



JOHN & SHIRLEY MURRER, *ET AL.*

182 IBLA 343

Decided August 23, 2012



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

JOHN & SHIRLEY MURRER, *ET AL.*

IBLA 2012-118 through 2012-122

Decided August 23, 2012

Appeal from a decision of the Field Manager, Eagle Lake Field Office, Northern California District, Bureau of Land Management, to turn off a bypass water flow valve. DOI-BLM-CAN050-2012-14-CX.

Consolidation Ordered; Motion to Dismiss in IBLA 2012-118 through 122 for Failure to State a Claim or Lack of Jurisdiction Denied; Motion to Dismiss in IBLA 2012-122 for Lack of Standing Granted; Petition for Stay in IBLA 2012-118 Denied as Moot; Decision Affirmed.

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

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.

2. Federal Land Policy and Management Act of 1976--Water and Water Rights: Generally--Water and Water Rights: State Laws

Where State regulatory authorities have determined that there are no decreed water rights in water issuing from a water pipe on public lands and that the flow of such water constitutes waste or unreasonable use and a violation of State law, BLM's decision to permanently halt the water flow is properly affirmed.

3. Environmental Quality: Environmental Statements: Categorical Exclusions--National Environmental Policy Act

of 1969: Environmental Statements: Categorical Exclusions

A decision to permanently close water flow valves on a water pipe on public land without preparing an environmental assessment or an environmental impact statement based on BLM's determination that such action falls within the scope of a categorical exclusion will be affirmed where it is reasonable and supported by the record.

APPEARANCES: Jaimee A. Jones, Esq., Susanville, California, for appellants John and Shirley Murrer; Jack and Darcy H. Hanson, Susanville, California, *pro sese*; Daren Hagata, Susanville, California, *pro se*; Jim L. and Nanette R. Martin, Fair Oaks, California, *pro sese*; and Todd Swickard, Susanville, California, *pro se*; Stephen R. Palmer, Esq., Office of the Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

John and Shirley Murrer, Jack and Darcy H. Hanson, Daren Hagata, Todd Swickard, and Jim L. and Nanette R. Martin<sup>1</sup> have appealed a February 2, 2012, Notice of Field Manager's Decision, issued by the Field Manager, Eagle Lake (California) Field Office, Northern California District, Bureau of Land Management (BLM), approving permanent closure of a pair of water flow valves on a water pipe located on public land. The decision was based on Categorical Exclusion (CX) Documentation, DOI-BLM-CAN050-2012-14-CX, dated February 2, 2012, in which BLM determined that no environmental review pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), was required.

*Preliminary Matters*

All the appellants assert that they are owners of private land in the Willow Creek Valley who hold adjudicated water rights to Willow Creek water with which BLM's action allegedly interferes. Only the Murrers included a petition for a stay in their Notice of Appeal. All the appellants filed a Statement of Reasons. In IBLA 2012-118, BLM filed a response to the Murrer's petition for stay (Response) and a

---

<sup>1</sup> The Hansons' appeal was docketed as IBLA 2012-119; Hagata's appeal was docketed as IBLA 2012-120; the Martins' appeal was docketed as IBLA 2012-121; and Swickard's appeal was docketed as IBLA 2012-122.

separate Answer, both styled *John and Shirley Murrer, et al. v. Bureau of Land Management*, IBLA 2012-118 through 122. In its Response, BLM addressed three of the four elements necessary to warrant a stay, *i.e.*, likelihood of success on the merits, immediate and irreparable harm, and the public interest. With respect to the final element, relative harm to the parties, BLM argues that the Murrers have not shown that they are adversely affected by the decision at issue, citing principles and case law applicable to the question of standing to appeal, but without addressing whether they are parties to the case, the first prong of a proper standing analysis. BLM moves the Board to dismiss the appeals. Response at 2, 12.

BLM filed a copy of its Answer in all the appeals. The Answer refers the Board to the Response to the Murrers' stay petition, and consists of notice-style assertions and denials more useful in judicial rather than administrative proceedings, and two affirmative defenses: failure to state a claim upon which relief can be granted, typically advanced as a motion to dismiss and the Board's lack of jurisdiction, which implicitly is an assertion that a party lacks standing, that the appeal is untimely or that the subject matter or a vital aspect of the appeal is beyond the Board's delegated authority. BLM again moves the Board to dismiss the appeals. Answer at 2. BLM's pleading style in this case necessitates several preliminary rulings.

First, the appeals arise from the same facts and raised the same questions of fact and law, and are hereby consolidated for disposition.

Second, BLM's motion to dismiss all the appeals for failure to state a claim upon which relief can be granted or because the Board lacks jurisdiction is denied. The Board's jurisdiction to decide appeals from decisions rendered by Departmental officials relating to, among other things, the use and disposition of public lands and their resources, 43 C.F.R. § 4.1(b)(2), is to be distinguished from specific issues or arguments raised in such decisions or by a party. Where, as here, BLM's decision holds that certain claims are matters of state law and that BLM's action is covered by a CX, the Board has jurisdiction to determine the correctness of both conclusions. The decision will be affirmed, reversed or vacated, in whole or in part, but the *appeal* is not properly subject to dismissal for failure to state a claim upon which relief can be granted or because the Board lacks jurisdiction. The motion to dismiss on these grounds is properly denied.

Third, although it is not at all clear, we assume BLM intends to challenge all the appellants' standing under 43 C.F.R. § 4.410 as a ground for its motion to dismiss. To have standing to appeal from a BLM decision under 43 C.F.R. § 4.410(a), the appellant must be both a party to the case and adversely affected by that decision. *State of Alaska*, 167 IBLA 250, 254-55 (2005), and cases cited. To be a "party to a case" a person must have actively participated in the decision-making process

regarding the subject matter of the appeal. *See, e.g., The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 81-82 (2005). An appellant must make colorable allegations of an adverse effect, supported by specific facts sufficient to establish a causal relationship between the approved action and the injury alleged. *The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004); *Southern Utah Wilderness Alliance*, 127 IBLA 325, 327 (1993). While an appellant need not prove that an adverse effect in fact will occur as a result of the BLM action, *Donald K. Majors*, 123 IBLA 142, 145 (1992), the threat of injury and its effect on the appellant must be more than hypothetical. *See Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992); *George Schultz*, 94 IBLA 173, 178 (1986).

In their Notices of Appeal, all the appellants claim adjudicated water rights in Willow Creek water, which is adequate to establish an adverse effect from BLM's decision to close the pipe valves. The Murrers, the Hansons, the Martins, and Hagata are parties to the case, having submitted written comments to BLM regarding potential impacts of permanently closing the valve in 2009, when the process leading to the decision before us began. We find no evidence of Swickard's participation in that process. Swickard is therefore not a party to the case and, accordingly, lacks standing to maintain an appeal. BLM's motion to dismiss is granted as to Swickard and denied as to the other appellants.<sup>2</sup>

Fourth, because we reach the merits of the appeals, the Murrers' petition for a stay will be denied as moot.

### *Background*

The decision involves physically and permanently turning off a pair of water flow valves mounted on an 8-inch diameter pipe within the Bly Tunnel (Tunnel) to preclude any flow of water from Eagle Lake (Lake)<sup>3</sup> into Willow Creek, a spring-fed

---

<sup>2</sup> Ordinarily, we would consider giving Swickard the opportunity to show he has standing. Given the disposition of the other appeals and the reasons for it, however, we will not do so in this case.

<sup>3</sup> The Lake, the second largest natural lake in the State, sits in a closed drainage basin, at an elevation of approximately 5,000 feet above sea level, in northeastern California. It has a surface area ranging from 16,000 to 29,000 acres, with over 100 miles of shoreline. *See generally* "Eagle Lake Water Budget" (attached to Memorandum to Field Manager from Acting Deputy State Director, Energy and Minerals, California State Office, BLM, dated Feb. 18, 2010). The Lake receives water from precipitation and surface and groundwater flows, and loses water, mostly through evaporation and groundwater seepage, as there is no surface outlet and no  
(continued...)

tributary of the Susan River, in Lassen County, California.<sup>4</sup> Shutting the valves will facilitate BLM's and the State's study of water budgeting options for the Lake and protect its fish populations, the overall ecology of the Lake, and other Lake resource values.

The Tunnel is 7,300 feet long and was constructed through Black Mountain on public lands in the early 1920s pursuant to a Federal right-of-way (ROW). The Tunnel was part of an historical irrigation project that was designed to convey surface water from the Lake to downstream water users in the Willow Creek Valley, and eventually the Honey Lake Valley to satisfy adjudicated State water rights.<sup>5</sup> The water was diverted into the Tunnel by a short manmade inlet channel along the eastern boundary of the Lake and, upon leaving the Tunnel, was carried southeasterly close to 2,000 feet by a manmade outlet channel across the Upper Murrer Meadow to the headwaters of Willow Creek. Inlet and outlet portals for the Tunnel are situated on public lands. Due to the excessive alkalinity of the Lake water and water shortages, the irrigation project was abandoned in the mid-1930s. From the mid-1930s forward, no surface water was diverted from the Lake through the Tunnel, because of falling water levels in the Lake.

In an April 18, 1940, Judgment and Decree, the Superior Court of the State of California for the County of Lassen (Susan River Decree) adjudicated the rights to water in the Susan River and its tributaries, including Willow Creek.<sup>6</sup> That Decree applied to all natural sources of water in Willow Creek and other tributaries of the Susan River.

In 1959, the adjudicated State water rights were revoked for non-use. In 1973, BLM cancelled the ROW. The entrance to the Tunnel was later blocked, by landslides and/or deliberately, in an effort to further ensure no surface water flowed through the Tunnel.

---

<sup>3</sup> (...continued)  
known subsurface outlet.

<sup>4</sup> All of the lands at issue are situated in T. 32 N., R. 11 E., Mount Diablo Meridian, Lassen County, California.

<sup>5</sup> BLM states that it has never held any right to the surface water diverted from the Lake through the Tunnel. See Response at 3 n.3.

<sup>6</sup> The Susan River Decree was ultimately affirmed by the Supreme Court of California in an Aug. 27, 1941, final judicial ruling in *Fleming v. Bennett*, 116 P.2d 442 (1941).

In 1986, BLM placed a permanent cement plug at approximately the mid-point of the Tunnel. From the upstream end near the Lake, groundwater seeps into the Tunnel. Little or no groundwater seeps into the Tunnel downstream of the cement plug because of impervious geologic conditions. BLM installed the pipe through the cement plug, through which up to 10 cubic feet per second (cfs) of water can flow. Water enters the Tunnel upstream of the permanent plug and is conveyed through the pipe. See Letter to Field Manager from Chief, Complaint Unit, State Water Resources Control Board (SWRCB), dated June 1, 2009, at 5. When BLM installed the plug, pipe, and valves, Federal and State authorities believed or assumed that the water seeping into the Tunnel naturally originated in springs seeping into the Tunnel and not from the Lake, and thus were subject to the Susan River Decree. The pipe therefore ensured continued beneficial use of the water rights in Willow Creek. See Attachment (Complaint Response-Variou Publics) to Letter to SWRCB from Field Manager dated Jan. 8, 2009, at 1. The valves were open until BLM's February 2012 decision.

Water levels in the Lake have steadily dropped over the years, so that surface water from the Lake was no longer being diverted into the Tunnel to Willow Creek. See Response at 3; Answer, Ex. A (SWRCB Letter dated Dec. 20, 2011) at 3. However, groundwater has long been seeping into the Tunnel and flowing through the pipe. Response at 3. In recent years, the flow has been "relatively minor" and measurements in 2011 at the valves show "the flow from the tunnel is only 1.25 cfs," with a maximum flow in recent years of only been 5.5 cfs. *Id.* at 3, 5; see Answer, Ex. B (California Department of Fish Game (CDFG) Letter dated Oct. 3, 2011) at 1; CX Documentation at 2; Eagle Lake Field Office Report, Bly Tunnel Questions and Answers, dated Feb. 1, 2012, at unpag. 1-3.

The question of closing the valves arose as a consequence of numerous complaints from property owners and members of the public objecting to the continued diversion of Lake water through the Tunnel and pipe. Those complaints were considered by SWRCB and CDFG, both of which have responsibilities concerning water appropriation and fish and wildlife and their habitat in the State of California under State law.

In 2009, SWRCB responded to an inquiry from BLM regarding whether water users downstream of the Tunnel have the right to demand that water be allowed to continue to flow through the pipe past the plug. SWRCB advised BLM that it had investigated water right complaints against BLM alleging that the water discharging from the pipe constitutes an unauthorized diversion. Among other things, SWRCB concluded that there are no appropriative rights in effect at this time for diversion of water from Eagle Lake; that, in general, all Eagle Lake water is required to remain in Eagle Lake for beneficial uses pursuant to existing right and the public interest; that

the Susan River Decree did not confer upon any user the right to take physical control of the water in the Tunnel and the Tunnel itself is not designated as an authorized point of diversion under the Decree; that there is no appreciable seepage from the Tunnel walls downstream of the plug; that the right to divert all percolating groundwater issuing from the Tunnel and the responsibility for controlling such diversion belongs to BLM; that downstream parties have “no discernible rights to demand the release of such waters”; and that BLM can shut off the discharge of the water any time. SWRCB advised BLM that the diversion and use of water from the Tunnel is subject to California water law, and if SWRCB subsequently determined that maintaining the flow resulted in a waste of water or caused unreasonable adverse impacts, it would recommend appropriate enforcement action against BLM to control the diversion. Administrative Record (AR) 37 (Letter from SWRCB, Division of Water Rights, to BLM Field Office Manager dated June 1, 2009) at 1-6.

In 2009, BLM solicited public comment regarding potential impacts from permanently closing the valve.

In a letter to BLM dated September 8, 2009, CDFG’s Regional Manager stated that the loss of water through the Tunnel was “approximately one percent of the volume of water lost due to evaporation.” AR 41 at 1. He concluded that this “small increment” was insignificant and had no measurable impact on the Lake’s fish resources and recommended that BLM assess the impact of losing 1.25 cfs of water on Willow Creek fishery and habitat. *Id.* at 1, 2.

Citing CDFG’s September 8, 2009, letter, BLM ultimately concluded it would allow the valves to remain open. *Id.*

Given the apparent inconsistency between the CDFG Regional Manager’s conclusion and those of SWRCB’s Water Rights Division, no further action was taken at that point.

In October 2011, in a letter to SWRCB’s Division of Water Rights, CDFG noted that the Eagle Lake watershed had been subjected to a multi-year drought that caused low lake levels that had likely contributed to a winter fish kill in February 2011. Further noting public concern that the Tunnel was affecting Lake levels, CDFG requested SWRCB to assert its regulatory authority and require BLM to close the valves on the pipe in the Tunnel to reduce export of Eagle Lake Basin water and help preserve public trust values in the Lake. Answer, Ex. B (Letter to SWRCB from CDFG dated Oct. 3, 2011) at 1-2.

As requested by CDFG, in a letter to BLM dated December 21, 2011, SWRCB requested closure of the pipe valves. SWRCB in large part repeated the findings and conclusions of its June 1, 2009, letter, adding:

- Since the mid-1980s, the water surface at Eagle Lake has dropped below and receded from the surface inlet to the Bly Tunnel, thus no surface water is being diverted directly from Eagle Lake. Instead, virtually all of the water emanating from the Bly Tunnel at this time is seeping into the tunnel through the porous substrate at the lake-end of the tunnel.
- In 1990, Dr. Peter B. Moyle and others investigated Bly Tunnel to see if the water issuing from it was lake or spring water. In their 1991 report, Moyle, et al[.] concluded: *“The highly alkaline water flowing through the Bly Tunnel clearly has its source in Eagle Lake.”*
- . . .
- The loss of water from Eagle Lake and its interconnected groundwater basin likely has a direct and adverse impact on the water level of the lake.
- While the amount of water lost annually through the Bly Tunnel is small when compared to the annual losses to seepage and evaporation, the losses through the Bly Tunnel are cumulative and controllable. The amount of water lost . . . since BLM installed the tunnel plug . . . may have reduced the water level in Eagle Lake by several feet.
- To the extent that losses through the Bly Tunnel have an adverse impact on the water levels and the public trust resources of Eagle Lake, and to the extent that BLM does not put such water to beneficial use, the release of water through the tunnel constitutes a waste or unreasonable use.

Answer, Ex. A (SWRCB letter to BLM dated Dec. 21, 2011) at 2-3.

SWRCB acknowledged that CDFG had reached a different conclusion in the past, but stated that SWRCB regarded CDFG’s October 2011 request as

acknowledgment that losses through the Bly Tunnel have an adverse impact on the water levels and the public trust resources of Eagle Lake, including the fishery and the recreational uses. Therefore, the [Water Rights] Division finds that the intentional release of water through the Bly Tunnel constitutes an unreasonable method of diversion.

*Id.* at 4.

SWRCB requested BLM to close the valves as soon as possible; take precautions to prevent tampering with them; monitor Lake water levels, hydrostatic pressure at the Tunnel plug, outflow from the Tunnel, and flow in Willow Creek, to the extent possible; and, with CDFG, monitor impacts to public trust resources in Willow Creek. *Id.*

An interdisciplinary team in the Eagle Field Office determined that approving closure of the valves was within a category of actions that are not likely, individually or cumulatively, to significantly impact the quality of the human environment. *See* 40 C.F.R. § 1508.4; 43 C.F.R. § 46.205; BLM's NEPA Handbook, H-1790-1 (Rel. 1-1710 (1/30/2008)). BLM concluded that the proposed action fit within two Department-wide CXs:

Nondestructive data collection, inventory (including field, aerial, and satellite surveying and mapping), study, research, and monitoring activities.

Routine and continuing government business, including such things as supervision, administration, operations, maintenance, renovations, and replacement activities having limited context and intensity (e.g., limited size and magnitude or short-term effects).

NEPA Handbook at 145 (Appendix 3 (Departmental Categorical Exclusions), Sections 1.6 and 1.7); *see* CX Documentation at 2, 3. BLM determined that the proposed action fit one other BLM-specific CX: "Minor modification of water developments to improve or facilitate wildlife use (e.g., modify enclosure fence, install flood valve, or reduce ramp access angle)." NEPA Handbook at 147 (Appendix 4 (BLM Categorical Exclusions), Section A.2.); *see* CX Documentation at 3.<sup>7</sup> BLM further determined that there are no "extraordinary circumstances" as

---

<sup>7</sup> The Field Manager's February 2012 decision also identified a second BLM-specific CX (set forth, under Section J.8., at page 154 of the NEPA Handbook): "Installation of minor devices to protect human life (e.g., grates across mines)." Decision at 2.

(continued...)

defined in 43 C.F.R. § 46.215 that would bar use of a CX in this situation. *See* 40 C.F.R. § 1508.4; 43 C.F.R. § 46.205(c); NEPA Handbook at 155-56 (Appendix 5 (Categorical Exclusions: Extraordinary Circumstances)); CX Documentation at 3, 4.

The Field Manager signed the CX Documentation on February 2, 2012, finding that BLM was not required to prepare either an Environmental Assessment (EA) to assess impacts, or an Environmental Impact Statement (EIS) to assess significant impacts. *See* 40 C.F.R. §§ 1501.4 and 1507.3(b); 43 C.F.R. § 46.205(a) and (c).

The Field Manager approved the permanent closing of the valves, concluding that BLM was not putting the diverted Lake water to beneficial use, and that, while preventing diversion would not be detrimental to the water rights of any downstream water users or any downstream fish and wildlife, not halting the diversion would be detrimental to the Lake and its dependent fish populations. *See* Decision at 1-2. He noted that State water rights determinations are binding on BLM and that SWRCB's December 2011 letter, supported by CDFG's October 2011 letter, constituted a "definitive statement" concerning decreed water rights. *Id.* at 1. The valves were shut off and sealed on February 2, 2012.

These appeals followed.

#### *Discussion*

At the heart of appellants' appeals are their claims that BLM's decision to close the pipe valves violates their water rights under the 1940 Susan River Decree; that BLM's decision effectively re-adjudicates their decreed water rights, which only the State can do; that the decision is inconsistent with prior SWRCB positions regarding the water issuing from the Tunnel; and that a CX is inappropriate because shutting the valves will have significant impacts on those downstream of the Tunnel and on fish and wildlife and their habitat, and therefore an "environmental impact report" (EIR) must be prepared before BLM can close the valves.<sup>8</sup>

[1] It is well established that the Department of the Interior has no power to determine questions of appropriation and control of water rights as between private parties, as such questions are exclusively matters of State law. *Daryl Richardson*,

---

<sup>7</sup> (...continued)

However, the signed CX Documentation made no mention of that CX.

<sup>8</sup> An EIR is prepared by the State pursuant to the California Environmental Quality Act, Cal. Pub. Res. Code, §§ 21000-21177 (West 2009), the State equivalent of section 102(2)(C) of NEPA. Appellants obviously mean to contend that BLM is required to prepare an EA or EIS pursuant to section 102(2)(C) of NEPA.

125 IBLA 132, 134-35 (1993); *Toghotthele Corp.*, 95 IBLA 225, 230 (1987) (citing *Broken H. Ranch Co.*, 33 IBLA 386 (1977); *Harold C. Brown*, A-30536, 73 I.D. 172 (May 31, 1966); *Hatch Brothers Co.*, A-27525 (Jan. 13, 1958)). Here, State, not Federal, water rights are at issue.

[2] SWRCB determined that no State water rights downstream of the Tunnel will be violated by closing the pipe valves because no such rights exist under the Susan River Decree. Appellants complain that the December 2011 determination is inconsistent with the SWRCB's earlier ruling to the contrary, but BLM has no authority to overturn SWRCB's rulings. BLM correctly held that issues related to the validity of water rights are beyond its authority and must be pursued before the SWRCB or in court and decided under State law. In light of SWRCB's determination that allowing the pipe valves to remain open constitutes waste or unreasonable use of water and an unreasonable method of diversion under California law, and in light of BLM policy with respect to water, BLM's decision to permanently close the valves is properly affirmed on appeal. Accordingly, we reject appellants' argument that permanently closing the pipe valves interferes with or improperly re-adjudicates their decreed water rights or otherwise intrudes upon State law.

[3] What remains are appellants' contentions that BLM improperly applied CXs to the valve closure and therefore should have prepared a NEPA document to analyze downstream impacts. A decision to permanently shut off the Tunnel pipe valves without preparing an EA or EIS based on BLM's determination that such action falls within the scope of a CX will be affirmed if it is reasonable and supported by the record. See *Oregon Natural Desert Association*, 174 IBLA 26, 33-34 (2008).

There appears to be no dispute regarding the need to study the Lake's water budget and no question that water levels in the Lake have steadily fallen over the years. The record clearly shows that Eagle Lake rainbow trout and other species are affected by the Lake's water level, as well as the State's recreational and fishery resources. The absence of flowing water in no way affects the Tunnel's status as an historic property. See CX Documentation at 2. We find that BLM's decision to permanently close the pipe valves reasonably falls within the CX for study, research, and monitoring activities, as well as the CX for minor modification of water developments to improve or facilitate wildlife use, and that there were no extraordinary circumstances that would bar use of a CX in this situation. The decision is affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, consolidation of the appeals in IBLA 2012-118 through IBLA 2012-122 is ordered; the motion to dismiss the appeals in IBLA 2012-118 through 121 for failure to state a claim upon which relief can be granted or because the Board lacks jurisdiction is denied; the motion to dismiss the

appeal in IBLA 2012-122 is granted on the ground of lack of standing; the petition for stay in IBLA 2012-118 is denied as moot; and BLM's decision is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
T. Britt Price  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge