



WILLIAM P. MAYCOCK

176 IBLA 206

Decided December 11, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

WILLIAM P. MAYCOCK

IBLA 2008-187

Decided December 11, 2008

Appeal from a decision of the Acting Deputy State Director, Wyoming State Office, Bureau of Land Management, affirming as modified a determination of bond adequacy for a bond posted to secure payment by a Federal oil and gas lessee to a private surface owner for damages to crops and tangible improvements and value of land for grazing resulting from development of leased Federal natural gas resources in Campbell County, Wyoming. WY-2008-14.

Affirmed.

1. Act of December 29, 1916--Mineral Lands: Mineral Reservation--
Oil and Gas Leases: Stock-Raising Homestead Act of 1916--
Stock-Raising Homesteads

When a unit operator has the exclusive right under the unit agreement to enter lands and develop the leased resources, a bond posted to secure payment to a patentee for damages to crops, tangible improvements, and the value of land for grazing signed only by the unit operator is not deficient under 43 C.F.R. § 3814.1 on the ground that other owners of interests in the Federal oil and gas leases underlying the patented lands did not execute the bond.

2. Act of December 29, 1916--Mineral Lands: Mineral Reservation--
Oil and Gas Leases: Stock-Raising Homestead Act of 1916--
Stock-Raising Homesteads

An amount for damages arising from water discharges into ditches dug on easements acquired in a state court condemnation action was properly excluded in calculating the amount of a bond posted to secure payment to a patentee for damages to crops, tangible improvements, and the value of land for grazing, where previous water discharges had occurred before any Federal lease operations had been approved or

conducted, and where produced water from Federal lease operations will be transported to off-lease locations outside the watershed in which operations will occur.

3. Act of December 29, 1916--Mineral Lands: Mineral Reservation-- Oil and Gas Leases: Stock-Raising Homestead Act of 1916-- Stock-Raising Homesteads

An appellant bears the burden of showing error in the amount of a bond accepted by BLM to secure payment for damages to the value of land for grazing. Where BLM properly rejected an appellant's alternative calculations and the appellant has not shown that it is likely that operations under the plan of development will make his livestock operation unprofitable, the appellant has not met his burden to show that the bond amount is inadequate.

APPEARANCES: Tom C. Toner, Esq., Sheridan, Wyoming, for William P. Maycock; Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; Matt J. Micheli, Esq., Cheyenne, Wyoming, for Williams Production RMT Company.

OPINION BY ADMINISTRATIVE JUDGE HEATH

William P. Maycock II appeals from an April 29, 2008, decision (Decision) of the Acting Deputy State Director, Wyoming State Office, Bureau of Land Management (BLM). The Decision affirmed, with some modifications to calculations, a February 8, 2008, BLM Land Law Examiner's determination (referred to hereinafter as the "determination of bond adequacy" or DBA) that a bond posted by Williams Production RMT Company (Williams) in the amount of \$37,000 was adequate to secure payment to Maycock, a private surface owner, for damages to crops, tangible improvements, and the value of land for grazing. Williams' June 12, 2008, motion to intervene was granted by order dated June 26, 2008.

Background

Maycock owns and operates a ranch approximately 11,000 acres in size located in T. 50 N., Rs. 75 and 76 W., Sixth Principal Meridian, Campbell County, Wyoming, in the Powder River Breaks area west of Gillette, Wyoming. The private lands within the ranch were patented to Maycock's predecessors in interest primarily under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. §§ 291-301

(1970).¹ Under the SRHA conveyances, the United States reserved the interest in all minerals, including oil and gas. 43 U.S.C. § 299(a) (2000). One parcel was patented to Maycock's predecessors under the Agricultural Entry Act of 1914 (AEA), 30 U.S.C. §§ 121-123 (2000). Conveyances under that statute also reserved mineral deposits (including oil and gas) to the United States. 30 U.S.C. § 122 (2000).

Williams is the unit operator for the "Carr Draw (CBM) Unit," encompassing some 21,459.51 acres, and is one of the lessees of unitized Federal oil and gas leases. The unit agreement was entered into in January 2001. Unit Agreement (Williams Answer Ex. 2) at 1. Several of the unit leases underlie Maycock's ranch. Williams is also a lessee of other oil and gas leases on lands adjacent to or near Maycock's ranch, and is a lessee of certain private fee oil and gas estate within Maycock's ranch in sec. 26, T. 50 N., R. 76 W. Williams negotiated with Maycock for a surface access agreement for use of the surface within Maycock's ranch for development of coalbed natural gas (CBNG, also referred to as "coalbed methane" or "CBM") both within and outside Maycock's ranch. After negotiations failed, Williams, under 43 U.S.C. § 299(a) (2000) and 43 C.F.R. § 3814.1, submitted a bond dated January 6, 2005, in the amount of \$37,000 to secure payment for damages to Maycock's crops, tangible improvements, and the value of land for grazing. Administrative Record (AR) Vol. D Doc. 2; AR Vol. C unnumbered. (The bond amount appears to have been derived by multiplying the number of land patents by which the covered lands were conveyed (37), as listed in the attachment to the bond, by the minimum bond amount of \$1,000 prescribed in 43 C.F.R. § 3814.1(c).)

Maycock objected to the bond as inadequate by letter dated February 8, 2005. AR Vol. D Doc. 4; AR Vol. C unnumbered. In support of his objection, Maycock submitted, *inter alia*, an analysis of the anticipated damage to grazing rights on the Maycock Ranch as a result of Williams' proposed CBNG operations. This analysis was dated February 3, 2005, and was prepared by Dennis Warren, a certified general real estate appraiser with Warren Land & Livestock, Inc. (hereinafter the "Warren Report").² SOR Ex. 4; AR Vol. C unnumbered.

¹ The SRHA was repealed in part by section 702 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Title VII, § 702, Oct. 21, 1976, 90 Stat. 2787. The repeal did not affect section 9 of the SRHA governing the exercise of mineral rights on lands covered by existing SRHA patents. 43 U.S.C. § 299 (1988), subsequently redesignated as 43 U.S.C. § 299(a) (2000), discussed below.

² The Warren Report stated: "Williams Production has proposed to drill 254 coal bed methane (CBM) wells on the Maycock Ranch," together with roads, power lines, pipelines, pod buildings, compressor stations, and water discharge facilities "that appears to involve 150 well sites and approximately 50 miles of road." Warren

(continued...)

More than a year after submitting the bond, Williams submitted a proposed Plan of Development (POD) for the Carr Draw III phase of unit development on March 2, 2006, together with Applications for Permit to Drill (APDs) a total of 197 CBNG wells. Under the proposed POD, Williams would construct roads, pipelines, and other infrastructure on Federally-leased public land in the unit area. BLM ultimately disapproved the POD because it included lands within year-long elk range, and thus posed a risk of significant impacts to the Fortification Creek elk herd. BLM Answer at 2.

After further negotiations between Maycock and Williams for surface access reached an impasse, Williams sued Maycock in State court under Article 1 § 32 of the Wyoming Constitution and provisions of the Wyoming Eminent Domain Act, W.S. (1977) §§ 1-26-814 and 1-26-815, to condemn certain easements on Maycock's ranch. These included easements to flow water down Barber Creek and South Prong Barber Creek (South Prong) and to construct channels in certain areas of Barber Creek and South Prong where there was no defined channel.³ Barber Creek flows generally from east to west across Maycock's ranch and is a principal source of water for the ranch. South Prong joins Barber Creek in the northwest portion of sec. 26, T. 50 N., R. 76 W. See topographic maps in AR Vol. B. Williams sought to take, under the power of eminent domain, "an easement and way of necessity through those portions of Barber Creek and South Prong Barber Creek, as needed across the Maycock Ranch for the flow of water produced by Williams from its CBM wells located both on and off the Maycock Ranch." Plaintiff's Amended Reply and Claims in Reply to Defendant's Answer and Counterclaim in *Williams v. Maycock* (SOR Ex. 6), ¶ 142 at 7-8. Williams also sought an easement to "survey for, construct, reconstruct, operate, maintain, and remove a ditch, canal, or other device (collectively a watercourse) for the flow of water produced by Williams for any portion of Barber Creek or South Prong Barber Creek that the Court deems is not legally a watercourse." *Id.*, ¶ 143 at 8. After making certain statutorily-required findings, the court granted Williams the easements it sought in an order dated June 15, 2006. The court also ordered that the compensation to which Maycock is entitled would be decided in a separate formal proceeding.⁴

² (...continued)

Report at 1. It is unclear where the numbers of 254 wells and 150 well sites came from; the record as submitted contains no written proposal to that effect. Maycock represents that this is what Williams told him. Statement of Reasons (SOR) at 2.

³ *Williams Production RMT Co. v. William P. Maycock II*, Civil No. 26099 (Wyo. Sixth Jud. Dist. Ct.) (hereinafter "*Williams v. Maycock*").

⁴ "Findings of Fact, Conclusions of Law and Order Authorizing Taking of Water Flow, Construction and Related Easements and Access Easements to South Prong and (continued...)"

In the Summer of 2006, Williams subsequently dug two ditches, serpentine in course, on these easements. One crossed bottom lands in the Barber Creek area in the northern portion of sec. 25 and the southern portion of sec. 24, T. 50 N., R. 76 W. The other crossed bottom lands in the South Prong area in the central portion of sec. 26, T. 50 N., R. 76 W. See map, SOR Ex. 3, Tab B. These ditches did not work as Williams apparently had planned and anticipated. Maycock has submitted extensive photographic evidence of the results of discharging produced water into these ditches — substantial erosion damage, destruction of vegetation, and flooding of creek bottom lands with produced effluent. See, e.g., SOR Ex. 3, Tabs D and E; attachments to Jan. 15, 2008, Objection to Bond, AR Vol. D Doc. 9.

After BLM's denial of approval of the Carr Draw III POD, Williams split the plan area generally between the portion inside the year-long elk range (Carr Draw III West) and the portion outside the year-long range (Carr Draw III East). Williams submitted the Carr Draw III East POD on October 31, 2007.⁵ Under the Carr Draw III East POD, Williams proposed to drill 82 CBNG wells at 41 locations in the POD area, for which it submitted APDs.⁶ It also proposed to use existing primitive roads and corridors and to construct new primitive roads and corridors to well pads and well sites, along with other facilities. See Carr Draw III East POD, AR Vol. B unnumbered.

On December 17, 2007, BLM sent a letter to Maycock noting that Williams' proposed operations had been modified with the submission of the Carr Draw III East POD and that Williams still considered the \$37,000 bond posted in January 2005 as sufficient to cover losses under the modified POD. AR Vol. D Doc. 8. In light of the differences in Williams' proposals and the passage of more than 2½ years, BLM deemed Maycock's February 9, 2005, objection to be moot and gave Maycock an opportunity to object to the modified proposal. Dec. 17, 2007, Letter at 2. Maycock took BLM up on its invitation and submitted a second objection to the adequacy of the bond by letter dated January 15, 2008. AR Vol. D Doc. 9. BLM requested further information from Williams, and Williams responded on January 24, 2008. AR Vol. D Doc. 11.

⁴ (...continued)

Barber Creek Drainages," dated June 15, 2006, in *Williams v. Maycock* (Williams Answer Ex. 1), at 1-2, 6, 8.

⁵ The approval of the Carr Draw III East POD is the subject of a separate appeal by Maycock, IBLA 2008-197, consolidated with an appeal by the Powder River Basin Resource Council and Biodiversity Conservation Alliance, IBLA 2008-200.

⁶ Williams originally proposed to drill 84 CBNG wells as part of the Carr Draw III East POD, but later dropped 2 wells at a single location because of the difficulty of reclaiming the access route.

The BLM Land Law Examiner rejected Maycock's objections and issued the DBA on February 8, 2008. AR Vol. D Doc. 13. Maycock then timely requested State Director review on March 6, 2008. AR Vol. E Doc. 1. As related above, the Acting Deputy State Director issued the Decision appealed from on April 29, 2008, affirming the DBA with modifications. AR Vol. E Doc. 3. The Decision (1) rejected Maycock's argument that all lease interest holders, and not just Williams, must sign the bond (Decision at 4-6); (2) recalculated the anticipated damages from loss of forage, but found that the \$37,000 bond amount was still adequate under the revised calculations (*id.* at 6-11); (3) rejected the calculations in the Warren Report as inconsistent with BLM policy and practices (*id.* at 11-12); (4) rejected Maycock's claim that damages resulting from the ditches dug in 2006 on the easements granted to Williams should be included in the bond because the Carr Draw III East POD did not propose to use the ditches and the State court maintained jurisdiction over such claims in the condemnation action (*id.* at 12-13); (5) found that consideration of effluent disposal reservoirs for which Williams previously had applied for permits was unnecessary because no such reservoirs would be constructed under the Carr Draw III East POD (*id.* at 13-14); and (6) Williams' previously stated intention to drill 197 wells was not relevant in view of the withdrawal of the proposed Carr Draw III POD and the submission of the Carr Draw III East POD (*id.* at 14).

On appeal, Maycock asserts four principal theories. First, he maintains that BLM's approval of the bond was improper because all of the lessees owning interests in Federal leases underlying Maycock's ranch must sign the bond. SOR at 4-6. Second, he asserts that the bond amount is inadequate because it does not take into account the damage caused by discharging effluent water into the serpentine ditches dug in 2006. *Id.* at 6-8. Third, Maycock asserts that BLM improperly rejected the analysis and conclusions of the Warren Report as based on consideration of factors beyond those stated in the applicable regulations. *Id.* at 8-11. Fourth, Maycock maintains that BLM's methodology for calculating the damage to the value of the land for grazing purposes incorrectly assumed a ratio of animal unit months to number of acres that does not apply to Maycock's ranch. *Id.* at 11-12.

Analysis

I. *The Bond Is Proper with Williams as the Only Signatory.*

Section 9(a) of the SRHA, *as amended*, 43 U.S.C. § 299(a) (2000), provides in relevant part:

. . . Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the

mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner . . . such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior

Section 2 of the AEA, 30 U.S.C. § 122 (2000), similarly provides that a lessee may reenter and occupy the surface “upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor” In addition to the requirement that the bond secure payment of damages to the surface owner’s crops or tangible improvements, 30 U.S.C. § 54 (2000) provides that any person who mines any minerals “from any land included in a stock raising or other homestead entry or patent, and who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals.”⁷ Thus, the bond must secure payment for damages to crops, tangible improvements, and the value of land for grazing. *See, e.g., William C. Hayes*, 122 IBLA 68, 71-72 (1992).

BLM regulations at 43 C.F.R. § 3814.1(b) and (c) summarize these provisions and prescribe certain procedural requirements. Among other things, section 3814.1(c) requires that the bond “must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved,” and “must be in the sum of not less than \$1,000.” Paragraph (d) of the same section provides for the landowner’s opportunity to object to approval of the bond and for associated appeal rights.

Onshore Oil and Gas Order No. 1, as revised in March 2007, 72 Fed. Reg. 10329 (Mar. 7, 2007),⁸ supplements 43 C.F.R. § 3814.1. In part VI., “Operating on

⁷ The application of this provision to “other homestead entry or patent” extends its applicability to patents issued under the AEA.

⁸ That Order was issued under 43 C.F.R. § 3164.1 as a rule after notice-and-comment procedures, although not codified in the Code of Federal Regulations. *See* 72 Fed. Reg. at 10328.

Lands With Non-Federal Surface and Federal Oil and Gas,” Onshore Oil and Gas Order No. 1 provides in relevant part as follows:

If no agreement was reached with the surface owner, *the operator* must submit an adequate bond (minimum of \$1,000) to the BLM for the benefit of the surface owner sufficient to: (1) Pay for loss or damages; or (2) As otherwise required by the specific statutory authority under which the surface was patented and the terms of the lease.

72 Fed. Reg. at 10336 (emphasis added).

Maycock asserts that because 43 C.F.R. § 3814.1(c) requires that the bond be executed by the person who has acquired the mineral deposits from the United States, and because there are other lessees besides Williams who own interests in the leases underlying the Maycock Ranch, all of those interest holders must execute the bond. SOR at 4. Maycock relies on this Board’s decision in *Brock Livestock Company, Inc.*, 101 IBLA 91 (1988). In that case, the surface owner objected to a \$3,500 bond for mining operations on SRHA-patented land filed by the American Bentonite Corporation because an individual co-owner of an interest in the mining claims underlying the patented land did not sign the bond as a principal. The Board held:

Since 43 CFR 3814.1(c) categorically requires that the mineral entry claimant’s bond “be executed by the person who has acquired” Federal mineral rights in SRHA lands, and since Thayer [the individual co-owner] is such a person, his failure to join in the bond is an apparent deviation from the regulatory requirement. It would be inconsistent with the purpose of the bonding requirement to insure the landowner’s property rights to excuse some mining claimants from the bonding requirement. . . . Neither the regulation nor the statute provides that where there are multiple owners of mining claims on SRHA lands, it is sufficient for only one of the mining claimants to sign the required bond as a principal to be charged. Further, it would not make good sense to do so, since such a practice could permit some members of a group of mining claimants to avoid the effect of the bonding provision, and to perhaps escape liability for conduct for which the individual may have been responsible. The regulatory requirement for bonding becomes meaningless if some, but not all, of the mining claimants seeking re-entry for mining purposes on SRHA land are required to post the required bond.

101 IBLA at 97-98. Maycock maintains that the same rationale applies to fluid mineral (oil and gas) lessees here. SOR at 5-6.

BLM counters that Onshore Oil and Gas Order No. 1 requires the operator to sign the bond. BLM Answer at 6-7. Maycock argues that nothing in Onshore Oil and Gas Order No. 1 states that only the operator has to sign the bond, and that under 43 C.F.R. § 3814.1(c), “a bond is adequate only if all those companies who have acquired the right to produce and remove the federally reserved minerals have signed the bond as principals.” SOR at 6. Williams, like BLM, relies on Onshore Oil and Gas Order No. 1 as requiring the operator to post the bond. Williams Answer at 3-4. Williams also relies on the language of the Unit Agreement for the Carr Draw (CBM) Unit, which provides:

Except as otherwise specifically provided herein, the exclusive right, privilege, and duty of exercising any and all rights of the parties hereto which are necessary or convenient for prospecting for, producing, storing, allocating, and distributing the Unitized Substances are hereby delegated to and shall be exercised by the Unit Operator as herein provided.

Unit Agreement (Williams Answer Ex. 2), ¶ 8 at 4. On that basis, Williams contrasts this case with *Brock Livestock Company*, because in that case “any one of the mining claimants could have entered the SRHA-patented lands to develop locatable minerals,” whereas in the instant case Williams, as unit operator, has the exclusive right to enter the patented lands. Williams Answer at 4.

[1] Onshore Oil and Gas Order No. 1 requires any party who has the right to conduct operations on the patented land to submit an adequate bond before doing so. We agree with Maycock that Onshore Oil and Gas Order No. 1 does not limit the rights of private surface owners under the SRHA or other statutes, as the last clause of the order quoted above expressly provides. However, both the SRHA and the AEA speak in terms not simply of parties who have acquired interests in Federal minerals underlying patented land, but more specifically of parties who enter (or reenter) and occupy the surface to remove minerals. In this case, under the Unit Agreement, Williams is the only party who may do so. No other co-lessee may enter the patented lands and drill or operate wells.

For this reason, we agree with Williams that the Unit Agreement distinguishes this case from *Brock Livestock*. In this case, no other co-lessee could, in the words of *Brock Livestock*, “avoid the effect of the bonding provision, and [] perhaps escape liability for conduct for which the individual may have been responsible” because it had not executed the bond. The fact that Williams is the only signatory does not, under the circumstances of this case, render the bonding requirement meaningless. Only Williams will be conducting operations under the Carr Draw III East POD, and the bond secures payment to Maycock for damages arising from Williams’ operations. The Decision was correct in holding that Williams’ execution of the bond is sufficient.

II. *BLM Properly Excluded from the Bond Amount the Damage Caused by Discharging Produced Water into the Ditches Dug on Easements Acquired under State Eminent Domain Law Before the Carr Draw III East POD Was Submitted.*

Maycock asserts that the Decision “chose to ignore operations by Williams which severely damaged Mr. Maycock’s land for grazing purposes,” SOR at 6, *i.e.*, the damage resulting from the discharge of produced water into the ditches or channels dug in 2006 following the Wyoming State court’s decision awarding easements to Williams. Maycock seems to rely principally on the fact that the ditches were dug on land within the area covered by the later-submitted Carr Draw III East POD. *Id.* at 6-8. He asserts that Williams dug the ditches for the purpose of flowing effluent produced from Federal leases and that Williams represented in the condemnation action that the easements were for water produced from wells located both on and off the Maycock Ranch. *See Id.* at 8. The Decision had noted that the State court “does retain jurisdiction over this matter [the compensation to which Maycock is entitled as a result of the condemnation of the easements], particularly aspects of compensation for those actions that are not associated with the CD3-E POD.” Decision at 13. Attacking this rationale, Maycock argues:

[T]he state court condemnation award, if one is ever granted, is irrelevant to the issue which the BLM is required to decide, that is, the amount of the bond required to cover the damage that these ditches, which are within the Carr Draw III East POD and which Williams has said that it will use for its federal oil and gas lease operations, will cause to Mr. Maycock’s land for grazing purposes. Mr. Maycock *is entitled to that damage regardless of his remedies in state court*, and he is entitled to a bond to secure the payment of those damages before Williams enters and begins surface disturbing activities.

SOR at 8 (emphasis added).

[2] In our view, Maycock’s reasoning is flawed and the record does not sustain the assumptions on which his argument rests. When Williams submitted the bond in 2005, it covered lands owned by Maycock in which the United States owns the oil and gas estate that the United States had leased, in which leases Williams owns an interest. *See* cover letter accompanying the bond from Williams to Maycock dated Jan. 10, 2005, and descriptions and homestead patent numbers in Attachment A to the bond, AR Vol. C unnumbered. Williams submitted the bond in connection with the then-proposed Carr Draw III POD. Letter from Chris E. Hanson, Field Manager for Williams, to Tom C. Toner, counsel for Maycock, dated Apr. 27, 2005, AR Vol. C unnumbered. As discussed above, the proposed POD for the Carr Draw III phase was disapproved. Until approval of the Carr Draw III East POD in

early 2008, no POD was ever approved for operations on Federal leases in the Carr Draw III phase area, including the Carr Draw III East area.

An e-mail from Tom Doll at Williams to BLM dated January 22, 2008 (AR Vol. D unnumbered), referring to the photographs of the ditches, states: “I believe that work was done for fee well development” and “has nothing to do with the current Carr Draw POD 3 East federal action.” On January 24, 2008, Williams responded to a BLM request for further information on the bonds following Maycock’s renewed objection. Williams there stated that the channel “was not included in the East Carr Draw POD III as it will not be utilized for East Carr Draw POD III purposes, but was obtained in connection with water production from operations on lands other than the unit lands.”⁹ Jan. 24, 2008, Letter (AR Vol. D unnumbered) at 3.

The operations that Williams conducted that resulted in the effluent flow into and through the ditches dug in 2006 were not in connection with the proposed Carr Draw III POD (which was disapproved) or the bond submitted in 2005. The ditches were dug on easements granted in the State court action described above, and were not dug as part of the exploration or development of the mineral estate reserved to the United States, on which no operations had been authorized. The bonding provisions of the SRHA and implementing regulations therefore do not apply to the ditches.

Further, it is clear that under the Carr Draw III East POD, produced water will not be discharged into the two ditches dug in 2006, even though they are located within the Carr Draw III East POD area. In the Water Management Plan (WMP) submitted as part of the Carr Draw III East POD, Williams states: “All produced effluent from the proposed 88 wells within the Carr Draw III East project will be transported by a common waterline system to off-project facilities associated with these PODs [*i.e.*, other BLM-approved PODs] that are located to the south of the Carr

⁹ The Project Facility Map (AR Vol. B, Map A) shows three fee well sites in sec. 26, T. 50 N., R. 76 W., on Maycock Ranch lands near the western boundary of the Carr Draw III East area below Barber Creek and east of South Prong. Wells on these sites and, possibly, water wells (for dewatering the subterranean coal seams) shown in sec. 35, T. 50 N., R. 76 W., and in secs. 1 and 2, T. 49 N., R. 76 W., located south and southeast of the fee wells, appear to be the likely source of the water discharged into the channel dug in sec. 26. Water wells shown in sec. 25, T. 50 N., R. 76 W., and sec. 30, T. 50 N., R. 75 W., appear to be the likely source of water discharged into the channel dug in secs. 25 and 24, T. 50 N., R. 76 W. At the time of the water discharge, none of the well sites designated as “Federal Wells” within the Carr Draw III East POD area were producing, because no POD had been approved.

Draw III East project (Figure 1).” WMP (AR Vol. A) at 5. Figure 1, at p. 2, is a map showing other POD areas.¹⁰ The WMP further explained:

Carr Draw III East effluents will be discharged to approved outfalls located upstream of on-channel containment reservoirs, utilized for managed irrigation, discharged directly into the Beaver Creek channel without any downstream containment facilities, treated and directly discharged into Beaver Creek [flowing principally through Ts. 47 and 48 N., Rs. 75, 76, and 77 W.], and/or transported to an approved injection well. All of these water management facilities are located south of the Carr Draw III East project.

Id. at 12. Finally, the WMP noted: “The Carr Draw III project was specifically developed to avoid downstream impacts to Barber Creek or its tributaries. In order to avoid impacts, all effluent will be transport[ed] to approved water management facilities outside of the Carr Draw III project” *Id.* at 19.

Map C in Volume B of the Administrative Record (the WMP map) shows a proposed water line from a proposed pump station in sec. 26, T. 50 N., R. 76 W., on the west boundary of the Carr Draw III East POD area that leads to the south, as described in the WMP. On October 19, 2007, BLM issued an environmental assessment (EA) for a produced water pipeline (44 miles of underground pipe) for nine Williams CBNG projects. AR Volume A unnumbered. This is the line through which water produced from operations under the Carr Draw III East POD would be moved away from the unit. The EA notes that the need for the pipeline “has arisen because the Wyoming Department of Environmental Quality (WDEQ) has rescinded the operator’s WYPDES [Wyoming Pollutant Discharge Elimination System] permit for discharge to containment structures in the Barber Creek Watershed [*i.e.*, the ditches dug in 2006].” EA at 3.¹¹ In addition, Williams affirmatively states that it “does not have the right to use the channel to flow water related to the development

¹⁰ The WMP then stated:

The existing off-project infrastructure is associated with the Williams BLM approved Schoonover Road Unit 1&2 (SRU1&2), Schoonover Road Unit 3 (SRU3), Schoonover Road Unit 5 (SRU5), and South Prong Unit 3 (SPU3) projects and the Waterline right of Way Sundry (Waterline Sundry). Proposed off-project infrastructure is located within the BLM pending South Prong Unit 1 and 2 (SPU 1&2) project.

Id. at 5; *see also id.* at 6.

¹¹ Page 4 of the EA describes the water management strategy and how the water will be disposed of. Page 12 also refers to the water that will be discharged into Beaver Creek.

of the federal minerals of the Carr Draw III East POD,” Williams Answer at 10, and does not have approval to do so unless it seeks an amendment to the POD.

We note that paragraphs 142 and 145 of “Plaintiff’s Amended Reply and Claims in Reply to Defendant’s Answer and Counterclaim” in *Williams v. Maycock* state that Williams sought the easements for the ditches “for the flow of water produced by Williams from its CBM wells located both on and off the Maycock Ranch” and that it would need the flow easement “for the duration of its operations in the area, which it estimates to be approximately 15 to 25 years.” SOR Ex. 6 at 8. Further, the State court’s June 15, 2006, Findings of Fact, Conclusions of Law, and Order granting the easements in that case contemplates Barber Creek drainage-wide development of CBNG and encompasses the Carr Draw III East POD area. June 15, 2006, Order (Williams Answer Ex. 1), ¶¶ 4-6 at 1-2. However, these various statements were made in 2006, before the ditches were dug, before the WDEQ rescinded Williams’ discharge permit, and before the separate amended POD for the Carr Draw III East project and the associated WMP for taking all the water off by pipeline. In short, Williams’ and the court’s statements in the condemnation action have been superseded by later events.¹²

It appears clear from the record that no water from the Carr Draw III East POD will be discharged into the ditches cut in 2006. Neither BLM nor this Board is a forum in which Maycock can seek a guarantee of payment for damages from previous actions taken by Williams that are unconnected to operations under the POD at issue. The State court has jurisdiction over Maycock’s claims for damages to his land from the prior discharge of water into the ditches, either as part of the condemnation action or by way of separate action. BLM and this Board do not. Therefore, BLM was correct in excluding from the bond amount damages arising from the discharges into the ditches cut in 2006.

¹² Maycock argues that water piped off the Carr Draw III East POD area might be returned after treatment and pumped into one of the ditches, citing a Sept. 26, 2007, e-mail from Penny Bellah at Williams to Bill Ostheimer at BLM. SOR at 7-8 and Attachment 3 Tab G. Bellah said: “Water management will be handled by a pipeline system taking the water off the POD and/or the water will be treated in an off POD Treatment site and then flow would be in the constructed channel or main stem Barber Creek.” In view of the specific provisions of the Carr Draw III East POD and the WMP, and the acknowledged lack of authority to discharge produced water into the ditches in Barber Creek, it appears that Bellah meant to refer to Beaver Creek rather than Barber Creek. There is no indication that Williams plans to, or has sought approval to, construct a second pipeline to pipe water transported off the Barber Creek drainage back to the Barber Creek drainage.

III. *Maycock Has Not Met His Burden to Show that the Bond Amount Is Inadequate.*

In the DBA, the BLM Land Law Examiner determined: “In addressing the harm that is potentially compensable under the regulations (*i.e.*, grasses and hays related to stockraising), and consistent with BLM regulations and guidance, BLM animal unit month (AUM) values (10 acres would satisfy 1 AUM) are utilized.” DBA at 3. After finding a short-term (less than 2 years) disturbance of 238 acres and a long-term disturbance of 26.7 of those 238 acres, the DBA determined a loss of 2.7 AUMs. The DBA continued: “The BLM’s current fee for trespass grazing is \$13.90 per AUM. Based on this figure, with the life span of the project being approximately 10 years and an annual inflation rate of 5%, the total loss is valued at \$4,161.02.” *Id.*

The Decision modified this calculation and found a short-term disturbance of 282.48 acres and a long-term disturbance of 109.7 acres. Decision at 8. The Decision noted that “[t]he DBA assumes forage productivity is approximately equal to 10 acres per Animal Unit Month (AUM). You have not taken issue with this value.” *Id.* at 9. On that basis, the Decision found a short-term forage loss of 28.25 AUMs and a long-term forage loss of 10.97 AUMs. *Id.* The Decision further found that “[t]he \$/AUM value used in the DBA correctly utilizes the BLM’s published fees for trespass grazing in Wyoming but utilizes an out-of-date value (\$13.90/AUM). This value has been increased to reflect the value in effect at the time the DBA was prepared (\$15.10).” *Id.*, citing Washington Office Instruction Memorandum (WO IM) 2007-061, dated Feb. 13, 2007.¹³ Assuming a project life of 25 years, the Decision calculated the damage to grazing value as \$8,440.89. Together with the estimated damages to tangible improvements, the amount was still less than the \$37,000 bond posted. Decision at 10.

A. *BLM Properly Rejected the Warren Report’s Analysis.*

The Warren Report used three alternative methods to calculate an alleged value for grazing. Under the first method, Warren derived a value of the privately-owned ranch property through comparison with recent offers or sales of similar property. Warren Report (SOR Ex. 4) at 6-7. He then calculated what he said was the ranch’s carrying capacity as 248 animals, which, taking into account four different categories or classes of pasture, he said represented 2,983 AUMs. *Id.* at 2. He then apparently divided the value by the carrying capacity to derive a value of \$8,550 per AUM. *Id.* at 1-2. Warren asserted that the then-proposed 254 CBNG wells would reduce the Ranch’s carrying capacity by 80 percent and on that basis calculated an “estimated damage to grazing rights” of over \$1.7 million. *Id.* at 2.

¹³ http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2007/im_2007-061.html. See AR Vol. F Doc. 1.

Under the second method, Warren looked to other surface and damage contracts between CBNG operators and ranchers in the immediate vicinity to assert that the damages to the value of the ranch for grazing would exceed \$1 million. *Id.* at 3-5. Under the third method, Warren looked to what he said were the “surface impact payments” made by CBNG operators to the State of Wyoming to compensate for negative impacts to State land for grazing, asserting that the damages from 254 wells would exceed \$2 million. *Id.* at 5.

The DBA rejected all three methods, finding that they were based on “factors beyond the permissible factors contained in the regulations” and found the \$37,000 bond to be adequate. DBA (AR Vol. V Doc. 13) at 3. On appeal, the Acting Deputy State Director found that Maycock’s “proposed alternate means of calculating damages [*i.e.*, the Warren Report] is not consistent with current BLM policy and practices.” Decision at 12.

In his SOR, Maycock continues to assert the validity of all three of Warren’s methods. SOR at 9-11. BLM argues that Maycock “has not provided any legal authority to support his arguments that the three methods Mr. Warren used . . . are contemplated in the [43 C.F.R.] 3814 regulations.” Answer at 10.

The regulations at 43 C.F.R. § 3814.1 say nothing about the method to be used to calculate the value of land for grazing. They neither prescribe a particular method nor expressly prohibit any of the several methods Maycock suggests. Neither does Onshore Oil and Gas Order No. 1. (As discussed further below, the method BLM used was taken in part from internal BLM instructions.)

BLM argues that Warren’s first method (looking to sales of similar ranch property and reducing the asserted value of the ranch by the asserted percentage reduction in carrying capacity) “overstates the amount of damages as it does not account for the temporal nature of some of the impacts, and assumes that the land has no value other than for grazing.” BLM Answer at 10. We agree that the value of land for grazing does not necessarily equate to the estimated sales value of ranch land as a tract of real estate. The land will have substantial value regardless of whether it is grazed. As discussed below, this does not mean that the effect of CBNG operations on the ranch’s carrying capacity is irrelevant, but we agree that Warren’s first method would tend to overstate damages to the value of land for grazing, and BLM properly rejected it.

We also agree that looking to other surface and damage agreements between operators and other ranchers is not a reliable measure of the damages to the value for grazing of Maycock’s ranch. Operators and landowners may agree to varying amounts in such agreements for different reasons and in view of considerations and incentives beyond the value of the land for grazing. Similar problems arise in

attempting to use “surface impact payments” made by CBNG operators to the State of Wyoming to compensate for negative impacts to State lands for grazing. Warren asserts that the \$2,000 per well for the first year and \$1,000 per well annually thereafter is “very common,” Warren Report at 5, but has provided no explanation of how these figures are derived, or why they apply to Maycock’s ranch, or why it would be reasonable to rely on them in this case.

We therefore agree that the Decision correctly rejected the Warren Report’s alternative calculations.

B. *Maycock Has Not Shown on the Current Record that CBNG Operations Are Likely to Make Livestock Operations Unprofitable.*

Maycock argues that an assumption of 10 acres per AUM is arbitrary and unrelated to actual conditions on the ranch, and that, contrary to the statement in the Decision, he did challenge the 10 acres per AUM assumption by providing the Warren Report that uses much different figures. SOR at 11. He further maintains:

The BLM methodology also did not account for the fact that where the disturbance occurs on the Maycock Ranch is critical. The most important areas for livestock forage on the Maycock Ranch are in the Barber Creek drainage, the tributaries to that drainage, and on the ridges. Disturbance in these areas has a much larger impact on the Maycock Ranch than a disturbance elsewhere. While ridge tops and the bottoms of draws and drainages make up only a small percentage of the total surface area of the ranch, approximately 90% of the edible forage available to Mr. Maycock’s livestock is located on the ridge tops and bottom land, and 90% of that forage comes from the bottom lands of Barber Creek or its tributaries. (Doc. 2 ¶ 3; Doc. 3 ¶ 17). Therefore, one acre of land disturbed on the ridge tops will have a much greater impact than one acre of land disturbed on a hill side, and 10 acres of land disturbed in the Barber Creek drainage . . . will have a much greater impact on carrying capacity of the entire ranch than 10 acres disturbed on a ridge.

SOR at 12. The several maps in AR Vol. B bear out Maycock’s description of the topographic character of the ranch. Nothing in the present record contradicts Maycock’s description of general forage location and distribution and where the most productive forage is. The Project Facility Maps in AR Vol. B, which show the well site locations, indicate that the vast majority of the wells will be located on the relatively

higher and flatter areas of the ridge tops.¹⁴ It appears that only three of the well sites will be located in lower drainage areas below the 4,300-meter elevation level (two along Barber Creek and one near Barber Creek along a tributary).¹⁵

[3] An appellant bears the burden of showing error in BLM's determination of the bond amount. *See, e.g., Mark Patrick Heath*, 175 IBLA 167, 187 (2008), and cases cited. We do not agree with BLM, BLM Answer at 10, that Maycock "did not take issue" with the 10 acres/AUM ratio during the State Director review process. In relying on the different acres/AUM ratios for different classes of grazing land used in the Warren Report, Maycock clearly did dispute BLM's figure.¹⁶ In this case, the record gives no indication of how BLM "determined that ten acres would support one AUM," *id.*, and one is left with the impression that BLM may have simply assumed this figure as a matter of routine practice. It appears that BLM commonly applies the \$/AUM trespass fee for unauthorized grazing¹⁷ to the expected AUM loss calculated using the assumed acres/AUM ratio to derive a measure of damages. The regulations neither compel nor prohibit use of that method, but it has been used in previous cases decided by this Board.¹⁸ The amount of the bond Williams has posted is more than four times the amount BLM calculated using this method.

We acknowledge that if development under the POD would substantially impair the overall carrying capacity of the ranch (because of the concentration of wells and facilities in prime forage area), rather than affect the carrying capacity only marginally, the damage to the value of the land for grazing may not be limited to a per-AUM trespass fee calculated by reference to the specific acreage occupied by wells, roads, pipelines, and related facilities. In his SOR, Maycock alleges that "Williams' proposed massive gas development will cause his ranch to no longer be able to support a livestock operation. If Mr. Maycock loses his forage grasses along Barber Creek alone, his livestock operation could be cut 30 to 50% and put him out

¹⁴ It is apparent that construction of access roads to ridge top sites will be easier than construction of access roads to sites in creek drainage areas.

¹⁵ Well site 41-26-5076BG/W in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 26, T. 50 N., R. 76 W., well site 21-26-5076BG/W in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 26, T. 50 N., R. 76 W., and well site 14-24-5076BG/W in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 24, T. 50 N., R. 76 W., respectively.

¹⁶ While the Warren Report uses different acres/AUM ratios, and distinguishes among classes of grazing lands within the ranch, it also does not explain how the ratios that it uses were derived.

¹⁷ The trespass fee is "the average private grazing land lease rate per AUM for the state where the unauthorized grazing occurs." WO IM 2007-061 at 1.

¹⁸ *See Richard Rudnick*, 143 IBLA 257 (1998); *William C. Hayes*, 122 IBLA 68 (1992); *William and Pearl Hayes*, 101 IBLA 110 (1988); *Elmer Silvera*, 42 IBLA 11 (1979).

of business.” SOR at 9. Though he avers this in his accompanying affidavit (SOR Ex. 3), he has not provided supporting calculations. Maycock has not provided any calculation or estimate of the acreage of available forage grasses along Barber Creek or what percentage of that acreage would be lost as a result of operations under the POD.¹⁹ Nor has Maycock provided any calculation of the available forage acreage in other lower tributary drainage areas or on the ridge tops, or the relative distribution of forage between the ridge tops and creek drainage areas. By Maycock’s own description, the ridge top areas are less valuable for forage than the creek drainage areas. Nor has Maycock explained how or how much acreage, if any, beyond the approximately 282.5 acres actually expected to be disturbed by wells, roads, pipelines, and related facilities, would be lost to grazing.

On the present record, Maycock has not shown that the proposed CBNG operations will substantially impair livestock operations on the ranch to the point that those operations will become unprofitable.²⁰ Because Maycock’s reliance on the Warren Report is misplaced, and in view of the absence of other specific evidence, Maycock has not met his burden to show that the bond amount is inadequate.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

¹⁹ The Project Facility Maps in AR Vol. B indicate that very little forage along Barber Creek would be lost, inasmuch as only two of the well sites are located along Barber Creek.

²⁰ If CBNG development were to make the ranch unprofitable and force Maycock out of business on land whose primary value is for grazing, the land effectively would become value-less for grazing purposes. Measuring damages solely by the BLM grazing trespass fee in such circumstances likely would not adequately reflect the surface owner’s damages. If Maycock were to demonstrate in the future that the CBNG operations are having the effect of making the livestock operations unprofitable, BLM presumably could require Williams to increase the amount of the bond. Although 43 C.F.R. § 3814.1 does not expressly so provide, the purpose of the bond is to secure a liability imposed by statute, 30 U.S.C. § 54 (2000). The bond amount should be set at a level to cover that liability. (We note that the statutory liability remains regardless of whether the amount of a particular bond is adequate under the circumstances.)

_____/s/
Geoffrey Heath
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge