

Appeals from a decision of the District Manager, Grand Junction District, Colorado, Bureau of Land Management, to grant irrigation ditch right-of-way. COC-50756.

Affirmed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976--Water and Water Rights: Generally

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis

of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

APPEARANCES: Daryl and Winifred Richardson, pro sese; Tye Richardson, pro se; James P. Mahan, Jr., pro se; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

Daryl and Winifred Richardson, Tye Richardson, and James P. Mahan, Jr., have appealed from a decision of the District Manager, Grand Junction District, Colorado, Bureau of Land Management (BLM), dated August 23, 1991, to issue irrigation ditch right-of-way grant COC-50756 to Barton Porter. On February 23, 1990, Porter filed an application for a right-of-way for construction and operation of an irrigation ditch across public land in secs. 35 and 36, T. 6 S., R. 90 W., and sec. 1, T. 7 S., R. 90 W., Sixth Principal Meridian, Garfield County, Colorado. The right-of-way also encompassed stream-flow diversion and over-flow discharge structures. The application was filed pursuant to Title V of the Federal Land Policy

and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1988).

The right-of-way sought from BLM was for only those portions of the ditch crossing public land administered by BLM. The ditch would originate on National Forest land administered by the Forest Service, U.S. Department of Agriculture, and then cross private land before entering public land. Of the total 29,700 feet traversed by the ditch, 9,040 feet would be on public, 6,170 feet on National forest, and 14,490 feet on private land. When finally constructed, the entire ditch was expected to carry, between early May and mid-July, up to 14.4 cubic feet per second (cfs) of water from Three Mile Creek, along with other spring runoff water intercepted along the course of the ditch as it passed through the Three Mile Creek and South Canyon Creek drainages, north along the slopes of Sunlight Peak to an existing ditch leading into the "Porter Reservoir." The water would then be used by Porter for irrigation of his private pasture and crop land. The proposed ditch would replace an existing ditch at a higher elevation that is subject to blockage by snow in the spring and has somewhat more porous soils, in order to allow Porter to fully exercise adjudicated State water rights of up to 14.4 cfs of water from tributaries of Three Mile Creek.

In order to consider the environmental consequences of the proposed ditch project on public land, BLM prepared an environmental assessment (EA), pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1988). On June 23, 1991, based on the EA, BLM issued a "Record of Decision" approving issuance of a right-of-way grant for the proposed ditch and related structures, subject to certain stipulations. Porter had also sought permission from the Forest Service to construct and operate portions of the proposed irrigation ditch across National Forest land. On August 23, 1991, the Forest Service issued a "Decision Notice" approving issuance of a special use permit for the proposed ditch project.

In his August 1991 decision, the District Manager stated that he was issuing a 30-year right-of-way grant to Porter for the irrigation ditch project, effective August 23, 1991. A copy of the grant is appended to the decision. As granted, the right-of-way is 11,070 feet long and 30 feet wide (or 7.6 acres). Appeal was timely taken from that decision.

Our review is confined to the propriety of the District Manager's August 1991 decision authorizing construction and operation of the proposed project on public land under right-of-way grant COC-50756, including the adequacy of BLM's assessment of the environmental consequences of granting that right-of-way. We do not review the Forest Service decision to permit construction and operation of the ditch on National Forest land, since the Board does not have appellate authority to review actions of the Forest Service. See 43 CFR 4.1(b)(3). Nor are we concerned with any permits issued to Porter by private landowners.

[1] Section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), authorizes the Secretary of the Interior to grant a right-of-way for "ditches \* \* \* and other facilities \* \* \* for the \* \* \* transportation \* \* \* of water." This authority has been committed to the discretion of BLM. C. B. Slabaugh, 116 IBLA 63, 65 (1990). A BLM decision exercising such discretion will be affirmed on appeal where the record demonstrates that it was based upon a reasoned analysis of all relevant factors, was made with due regard for the public interest, and sufficient reasons for disturbing the decision are not shown. Coy Brown, 115 IBLA 347, 356 (1990).

Mahan contends that BLM failed to adequately consider the extent to which the proposed ditch will divert water from Three Mile Creek and intercept runoff water in the Three Mile Creek drainage area, thereby adversely affecting his own State water rights attached to the Flannery Ditch and Reservoir. Mahan indicates that water from the creek is delivered by the ditch to users in the area and that reservoir water is being used by him for irrigation and creation of wetlands. He states that he has proposed stocking the reservoir and using it for a fishery and concludes there is not enough water in the creek to satisfy both his and Porter's water rights.

The Richardsons assert that the proposed ditch will intercept runoff water in the South Canyon Creek drainage area, thereby adversely affecting their own State water rights in that creek. They refer to a statement by John M. Currier, a professional water resources engineer, that the ditch will catch water running downslope in the South Canyon Creek drainage area and prevent it from reaching groundwater recharge areas below the ditch, thus affecting springs and ultimately South Canyon Creek. See Letter from Currier, dated July 25, 1991, at 3. They state that such water is used in their farming and grazing operations and adds to the value of their property.

BLM responds that the State has permitted over-appropriation of water in the tributaries of Three Mile Creek and runoff water in the Three Mile Creek drainage area so that there is not enough water to satisfy Porter and those holding senior water rights if they fully exercise those rights. The same is not true in the case of runoff water in the South Canyon Creek drainage area. In either case, BLM correctly concludes that adjudication of a conflict between State water rights is not within the province of BLM, but rather must be resolved by the parties or, if need be, decided in State court pursuant to applicable principles of State law. See also EA at 8.

It cannot yet be said whether and to what extent there will be a conflict between the exercise of Porter's State water rights and those of Mahan and the Richardsons. The potential for a conflict existed before Porter's current request to construct and operate an irrigation ditch so far as it affects the exercise of rights to water from Three Mile Creek, since Porter has long been accorded a right to 14.4 cfs of water from water entering that creek. That he has not fully exercised that right, for whatever reason, does not diminish the fact that the potential for conflict exists. Nevertheless, any such conflict must be left for resolution by the parties

involved or by a State court. See Toghotthele Corp., 95 IBLA 225, 229-30 (1987) (quoting from East Canyon Irrigation Co., 47 IBLA 155, 162 (1980)).

BLM considered the threat to senior rights in drainage areas traversed by the proposed ditch on public land (EA at 3). Further, BLM has provided for protection of those rights. Id. at 10-11. Stipulation No. 12 attached to the right-of-way grant states that, as a condition of issuing the grant, Porter is required to "install all necessary structures [as determined by the Colorado Water Engineer's Office] to \* \* \* bypass water required by senior water rights on drainages intercepted by the ditch." This conforms to Currier's recommendation. See Letter from Currier, dated July 25, 1991, at 4. This stipulation constitutes BLM's assurance that senior water rights will not be adversely affected by the proposed ditch. Appellants have offered no evidence that it will not be adequate to protect senior water rights. The stipulation, however, does not go beyond requiring installation of the proper structures on those affected portions of the ditch found on public land, with the grant subject to termination should Porter fail to do so. It leaves the resolution of any conflict among State water rights to the State courts.

Mahan and Tye Richardson also assert that Porter does not have a State water right permitting him to divert up to 14.4 cfs of water from Three Mile Creek into the proposed irrigation ditch. The record establishes that Porter does in fact have an absolute right to 14.4 cfs of water from tributaries of that creek. On June 20, 1958, a State court awarded Porter an absolute right to 7.8 cfs of water (appropriated July 24, 1953) and a conditional right to 6.6 cfs of water (appropriated September 20, 1955) from such tributaries. The conditional water right was made absolute by final decree of a State court on November 25, 1975. See also Letter to BLM and Forest Service from Water Division V, Division of Water Resources, State of Colorado, dated Sept. 28, 1990, at 1. It therefore appears that Porter has State water rights permitting him sufficient water to use the proposed irrigation ditch to the full extent proposed in his right-of-way application and approved by BLM in issuing the right-of-way grant. See Record of Decision at 2. All that remains is for Porter to obtain State approval for a change in the point of diversion under his water rights from the tributaries of Three Mile Creek to the creek itself. That the State has not yet agreed to that change does not prevent issuance of the right-of-way grant. See Georgene E. Rieck, 76 IBLA 45, 46 (1983) (citing Broken H. Ranch Co., 33 IBLA 386, 389 (1978)).

Appellants Richardson also contend that BLM failed to adequately consider the threat to the environment, as well as to downstream interests, posed by the proposed ditch which, if breached, would subject the surrounding land to erosion and accumulation of sediment. Appellants state that breaches of Porter's existing ditch on private land have occurred in the past and that the portion of the current ditch already constructed on private land has recently been breached. They contend that Porter has seriously underestimated the cost of building the proposed ditch to suggest that he will again build a ditch that is likely to fail.

Appellant Mahan fears that any breach in the ditch will adversely affect the Flannery Reservoir. BLM responds that the portions of the ditch that cross public land are "downstream" from the reservoir, such that any break in the ditch "would have no effect on th[e] reservoir" (Response to Appeal of Daryl Richardson, et al. (Response) at 3). Mahan does not dispute this assertion. We therefore conclude that it was not necessary for BLM, when deciding whether to authorize construction and operation of the ditch on public land, to consider the potential effect of the ditch on the reservoir.

The Richardsons' land lies downstream of those portions of the proposed ditch on public land. The record indicates that BLM has considered the threat posed to that land by any breach in the ditch (Record of Decision at 3; EA at 6; Supplement to EA at 1). The Richardsons have failed to demonstrate that BLM did not adequately comprehend the true nature of the threat to downstream interests and realistically address that threat. See Letter to BLM from Peter Belau, civil engineer, dated July 11, 1990. BLM has taken steps to mitigate the threat. See Record of Decision at 3; EA at 9, 11-12; Supplement to EA at 1. While it may be true that Porter has underestimated the cost of building an adequate ditch and may have failed to maintain the existing ditch on private land, the current right-of-way grant and the attached stipulations provide sufficient assurance that any ditch now built on public land will not fail. Permit stipulation No. 7 requires Porter to build a ditch "in strict conformity" to specifications designed to ensure the integrity of the ditch over time. The 3-foot deep ditch is designed to convey, in normal circumstances, a flow of 14.4 cfs of water at a depth of 1.6 feet, leaving 1.4 feet of freeboard. Run-off water in excess of 14.4 cfs of water flowing in the ditch would leave the ditch by means of overflow structures. Consequently, the ditch would be capable of handling 100-year storms. Also, before passing any water through the ditch, stipulation No. 17 requires Porter to provide BLM with the certification of a licensed civil engineer that the ditch has been constructed in accordance with these specifications. The construction will be inspected by BLM representatives to ensure that it conforms to the specifications. Porter is also required by stipulation No. 1 to provide a bond in the amount of \$10,000, to secure the performance of his obligations regarding construction. If all of this entails more costs than Porter originally anticipated, his only alternative is to pay those additional costs or not build the ditch.

In connection with the bond requirement, the Richardsons contend that the amount required is inadequate, but have presented no evidence to support their contention. We accordingly uphold the amount of the bond. See, e.g., Dallas Oil Co., 93 IBLA 218, 220 (1986) (oil and gas lease). Moreover, appellants have failed to establish the validity of their contention that the ditch will not be adequately constructed in conformity to the specifications required by BLM.

Following construction of the ditch, stipulation No. 16 requires that it be maintained "in a constant state of repair by a usual, customary and

reasonable inspection and maintenance schedule." If "channel down-cutting" exceeds 3 feet where water is allowed to drop, stipulation No. 15 requires the cessation of ditch use until BLM provides further written approval. Stipulation No. 19 further requires that, prior to diverting any water into the ditch each year, Porter inspect the ditch to ensure it will operate in accordance with the design specifications and provide a certification that it is in a "safe condition." Also, under stipulation No. 20, Porter must determine each day that the inflow to the Porter Reservoir is at expected levels or, if it is not, immediately determine the cause and take remedial action. Altogether, these measures should ensure that any deterioration in the condition of the ditch will be timely detected so that a failure can be avoided. Appellants have failed to show otherwise.

Should Porter build or maintain a ditch that is not in conformity to these stipulations, he is required by stipulation No. 14 to reclaim and revegetate "all erosion or other damage on public and private lands" resulting from such failure and, moreover, is subject to the termination of his right-of-way grant for failure to comply with its terms, under section 4(e) of the grant. Frank A. Keele, 107 IBLA 296 (1989). BLM also may continue the original bond in the same or lesser amount to secure the performance of all post-construction obligations, including maintenance of the ditch and restoration of land damaged by any failure of the ditch, even after termination of the grant. BLM indicates that the bond will be so continued (BLM Response at 3-4). Also, the requirement to cure all damage caused by a failure of the ditch will come into play in those situations if, for some reason, there is a delay in responding to a failure and damage occurs. Finally, those affected by any resulting damage may seek to hold Porter liable under State law.

Tye Richardson has argued in favor of requiring Porter to use his existing ditch to bring water to his reservoir. That approach was considered by BLM when the no action alternative was reviewed (EA at 8; Record of Decision at 2). In so doing, BLM fulfilled its NEPA duty. See, e.g., In re Blackeye Again Timber Sale, 98 IBLA 108, 111 (1987). It was not required to adopt that alternative. Appellants have otherwise asserted that BLM failed to adequately review Porter's proposed ditch, including the impact to old growth timber, wetlands, and the Alkali Creek drainage area. In these respects, we have studied the record and conclude that the review was adequate. See Record of Decision at 2-3; EA at 8; Response at 4.

A BLM decision to issue a right-of-way grant will be affirmed on appeal where the record demonstrates that it was based upon a reasoned analysis of all relevant factors, was made with due regard for the public interest, and sufficient reasons for disturbing the decision are not shown. That is the situation here. That appellants would have preferred that no right-of-way grant issue does not establish error in the District Manager's August 1991 decision to issue right-of-way grant COC-50756 to Porter. Therefore, we conclude that the decision under review was proper.

IBLA 92-2

Accordingly, 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.

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Franklin D. Arness  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

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