

## WASHBOARD PERMITTEE GROUP

IBLA 86-249

Decided August 12, 1987

Appeal from a decision of the Utah State Office, Bureau of Land Management, denying protest to public land sale U 53822.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Sales -- Grazing Permits and Licenses: Generally

When BLM determines to sell a tract of public land because the land is difficult and uneconomic to manage, one of the standards for disposal set forth in sec. 203(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(a) (1982), and that determination is protested by a group holding grazing permits for such land, the decision denying the protest will be set aside where the group alleges the land is not difficult and uneconomic to manage and there is a lack of substantial evidence in the record to support BLM's determination.

APPEARANCES: Kay Jensen, President, Washboard Permittee Group, Cleveland, Utah.

### OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Washboard Permittee Group (Washboard) has appealed from a December 5, 1985, decision of the Utah State Office, Bureau of Land Management (BLM), denying its protest of a proposed sale of parcels 4 and 5, encompassing 40.68 and 80 acres, respectively, situated in sec. 1, T. 17 S., R. 9 E., Salt Lake Meridian. Pursuant to the provisions of section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982), BLM published notice of the proposed sale in the Federal Register on September 13, 1985. 50 FR 37442. This notice stated that a number of parcels of public land, including parcels 4 and 5, had been examined and identified as suitable for disposal under section 203 of FLPMA. The notice indicated that parcel 4 would be offered to the Castle Valley Special Service District, Castle Dale, Utah (Service District), by use of "direct sale procedures," 1/

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1/ BLM may utilize "direct sales" procedures in disposing of Federal lands pursuant to section 203 of FLPMA, "when in the opinion of the authorized

and that parcel 5 would be sold pursuant to the competitive bid system. <sup>2/</sup> In addition, the notice provided that patents to the parcels would be issued subject to various terms and conditions, including, inter alia, "Washboard Allotment grazing permits valid until March 20, 1987." Finally, the notice stated that the "successful bidder" on parcel 4 agreed to "take the property subject to existing grazing uses":

The privilege of the permittees to graze domestic livestock on the property according to the conditions on authorizations No. 4012 and No. 4115 shall cease on December 20, 1986, and March 20, 1987, respectively. The successful bidder is entitled to receive annual grazing fees from the permittees in an amount not to exceed that which would be authorized under the Federal grazing fee published annually in the Federal Register.

50 FR 37442 (Sept. 13, 1985).

On October 28, 1985, Washboard filed a timely protest to the proposed sale of parcels 4 and 5, which, in Washboard's view, constituted a viable and necessary part of the grazing unit. The bases for Washboard's protest were as follows:

(1) Closing livestock out of these areas virtually takes away all possibility for a drink for cattle in this, the larger part of the grazing unit.

Note: \* \* \* the nearest drinking area, South of crossing Highway #155 for a drink is approximately 6 miles away over rough terrain. Note also any drinking areas South of 155 other than the areas proposed for sale are at present privately owned.

(2) Presently cattle may be herded from farms directly to this area; However if these parcels are sold many of the cattle will need to be coralled [sic], loaded, and trucked approximately 14 miles to enter the allotment.

(3) This land could not possibly be classified as suitable for disposal under section 203 of the FLPMA because of the fact it is not Innaccessible [sic] to the permittees but in fact is very accessible and is very much in use both for access to the Unit and for Watering cattle in the Unit. [Emphasis in original.]

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fn. 1 (continued)

officer, a competitive sale is not appropriate and the public interest would best be served by a direct sale." 43 CFR 2711.3-3(a). BLM may make a direct sale to a "State or local government or nonprofit organization." 43 CFR 2711.3-3(a)(1). The Service District is a local government entity, which provides water and sewer services for seven communities in Emery County, Nevada.

<sup>2/</sup> The procedures governing BLM in disposal of Federal lands through competitive bidding are set forth at 43 CFR 2711.3-1.

In a memorandum to the Utah State Director, BLM, dated November 5, 1985, the District Manager, Moab District, responded to the protest filed by Washboard. He stated that BLM relied upon the criteria reflected in subsection 203(a)(1) of FLPMA in determining to dispose of parcels 4 and 5:

A tract of the public lands \* \* \* may be sold under this Act where, as a result of land use planning required under section 1712 of this title, the Secretary determines that the sale of such tract meets the following disposal criteria:

(1) such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency; \* \* \*.

The District Manager states that "[t]here are supporting factors as to the unmanageability of this parcel." He refers specifically to evidence indicating that "livestock may be in trespass a substantial amount of the time."

Based upon the District Manager's memorandum, the Utah State Director issued the letter-decision now being appealed to this Board. The State Director concluded that sale of parcels 4 and 5 would not "unreasonably interfere" with Washboard's grazing permits, responding to Washboard's protest as follows:

1. The terms and conditions of the sale include a right-of-way reservation to the United States for a 20-foot wide stock driveway. This will provide access to the canal for water where livestock normally drink, and continued access to the allotment.

2. The fact that the parcel is accessible or inaccessible is not an acceptable basis for disposal under Section 203 of the Federal Land Policy and Management Act. Instead, parcels that are difficult and uneconomic to manage as a part of the public lands are considered as suitable for disposal. For this reason, a decision was made in the Price River Planning Area Management Framework Plan, approved in September 1983, to dispose of parcels 4 and 5.

3. The sale of these lands will ultimately reduce the allotment by only 10 AUMs. In accordance with the cancellation letter dated March 14, 1985, sent to you from the Price River Resource Area Manager, the patent will contain a reservation for the grazing permits. This means the existing permits and preference will remain valid on the land that is to be sold until March 20, 1987.

In its statement of reasons (SOR) for appeal, Washboard states that the cattle now have "very direct access" to the allotment by entering the "major part of the allotment at the Northwest corner of parcel 4." The cattle are driven off the unit by the same access route. Washboard argues that the drive trail proposed by BLM provides "round-about access" and is uneconomical (SOR at 1). According to Washboard, the term "stock drive trail" must be

redefined to make clear that the cattle can come and go freely to drink water, rather than "driven" when they use the trail (SOR at 2). Washboard contends that the area where the cattle reach the canal for water must be much wider, given the number of cattle which will drink from the canal at a given time (SOR at 2). Further, Washboard challenges BLM's conclusion that parcels 4 and 5 are difficult and uneconomic to manage. Washboard states:

We meet with District [BLM] personnel in the spring and establish a management plan. We do the necessary repair and construction of fences, etc. We have always responded to any problems that the District may draw to our attention. There is No Way that we can see that it is more difficult or more expensive to manage these parcels than any other parcels would be.

(SOR at 2).

Washboard advocates "planned multiple use" of the property whereby the needs of BLM, the Service District, and the permittees are served (SOR at 3). Washboard complains that the terms of the sale of parcels 4 and 5 do not consider the investment made by the permittees, including 1-1/2 miles of fence along the eastern border of parcels 4 and 5. Finally, Washboard feels that the loss of 10 AUM's is unreasonable; given their pasture rotation system and higher moisture conditions, it asserts that it should receive back some AUM's taken away previously (SOR at 2). <sup>3/</sup> No answer was filed by the Office of the Solicitor on behalf of BLM.

[1] BLM stated in its decision that it was disposing of parcels 4 and 5 because the land was difficult and uneconomic to manage, one of the standards established in section 203 of FLPMA for disposal of public lands under that Act. However, BLM's decision offers little explanation as to why parcels 4 and 5 are difficult and uneconomic to manage. The memorandum from the District Manager, Moab, to the Utah State Director refers to "supporting factors as to the unmanageability of this parcel," specifically "[p]hysical evidence [which] leads us to believe livestock may be in trespass a substantial amount of the time. This is backed up by the permittees within the allotment (see enclosure 2)."

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<sup>3/</sup> We note that in its SOR at page 3 Washboard stated:

"In our letter of protest of October 23, 1985 we respectfully made this request to the BLM District Management. 'Please, if you would, consider an on-site meeting with permittees to consider your office actions.'" We were disappointed that this request was ignored. We doubt very much that they have availed themselves with adequate facts concerning this action and its consequences."

The State Director's Dec. 5, 1985, decision, however, stated that "[w]e understand you had a meeting with District personnel and were unable to reach an agreement." There is no evidence in the record that District office personnel met with the permittees following the filing of the protest.

Enclosure 2 is a BLM document dated April 6, 1984, recounting the details of the Washboard Permittees Annual Meeting held on April 5, 1984. The document states:

During this spring Richard Dotson has been using the isolated public land located in the southwest corner of the Washboard Allotment, specifically the NW 1/4 SW 1/4, Section 1, T. 17 S., R. 9 E., SLB&M. The permittees have decided to fence this portion of the allotment to stop this problem. Kay Jensen will contact Richard Dotson on this action.

The map prepared on December 13, 1984, to accompany the Land Report (dated January 8, 1985) for the sale shows that the NW 1/4 SW 1/4, sec. 1, is private land owned by J. D. and Maxine Leverton. It also indicates that fencing exists along the western boundary of the NW 1/4, the northern and eastern boundaries of lot 4, and the northern and eastern boundaries of the SE 1/4 NW 1/4, sec. 1. Only the boundary between the NW 1/4 and SW 1/4 sec. 1, was, according to the map, not fenced at that time. However, regardless of what the actual circumstances were regarding trespass and the building of fences, BLM's reliance on livestock trespass as an example of difficulty in management is not supported by enclosure 2. Rather, that document would indicate that although there may have been a trespass situation, the permittees had agreed to address it at their own expense. It does not support a conclusion that these lands are difficult and uneconomic for BLM to manage.

Turning to the Price River Planning Area Management Framework Plan (MFP) approved September 2, 1983, we find that it provides only a brief rationale for the recommended disposition of public lands involved herein. The MFP characterizes the 23,962.25 acres proposed for exchange, State selection, or sale as "problem management areas." In BLM's view, implementing the recommendation in the MFP will make possible BLM's obtaining "other lands which could better meet management objectives and goals." This statement, however, obviously relates to exchanges. According to the MFP, "[s]elling these parcels would help cut cost of government by eliminating unnecessary management and ownership of land," and "would help pay off part of the national debt" (MFP at L-3.1 page 1). There is nothing site specific in the MFP which would support a conclusion that the lands in question are difficult and uneconomic to manage.

On the other hand, Washboard alleges that management of the lands is undertaken pursuant to a management plan developed by it and BLM and that improvements to the lands in question such as a bridge, gates, and fences have all been made by the permittees utilizing their labor, machinery, and materials.

In cases involving the judgment of agency personnel who have special knowledge or qualifications to make such determinations, the Board may accord considerable weight or deference to such decisions if they are supported by

substantial evidence. Such decisions may be overcome, however, by a preponderance of countervailing evidence. United States Fish & Wildlife Service, 72 IBLA 218 (1983). This standard of review has been applied in section 203 land sale cases. Dean M. Anderson, 94 IBLA 88 (1986).

In this case BLM attempted to accommodate the permittees through reservation of a right-of-way to the water source in lot 4; however, it failed to support its decision to sell in the first instance. There is a dearth of evidence in the record to support the conclusion that these lands are difficult and uneconomic to manage. Nevertheless, Washboard's representations do not rise to the level of establishing by a preponderance of the evidence that BLM's decision is incorrect. Thus, we do not reverse BLM's decision to sell, rather we must set aside BLM's decision on Washboard's protest and remand the case to BLM for reconsideration of its sale determination. <sup>4/</sup>

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 is remanded for action consistent with this opinion.

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Bruce R. Harris  
Administrative Judge

We concur:

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James L. Burski  
Administrative Judge

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Kathryn A. Lynn  
Administrative Judge  
Alternate Member

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<sup>4/</sup> We do not mean to imply that the sale may not go forward. If BLM can resolve Washboard's objections, the sale may proceed or it may proceed despite the objections if the record is supplemented to support such action. However, in that situation BLM must again provide Washboard the opportunity to appeal. In addition, we note that 43 CFR 2711.4-1 provides that no public lands in a grazing lease or permit may be conveyed until BLM has complied with the regulations relating to compensation for grazing improvements. The regulation at 43 CFR 4120.3-6(c) provides for reasonable compensation for the adjusted value of a lessee's or permittee's interest in authorized permanent improvements placed or constructed on the public lands by the lessee or permittee. To the extent these regulations are applicable, BLM must comply with them, if it proceeds with the sale.