

STANLEY DIMEGLIO ET AL.

IBLA 2001-95

Decided November 8, 2004

Appeal from decision of the Palm Springs-South Coast (California) Field Office, Bureau of Land Management finding knowing and willful trespass and assessing past rental. CACA-22572.

Affirmed.

1. Trespass: Generally

Any use, occupancy, or development of the public lands without authorization is a trespass. Where a party plants fruit trees on public lands and maintains them for a period of at least 13 years, and where there is nothing indicating that he was authorized to do so, he has committed trespass.

2. Trespass: Willful Trespass--Words and Phrases

Knowing and Willful. A trespass is “knowing and willful” if it constitutes the voluntary or conscious performance of an act which is prohibited or the voluntary or conscious failure to perform an act or duty that is required; the knowing or willful nature of conduct may be established by plain indifference to or reckless disregard of the requirements of law, regulations, orders, or terms of a lease; and a consistent pattern of performance or failure to perform supports a finding that the conduct is knowing or willful in nature, where such consistent pattern is neither the result of honest mistake nor mere inadvertency. Planting fruit trees on lands known to be Federally-owned and subsequently failing to remove them

and continuing to harvest fruit from them following notification that the trees were planted in trespass was “knowing and willful” trespass, as those actions constituted both a voluntary and conscious performance of an act which is prohibited (planting the trees) and a voluntary and conscious failure to perform an act or duty that is required (removing the trees). The continued presence on public lands of the fruit trees, as well as a water reservoir, equipment, and supply storage yard without BLM authorization throughout a 13-year period shows a consistent pattern of performance and failure to perform supporting the knowing and willful nature of the trespass. The trespasser’s subjective beliefs that he was legally expanding his operation and reclaiming adjacent lands and that it was reasonable to do so do not mitigate the knowing and willful character of his conduct.

3. Appraisals--Trespass: Measure of Damages

Anyone properly determined by BLM to be in trespass on Federally-owned lands shall be liable to the United States for damages, including the administrative costs incurred by the United States as a consequence of such trespass and the fair market value rental of the lands for the current year and past years of trespass. Where trespass is “knowing and willful,” the trespasser shall be liable to the United States for three times the fair market rental value which has accrued since the inception of the trespass, not to exceed a total of 6 years. In determining the “fair market rental value,” it was proper for BLM to consider the value of the improvements (most particularly the fruit trees) placed on the Federally-owned lands in trespass.

4. Trespass: Generally

BLM could properly direct trespassers to rehabilitate and stabilize the lands that were the subject of a trespass, including bringing the lands back to their pre-trespass condition by removing fruit trees planted and maintained in trespass.

APPEARANCES: Michael E. Quinton, Esq., for appellants; James G. Kenna, Manager, Palm Springs-South Coast Field Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Stanley DiMeglio, et al., ^{1/} have appealed from the November 29, 2000, decision of the Palm Springs-(California) South Coast Field Office, Bureau of Land Management (BLM), finding that the existence of fruit trees, as well as a water reservoir, equipment and supply storage yard, on public lands constituted unlawful trespass and that DiMeglio was liable for past rent of those lands in the amount of \$105,535.

The public lands at issue consist of approximately 60 acres (approximately 27 acres that have been developed into a citrus grove and 33 acres of vacant land containing a portion of a pond) situated within the N¹/₂ NE¹/₄ NW¹/₄ and the W¹/₂ NW¹/₄ NE¹/₄ sec. 23, T. 5 S., R. 1 E., San Bernardino Meridian, Riverside County, California. See Memorandum dated Sept. 9, 1998, from California State Office Appraiser to Palm Springs Area Office, at 2. The record shows that those lands are located to the south of and directly adjoin a parcel of privately-owned lands (553-210-004) listed as owned by Stanley DiMeglio, Ralph J. DiMeglio, and Eugenia C. DiMeglio.

On June 7, 1988, a BLM realty specialist completed an Initial Report of Unauthorized Use form documenting that, on June 3, 1988, he observed grapefruit, orange, and possibly other types of citrus fruit trees on BLM property adjoining the Skyline Ranch. The report names R. & S. DiMeglio as "suspect[s]." The realty specialist states in the report that he met the foreman of the Skyline Ranch and left a business card. The report indicates that, on June 7, 1988, Stan DiMeglio called the realty specialist and discussed his findings and that DiMeglio "seemed to want to resolve the issue properly." He apparently did not dispute the trespass, which the realty inspector described in his report as "confirmed."

On August 2, 1988, the Indio Resource Area Office sent a notice of trespass letter to DiMeglio stating:

We have evidence that tends to show you are growing fruit trees, have constructed and are operating and maintaining a water reservoir site, and equipment and supplies storage yard, and an access road on lands owned by the U.S. Government without the proper authorization.

^{1/} The Notice of Appeal was filed on behalf of Stanley DiMeglio, Gary McMillan, Patricia McMillan, and McMillan Farm Management Company.

As such, we assert that you are in violation of the Federal Land Policy and Management Act of 1976 [(FLPMA)], as amended (43 U.S.C. 1761-1771) and of the federal regulations pertinent thereto (specifically, [43 CFR] 2800-2879, and [43 CFR] Part 2920.

The letter informed DiMeglio that he had 15 days within receipt thereof to provide information and urged him to work towards resolving the issue.^{2/}

The matter languished before BLM. A compliance inspection at the site on July 19, 1995, revealed that the Skyline Ranch trespass was still ongoing. The compliance technician reported at that time that the owner had “in the past * * * acknowledged the trespass and expressed his desire to resolve the issue,” presumably in 1988, but that the “problem [appeared] to be [BLM’s] part in not following through with meeting requests.”

The record shows that BLM picked up the matter again in 1997. On March 25, 1997, a BLM employee reported that he had “walked the perimeter of the trespass site” and that, “[a]side from the fruiting grapefruit trees on public lands, the area is also being used for farm equipment storage and water storage.” There were “several dozen [55-gallon] barrels on site” that “appeared empty”; otherwise, no “obvious signs of hazardous waste material being stored on the site” were detected.

On April 3, 1997, a second notice of trespass letter was sent to DiMeglio (dba Skyline Ranch) noting “the agricultural trespass” on the public lands “immediately south of property owned and similarly farmed by you.” The notice of trespass stated that BLM files indicated that DiMeglio had been notified of this trespass in August 1988. The notice of trespass indicated that, “[b]ased on data gathered, using [global positioning system (GPS)] technology, we determined that the amount of trespass encompasses approximately 27.1 acres of public lands administered by” BLM, and that the “trespass involves a water storage reservoir, excess farm equipment, and several acres of farmed public lands.” BLM noted that DiMeglio had recently indicated to a BLM employee his “desire to resolve this trespass in a timely fashion” and requested from him the date the reservoir was constructed and the date the grapefruit orchard was planted on public lands. BLM also invited DiMeglio to meet with BLM staff to discuss the situation.^{3/}

^{2/} The record indicates that delivery was completed by certified mail to R. & S. DiMeglio at 2204 Signal Place, San Pedro, CA 90371.

^{3/} That notice of trespass was received by Stanley DiMeglio at 26670 Blackburn Road, Hemet, CA 92343.

BLM subsequently studied the matter extensively, securing aerial photos of the area to determine the extent of the trespass. An appraisal of the fair market value of the fee simple estate and the rental value for the property from January 1, 1991, was completed in February 1998 by a third-party contract appraiser. On September 9, 1998, the BLM California State Office Review Appraiser submitted a memorandum to the Area Manager, Palm Springs Resource Area Office, BLM, analyzing the case based on the appraisal. The memorandum described the trespass property as containing “approximately 60 acres,” consisting of “approximately 27 acres that have been developed into a citrus grove and 33 acres of vacant land with a portion of a pond” (Memorandum dated Sept. 9, 1998, at 2), although the parcel was elsewhere “estimated to have 40 plantable acres.” *Id.* at 3. The highest and best use of the land “as vacant” was found to be “land held for investment or possible development to a citrus grove.” *Id.* at 2. Noting that the appraiser had used the “market data approach” to value the fee simple interest of the property, the “estimated market value” of the property was found to \$240,000, or \$6,000 per “plantable acre.”

The State Office Review Appraiser did not accept “the appraiser’s estimate for the back rent” of the trespass property, instead setting that amount at \$105,535. The State Office Review Appraiser instead determined rental by examining the production from the four different types of citrus fruit trees that had been planted on the trespass acreage, *viz.*, pink grapefruit planted in 1987 (1987 pink grapefruit) (9.11 acres); pink grapefruit planted in 1977 (1977 pink grapefruit) (7.47 acres); Starr grapefruit planted in 1991 (1991 Starr grapefruit) (3.00 acres); and navel oranges planted in 1990 (1990 navel oranges) (1.10 acres). The State Office appraiser elected to begin calculating the rental in 1991 for each type of citrus tree, estimating total production of fruit (in boxes) and gross sales for each. The rental value was determined to be the “owner[‘s] 20 % share” of the gross sales for each year for each of the four different types of citrus fruit trees. ^{4/}

^{4/} Thus, for example, “total production in boxes” in 1991 from the 9.11 acres of 1987 pink grapefruit trees was determined using an “estimated production per acre” for 5-year-old trees of 400 boxes per acre, resulting in 3,644 boxes. An “estimated price per box” of \$7.50 was applied, resulting in “gross sales” for 1991 of \$27,330, and the “owner[‘s] 20 percent share” was accordingly calculated to be \$5,466. The “estimated production per acre” was shown as increasing from 400 boxes in 1991 to 900 boxes in 1994, ostensibly to reflect the increased production from maturing fruit trees. The “estimated price per box” varied from year to year, evidently reflecting historic market pricing for each year.

The “estimated production per acre” for 1991 Starr grapefruit was zero for the first three years (1991, 1992, and 1993), ostensibly because the trees (planted only in 1991) did not bear commercial amounts of fruit until 1994. Estimated production for the 1991 Starr grapefruit was shown as increasing from 150 boxes in 1994 to 850 boxes in 1998.

The record reveals that the appraisal was provided to DiMeglio in June 1999, after which there were unsuccessful attempts to resolve the matter over the subsequent months. According to a memorandum in the record, at a meeting with BLM personnel on July 19, 1999, DiMeglio maintained that instead of using “on-tree prices received” in calculating rental, the “pack-out” or “packing house” prices should have been used. He asserted that this would result in “actual income produced [per] acre [to be] used to fix the rental.” He also asserted that the “estimated production rate per acre” was slightly high. More basically, he asserted that the appraisal of the fair market value (presumably of the fee simple title) was too high because it did not take into consideration that there is no water on the property or legal access to it. He also claimed that only 26 acres of the tract is usable, and that the remainder is of poor quality, being gullied or too steep for growing citrus.

On August 31, 1999, the Palm Springs-South Coast Field Office Manager, BLM, wrote Dimeglio rejecting his concerns. He noted that using on-tree prices for fruit and using county averages for citrus groves in establishing boxes per acre were “the accepted practice[s] for establishing rental for citrus orchards in [the] region”; that available water was not “an issue in this appraisal as there is a pond on a portion of these public lands that is used for irrigation,” and that “access is available through the Skyline Ranch as part of this overall operation that involves both public and private lands”; and that the appraiser had determined “that 40 acres of the 60 acre parcel [were] usable given the soils and terrain typically used in the area for citrus production,” such that the “remaining 20 acres were considered unusable and may be part of this sale with no value.” BLM urged Dimeglio to complete the trespass settlement as soon as possible.

BLM advised Dimeglio by letter dated October 1, 1999, that

[a]fter lengthy discussions with our appraisal staff, we are comfortable with the approved appraisal of September 9, 1998. This appraisal establishes the property value at \$240,000 and the back rental at \$105,535. The total settlement value is \$345,535.00

Under our regulations, anyone determined to be in trespass on public lands shall be liable for the administrative costs incurred as a consequence of the trespass as well as the fair market rental and the costs of rehabilitating and stabilizing the subject lands. For a knowing and willful trespass, such as one involving these many acres, the trespass rental is three times the fair market value for six of the years of trespass.

BLM noted that it had attempted to “reach an amicable settlement with Mr. [DiMeglio] that avoids these trespass remedies” and had “incurred all the administrative costs in completing and processing the appraisal as well as handling the case.” BLM warned that, it “was not, however, in a position to compromise [its] appraisal process,” and that it stood “firm on the established settlement value.”

DiMeglio, through counsel, filed detailed objections to BLM’s valuation on November 12, 1999. Those objections have become the basis of DiMeglio’s appeal and, to the extent relevant, are considered below. DiMeglio conceded that he had “continued an historical occupancy and use and [made] unused property productive,” but argued that he had not “done anything dishonest” in doing so. (Letter from Michael E. Quinton, Esq., to Palm Springs-South Coast Field Office, BLM, filed Nov. 12, 1999, at 3.) He contended that the proper fair market value for the fee simple interest in the subject 60 acres was approximately \$40,000, and that the “fair market rental value for the subject land is approximately \$4,000.00 per year or a total of \$24,000.00.” *Id.* at 3.

On December 2, 1999, without commenting on those objections, BLM advised counsel that it remained comfortable with its approved appraisal and settlement offer totaling \$345,525.00, representing fair market value of the fee interest of \$240,000 and the “back rental” of \$105,535. BLM explained that this was its “final offer for the sale of these lands and payment of rental.” ^{5/}

Further discussions between DiMeglio’s attorney and BLM ensued, culminating in a January 19, 2000, letter from BLM offering him a lease “for a term” ^{6/} as a “short term solution to this on-going trespass issue.” DiMeglio apparently requested arbitration, but BLM denied that request by letter dated February 25, 2000. DiMeglio did not accept that offer.

Counsel for DiMeglio directly contacted BLM’s legal counsel in March 2000. ^{7/} In its April 19, 2000, memorandum briefing its legal counsel, BLM indicated that it did not, in fact, wish to sell this land “unless there is clear benefit to the habitat management goals of” the “extensive and on-going multiple species habitat planning

^{5/} We note that, up until this letter, it was not clear from the record that BLM was actually offering to sell the trespass lands to DiMeglio as part of the settlement process.

^{6/} This would presumably be an agricultural lease under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000).

^{7/} The record contains references to letters dated Mar. 7 and 30, 2000, which are not in the record.

[then being] undertaken by numerous agencies and entities in Western Riverside County,” which “planning effort [was] focused on managing habitat for listed species under the Endangered Species Act of 1973.” (Memorandum from Palm Springs-South Coast Field Manager to Assistant Regional Solicitor dated Apr. 19, 2000, at 1-2.) BLM thus effectively retreated from its willingness to sell the property to resolve the trespass.

The record contains a report of a field visit on November 17, 2000, to “the parcel that incorporates the DiMeglio (Skyline Ranch) trespass.” It indicates that there was “very likely presence of the threatened coastal California gnatcatcher” within the parcel and “a potential for the presence of the endangered Stephen’s Kangaroo rat and the endangered Quino Checkerspot butterfly.” The report noted that, “[c]onsistent with the South Coast [Resource Management Plan (RMP)], this 1,470 parcel is pristine and is high value wildlife habitat.” In view of these wildlife concerns, the inspector opined that “[a]ny action, including [disposal to DiMeglio], will require wildlife surveys and very likely Sec. 7 consultation under the Endangered Species Act.”

On November 29, 2000, BLM issued the decision under appeal, styled “Trespass Decision” and “Notice to Vacate.” BLM recited the history of the matter, noting the failed attempts at resolution and the large difference between the parties as the proper valuation of the interest in dispute, concluding “that it is not in the public interest to continue pursuing a land disposal option as a means of resolving [DiMeglio’s] unauthorized land use given the lack of any agreement on this proposal.” BLM also noted that “this land disposal would be subject to the completion of a BLM land use plan amendment, a full environmental review and other processes required under agency land processes,” including “consultation with the U.S. Fish and Wildlife Service on Endangered Species Act issues and concurrence of the Riverside County as related to ongoing multiple species habitat planning efforts in this region.” BLM noted that it is “not in public interest to advance to this next project phase because the lack of agreement suggests a low probability of our achieving a successful project conclusion.” (Decision dated Nov. 29, 2000 (Decision), at 2.)

BLM held that “[n]othing in the case would lead us to believe that this trespass was inadvertent or that [DiMeglio’s] placement of a citrus orchard on 27 acres of public lands was legally authorized or approved”; and that “[o]ccupancy of 27 acres of public lands without authorization and under these circumstances is classified as knowing and willful trespass.” BLM concluded that “the existence of said property on said lands constitutes unlawful trespass” and that DiMeglio was “liable for the past rent of these lands, in the amount of \$105,535.00,” as identified in the appraisal discussed above. BLM directed DiMeglio to “settle this past due rental account” prior

to March 1, 2001. Additionally, BLM directed DiMeglio to remove “all personal property and improvements” on or before March 1, 2001, including “all property and improvements associated with this unauthorized use including, but not limited to, citrus trees and shrubs, irrigation systems, the water reservoir, refuse, and all stored material and equipment.” (Decision at 2.) BLM also directed DiMeglio to “reclaim these lands to the satisfaction of the BLM Authorized Officer” on or prior to April 9, 2001. BLM warned that these steps would be taken by the United States if not timely completed by DiMeglio, and that he would be required to reimburse associated costs. (Decision at 3.) ^{8/}

DiMeglio timely appealed BLM’s decision

[1] Section 303(g) of FLPMA provides that “the use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary [of the Interior] * * * is unlawful and prohibited.” 43 U.S.C. § 1733(g) (2001); Factory Homes Outlet, 153 IBLA 83, 88 (2000). Implementing regulations provide that “[a]ny use, occupancy, or development of the public lands, other than casual use as defined in [43 CFR 2920.0-5(k)] without authorization under the procedures in 2920.1-1 of this title, shall be considered a trespass.” 43 CFR 2920.1-2(a). Anyone determined to be in trespass by the authorized officer is entitled to notice of that fact and is liable to the United States for various costs and expenses, as listed in the regulations. Factory Homes Outlet, 153 IBLA at 88; 43 CFR 2920.1-2(a) and (b).

The record leaves no doubt that DiMeglio planted fruit trees on public lands and maintained those trees, harvesting and selling citrus fruit from them, and that this use dates back to at least 1988 (and, based on his admissions, as far back as to 1970). The record also shows that he constructed a water reservoir, and equipment and supply storage yard, and access roads on public lands some time prior 1988. DiMeglio does not deny that he did so.

There being no question that DiMeglio’s substantially intrusive development and long-term use of the lands in question was not “casual use” as defined in 43 CFR 2920.0-5(k), the applicability of 43 CFR 2920.1-2 hinges on whether his use, occupancy, or development of the public lands was without authorization. William H. Snively, 136 IBLA 350, 356 (1996). Departmental regulations in effect

^{8/} BLM also indicated that a “bill for collection” would be issued “for all administrative costs incurred by the United States as a consequence of this trespass case including, but not limited to, securing back rent, removal of property and improvements, and/or rehabilitating the lands subject to this trespass.” (Decision at 3.)

during the time period covered by BLM's decision provide a means to authorize agricultural uses: "Any use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part," including "residential, agricultural, industrial, and commercial" uses. 43 CFR 2920.1-1; see C Bar C Ranch Partnership, 132 IBLA 261, 267-268 (1995); Sierra Production Service, 118 IBLA 259 (1991); Steve Medlin, 115 IBLA 92 (1990). Thus, DiMeglio's use of public land bordering the Skyline Ranch for agriculture (fruit trees and related uses, such as water reservoir and equipment and supplies storage) was subject to authorization under 43 CFR 2920.1-1. There is no evidence in the record that BLM ever authorized DiMeglio to occupy the land in question under 43 CFR Part 2920 or under any other authority. Accordingly, the planting and continued presence of the citrus trees, water reservoir, and the equipment and supplies storage on these public lands without authorization under 43 CFR 2920.1-1 constituted a trespass, and subjected DiMeglio to trespass liability under section 303(g) of FLPMA, supra, and 43 CFR 2920.1-2.

DiMeglio claims that he had some sort of continuing tenancy on the trespass lands owing to the fact that he and his partner "leased the subject land and approximately 2,300 to 2,600 additional acres of land in the immediate area under the Taylor Grazing Act." (Appellants' Reply to BLM's Answer, filed Mar. 9, 2001 (Reply), at 3.) We reject that argument. DiMeglio concedes that this "grazing lease was terminated on April 14, 1970, for failure to comply with reporting requirements." Id. In fact, DiMeglio's lease expressly stated that it was "void after the final date noted" therein, so that he had plainly no authority to use the lands after its expiration on March 5, 1970, and so that all rights associated with the grazing lease accordingly terminated on that date. In any event, we are aware of nothing in the Taylor Grazing Act that could be construed as to allow the use of leased lands for planting a citrus orchard. Moreover, the fact that DiMeglio had entered into that lease, with its unambiguous limitations, provided him actual knowledge that the subject property was public lands and as such, DiMeglio should have known that he was required to comply with regulations pertaining to the occupancy and development of such lands.

Although DiMeglio originally claimed in his SOR that he had previously entered the property as a desert land entryman for the purpose of reclaiming it under the Desert Land Act of 1877, as amended, 43 U.S.C. §§ 321 through 329 (2000), and 43 CFR 2521.2(a)(1) and (d) (SOR at 1), he subsequently admitted that he did not do so. (Reply at 2.) However, DiMeglio stated in his Reply that he was then in the process of petitioning for reclassification of the subject lands so as to open it for a desert land entry (DLE), that there was no reason why the property should not be reclassified as such, and that he had complied with all other necessary requirements. Id. It is enough to note that whatever interest DiMeglio may succeed in getting with respect to the property in the future under the Desert Land Act would not affect the

question of whether he was authorized to use the lands during the time BLM cited him for trespass here.

DiMeglio asserts an equitable right to these Federally-owned lands, based on the fact that he became owner of lands adjacent to them at a time when the Government assertedly encouraged irrigation and development to production of desert land. He apparently believes that he was within his rights to expand the development of the adjacent lands to production because the Government had, at one time, encouraged the practice. There is simply no legal basis for the assertion of any right on the basis DiMeglio advances. We are not aware that the Desert Land Act grants any rights to adjacent landowners or provides grandfather rights to them, and appellants have not cited such authority.

DiMeglio complains that “[p]ersons occupying government land when the government’s policy changes should be allowed to legalize their occupancy through the existing government remedy” (Reply at 2), suggesting that BLM failed to allow him that opportunity. DiMeglio thus ignores that BLM did provide him a chance to legalize his occupancy through existing law. BLM made many overtures to sell or lease this property to DiMeglio under FLPMA. It was DiMeglio who refused to close the deal.

However, DiMeglio believes that BLM had a duty to inform him of the opportunity to file a DLE, claiming that “he should have been advised of his right to file a petition-application under the Desert Land Act when he was discovered to have been encroaching on government land in 1988.” We cannot presume that BLM could have recognized a DLE in 1988. The record indicates that DiMeglio developed the lands in such a manner for a period of at least 10 years before BLM discovered his trespass. By reclaiming the land in trespass, so, DiMeglio removed the property from consideration as land available for disposal under the Desert Land Act, as Departmental regulations specifically provide that “[l]and that has been effectively reclaimed is not subject to desert land entry.” 43 CFR 2520.0-8(a)(3); Carl S. Hansen, 130 IBLA 369, 373 (1994).^{2/} Thus, BLM most likely could not have

^{2/} By statute, desert land entries are limited to desert land, and lands that have been reclaimed to the point that they are no longer in a desert state are not subject to entry. 43 U.S.C. § 321 (2000); Nathan F. Gardiner, 114 IBLA 380, 382 (1990). The determination of the desert character of the lands sought must be made as of the date of filing of the application. Id. Lands are considered effectively reclaimed where a sufficient quantity of water has been brought on the land so as to render it available for irrigation of the land and one-eighth of the land has been cultivated. Id. It does not matter if the irrigation/reclamation occurs while the lands are being held in

(continued...)

correctly advised DiMeglio to file a DLE petition/application at that time. In any event, the opportunity to pursue a DLE was a matter of public knowledge which is properly imputed to DiMeglio.

DiMeglio also asserts that BLM is to blame for not informing him about the Desert Land Act in 1970. This is apparently only because he first “brought water onto and planted citrus trees on approximately 10 acres of subject land” at that time. The suggestion that BLM had a duty somehow to anticipate his efforts to usurp the public lands in time to offer him advice on how to do so legally is dismissed as simply untenable.

DiMeglio points to nothing indicating that BLM ever engaged in affirmative misconduct concerning the availability of the lands under the Desert Land Act. Accordingly, there is no basis to estop BLM from declaring DiMeglio’s unauthorized use of the lands to be trespass. See United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); Arpee Jones, 61 IBLA 149, 151 (1982). In particular, DiMeglio has presented no evidence even suggesting that a BLM representative ever expressly incorrectly advised him the lands were not available under that authority, thus distinguishing this case from United States v. Wharton, 514 F.2d 406 (9th Cir. 1975). At most, DiMeglio notes BLM’s failure to seek him out to suggest that he legitimize his unauthorized use by applying under the DLA; that is not affirmative

^{2/} (...continued)

trespass:

“At the time appellant filed his DLE application in January 1982, he had been cited for trespass for farming part of the lands in question. In an apparent attempt to legitimize that trespass and allow appellant to continue farming, BLM issued him a land use permit. However, by farming the land, appellant removed it from consideration as land available for disposal under the DLE laws. The DLE regulations specifically provide that “[l]and that has been effectively reclaimed is not subject to desert land entry.” 43 CFR 2520.0-8(a)(3). The reason for this regulation is clear, since by statute (43 U.S.C. § 321 (1988)), DLE’s are limited to desert land, and lands which have been reclaimed to the point that they are no longer in a desert state are not subject to entry. Nathan F. Gardiner, 114 IBLA at 382. The determination of the desert character of the lands sought must be made as of the date of filing of the application. Id. at 381. Lands are considered effectively reclaimed where a sufficient quantity of water has been brought on the land so as to render it available for irrigation of the land and one-eighth of the land has been cultivated. Id. at 385. The record shows the existence of those factors at the time appellant filed his application in January 1982.” Carl S. Hansen, 130 IBLA at 373.

It appears that all of the lands in question here were effectively reclaimed not later than the discovery of the trespass in 1988.

misconduct. ^{10/} The course of action that BLM employed, recommending that the matter be resolved by direct sale or lease, was entirely reasonable and appropriate and did not in any way misadvise DiMeglio.

In sum, we affirm BLM's holding that DiMeglio's planting of citrus trees and construction of improvements on the land in question was unauthorized and was, therefore, a trespass.

[2] It remains to determine whether BLM's conclusion that the trespass was willful was proper. We conclude that it was. The governing regulation provides:

Knowing and willful means that a violation is *knowingly* and *willfully* committed if it constitutes the voluntary or conscious performance of an act which is prohibited or the voluntary or conscious failure to perform an act or duty that is required. The term does not include performances or failures to perform which are honest mistakes or which are merely inadvertent. The term includes, but does not require, performances or failures to perform which result from a criminal or evil intent or from a specific intent to violate the law. The knowing or willful nature of conduct may be established by plain indifference to or reckless disregard of the requirements of law, regulations, orders, or terms of a lease. A consistent pattern of performance or failure to perform also may be sufficient to establish the knowing or willful nature of the conduct, where such consistent pattern is neither the result of honest mistake or mere inadvertency. Conduct which is otherwise regarded as being knowing or willful is rendered neither accidental nor mitigated in character by the belief that the conduct is reasonable or legal.

43 CFR 2920.0-5(m). The current situation plainly falls within that definition.

There is no doubt that, in initiating the agricultural activity in 1970, DiMeglio knew or should have known that he was using Federally-owned lands without authorization. Thus, he knew when he first planted trees that the lands were Federally-owned because he had a Federal grazing lease for them, and he knew (or should have known) by the express terms of that lease, which was "void after the final date noted" therein, that he had no authority to use the lands after its expiration

^{10/} In view of the likely unavailability of the lands for DLE in 1988, BLM's action in recommending that a FLPMA sale be pursued was very likely the best advice it could give. BLM certainly cannot be faulted for not advising DiMeglio how to proceed in 1970, as there is no evidence that BLM was even aware at that time that he was using public lands without authority.

on March 5, 1970. It also appears that 1.1 acres of navel oranges were planted in 1990 and 3 acres of Starr grapefruit were planted on public lands in 1991, following BLM's 1988 notification to DiMeglio that his use of the public lands was in trespass. Plainly, the planting of the trees was "the voluntary [and] conscious performance of an act which is prohibited."

Moreover, having been explicitly advised by BLM in 1988 that he had planted fruit trees on Federally-owned lands, DiMeglio's failure to remove the trees and his continued use of the lands to harvest fruit and for activities to support growing fruit constituted "the voluntary [and] conscious failure to perform an act or duty that is required."

Although the above definition excludes "honest mistakes," we cannot regard the continuance (and expansion) of the agricultural trespass as such in view of the clarity of the warnings given to DiMeglio over the years that his occupancy was not authorized. In this regard, we note that, under the regulation, DiMeglio's subjective beliefs that he was legally expanding his operation and reclaiming adjacent lands and that it was reasonable to do so do not mitigate the knowing and willful character of his conduct. To the contrary, the facts in this case show a consistent pattern of performance or failure to perform sufficient to support the finding that the conduct was knowing or willful in nature.

We therefore affirm BLM's holding that the continued presence (and expansion) of DiMeglio's citrus trees, water reservoir, and the equipment and supplies storage on public property without BLM authorization throughout the 6-year period involved in BLM's decision shows a consistent pattern of performance sufficient to establish the willful nature of the trespass.

[3] Anyone properly determined by BLM to be in trespass on Federally-owned lands shall be liable to the United States for damages, including the administrative costs incurred by the United States as a consequence of such trespass (43 CFR 2920.1-2(a)(1)) and the fair market value rental of the lands for the current year and past years of trespass. 43 CFR 2920.1-2(a)(2); Factory Homes Outlet, 153 IBLA 83, 39 (2000); Michael Rodgers, 137 IBLA 131, 135 (1996); Sierra Production Service, 118 IBLA 259, 263 (1991). Further, where (as here) trespass is "knowing and willful," the trespasser shall be liable to the United States for "three times the fair market rental value which has accrued since the inception of the trespass, not to exceed a total of 6 years." 43 CFR 2920.1-2(b)(2). ^{11/}

^{11/} The regulations also provide that the "person determined to be in trespass" shall be "liable for the costs incurred by the United States in rehabilitating and stabilizing (continued...)"

We have carefully reviewed BLM's calculation of the fair market value rental of the lands and conclude that it is well supported by the record. Appellants have not met their burden of showing error in that calculation. See Yukon River Tours, 156 IBLA 1, 9 (2001).

We hold as well that, in determining the "fair market rental value of the lands," it was proper for BLM to include in "the lands" the improvements placed on the Federally-owned lands in trespass. 43 CFR 2920.1-2(a). Thus, BLM properly considered the value added by the improvements (most particularly the fruit trees) in determining fair market rental value. It is only the value of authorized improvements owned by anyone other than the United States upon the lands involved that are not properly included in the determination of fair market rental. See 43 CFR 2710.0-6(f) (establishing this rule for determining "fair market value" lands subject to public sales); and Willis A. Brown, 137 IBLA 383, 387 (1997) (applying this rule in the closely-related context of determining "fair market rental" for an agricultural lease issued under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000)). However, the planting of those trees was not authorized, and was therefore not an "authorized improvement." Moreover, those trees have been, since their planting, the property of the United States, because improvements placed upon Federally-owned lands by trespassers belong to the United States from their inception. See KernCo Drilling Co., 71 IBLA 53, 56 (1983); Kelly E. Hughes, 135 IBLA 130, 134 (1996).^{12/}

Accordingly, we find that the appraiser properly calculated the fair market rental principal at \$105,535.00 as set forth in BLM's bill for collection.

^{11/} (...continued)

such lands" if he/she "does not rehabilitate and stabilize the lands determined to be in trespass within the period set by the authorized officer in the notice." 43 CFR 2920.1-2(a)(3). It is premature to consider that question, as it remains to be seen whether DiMeglio will comply with BLM's order to reclaim the site.

^{12/} We recognize that the two cited cases do not precisely address the issue presented here, where BLM charged rental value for lands improved by a trespasser, but also demanded that the improvements be removed from the property in a manner that might be seen as decreasing the rental value of the lands. As land owner, however, BLM has the authority to maintain and manage the public lands for values that are recognized by Congress (including providing habitat for wildlife, 43 U.S.C. § 1701(a)(8) (2000)) but that are not necessarily reflected in determinations of value based on the private-enterprise marketplace. This management authority does not change the rule that the "fair market value of the lands" is to be measured by the use made by the trespasser with his own improvements.

[4] Finally, BLM could properly direct DiMeglio to rehabilitate and stabilize the lands that were the subject of the trespass, including bringing the lands back to their pre-trespass condition. 43 CFR 2920.1-2(a)(3); see Double J Land & Cattle Co., 126 IBLA 101, 109 (1993) (affirmed in part and reversed in part on other grounds, Double J. Land & Cattle Co. v. U.S. Dep't of Interior, 91 F.3rd 1378 (10th Cir. 1996)); Sharon R. Dayton, 117 IBLA 164 (1990); Clive Kincaid, 111 IBLA 224 (1989); Juliet Marsh Brown, 64 IBLA 379 (1982).

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.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge