropriate steps to secure such a right to the extent allowed by law. Janice Pearson, 73 IBLA 220 (1983); James R. Hardcastle, 69 IBLA 341 (1982). 1/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed without prejudice.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

James L. Burski
Administrative Judge

1/ In states where no permit or right to appropriate water is granted until the land within the application is classified as suitable for desert land entry or the entry is allowed, the regulation permits a showing that the applicant is otherwise qualified under state law to secure such a right. 43 CFR 2521.2(d).

