

ALFRED GAISER

IBLA 76-499

Decided August 30, 1976

Appeal from decision of the Shoshone, Idaho, District Office, Bureau of Land Management, rejecting application for a special land use permit, I-5202.

Set aside and remanded.

1. Public Lands: Special Use Permits -- Special Use Permits

The issuance of a special land use permit by the Bureau of Land Management is discretionary, but the Bureau may not issue a permit when the provisions of existing laws may be invoked by the applicant to provide for the proposed use.

2. Public Lands: Special Use Permits -- Special Use Permits

A special land use permit may be issued for land being used in trespass for a limited time during pendency of negotiations seeking to effect a land exchange whereby the land occupied in trespass may be patented.

APPEARANCES: Alfred Gaiser, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Alfred Gaiser has appealed from a decision of the Shoshone, Idaho, District Office, Bureau of Land Management (BLM), dated January 29, 1976, rejecting his application for a special land use permit for agricultural purposes.

Appellant filed his application on June 2, 1972, seeking the use of approximately 30 acres in Lots 1 and 2, Sec. 29, T. 3 S., R.18 E., B.M., Lincoln County, Idaho, for agricultural purposes.

He explained in his application that such land had been fenced and irrigated by one Edward Sharp; that Sharp had used said land for agricultural purposes since the 1950's; that appellant had purchased all sharp's land in Lincoln and Blaine Counties; and that appellant desired to continue using the land applied for as it had been used by Sharp. ^{1/}

In rejecting appellant's application BLM stated that "[i]ssuance of a special land use permit for agricultural trespasses is not in accordance with policies established by the Idaho State Bureau of Land Management Office." BLM also indicated that the land was classified for multiple use values and was not open to entry under agricultural land laws, and that granting the application would be inequitable because "the trespasser could utilize the National Resource Lands for agricultural purposes, whereas the public would be excluded under the provisions of the Classification and Multiple Use Act" [43 U.S.C. § 1391 et seq. (1970)].

On appeal appellant asserts that the "wrong standards, rules and regulations of the BLM were applied in making said decision" and that the "decision is predicated upon wrongful classification of said lands in that the same have a higher and more valuable use for agricultural lands, than for multiple use lands." Appellant also states that he offered other lands to the United States in exchange for the subject lands and that the decision failed to take that into consideration.

[1] A special land use permit is not specifically authorized by statute. The genesis for special land use permits is regulatory. 43 CFR 2920.0-2(a) provides:

It is the policy of the Secretary of the Interior, in the administration of the lands under the jurisdiction of the Bureau of Land Management, to permit the beneficial use thereof, where practical, for special purposes not specifically provided for by existing law. Permits for such special use will not be issued, however, in any case where the provisions of any law may be invoked. Permits will not be issued where such issuance would be inconsistent with the objectives of the regulations in this chapter or would be in conflict with any Federal or State laws. [Emphasis added.]

^{1/} There is nothing in the record to indicate that any application to purchase the land in issue had been filed during the period ending September 25, 1971, as provided by the Act of September 26, 1968, 82 Stat. 870, 43 U.S.C. § 1431 et seq. Gaiser acquired his interest in the contiguous land after expiration of the Act.

Therefore, a permit may be issued only to authorize a use not otherwise specifically provided for by existing law and only in a case where the provisions of existing laws may not be invoked. Edward L. Butterworth, 23 IBLA 136 (1975); Walt's Racing Association, 18 IBLA 359 (1975). The issuance of such permits is purely discretionary. Edward L. Butterworth, supra; Wyoming Highway Department, 14 IBLA 258 (1974).

The Environmental Analysis Record prepared in the District Office for the application states on page 2, under the heading of Anticipated Impacts, that:

* * * The anticipated impact of the proposed action is expected to be mostly beneficial. The land is being put to a higher degree of productivity under irrigation and cultivation. Some use of the succulent forage being produced will be made by wildlife. Adverse effects that will result are the loss of natural vegetation and cover for wildlife and the condoning of an agricultural trespass situation on Federal land.

The impact of application denial would result in reversion to natural vegetation. A loss of forage production would occur, a less diverse and succulent quantity of forage would result. Cover species for wildlife would increase at the expense of forage species. Livestock quantity and quality would also decrease.

Apparently, the irrigation and cultivation of the subject land, albeit in trespass, have resulted in increased productivity of the land. The EAR indicates that the present use of the land is the most beneficial use.

Under the BLM Order I-2837, Classification for Multiple Use Management, 35 F.R. 18131, November 26, 1970, the subject lands were segregated from appropriation under the desert land entry, homestead, public sale and Indian allotment laws. The order stated that the lands "shall remain open to all other applicable forms of appropriation."

[2] Although the land in issue is segregated from appropriation under the homestead or desert land laws (and it is doubtful that the small area involved could be classified as a suitable tract under the economic feasibility standards applied to applications under those laws), the public interest seemingly will be benefited to a greater extent by the continued agricultural use in conjunction with the contiguous patented lands of appellant than by

a reversion to native forage. In this situation we find it would not be improper to grant the special land use permit for a limited time not to exceed 2 years to enable a meaningful dialogue between the appellant and the BLM district office personnel relative to an exchange under section 8 of the Taylor Grazing Act, 43 U.S.C. § 315g (1970). Disposal of the land at issue by means of an exchange is not barred by the present classification of the land. Appellant indicated that he is willing to effect such an exchange. However, prior to issuance of a special land use permit, Gaiser must make settlement with BLM for his use of the land in trespass. 43 CFR 9239.0-8.

We are moved to observe that the proper test to be applied in determining to grant a special land use permit is whether it will be consistent with the public interest. There is no merit in the assertion by the BLM personnel in the decision below that issuance of a permit in this case would be unfair to the public. Anytime a special land use permit is authorized on national resource land, the remainder of the public is excluded from that use of the land but not from certain other defined uses. See 43 CFR 2920.6. We are unable to see how issuance of a special land use permit in the circumstances here presented would impinge upon the public interest.

Accordingly, 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 set aside and the case remanded for action consistent herewith.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Martin Ritvo
Administrative Judge

