

REED Z. ASAY

IBLA 81-444

Decided June 9, 1981

Appeal from the decision of the Idaho State Office, Bureau of Land Management, rejecting sale application I-4528.

Affirmed as modified.

1. Act of September 26, 1968 -- Public Sales: Applications -- Trespass: Measure of Damages

Bureau of Land Management properly rejects an application for the sale of public land pursuant to the Unintentional Trespass Act, 43 U.S.C. §§ 1431-1435 (1976), where the applicant refuses to pay related damages for unauthorized use of the land. Where BLM assesses trespass damages based on the reasonable value, extent, and duration of an unauthorized use of the public lands, this assessment will not be disturbed unless the trespasser submits convincing evidence that it is incorrect.

APPEARANCES: Reed Z. Asay, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Reed Z. Asay has appealed the decision of the Idaho State Office, Bureau of Land Management (BLM), dated February 10, 1981, rejecting public land sale application, I-4528, which had been filed on September 14, 1971, under the Unintentional Trespass Act of September 26, 1968, 43 U.S.C. §§ 1431-1435 (1976). 1/

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1/ Sales under the Unintentional Trespass Act are now governed by the provisions of section 214 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1722 (1976).

Appellant's application requested sale of 120 acres of public land described as the S 1/2 NW 1/4, sec. 27, and the NE 1/4 SE 1/4, sec. 28, T. 7 N., R. 25 E., Boise meridian. Following evaluation of the application, BLM found only 13.1 acres to be in actual trespass and determined that only the N 1/2 N 1/2 SW 1/4 NW 1/4, N 1/2 S 1/2 N 1/2 SW 1/4 NW 1/4, N 1/2 N 1/2 NW 1/4 SE 1/4 NW 1/4, sec. 27 (parcel 1), and N 1/2 N 1/2 NE 1/4 SE 1/4, sec. 28 (parcel 2), or 27.5 acres of the requested 120 acres, would be offered for sale. By letter dated May 9, 1980, BLM notified appellant that it was ready to issue a "Notice of Offer of Sale and Right of First Refusal" for the 27.5 acres of land at an appraised value of \$2,200 based on fair market value determined as of September 26, 1973.

Thereafter the district manager of the BLM Idaho Falls Office sent appellant three notices during May through August 1980, that he must pay \$800 to settle damages for his unauthorized use of 13.1 acres of public land from 1973 through 1978 before the offer to sell would be made. When appellant did not take any action to settle, BLM issued a decision dated September 12, 1980, allowing appellant 30 days in which to settle the trespass charges or suffer rejection of his sale application. The decision stated that the Unintentional Trespass Act, supra, did not relieve appellant from liability for unauthorized use of the land.

Appellant responded that he felt BLM owed him for trespassing on 35 acres of his privately-owned land citing the existence of a fence across his land joining BLM land on two sides. He later indicated that he felt that he did not owe BLM anything but would offer \$10 to settle the trespass issue.

The record indicates that a search of the BLM project file did not turn up any record of the fence on appellant's property. BLM asked local ranchers about the fence but they had no knowledge of who built it or when it was built. BLM concluded that the fence was not part of any BLM project.

Since appellant refused to pay the \$800 in settlement for his unauthorized use of public lands, BLM issued the decision appealed herein rejecting sale application I-4528. In his notice of appeal appellant indicates that he would still like to buy the 27.5 acres of land but asserts that the amount of damages imposed is too much. He suggests that if BLM had taken care of this matter in a timely manner, BLM wouldn't be trying to collect so much in damages. In his statement of reasons, appellant argues that \$800 damages is too much when compared to his actual farm income. He explains that he farms 300 to 350 acres of land depending on water availability and primarily raises lambs and calves by grazing them on his land. He reports that his total farm income over the 1973-78 period averaged \$863.33 per year or \$2.88 per

acre per year based on 300 acres farmed. <sup>2/</sup> He urges that a fairer figure for trespass damages would be \$37.73 per year for 13.1 acres at \$2.88 an acre or a total of \$226.38. He suggests that BLM's appraisal report overestimates production on parcel 2 and indicates that parcel 1 is mostly dry pasture. He feels he should not be penalized because of a fence which neither he nor BLM constructed.

[1] Section 3 of the Unintentional Trespass Act, supra, provides:

Sec. 3. If a person who has a preference right under section 2 of this Act is the purchaser of land sold pursuant to this Act, he shall not be required to pay for any values he or his predecessors in interest have added to the land. However, nothing in this Act shall relieve any person from liability to the United States for unauthorized use of the land prior to conveyance of title by the United States. [Emphasis added.]

Appellant is liable for unauthorized cultivation public land.

The BLM appraiser found 8.8 acres of parcel 1 and 4.3 acres of parcel 2, which were fenced into appellant's adjoining field and farmed as part of his ranching operation, to be in agricultural trespass. The remaining 18.9 acres of the two parcels are dry grazing rangeland which has never been farmed. The appraiser used the sharecrop method of computing damages which places the Government in the position of a landlord receiving a share of the gross crop income from the land in trespass. Expenses which are normally assumed by the landlord are deducted because the Government does not incur those expenses.

<sup>3/</sup> The appraisal

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<sup>2/</sup> Appellant reported his total yearly farm income from his tax returns as follows:

1973:	\$5,290.56 -income
1974:	(3,020.71) -loss

<sup>3/</sup> According to the appraisal report, in a typical grain sharecrop agreement, the landlord pays the taxes, water costs and half the fertilizer and weed control expenses. The lessee pays all other costs pertaining to production of the crop. The landlord receives one-third the crop value and the lessee receives the remaining two-thirds crop value.

In typical alfalfa sharecrop agreements the landlord usually pays the water costs, one-half the weed control and fertilizer costs, and all the seeding costs. The lessee pays all other costs pertaining to production of the crop. The landlord receives one-half the crop value and the lessee receives the remaining half.

The landlord usually carries crop insurance and public liability to protect himself in case of accidents. Landlords usually pay for

report at issue was based on crops grown and yields per acre per crop for 1973-1978 as reported by appellant. The average price per harvested unit of oats, barley, and alfalfa grass hay used by the appraiser was supplied by appellant and crop production statistical publications compiled by county agricultural extension agents and the Idaho Statistical Reporting Service. The appraisal report summarizes appellant's income from the 13.1 acres of land in trespass, related expenses, and resulting trespass damages as follows:

	<u>1973</u>	<u>1974</u>	<u>1975</u>
Gross			
Income	\$917.00	\$917.00	\$1157.80
Landlord's			
Share	458.50	458.50	488.60
Asay's Expenses	-493.87	-196.50	-213.70
Total	-\$35.37	\$262.00	\$274.90
	<u>1976</u>	<u>1977</u>	<u>1978</u>
Gross			
Income	\$1054.60	\$171.56	\$1045.88
Landlord's			
Share	454.20	57.19	374.63
Asay's Expenses	-218.00	-59.20	-310.62
Total	\$236.20	-\$2.01	\$64.01
			\$799.73

The report concludes that "rental due the United States for the 6-year period for the farming of public land is estimated to be \$799.73, say \$800."

Unintentional trespass damages are computed on the basis of a fair rental return to the Government for the unauthorized use of public lands. The income figures for appellant's 300-acre farming operation, which appellant contends are a fair basis for damages, in fact, bear no relation to the actual income derived from appellant's use of the 13.1 acres of public land found to be in agricultural trespass. Where BLM assesses trespass damages based on the reasonable value, extent, and duration of an unauthorized use of public lands, the assessment will not be disturbed unless the trespasser submits convincing evidence that it is incorrect. Outdoor Adventure River Specialists, Inc., 41 IBLA 132 (1979); Gold Mountain Logging Co., 34 IBLA 326 (1978). Appellant has presented no evidence showing that the appraisal report is in error or does not reasonably represent his production on the land. We find that

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fn. 3 (continued)

permanent improvements which increase value of the property such as clearing, rock picking or fencing the land. However, appellant was never authorized to develop and farm the subject property. Therefore, the value added credits (expenses) of clearing, fencing, and rock picking were not deducted from annual expenses.

Irrigation water was obtained from Pass Creek by gravity flow at no cost to the appellant. However, annual ditch maintenance costs of \$3 per acre per year were credited as annual expenses.

BLM properly concluded that sale application I-4528 must be rejected where appellant fails to pay related damages for unauthorized use of public land. Cf. Fred J. Rand, A-30228 (Mar. 26, 1965) (trespass damages for prior unauthorized use must be paid as a prerequisite to issuance of a small tract lease).

The case record contains a memorandum to the file by the Big Butte Area Manager that relates the substance of a meeting on November 10, 1980, with an attorney representing the appellant. The memorandum notes that the fence which contributed to appellant's trespass does isolate 35 acres of his land with BLM lands adjoining on two sides. It was agreed by the participants at the meeting that the land had been used for grazing and would probably have provided 3 to 7 animal unit months (AUM's) of forage per year. We find that the value of this use of appellant's land should be applied to offset in part the trespass damages. Based on BLM's annual schedule of grazing fees for 1973 through 1978, 4/ the value of the grazing was \$36.55 for the average 5 AUM's per year.

We will afford appellant 30 days from receipt of this decision to pay the assessed \$763.45 damages. If he fails to pay the damages within that time rejection of sale application I-4528 will become final. BLM may refer the matter to the United States Attorney for collection of the debt due the United States.

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 as modified.

Douglas E. Henriques  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

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4/ The grazing fee per AUM for each year was:

1973:	\$ .78	1976:	\$1.51
1974:	1.00	1977:	1.51
1975:	1.00	1978:	1.51

