

DIANE M. JENSEN
ODELL M. SMITH, JR.

IBLA 86-110, 86-114

Decided April 23, 1987

Appeals from decisions of the Boise District Office, Bureau of Land Management, rejecting applications for desert land entry. I-12021; I-7153.

IBLA 86-110 affirmed; IBLA 86-114 dismissed.

1. Desert Land Entry: Applications -- Withdrawals and Reservations:
Effect of

BLM may properly reject a desert land entry application where, prior to classification of the lands sought and prior to the entry being allowed, the lands have been withdrawn by a public land order as part of the Snake River Birds of Prey Area.

APPEARANCES: Diane M. Jensen, pro se; Odell M. Smith, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Diane M. Jensen and Odell M. Smith, Jr., have appealed from decisions of the Boise District Office, Bureau of Land Management (BLM), dated September 27 and September 30, 1985, respectively, rejecting the application filed by each for a desert land entry. ^{1/} In support of its decisions, BLM stated that in November 1980, the Secretary of the Interior issued Public Land Order (PLO) No. 5777 withdrawing the lands sought by appellants from entry under the Desert Land Act. This order established the Snake River Birds of Prey Area. Rejection was appropriate, BLM concluded, because regulation 43 CFR 2520.0-8(a) requires that desert land entries be made only on "unreserved, unappropriated" public land.

Appellants Jensen and Smith point out on appeal that they had each filed their desert land entry application prior to the order withdrawing the

^{1/} These applications were filed pursuant to section 1 of the Act of Mar. 3, 1877, as amended, 43 U.S.C. § 321 (1982), commonly known as the Desert Land Act. Appellant Jensen seeks lands in S 1/2 NE 1/4, N 1/2 S 1/2 sec. 10 and in S 1/2 NW 1/4 sec. 11, T. 1 N., R. 1 W., Boise Meridian. Appellant Smith seeks NW 1/4 sec. 21, T. 5 S., R. 7 E., Boise Meridian.

lands sought by each. The record shows that Jensen filed a deficient application on April 30, 1976, and apparently corrected these deficiencies by filings received on January 31, 1977. By memorandum of February 8, 1977, BLM informed Jensen that her petition-application 2/ would be forwarded to the Boise District Office for "the required field examination and classification action."

A deficient application was similarly filed by Smith on August 29, 1973. Following a notice of deficiency dated October 28, 1975, Smith filed additional materials on November 24, 1975. Some of these materials addressed a common water delivery system that Smith planned to develop along with other desert land entry applicants. By internal memorandum dated August 17, 1976, BLM found that the information submitted by those applicants seeking the common water delivery system "leaves a lot to be desired." BLM did not request further information of Smith and others sharing the common water delivery system because the lands sought were within the Snake River Birds of Prey study area, were the subject of numerous conflicts with other desert land entry applications and Carey Act proposal I-8892, and were involved in an "eight-year agriculture study plan" and other programs. Believing that these matters would delay BLM action and that any supplemental data would be out of date and obsolete by the time these applications could be considered, BLM deferred its request for further information and instead concluded that the applications should be sent to the Boise District Office for classification action. Smith was informed of these facts and was further told that there would be considerable delay before action would be taken on his application by letter dated August 19, 1976.

The above facts describing the progress of the Jensen and Smith applications are set forth in some detail to ascertain what rights, if any, the applicants had that might cause their applications to survive the withdrawal under PLO No. 5777. That withdrawal, while describing the lands sought by appellants, was expressly made subject to valid existing rights.

The BLM decision of September 27, 1985, refers to Jensen's application as "perfected." In her statement of reasons, Jensen argues that her application was "allowed" on January 31, 1977, and that it then remained for BLM to approve or disapprove it. The record reveals, however, that Jensen's application was never allowed. By sending Jensen notice of her application deficiencies, BLM sought to make her application "acceptable for filing." 3/ BLM's action was in conformity with 43 CFR 2450.2:

Upon the filing of a petition-application, the authorized officer shall make a preliminary determination as to whether it is regular upon its face and, where there is no apparent defect, shall proceed to investigate and classify the land for which it has been filed. No further consideration will be given to the

2/ Accompanying the applications filed by Jensen and Smith were petitions to the Secretary of the Interior to have the lands in n.1 "classified or otherwise made available for entry or disposition pursuant to my application."

3/ Letter decision to appellant Jensen, dated Jan. 24, 1977.

merits of an application or the qualifications of an applicant unless or until the land has been classified for the purpose for which the petition-application has been filed.

Upon Jensen's apparent cure of the deficiencies in her application, classification of the lands as suitable or unsuitable for desert land entry was BLM's next task. Before classification occurred, however, the Secretary withdrew the subject lands from entry under the Desert Land Act. This withdrawal (PLO No. 5777) rendered moot any inquiry whether Jensen's application would be "allowed." BLM's description of Jensen's application as perfected, rather than "allowed," was accurate.

With respect to appellant Smith, it is doubtful whether his application was ever perfected. As noted by BLM in its internal memorandum of August 17, 1976, additional information had yet to be requested to more fully describe the common water delivery system in which Smith participated.

Departmental case law makes clear that the filing of an application to appropriate public land, such as an application for a desert land entry, does not create any present right to the land in the applicant. Everett H. Adkins, A-28245 (May 23, 1960). Thus, an applicant has no valid existing right that will survive a withdrawal of land, even though the public land order accomplishing the withdrawal expressly makes such action subject to valid existing rights. Id. at 3. A similar holding is present in Frances M. Williams, A-28034 (Aug. 20, 1959) wherein Deputy Solicitor Fritz concluded, "The filing of an application for desert land entry gives the applicant no right to the land, the allowance of such an application being discretionary with the Secretary." Id. at 2. BLM's rejection of the applications of appellants Jensen and Smith was consistent with the above principles. See also Richard S. Gregory, 96 IBLA 256 (1987), and Gary E. Carter, 65 IBLA 338 (1982).

In the Petition for Classification accompanying the application for desert land entry filed by each appellant, classification of land is described as an action "entirely within [the Secretary's] discretion." Guiding that discretion are certain principles set forth at 43 CFR Group 2400. When, in February 1977, Jensen's application was forwarded to the Boise District Office for field examination and classification, the Snake River Birds of Prey study area had already been formed. As subsequently withdrawn by PLO No. 5777 in November 1980, the Snake River Birds of Prey Area was established to protect some 65,000 acres of essential nesting habitat of Snake River birds of prey in Ada, Canyon, Elmore, and Owyhee Counties. Also part of the withdrawal are approximately 420,000 acres of land, including those lands sought by appellants, that were specifically withdrawn from entry under the Desert Land Act. 45 FR 78688 (Nov. 26, 1980). Appellants have failed to show any abuse of discretion by the Secretary in issuing PLO No. 5777.

Our discussion above of the merits of Smith's appeal is dicta inasmuch as Smith failed to file his notice of appeal with BLM in a timely fashion. Smith received BLM's decision of Sept. 30 on Oct. 1, 1985. By the terms of 43 CFR 4.411, Smith was required to file or, at a minimum, to transmit his notice of appeal on or before Oct. 31, 1985. The record shows that his notice of appeal, while dated Oct. 30, 1985, was not transmitted until

Nov. 4, 1985. Appellant's tardy transmittal indicates that he is not qualified to invoke the grace period set forth at 43 CFR 4.422. Failure to file a timely notice of appeal requires dismissal of the appeal. Gary T. Suhrie, 75 IBLA 9 (1983). Accordingly, Smith's appeal is dismissed for failure to file a timely appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 27, 1985, decision of the Boise District Office is affirmed, and the appeal of appellant Smith is dismissed.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge