

ELMER A. KUBLER

IBLA 84-115

Decided May 4, 1984

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting desert land entry application, N-22198.

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 underground water sources but fails to show at the time of filing his application 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, looking to the acquisition of such a right.

APPEARANCES: Elmer A. Kubler, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Elmer A. Kubler appeals from an October 12, 1983, decision of the Nevada State Office, Bureau of Land Management (BLM), rejecting desert land entry application N-22198, because appellant had not "proceeded as far as possible in acquiring a right to water for irrigation of [his] entry." BLM stated that information submitted with appellant's desert land application indicated that he proposed to irrigate the entry from a well, but that appellant had provided no evidence showing he had applied to the Nevada State Water Engineer for appropriation of underground water for irrigation purposes.

In his statement of reasons for appeal of the BLM decision, appellant states that he was under the impression that he had gone as far as he could to acquire a right to water because a "Water Marshall" in Elko, Nevada, ^{1/} had told him that "[h]e [the water marshall] wouldn't allot water until [appellant] had permission to go on the land." Appellant further asserts that the water marshall also told him both that, since water permits are "only good for 90 days at a time," obtaining a water permit would "be a waste

^{1/} The reference is apparently to a representative of the Division of Water Resources, Department of Conservation and Natural Resources, of the State of Nevada.

of money until I had permission to go on the land" and that "[s]ince he wouldn't know for sure if I would get the land * * * I would be trespassing on government land." Appellant has enclosed with his statement of reasons a photocopy of a letter dated May 16, 1980, sent to him by BLM in response to an inquiry made by appellant regarding the processing of his application. Among other information contained in the response is the statement, emphasized by appellant, that "[BLM is] attempting to have all of the [desert land entry applications] processed before next spring--thus entry may be possible at that time." 2/ Based on the information provided to him it can be concluded that appellant was waiting for his application to be approved before obtaining a "permit" for water. Finally, appellant states that information should have been provided to him "about how to get water permits without entry to land." 3/

[1] The Desert Land 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 in original.)

The pertinent regulation, 43 CFR 2521.2(d), provides that no desert land entry application will be allowed unless accompanied by evidence

2/ The May 16, 1980, BLM letter to appellant stated that BLM did not have a copy of the soils report mentioned by appellant. The record shows that appellant later provided BLM with those samples.

3/ Included in the case file is an undated interlocutory "Decision-Notice of Deficiency-Application Held For Rejection Unless Deficiency Corrected" issued by BLM to appellant. The decision states that page 3 of appellant's application was being returned because of the way appellant answered question 12b. That question asks whether an applicant has proceeded as far as possible toward acquiring a right to the permanent use of sufficient water to irrigate and reclaim permanently all of the irrigable portions of each of the legal subdivisions applied for.

Concerning this question, the decision provides:

"You have answered this question 'yes.' This response requires submission of evidence that you have filed a water permit application with the State Water Engineer's Office or evidence of the source from which your irrigation water is being obtained (i.e., private water rights you are purchasing). * * * If yes is not an accurate response, please correct your application by answering 'no' to this question."

The decision further provides that appellant's application could not be considered complete and could not be processed until the deficiency is corrected. Appellant was allowed 30 days from receipt by him of the decision within which to correct the deficiency.

A certified mail return receipt card signed by Mrs. Elmer Kubler shows the date of delivery of the decision to be Nov. 2, 1981.

In response to the notice, appellant returned page 3 of the application with the response to question 12b having been changed from "yes" to "no." In explanation, appellant provides much the same information as is found in the statement of reasons concerning his inability to make application for water rights until he had the permission of BLM to enter on the land.

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.

The Department has consistently held that a desert land entry application not accompanied by evidence showing both that the applicant has obtained a water right and that the right would provide a permanent and feasible source of sufficient water for irrigation is properly rejected. Janice Pearson, 73 IBLA 220 (1983); Patricia K. Scher, 59 IBLA 276 (1981). Further, this Board has noted that an application in Nevada is properly rejected where the applicant who proposes to irrigate the land by means of a well makes no showing that, at the time of filing of his application, he had taken any action to initiate the right to appropriate underground water. James Neil Fletcher, 78 IBLA 330 (1984); James R. Hardcastle, 69 IBLA 341 (1982), and cases cited therein.

Despite a declaration that appellant, after inquiry, had learned that the area where desert land entry is sought is open to well drilling and that sufficient water is available to irrigate the acreage for which he applied, there is no evidence in the record showing he had proceeded as far as possible in acquiring a right to water. The water right showing could be accomplished by evidence that an application for an underground water permit had been filed with the State Engineer, or by evidence that the applicant had procured a source of sufficient water to irrigate the irrigable portions of the lands he sought to enter under the Desert Land Laws. James R. Hardcastle, *supra*. 4/

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.

Will A. Irwin
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

4/ The regulation, 43 CFR 2521.2(d), further provides that 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, no application will be allowed unless accompanied by evidence satisfactorily showing that the applicant is otherwise qualified under State law to secure such permit or right. If applicant intends to procure water contractually but is unable to obtain a contract for the water in advance of the allowance of his entry, then the regulation requires that he must furnish, in lieu of the contract, some written assurance from the responsible officials of the entity with whom he is contracting that, if his entry be allowed, he will be able to obtain from that source the necessary water.

