

JEFF AND PATTY WALKER

IBLA 93-561

Decided August 22, 1995

Appeal from a decision of the Acting Dillon Resource Area Manager, Butte District Office, Montana, Bureau of Land Management, denying a protest of an application for a water pipeline right-of-way. MTM-79001.

Affirmed.

1. Rights-of-Way: Applications–Rights-of-Way: Federal Land Policy and Management Act of 1976–Water and Water Rights: Generally–Water and Water Rights: State Laws

When considering an application for a water pipeline right-of-way, the Department has no power to determine questions of control and appropriation of water rights, as between private parties, as such questions are exclusively matters of state law.

APPEARANCES: Jeff and Patty Walker, Glen, Montana, pro sese; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Jeff and Patty Walker have appealed from a June 25, 1993, decision by the Acting Dillon Resource Area Manager, Butte District Office, Montana, Bureau of Land Management (BLM), denying their protest of an application for a right-of-way (MTM 79001) for a water pipeline filed by Randall and Ila Mae Brooks.

In an application dated March 16, 1993, the Brooks sought a right-of-way for a buried water pipeline from a well on BLM land in the NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub> of sec. 5, T. 4 S., R. 9 W., Principal Meridian, Beaverhead County, Montana, approximately 400 feet across BLM land to private land owned by the Brooks. The water was to be used for domestic and livestock purposes. With their application, the Brooks provided a copy of an acknowledgement of the transfer of Water Right No. 41D-W-040063-00, issued by the Montana Department of Natural Resources and Conservation. That acknowledgement, dated August 17, 1990, showed a transfer from Kambich Ranch, Inc., to the Brooks, entitling them to a water right from the well in question. According to the record that well was drilled in the 1950's by Minerals

Engineering Company to provide a water source for workers at the Ivanhoe millsite and nearby Ivanhoe tungsten mine. The mine operated during the years 1953-1958. The proposed pipeline route passed through an area once occupied by housing for mine and mill workers.

On March 30, 1993, the Walkers filed a protest with BLM arguing that the Brooks should not receive a right-of-way grant. Therein, they alleged: (1) the "water filing is invalid because it is not based on historic use of any kind;" (2) the alleged stockwater improvements upon which the Brooks "claimed water filing" was based never existed and "construction of these improvements would have been illegal without BLM authorization;" (3) "Mineral Engineering drilled this well and used this water for domestic use at the millsite, for which GE [General Electric] holds the water right;" and (4) any right-of-way for a pipeline "would have to be issued by the current millsite permit holder."

On May 26, 1993, BLM responded by letter to the Walkers' protest. BLM explained with regard to items (1) and (3) that the existing water rights appeared to have been transferred correctly and in accordance with Montana water law from Minerals Engineering to Kambich Ranch in the 1950's and from Kambich Ranch to the Brooks in August 1990 upon sale of the ranch. BLM explained that a transfer of ownership of water rights did not require public notice, and that "[i]f you question the validity of the water right, you may pursue your concerns through the [state] adjudication process." BLM further explained that it was the Brooks' responsibility to file an Application for Change of Appropriation Water Right with the state if the purpose of the use has changed from the original application. It also informed the Walkers that they could file an objection to any such application.

Regarding item (2), BLM stated that stockwater improvements are located on the Brooks' private land and do not require any authorization for BLM. Finally, BLM explained concerning item (4) that to the extent that Brooks' pipeline crossed Federal land, BLM was charged with the authority to adjudicate an application for such a right-of-way.

On June 11, 1993, the Walkers wrote BLM stating that they would like to "maintain our formal protest \* \* \* of the right-of-way." The Acting Area Manager replied by decision of June 25, 1993, that the Walkers had raised no new issues, that BLM's previous response had dealt comprehensively with their concerns, and that they had failed to raise further challenges to BLM's responses.

In their statement of reasons (SOR) for appeal, appellants again assert that the Brooks have no water right. They also assert that they do not own the well. They charge that by granting the right-of-way, BLM may be facilitating the Brooks' illegal use of the water. Appellants also allege that BLM is wrongly taking "water from our spring to use for livestock when we are not receiving the water we are entitled to and when the BLM already has an existing stockwater facility just 200 yards away" (SOR at 2).

BLM answers that the Brooks are named on the official Montana Department of Natural Resources and Conservation Acknowledgement of Water Right Transfer concerning the well at issue. BLM contends that it properly relied on the transfer document in issuing the Brooks' right-of-way. BLM contends that arguments concerning the proper use of the water right and the amount of the water right are issues for state adjudication and are not germane to issuance of the right-of-way. BLM further states that allegations concerning the use and ownership of lands adjoining the right-of-way area are not relevant to the issuance of the right-of-way and are, in fact, the subject of a suit filed by the United States in Federal District Court, United States v. Jeff and Patty Walker, No. CV 93-32-BU (D. Mont.).

[1] When considering applications for rights-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights, as between private parties, as such questions are exclusively matters of state law. Togothle Corp., 95 IBLA 225, 229-30 (1987).

Section 501(a)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(1) (1988), authorizes issuance of "'rights-of-way' over, upon, under, or through [public] lands for (1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water." In East Canyon Irrigation Co., 47 IBLA 155 (1980), BLM rejected a right-of-way application to drill two water wells, construct a 12-foot road and two pump houses, and to convey water therefrom off the public land. The Board rejected a charge that BLM was improperly adjudicating water rights, stating that BLM's nexus to the controversy was grounded solely on the fact that the well sites were situated on Federal land. Therefore, under applicable Federal law, a Federal right-of-way grant was necessary if an applicant wished to construct, operate, and maintain a water gathering facility. In exercising its discretion whether to grant or deny a right-of-way application, the Department has no power to determine questions of control and appropriation of water rights, as such questions are exclusively matters of state law. Id. 47 IBLA at 162.

In the present case, as in East Canyon Irrigation Co., the well is on BLM land, and under FLPMA, BLM is charged with authority to grant or deny water pipeline rights-of-way across Federal lands. To the extent appellants allege that BLM's grant of the right-of-way was improvident or administratively in error, appellants' allegation is not supported by the record. Appellants' challenge to the Brooks' water rights is not within the jurisdiction of the Department. Finally, the scope of this appeal is limited to a review of whether BLM properly denied appellants' protest of the right-of-way grant. Appellants' allegations that BLM interfered with their property or water rights is not germane to that issue and therefore beyond the scope of this appeal.

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.

---

Bruce R. Harris  
Deputy Chief Administrative Judge

I concur.

---

Franklin D. Amess  
Administrative Judge

