

STEWART HAYDUK

IBLA 93-154

Decided September 13, 1995

Appeal from a decision of the Kemmerer Resource Area Manager, Bureau of Land Management, denying right-of-way application WYW-119922. EA WY-047-92-31.

Affirmed.

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

A BLM decision rejecting a right-of-way application for a water-gathering and pipeline project, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1988), will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Generally–Rights-of-Way: Federal Land Policy and Management Act of 1976–Rules of Practice: Appeals: Burden of Proof

The burden is on a right-of-way applicant, who challenges a BLM decision denying its application, to demonstrate by a preponderance of the evidence that BLM erred in the collection or evaluation of data supporting rejection and in its conclusions. The applicant's reliance on a BLM engineering report, which concluded that a water-gathering and pipeline project was marginally feasible, does not establish error in the denial, when the denial decision was based not only on the engineering report, but on an environmental analysis prepared by BLM experts, showing that granting the application would adversely affect public land values, including grazing activities, wetlands, and wildlife and its habitat.

APPEARANCES: Karen Budd-Falen, Esq., Cheyenne, Wyoming, for appellant; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Stewart Hayduk has appealed from a June 11, 1992, Decision Record (DR) issued by the Kemmerer Resource Area Manager, Bureau of Land Management (BLM), denying right-of-way application WYW-119922 for the Thomas Canyon Pipeline and Spring Development Project, in sec. 11, T. 15 N., R. 121 W., sixth principal meridian, Uinta County, Wyoming. The Area Manager based his DR on Environmental Assessment (EA) No. WY-047-92-31.

On July 30, 1990, appellant, the owner of a ranching operation near Evanston, Wyoming, filed with BLM a right-of-way application seeking approval to develop "springs * * * within BLM boundaries" and construct a pipeline on a 35 foot-wide and 3,500 foot-long right-of-way across public land in order to provide "water for livestock on adjacent ground."

The record shows that there are two springs located on public land in the NE $\frac{1}{4}$ sec. 11, T. 15 N., R. 121 W., and another spring on private land in the SW $\frac{1}{4}$ sec. 11. Although appellant stated in the application that the springs for development were on public land, the map accompanying his application showed the proposed right-of-way running from the spring on private land northeast across public lands in the NE $\frac{1}{4}$ sec. 11 to private lands in sec. 1, T. 15 N., R. 121 W.

The record also contains a copy of a 1909 State of Wyoming "Certificate of Appropriation of Water," presently held by appellant. That certificate, with an April 16, 1904, appropriation date, grants the right to appropriate 0.21 cubic feet per second (cfs) of water from "Three Springs in Thomas Canyon," through the Thomas Ditch, for irrigation and domestic use on 15 acres of private land in sec. 1, T. 15 N., R. 121 W. ^{1/} Appellant sought the pipeline as a replacement for the Thomas Ditch, stating in his application that the flow of water was so small that the ditch was not an efficient form of conveyance.

^{1/} Prior to the passage of FLPMA, one could obtain a right-of-way across public lands for "ditches and canals," under the Act of July 26, 1866, 43 U.S.C. § 661 (1970). However, section 706(a) of FLPMA, 90 Stat. 2793, amended 43 U.S.C. § 661 (1970), by deleting references to rights-of-way. In a Sept. 28, 1989, letter to appellant, the Area Manager acknowledged that appellant had a "valid right to operate the Thomas Ditch under the authority of the Act of July 26, 1866, as amended." He stated that appellant had the "right to maintain this facility, but any relocation, or reconstruction will need to be authorized with a FLPMA right-of-way grant. Any surface disturbance not within an area previously disturbed by the facilities including construction, operation or maintenance activities is considered realignment or reconstruction."

In a November 9, 1990, letter to appellant, the Area Manager explained that BLM had originally interpreted his application as proposing development of one spring on private land (apparently on the basis of the map accompanying the application), but that "during a recent field visit by my staff, you pointed out two springs on public land that you wish to develop." The Area Manager stated that he considered that to be a "major deviation" from the original proposal and he expressed his concern that "enough water remains flowing from the springs to meet the needs of the livestock and wildlife currently utilizing the public lands." The Area Manager requested that appellant amend his application to reflect the change and that he submit information regarding flow rates from the springs and a plan of development.

The file contains an undated letter to appellant from John A. Yarbrough, the State of Wyoming Hydrographer-Commissioner, apparently filed with BLM by appellant in response to its request for further information. ^{2/} In that letter Yarbrough stated that on November 29, 1990, he measured the flow "of Three Springs in Thomas Canyon." He found that the combined flow rate from all three springs was 0.0162 cfs with 0.0032 cfs coming from the "Upper spring," 0.003 cfs from the "Middle spring," and 0.010 cfs from the "Lower spring." ^{3/} He then stated: "According to your appropriation you should receive 0.21 cfs. Without developing these springs, I do not believe you will be able to receive your full appropriation."

By letter of February 8, 1991, the Area Manager informed appellant of the necessity to prepare an environmental assessment of the proposed use, and he again requested that appellant submit a plan of development and an amended application. ^{4/}

On February 12, 1991, appellant filed with BLM his "proposal for development of the two springs on BLM ground in Thomas Canyon." That proposal consisted of a contractor's one page description of construction and cost data. However, appellant submitted no profile drawings and no indication where the pipeline would be located on the ground. Also, appellant did not specify the amount of surface disturbance that would be caused by construction.

^{2/} The copy of the letter in the file does not bear a BLM date-stamp. Nevertheless, in its answer BLM represents that it received the letter "on December 18, 1990." Another copy of the letter accompanied a plan of development filed by appellant with BLM on Feb. 12, 1991.

^{3/} The "Upper spring" is the spring located on private land in sec. 11. The "Middle" and "Lower" springs are those located on public land in sec. 11.

^{4/} No mention is made in this letter of the necessity for filing flow rate information. Thus, BLM apparently had received a copy of the Yarbrough letter prior to February 8, 1991.

By letter of February 28, 1991, the Area Manager notified appellant that his plans were insufficiently detailed to permit an evaluation of environmental consequences or to determine whether the project was feasible. The Area Manager made suggestions to aid appellant in preparing and submitting a properly detailed plan of development. He specifically stated that the plan should include "detailed information about the construction of the pipeline through the old spillway of the dam, and how reclamation will be accomplished to stabilize the soil." 5/

In June and July 1991, appellant submitted engineering plans for the pipeline as designed by Uinta Energy and Surveying Company, Inc. 6/ The Assistant District Manager, Operations (ADMO), BLM, reviewed the plans and provided the Area Manager with his evaluation in an August 21, 1991, memorandum. The ADMO stated that the design submitted by Uinta was "a full pressure gravity flow system" utilizing a 2-inch PVC pipeline, which has a capacity of 18 gallons per minute [GPM]. Because "the measured yield from all three springs is only 7 GPM," 7/ he concluded that the pipeline "will have difficulty flowing because it will airlock and surge" (Memorandum at 1). He identified problems where the pipeline would be constructed through the reservoir spillway because "grade requirements dictate the need for a deep trench and the possibility of major excavation in the spillway." Id. At another point in his memorandum he identified such excavation as "the weak link in the entire project and additional explanation is needed from the engineer and Mr. Hayduk." Id. at 2. While he did not generally foresee any further problems relating to surface disturbance, he stated that

5/ The referenced "dam" was the "Chesney Dam." As explained in the EA, "[m]aps filed in 1904 showing the Thomas Ditch do not differentiate between the Thomas Canyon drainage and the ditch. In approximately 1923 the Chesney Dam and Reservoir were constructed * * * near the original location of the Thomas Canyon Drainage" (EA at 1). The EA further stated that over the years, the reservoir trapped silt, obliterating the historical channel of the Thomas Ditch, and the spillway on the dam was washed out, "allowing the water from the spring runoff to flow out the breach in the dam." Id. In addition, "water from the springs collect[s] in shallow pools in the reservoir and seeps under ground and resurface[s] at various points downstream from the old dam." Id.

6/ The Uinta plan drawings identify the Thomas Canyon pipeline project as progressing in two phases. Phase I is the development of the two springs on public land, identified on the drawing as "Thomas Ditch Spring No. 1" and "Thomas Ditch Spring No. 2," and the pipeline right-of-way to appellant's private lands. Phase II is development of the spring on private land to the west of the public land ("Thomas Ditch Spring No. 3") and a pipeline right-of-way from that spring to the "Thomas Ditch Spring No. 2."

7/ Attached to a copy of the Yarbrough letter in the case file is a note which states: "Conversion of CFS to GAL/MIN .0162 x 448.831 = 7.27 gals/ min."

he was concerned with the stability of the spillway and wanted to ensure that there would be no acceleration of erosion created by the pipeline construction.

The ADMO also found that the design did not include a maintenance and operation plan. However, based on conversations with appellant, the ADMO predicted, at page 3 of his memorandum, various problems with maintenance and operation of the pipeline. First, he stated that sections of the pipe could freeze and possibly break because of no plans to "blow the pipeline out in the fall." Repairs would be necessary and a break in the spillway "could cause some erosion." Second, he stated that the valve at the end of the pipeline would have to be monitored "to insure the outflow rate is less than inflow rate if he wants to maintain a full pipe and have a pressure system to operate a small sprinkler." He characterized the project as "marginally feasible" due to the maintenance and operation concerns and compared it to "watering a large lawn with a garden hose." ^{8/}

In the conclusory section of his memorandum, the ADMO again stated that the project was "marginally feasible" and that because of its hydraulic characteristics, trouble-free operation was unlikely. He also predicted that "some surface water will be maintained at Springs No. 1 and 2," but that "access to livestock water could be a problem if the reservoir is dry" (Memorandum at 3). Finally, he stated that in his opinion, "the right-of-way may have to be granted in order to avoid a potential conflict with the State Engineer's office. I feel mitigation can be developed" (Memorandum at 4).

By letters dated April 21, 1992, the Area Manager distributed to appellant and various other interested parties copies of the draft EA and draft DR denying the right-of-way application. Comments were to be filed by May 20, 1992. During that time period, BLM received two comments, one from the Wyoming Game and Fish Department and one from Harold J. Saxton, the Federal grazing lessee for the land in sec. 11 containing the two springs. Both supported BLM's action. Appellant provided no comments.

^{8/} The comparison was based on the ADMO's belief that the purpose of the system was for irrigation. This belief is further evidenced in his offered opinion that "if successful irrigation of 15 acres is the objective, this could be more realistically achieved by pumping from the river" (Memorandum at 3). However, appellant had stated in his application that the purpose of the system was to provide water for livestock. The exact end use for the water is not clear from the record, since the EA recounts that appellant explained to BLM that "he plans to construct a guest cabin on his land and plans to supply the cabin with water from the springs" (EA at 3); see also October 21, 1991, memorandum from Mark Hatchel, Lead Realty Specialist, to Darrel Short, Area Manager, regarding an Oct. 18, 1991, field meeting with appellant.

On June 11, 1992, the Area Manager issued his DR from which this appeal is taken. Relying on the EA, the Area Manager stated the following rationale for his action:

The development of the spring sources would dry up or significantly reduce the wetlands associated with the springs and the wetlands down stream from the old dam. Approximately 2 to 3 acres of wetlands and the associated vegetation could be lost or severely degraded by the development of the springs. This action would violate the directives stated in Executive Order 11990, [9/] and Bureau policy concerning the protection of wetlands, and the Kemmerer Resource Management Plan (RMP). This action would also violate the presidential policy of no net loss.

If the springs are taken out of production the local mule deer population would be forced to move to less dependable water sources on private land. The sage grouse would be more affected as would other non-game birds and small mammals because they would be less likely to find a new source of water. Drying up of the springs would also affect the biodiversity of the area by reducing the wetlands. The non-game mammals that now depend on the spring as a source of water would not be able to find new water. Other types of small animals that depend on the wetlands would also disappear from this area thus reducing the number and diversity of animals in the area.

Alternative stock watering structures will have to be developed. However, it is unlikely that there are any suitable sites to construct such water catchment structures on public land. If sufficient amount of water is not available to his livestock throughout the grazing season, the grazing lessee may

9/ Exec. Order No. (EO) 11990 of May 24, 1977 (EO 11990), 3 CFR 121 (1978), as amended, EO 12608, 3 CFR 249 (1988), requires the protection of "wetlands." BLM's policy for the protection of wetlands in accordance with EO 11990 is set forth at 45 FR 7889 (Feb. 5, 1980). The term "wetlands" is defined in sec. 7(c) of EO 11990, 3 CFR 123 (1978), as "those areas that inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction." 42 FR 26964 (May 25, 1977). Sec. 2(a) of EO 11990 provides that a Federal agency

"shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use."

have to reduce the amount of cattle on the allotment or give up the lease altogether.

The proposed action will have no effect on any documented historic properties. However, there is a potential effect on the Chesney Dam, which must be documented, evaluated and assessed for effects prior to authorization of any future actions affecting the Dam.

The feasibility of the project is marginal. The hydraulic characteristics and the design of the project raises doubt that a reliable and trouble free pipeline operation will occur, resulting in continual environmental disturbance associated with the maintenance of an unreliable project.

During the adjudication process several alternatives to the proposed action, that would reduce the impacts, were brought up and discussed with the applicant. These alternatives, though feasible were rejected by the applicant.

The environmental assessment has shown that the proposed action would violate regulations stated in 43 CFR 2800.0-7(a), 43 CFR 2802.4(a)(2), 43 CFR 2802.4(a)(4), and 43 CFR 2802.4(a)(5).

The first regulation identified by the Area Manager, 43 CFR 2800.0-7(a), merely states that 43 CFR Part 2800 contains the regulations governing the issuance, amendment, and renewal of rights-of-way for necessary transportation or other systems or facilities which are in the public interest. The other three regulations, 43 CFR 2802.4(a)(2), (a)(4), and (a)(5), provide that a right-of-way may be denied if the authorized officer determines, respectively, that the proposed right-of-way would not be in the public interest; that the proposed right-of-way would be inconsistent with the Federal Land Policy and Management Act of 1976 (FLPMA) or other applicable laws; or that the applicant does not or cannot demonstrate the requisite technical or financial capacity.

On appeal, appellant questions whether the Area Manager's decision is based on significant public interest considerations. He disputes the merits of the Area Manager's stated concerns regarding degradation of wetlands, if the project were approved. Also, he contends that several judgments made by the Area Manager are inconsistent with those made by the ADMO. Appellant asserts that while the ADMO, in his August 21, 1991, memorandum, indicated that there would be water available on the public lands if the project were built, the Area Manager "may have drastically overestimated the loss of water to the area," and wrongly concluded that wildlife would have to seek new sources of water (Notice of Appeal at 10). Moreover, appellant states, the Area Manager's finding that scarcity of water

could reduce livestock use or force reduction of grazing privileges is much more dire than the ADMO's prediction of the worst case scenario, to the effect that scarcity of water for livestock "could be a problem if the reservoir is dry" (Notice of Appeal at 11). Appellant alleges that the Area Manager failed to properly research whether alternative water catchment structures for a livestock water supply could be constructed on the public land.

Appellant asserts that while the EA envisions detrimental effects if the project were built, there is no explanation of how these conclusions, which, he alleges, are inconsistent with BLM's field studies, were reached. Appellant also maintains that he is technically and financially capable of sustaining the project. Appellant emphasizes that "marginally feasible" is still feasible and that he ought to be able to exercise his legally acquired water right.

Appellant claims that if BLM's decision is affirmed, he would be entitled to compensation for the taking of his water right. In a supplemental pleading, appellant has amplified this argument to allege that BLM's rejection of the right-of-way constitutes a challenge to his water right as permitted and certified by State law. Appellant asserts that "[i]n order to effectively protect [his] water right in the Thomas Ditch from an illegal taking, the ditch would require physical reconstruction * * * [without which his] water would be 'taken' as it traveled between the source and his private lands due to livestock use and seepage" (Reply to Answer at 3).

Appellant further alleges that while BLM appears to be acknowledging his water right, its rejection of the right-of-way application is inconsistent with that position and with its acknowledgment that the Wyoming State Engineer's Office approved a transfer of his water right to his private land. Appellant asserts that BLM, via the ADMO's August 21, 1991, memorandum, "recognized the State Engineer's approval of the surface water right as a final decision" (Reply to Answer at 4 (emphasis in original)).

In response, BLM contends that appellant's proposal for excavating the springs and draining them into a pipeline is actually a project to use underground water by constructing a well and not a project to use surface water as authorized by appellant's water right. BLM asserts that its decision did not adjudicate appellant's water right and had no impact on his ability to "reconstruct the Thomas Ditch and to continue to exercise [his] water right in the same manner as it has been exercised for the past 80 years" (Answer at 6). BLM asserts that appellant has offered no evidence that Three Springs ever supplied or could supply the full volume of his water right (Answer at 4). BLM emphasizes that appellant's water right is not being denied, and that the ADMO's opinion that the right-of-way might have to be granted to avoid potential conflict with the State Engineer's office, is not the official agency decision on the right-of-way application. BLM points out that appellant has not supported these arguments with evidence demonstrating that the Wyoming State Engineer's Office

is authorized to make final decisions for the Department (Reply to Appellant's Reply at 2).

Appellant invokes the doctrine of estoppel, arguing that "BLM should be precluded from taking a position which is inconsistent with its earlier ruling" (Reply to Answer at 5). The inconsistent position, appellant alleges, is BLM's assertion on appeal that appellant is pursuing a ground water right.

In this case, BLM has recognized that construction of the Thomas Ditch established a right-of-way under the 1866 Act and that appellant is the successor in interest to such right-of-way. See note 1, supra. However, appellant has not chosen to maintain a right-of-way under the 1866 Act; he has filed an application for a FLPMA right-of-way and the question is whether BLM properly denied that application. We conclude that it did.

[1] As the authorized representative of the Secretary of the Interior, BLM has the discretion to accept or reject a right-of-way application for a water-gathering and pipeline project filed pursuant to section 501 of FLPMA, 43 U.S.C. § 1761 (1988). Kenneth Knight, 129 IBLA 182, 183 (1994); C. B. Slabaugh, 116 IBLA 63, 65 (1990); Eugene V. Vogel, 52 IBLA 280, 283, 88 I.D. 258, 259 (1981). A BLM decision rejecting such an application will be affirmed where the record shows that the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Kenneth Knight, supra.

[2] The burden is on appellant, as the party challenging BLM's decision, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). The Department is entitled to rely on the reasoned analysis of its experts in the field in matters within their realm of expertise. King's Meadows Ranches, 126 IBLA 339, 342 (1993), and cases there cited. Thus, where BLM has evaluated the feasibility of the water-gathering project proposed by appellant, and has researched the anticipated environmental consequences, it is not enough that appellant offers a contrary opinion. In order to prevail, appellant must demonstrate by a preponderance of the evidence that BLM erred in evaluating its data or reaching its conclusions. King's Meadows Ranches, supra at 342.

To determine whether a BLM decision rejecting a right-of-way application was based on a reasoned analysis of the facts and was made with due regard for the public interest, the Board looks to the impacts anticipated from the proposal as those impacts are evaluated in the EA. The EA states that the proposed action and alternatives were analyzed to determine the effect on the following resources: Wetlands/Vegetation; Wildlife; Cultural Resources; and Water Use/Quality.

The area affected by the proposed spring development is classified as wetlands by the U.S. Fish and Wildlife Service. These lands contain vegetation which is dependent on being submerged for at least a part of the growing season. The EA cites definitions of wetland or wetland habitat and riparian habitat from the glossary of BLM Manual 6750 - Aquatic Resources Management (Rel 6-118 3/22/91) and concludes that "[u]nder either of the above definitions, the subject area is considered wetland habitat" (EA at 5).

The EA indicates that BLM has embraced EO 11990 in the 1986 Kemmerer Resource Management Plan. "Section one of Executive Order 11990 states that agencies shall take action to minimize the loss, destruction or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agencies responsibilities" (EA at 5). BLM determined that the project "would dry up or significantly reduce the wetlands associated with the springs," resulting in a loss of 2 to 3 acres of wetlands and associated vegetation (EA at 6). The EA lists negative impacts on certain species of wildlife (mule deer, sage grouse and other nongame birds, and small mammals), for whom no other dependable source of water would be available, if the project were built. 10/

With respect to livestock grazing, the EA states that alternative sources of water would have to be developed if the project is built. Without alternative sources, serious economic impacts would result to the grazing lessee, who advised BLM that it was unlikely that a catchment basin of sufficient size could be developed due to the terrain of the area (EA at 7). 11/

Appellant has asserted that BLM did not investigate the alternative of constructing water catchment facilities. The EA reveals, however, that, in addition to the proposed action, several alternatives and a no-action alternative were considered. According to the EA, appellant was not interested in designing a system which would leave sufficient water for the other resources, or in constructing a pond to catch the water from the springs with excess water going into his pipeline. In addition, appellant did not wish to construct a pipeline to the third spring on private land ("Phase II," see note 6, supra) until BLM approved the development of the two springs on public land (EA at 3).

10/ The basis for the EA analysis regarding wetlands and wildlife is an October 28, 1991, memorandum concerning the proposal from Vern Phinney, Wildlife Biologist, to Mark Hatchel, Realty Specialist. Although appellant alleges that the conclusions of the EA are inconsistent with BLM field studies, the Phinney memorandum clearly supports the relevant conclusions in the EA.

11/ See Nov. 7, 1991, letter from the grazing lessee to the Area Manager.

In the environmental assessment process, an agency is obliged to explore a reasonable range of alternatives; it need not ferret out every possible alternative, and the burden is on the proponent to show that a reasonable alternative was not discussed. California v. Bergland, 483 F. Supp. 465, 488 (E.D. Cal. 1980)). The EA shows that reasonable alternatives were discussed.

A fair reading of the August 21, 1991, memorandum, evaluating the project from an engineering viewpoint, reflects that the ADMO had strong reservations about the project, despite his conclusion that the project was marginally feasible. He found that the plans and drawings presented by appellant were incomplete in a number of crucial respects. Among other items, appellant's plans left in doubt, for example, whether a full pressure flow system, or a free-flowing system was intended. In addition, no flow regulating mechanism was indicated, and it was uncertain if all water would be captured at the springs. The ADMO further anticipated problems in construction at the spillway with the project, as then proposed, as well as operational and maintenance problems. Although there is some indication that after the ADMO's analysis appellant proposed some changes to his project, many of the problems raised by the ADMO were never addressed. Thus, the marginally feasible nature of the project, with its attendant unaddressed technical problems, if not alone supporting rejection of the application, clearly provides additional support for such action.

However, the crux of the Area Manager's rationale for rejection, as quoted above, is that realization of the project would leave insufficient water for several other resources dependent on the water supply from the two springs. That judgment is amply supported by the EA. Appellant appears to argue that the Area Manager should have been bound by the ADMO's statement in his memorandum that "[i]n my opinion, the right-of-way may have to be granted in order to avoid potential conflict with the State Engineer's office."

That statement is not controlling and, in fact, represents only the ADMO's opinion. ^{12/} In fact, the record contains a copy of a November 26, 1991, letter from the Wyoming State Engineer's Office (Administrator for Surface Water) to appellant, advising that his water right was in good standing and recognized by both the State and BLM, but that, as BLM had determined, an EA would have to be prepared before appellant's project could go forward (Reply to Answer, Exh. 2).

The grant or denial of appellant's right-of-way application was within the discretion of the Area Manager in this case. The Area Manager relied on the EA in making his determination, and the ADMO's opinion was only one

^{12/} To the extent appellant relies on the ADMO's memorandum to support a different conclusion, it is clear that the ADMO did not conduct an environmental review of the proposed project.

of the sources utilized in the preparation of the EA. The EA shows that in addition to the ADMO, other resource specialists, including a wildlife biologist, a range conservationist, a riparian specialist, and a planning and environmental specialist, among others, contributed to the environmental evaluation.

As set out above, the Secretary of the Interior, and not a state agency, has the authority to accept or reject an application for a water pipeline across Federal lands. That authority is exercised where, as here, a BLM officer issues a decision with right of appeal to this Board, adjudicating a right-of-way application. Appellant's reliance on the opinion of only one of BLM officials who participated in the evaluation of the project does not establish that the Area Manager erred in rejecting the application, where the Area Manager's determination was based on the consideration of input from all sources.

In this case, BLM did not adjudicate appellant's water right, which remains as it was before appellant filed his right-of-way application. Therefore, there is no merit to appellant's argument that rejection of the right-of-way application constitutes a taking of his water right without just compensation. 13/

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.

R. Harris

Deputy Chief Administrative Judge

Bruce

13/ We need not address appellant's assertion that BLM's should be estopped from arguing on appeal that his project constituted a request for a ground water right. The reason is that the nature of appellant's water right had no bearing on the Area Manager's decision or on our affirmation thereof.

CHIEF ADMINISTRATIVE JUDGE BYRNES CONCURRING IN THE RESULT:

While I concur in the result of this appeal, I do so just barely and for none of the reasons proffered by BLM in its environmental assessment (EA).

BLM acknowledges from the outset that appellant has a water right. But BLM's decision, while paying lip service to the water right of appellant, considers only alternatives that would vitiate that right.

The EA issued with the decision in this appeal states:

On September 28, 1989 the BLM acknowledged Mr. Hayduk's rights under the Act of July 26, 1866 to utilize the Thomas Ditch to transport water runoff from two springs on public land in: 6th Principal Meridian, T.15 N., R.121 W., Section 11, SW1/4NE1/4, NE1/4SE1/4, and one spring on private land in: 6th Principal Meridian, T.15 N., R.121 W., Section 15, NE1/4NE1/4. Mr. Hayduk was notified that our records would be noted, and explained that he has the right to maintain the ditch, but any relocation, or reconstruction of the ditch will require that these activities be authorized under a right-of-way grant under the Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (BLM Manual 20801.48G Rel. 2-263 3/8/89). EA No. WY-047-92-31 at 1.

After that statement, however, it becomes clear from the record that BLM's major disagreement is with appellant's water right, rather than the particular way he would choose to appropriate that right. As a result, BLM has considered only alternatives in the EA that would cause appellant to forgo some or all of his water right, in exchange for approval of his proposed access to some portion of that right.

The EA further states:

During a conversation with the applicant on October 18, 1991, suggestions for possible alternatives were brought up. One suggestion was whether the applicant was willing to design a system that would leave enough water to maintain the wetlands and to allow the livestock and wildlife to drink. Another alternative discussed was the possibility that the irrigation could be accomplished by utilizing water from a well that could be drilled in the Bear River floodplain. Mr. Hayduk's response was that he wanted to receive the water coming to him under his water right. He didn't feel that he should be obligated to leave any water behind or go to the expense to drill a well. * * * With these limitations imposed by the applicant, no reasonable alternatives to the proposed action could be mutually agreed upon.

(EA at 3).

Ultimately, the decision record (DR) reflects this same analysis. The Area Manager decided to adopt the "No Action" alternative because to allow the pipeline would dry up or reduce water for wetlands downstream in violation of Exec. Order No. 11990. Additional reasons were that the local wildlife population would be forced to move to less reliable water sources on private land and that additional water structures might be required to allow grazing of livestock. Each of these reasons, as noted previously, go to the very heart of appellant's water entitlement, which BLM purports to acknowledge.

The problem is that BLM's acknowledgement of this water right is inconsistent with its analysis in the EA and DR. If BLM wishes to appropriate part of appellant's water right it should attempt to reopen the adjudication of that right under state law. BLM's position in those two documents seems to be that if appellant refuses to forgo any water to which he is entitled, BLM will refuse to approve the necessary right-of-way.

BLM has articulated only one legitimate concern over the proposed pipeline. That is the possible effect the construction may have on the already ruined spillway of the Chesney Reservoir. BLM may still have true public interest concerns that need to be adequately addressed by appellant before a right-of-way is issued.

BLM states in its response to appellant's statement of reasons that the claim of an unconstitutional taking is "frivolous." While the Board is not the appropriate forum to decide constitutional issues, appellant properly notes that BLM fails to address the concerns expressed by the court in Fallini v. Hodel 725 F. Supp. 1113, 1122-1124 (D. Nev. 1989), aff'd on other grounds, 963 F.2d 275 (9th Cir. 1992). Additionally, while BLM declares its devotion to Exec. Order No. 11990 concerning Wetlands Protection, it makes no mention that it performed a Takings Implications Assessment pursuant to Exec. Order No. 12630. In the absence of such an analysis, boldly asserting that the takings claim is "frivolous" is premature.

Likewise, appellant's takings claim is also premature since he and BLM agree he has a water right and could use the Thomas Ditch to exercise that right, if it were in a state of repair. There is a difference between having a water right and utilizing that right by any means which appellant may choose. Appellant apparently is cognizant of this option but would ask that BLM share in the cost of returning Thomas Ditch to operational condition (Appellant's Reply to BLM's Answer at 3).

BLM and appellant should set on a course of action to accommodate each other's legitimate concerns. Since BLM concedes he has the right to proceed with the reconstruction of the Thomas Ditch (BLM Answer at 6), BLM should issue a right-of-way to appellant if appellant can satisfy BLM's stated concern over the spillway construction.

For the reasons stated above, I concur that the decision should be affirmed, because there is still a legitimate concern for BLM. However, BLM should not bury its head in the sand and ignore the fact that appellant is entitled to collect the water right that is his.

James L. Bymes
Chief Administrative Judge

