

Appeal from a decision of Boise District Office, Idaho, Bureau of Land Management, rejecting desert land entry application. I-10184.

Affirmed.

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

A decision rejecting a desert land entry application will be affirmed 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 is qualified under state law to obtain the necessary right to appropriate water.

APPEARANCES: Richard H. Greener, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Richard H. Greener has appealed from a decision of the Boise, Idaho, District Office, Bureau of Land Management (BLM), dated October 18, 1984, rejecting his desert land entry application, I-10184.

This case stems from a prior decision by the Board on February 29, 1984. In Richard H. Greener, 79 IBLA 234, we dismissed without prejudice an earlier appeal from an April 25, 1983, BLM decision requiring appellant to submit evidence pursuant to 43 CFR 2521.2(d) of a source of water "both permanent and sufficient to irrigate all the irrigable lands in [his] application" and providing that failure to do so will "result in the final rejection of [the] application." We dismissed the prior appeal as interlocutory because the BLM decision was an "interim determination allowing appellant an opportunity to cure a perceived deficiency." Richard H. Greener, supra at 235. In its October 1984 decision, BLM finally rejected appellant's application because he had made no showing of an "adequate and permanent source of water."

Appellant's application was filed with BLM on December 19, 1975, for 320 acres of land situated in secs. 15 and 22, T. 3 S., R. 4 E., Boise Meridian, Idaho. Appellant proposed to irrigate the land by means of a well, drilled to a depth of 300 feet. Appellant stated on the application that

the State of Idaho would not grant water appropriation rights until the land was either classified as suitable for desert land entry or the entry was allowed (Item 13c, Form 2520-1 (Oct. 1973)). A petition for classification of the land as suitable for desert land entry accompanied appellant's application.

[1] The issue raised by this case is whether BLM may reject an application for desert land entry where the applicant fails to provide any evidence that he will be successful in obtaining a right from the state to appropriate the water necessary to cultivate the land described in the application. By order dated May 7, 1981, the Director, Department of Water Resources for the State of Idaho (DWR), designated certain land as part of the "Cinder Cone Butte Critical Groundwater Area," because DWR had determined that "potential withdrawal and use of groundwater pursuant to the outstanding permits total more than 1.5 times the calculated recharge and would exceed the reasonably safe supply." By letter dated March 9, 1983, DWR informed BLM that: "Since the designation, the department has not approved new permits for appropriation of groundwater for consumptive uses within the boundaries and does not anticipate that it will." In its April 1983 decision, BLM stated that appellant's application is "within [the] critical groundwater area." ^{1/}

In his statement of reasons for appeal from the October 1984 BLM decision, appellant contends there are "insufficient facts" to support the decision and that the "[m]oratorium" is illegal, arbitrary and capricious, and a denial of equal protection to persons similarly situated.

At the outset, we note that this Board, an agency of the Federal Government, is not in a position to adjudicate the validity or constitutionality of the "moratorium," by which we interpret appellant to mean the apparent decision by DWR not to issue state water permits for this land in the foreseeable future. Relief from this moratorium can only be obtained by appellant from state administrative tribunals or state courts. The critical factor here is that DWR, the state agency authorized to issue rights to appropriate water, has determined not to issue such rights for the land involved here. This is indicated in the record by the May 7, 1981, order of the Director, DWR, establishing the "Cinder Cone Butte Critical Groundwater Area." This determination is confirmed by the March 9, 1983, letter from DWR to BLM indicating that no new permits for appropriation of groundwater have been approved since the designation and that no approval of permits is anticipated.

We find this case to be distinguishable from Julie A. Peterson, 86 IBLA 118 (1985), in which the Board held BLM erred in rejecting desert land entry applications on the assumption that the state water authority would reject the appellants' water right applications which had not been adjudicated by the state. In Peterson, BLM proceeded, in essence, to adjudicate the water right applications pending before the state authority based on information

^{1/} It appears from the record that the land in sec. 15, T. 3 S., R. 4 E., Boise Meridian, Idaho, included in appellant's application, is within the critical groundwater area although the adjacent land applied for in sec. 22 is just outside the boundary of the critical groundwater area.

obtained from the state. In this case, the state has made a ruling that it will not issue any further permits for appropriation of groundwater in the critical area and has indicated it does not anticipate a change in this ruling. Thus, approval of appellant's water right application is effectively precluded.

The regulation at 43 CFR 2521.2(d) provides that "[n]o desert-land application will be allowed unless accompanied by evidence satisfactorily showing" either that the applicant has acquired a right from the state to appropriate sufficient water or that he has taken appropriate steps to secure such a right to the extent allowed by law. In addition, the regulation provides that, where a state will not grant a permit or right until the land is classified as suitable for desert land entry or the entry is allowed, the applicant may submit evidence that he is "otherwise qualified under State law to secure such permit or right." *Id.* It is well settled that BLM may properly reject a desert land entry application where the applicant fails to submit the evidence required by 43 CFR 2521.2(d). Joe J. Pinson, 84 IBLA 96, 91 I.D. 359 (1984), and cases cited therein. A decision rejecting a desert land entry application will be affirmed where the record indicates that the state agency with authority to issue water rights permits is refusing to issue any permits for land within appellant's application. 2/

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.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Will A. Irwin
Administrative Judge

2/ While, as we noted above at n.1, only part of the land sought appears to be within the Cinder Cone Butte Critical Groundwater Area, appellant has not indicated any willingness to accept less than all of the acreage within his application. Accordingly, rejection of the entire application seems appropriate.

