

HENRY DEATON

IBLA 86-324

Decided February 17, 1988

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, declaring trespass and assessing damages. NM 9230.

Affirmed as modified.

1. Administrative Procedure: Generally -- Rules of Practice: Generally

When there is no dispute as to material facts, an appellant's due process rights are satisfied by an appeal to the Board of Land Appeals.

2. Trespass: Measure of Damages

When an individual willfully trespasses on the public lands and drills a water well, the measure of damages in such a case is a matter of the law of the state where the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

3. Trespass: Generally

In addition to assessing a trespasser on the public lands a measure of damages for the trespass, BLM may also collect from that person the administrative costs incurred by the United States as a result of that trespass.

APPEARANCES: Donald C. Turpen, Esq., Albuquerque, New Mexico, for appellant; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Henry Deaton (Deaton) appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated November 18, 1985, assessing back rental and administrative charges for use of Federal lands when erecting structures and fixtures associated with a water well Deaton had drilled in trespass.

The record in this case reveals that in February 1983 Deaton inquired of the Rio Puerco Resource Area Office, BLM, about the possibility of purchasing lot 26, sec. 11, T. 10 N., R. 5 E., New Mexico Principal Meridian, in order to drill a water well thereon. Deaton was informed by BLM that the lands in question had not been identified for disposal, but that a water well right-of-way application would be entertained. Deaton did not file a right-of-way application. Instead, on August 31, 1983, Deaton wrote a letter to the Assistant Secretary of the Interior for Land and Water Resources, stating that he had drilled for water in trespass and requested assistance in resolving his situation. BLM inspected the tract on September 5, 1983, and found no indication of trespass. However, a drill report filed with the New Mexico State Engineer's Office indicates a well was drilled on the property commencing September 12, 1983. On December 5, 1983, BLM re-inspected the tract and found the well and a pumphouse.

On December 16, 1983, BLM issued a trespass notice to Deaton. It stated: "You have entered on and appropriated public lands of the United States by constructing buildings thereon without authority" in violation of 43 U.S.C. §§ 315c, 1061, 1063 (1982); 43 CFR 9239.2-1(a) and (b), and 9239.2-5.

In a September 4, 1984, appraisal report for lot 26, the BLM appraiser found the total lot value to be from \$ 15,000 to \$ 20,000. He applied a 10 percent rate to the estimated total value to derive a rental value of between \$ 1,500 and \$ 2,000 per year for the entire lot. He stated, however, that "because the use will be restricted to the existing unauthorized use (water well and appurtenances), it is recommended that the rental be discounted and fixed at \$ 100 per month or \$ 1,200 per year."

On February 19, 1985, BLM issued a bill to Deaton requesting payment of trespass charges based on the \$ 100 per month figure established by the appraisal. Subsequently, on March 25, 1985, BLM requested that the BLM appraiser reappraise only that portion of lot 26 which included the pumphouse, waterlines, and power and control lines, aggregating 0.011 acre. In his April 1, 1985, response, the BLM appraiser stated that because of the very small area involved and the limitation to well use, he would recommend a rental value of \$ 350 per year, which was the statewide minimum site rental.

On April 16, 1985, the Albuquerque District Office, BLM, revised its trespass billing to reflect the newly recommended minimum site rental of \$ 350 per year. This billing charged \$ 525 for "trespass rental" from August 31, 1983, through February 28, 1985. On May 13, 1985, Deaton again offered to purchase lot 26, this time for \$ 6,000, the value set by a private appraiser. BLM declined, stating in a July 11, 1985, letter that, as it had previously explained on a number of occasions, it could not dispose of the parcel until completion of its planning process and only then if the parcel were identified for disposal.

On July 15, 1985, Deaton met with BLM State Office representatives and attorneys from the Office of the Field Solicitor and reiterated his desire to purchase the entire lot 26. BLM responded by asking for back rental for

use in trespass, and advised Deaton to file a prospective right-of-way application for continued use. In a follow-up letter dated July 26, 1985, BLM assessed \$ 656.33 back rental (\$ 350 per year from August 31, 1983, through July 15, 1985); \$ 350 annual rental in advance; \$ 870.45 administrative charges; and \$ 70 for a right-of-way application fee and post-permit compliance fee.

On August 2, 1985, Deaton offered to pay all charges listed in the July 26, 1985, BLM letter, except the administrative charges, if he could use the entire tract. On September 5, 1985, a representative of Deaton tendered \$ 525 cash at the New Mexico State Office, BLM, in payment of back rent, pursuant to the April 16, 1985, bill issued by BLM. In a September 6, 1985, memorandum to the file, BLM noted that it had explained to the person tendering the money that "we would not accept the \$ 525."

On November 18, 1985, BLM issued its decision stating:

An unauthorized well, storage building, electrical drop pole, water pipeline and other improvements and fixtures were constructed by Henry Deaton on public land described as Lot 26, Sec. 11, T. 10 N., R. 5 E., NMPM. Since they have not been removed as demanded in the "Notice to Remove Unauthorized Improvements on United States Land" received by you [appellant's attorney] and Mr. Deaton on August 30, 1985, title to the improvements and fixtures not removed is now vested in the United States.

We still demand that Mr. Deaton pay back rental on the parcel for the willful trespass from August 31, 1983, to July 15, 1985, for a total of \$ 656.33 and administrative charges occurring as a direct result of said trespass of \$ 870.45, for a total of \$ 1,526.78. This does not include the \$ 350.00 advanced annual rental, plus a \$ 70.00 filing fee and post permit compliance fee for a right-of-way, as provided for in the July 26, 1985 certified letter to Mr. Henry Deaton, because no application for a right-of-way was filed. The amount of \$ 1,526.78 representing past damages and costs must be paid within 30 days from receipt of this decision. In the event we do not receive this amount in the specified time, we will refer the case to the U.S. Attorney's Office for further action. You should also be advised that failure to pay this amount will result in Mr. Deaton being ineligible to bid on the parcel of land, if and when it is offered for competitive sale to the public.

(Decision at 1). Deaton filed this appeal.

[1] Appellant asserts that the procedures BLM followed in this case denied him due process. Presumably, this objection was prompted by the presence of the New Mexico State Director at the July 15, 1985, negotiation meeting. The State Director subsequently signed the decision from which this appeal was taken. The records in the case file clearly indicate that this meeting was not a formal adjudication but was an attempt to negotiate a resolution of the ongoing trespass dispute between appellant and BLM.

This meeting did not and was never intended to replace or foreclose administrative appeal rights, and appellant has pursued his right to a formal administrative appeal by filing an appeal to this Board, pursuant to 43 CFR Part 4.

Appellant asserts a right to a hearing outside the agency pursuant to P.L. 97-365, 96 Stat. 1749 (1982). However, that law applies only to appeals by agency employees or members of the Armed Forces or Reserves who are in debt to the United States. The Board of Land Appeals is empowered, pursuant to 43 CFR 4.415, to order an evidentiary hearing to allow presentation of evidence, if a material issue of fact exists. Where there is no dispute as to material facts, appellant's due process rights are satisfied by an appeal to this Board. Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578 (1985); Woods Petroleum Co., 86 IBLA 46 (1985). Due process mandates the opportunity to be heard. Appellant exercised his right to present his objections to this Board. Prior to appeal, BLM considered appellant's objections, but rejected them in an appealable decision. This rejection cannot be equated with a denial of due process. See Santa Fe Pacific Railroad Co., 90 IBLA 200 (1986).

[2] Appellant objects to the back rental charged for his use and occupancy of Federal land. There is no question that appellant was in trespass. See 43 U.S.C. § 1733(g) (1982); 43 CFR 9239.0-9(a). The measure of damages in such a case is a matter of the law of the state where the trespass is committed, unless by Federal law a different rule is prescribed or authorized. 43 CFR 9239.0-8. In New Mexico, there is no settled law to govern the measure of damages. In such a case, the United States may seek damages expressed in terms of the fair market rental value of the land. Penasco Valley Telephone Cooperative, Inc., 55 IBLA 360, 369 (1981). <sup>1/</sup> If no satisfactory arrangement is completed within a reasonable time, and the authorized officer has reason to believe payment will not be made, the authorized officer may also refuse to accommodate a trespasser with a lease,

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<sup>1/</sup> BLM's assessment of fair market rental value in this case is consistent with final Departmental regulations recently published in the Federal Register addressing unauthorized use of the public lands. 52 FR 49114 (Dec. 29, 1987). Such regulations, which have an effective date of Jan. 28, 1988, provide in relevant part at 43 CFR 2920.1-2:

"(a) Any use, occupancy, or development of the public lands, other than casual use as defined in § 2920.0-5(k) of this title, without authorization under the procedures in § 2920.1-1 of this title, shall be considered a trespass. Anyone determined by the authorized officer to be in trespass on the public lands shall be notified of such trespass and shall be liable to the United States for:

"(1) The administrative costs incurred by the United States as a consequence of such trespass;  
and

"(2) The fair market value rental of the lands for the current year and past years of trespass;  
and

"(3) Rehabilitating and stabilizing the lands that were the subject of such trespass, or if the person determined to be in trespass does not rehabilitate and stabilize the lands determined to be in trespass within the

permit, or license. 43 CFR 9239.0-9(b); see 43 CFR 2920.1-2(d)(1) (52 FR 49116 (Dec. 29, 1987)). 2/ BLM negotiated with appellant in a good faith attempt to reach a settlement satisfactory to both parties. BLM is clearly authorized to seek trespass damages and to request a right-of-way application. Although reasonable steps may be taken to accommodate a trespasser, BLM cannot permit a willful and continuing trespass on Federal lands.

BLM correctly sought compensation, in the form of back rental, for Deaton's use in trespass. See 43 CFR 9239.0-9(b). However, the BLM decision specified the time for which damages were sought was from August 31, 1983, to July 15, 1985. BLM's choice of August 31, 1983, as the starting date for back rental apparently relates to Deaton's letter to the Assistant Secretary, admitting to a trespass. However, the BLM inspection on September 5, 1983, which was after the date of Deaton's letter, found no indication that a trespass had actually occurred. Therefore, we find it inappropriate to charge back rental for occupancy from August 31. The correct starting date for back rental charges should be September 12, 1983, the date well drilling commenced.

BLM stated in its November 18, 1985, decision that it had served appellant on August 30, 1985, with a "Notice to Remove Unauthorized Improvements", and that the improvements had not been removed. It then concluded that "title to the improvements and fixtures not removed is now vested in the United States." The improvements which existed on the property became Government property on November 18, 1985. Therefore, appellant is liable for trespass charges up to and including November 18, 1985. Appellant would also be liable for any expenses incurred by the Government in removing those improvements.

Appellant argues that by temporarily accepting his tender of \$ 525 on September 15, 1985, for a back rental bill dated April 15, 1985, the United States is estopped from levying additional charges or changing its assessment. Such an argument has no merit. Estoppel against the Government is an extraordinary remedy, especially as it applies to the public lands, and must be applied with greatest care and circumspection. The elements of estoppel are: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must rely on the former's conduct to his injury. See Smith v. Bureau of Land Management, 48 IBLA 385 (1980).

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fn. 1 (continued)

period set by the authorized officer in the notice, he/she shall be liable for the costs incurred by the United States in rehabilitating and stabilizing such lands." 52 FR 49115 (Dec. 29, 1987).

2/ In addition, the United States is entitled to order an unauthorized occupant of the public lands to remove himself and his possessions from Federal land and direct that if he does not do so by a specified date, any remaining structures will be deemed abandoned and property of the United States. James E. Billings, 38 IBLA 353, 356 (1978); see United States v. Smith Christian Mining Enterprises, 537 F. Supp. 57 (D. Ore. 1981).

There is no indication here that either party was ignorant of the ongoing dispute regarding the billable amount or of subsequent bills. In addition, there is no evidence that appellant actually relied on the April 15 bill to his injury. In fact, that bill called for payment within 30 days. Appellant's attempted tender of \$ 525 occurred well after the due date.

Appellant objects to the rental value set by BLM. Had appellant been charged rental based on the original September 14, 1984, appraisal, and not limited to the actual area appellant used in trespass, the rental amount would have been inappropriate. However, BLM reconsidered its reappraisal in light of the actual area and use involved in the trespass. As a result, the \$ 350 per year minimum charge was deemed appropriate. Appellant has not shown error in the rental determination, nor has he shown this minimum charge to be excessive. We conclude that imposition of this minimum rate was appropriate.

[3] Appellant also objects to the levy of administrative costs in addition to fair market rental. Section 304 of the Federal Land Policy and Management Act permits BLM to assess reasonable charges for applications and other documents relating to the public lands. 43 U.S.C. § 1734 (1982). This provision authorizes the Secretary of the Interior to charge an applicant for actual administrative costs incurred by the agency relating specifically to an application or other document relating to the public lands. See Penasco Valley Telephone Cooperative, Inc., supra at 368 n.11. However, 43 U.S.C. § 1734 (1982) does not apply to general management costs. Nevada Power Co. v. Watt, 711 F.2d 913, 931 (10th Cir. 1983). Administrative costs must apply directly to documents relating to the public lands, e.g., trespass notices and bills for collection. 3/

Therefore, it was reasonable and proper for BLM to seek reimbursement of costs it incurred as a result of the trespass. However, our review of the trespass administrative costs compiled by BLM reveals certain charges that were not properly included.

The list of administrative costs compiled by BLM includes expenses incurred in August 1984 for compilation of an appraisal report which is dated September 4, 1984. However, on March 25, 1985, the Area Manager, Rio Puerco Area Office, requested a reappraisal of the unauthorized occupancy. That request stated "[a]mend appraisal dated September 4, 1984, to include only the rights indicated above [a list of the improvements] which contain approximately .011 acres." Based on the reduced acreage, the appraiser concluded in his April 1, 1985, letter to the Rio Puerco Area Manager that the "Statewide minimum site rental of \$ 350 per year [should] be used."

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3/ BLM's new regulations governing unauthorized use of the public lands specifically authorize the collection of administrative costs incurred by the United States as a consequence of such trespass. 43 CFR 2920.1-2(a)(1) (52 FR 49115 (Dec. 29, 1987)); See note 1, supra.

Since BLM's trespass charges were based on the \$ 350 minimum site rental, the August 1984 appraisal expenses are not properly charged to appellant as an administrative expense.

In addition, BLM included as an expense the costs of a survey undertaken on July 21, 1985. That expense does not appear to be reasonably related to the trespass itself. At the time of the survey, BLM had already determined the basis for the trespass charges. Therefore, that expense is not properly assessed as an administrative charge for trespass. All other expenses included in BLM's list of administrative charges appear to result directly from the trespass, and we affirm their imposition. Moreover, we note that BLM's list of expenses only reflects costs incurred up to and including June 21, 1985. Clearly, appellant should be responsible for all administrative charges relating to the trespass up to and including November 18, 1985, the date of BLM's decision in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is affirmed as modified.

Bruce R. Harris  
Administrative Judge

I concur:

Anita Vogt  
Administrative Judge  
Alternate Member

## ADMINISTRATIVE JUDGE MULLEN DISSENTING IN PART

The majority has gone to some length to set out the facts in this case in a manner which indicates a continued lack of cooperation on the part of appellant. There can be little doubt that at some point in the course of the dealings appellant refused to agree to the demands being made by the Bureau of Land Management (BLM). However, the mere fact that a party does not acquiesce to BLM's demands does not overcome the underlying notion that the demands should be reasonable. Once a party has agreed to the demands, he can no longer object to the terms of the settlement.

There is no question that Henry Deaton committed a trespass on the public land. Upon finding that he did, he notified the Department of the Interior and sought to resolve the problem. As a matter of record, he sought to purchase a tract of land adjacent to his private residence upon which he had drilled a well for potable water.

BLM then undertook the customary steps to determine the extent of trespass and the damages incurred by the Government. A customary first step taken by BLM when attempting to resolve a trespass such as this is to determine the fair market rental value of the land subject to the trespass and assess that amount as damages for the trespass. See 43 CFR 2920.1-2. To make this determination BLM made an appraisal of the land in question. When doing so it appraised the entire tract of land Deaton indicated he desired to purchase, even though he had not trespassed on the entire tract.

The land appraised by BLM contained 1.47 acres. The appraiser found the total tract to have a value of between \$ 15,000 and \$ 20,000. This equates to between \$ 10,204 and \$ 13,605 per acre. Having determined the fair market sales value of the tract, BLM then determined the fair market rental value of the tract based upon a return of 10 percent of the fair market sales value. This would normally equate to a fair market rental value for the entire tract of between \$ 1,500 and \$ 2,000 a year, according to BLM's calculations. In fact, after making some downward adjustment to take into consideration restrictions on the use of a portion of the tract, the suggested fair market value of the entire tract was set at \$ 1,200 per year.

However, the trespass did not cover the entire tract. After appellant objected to an assessment of trespass damages at the rate of \$ 1,200 per year BLM determined that the trespass consisted of not 1.47 acres, but 0.011 acre. Based on the BLM appraisal document, the fair market sales value of the land subject to the trespass was between \$ 112 and \$ 150.

When dealing with small tracts BLM has logically and correctly observed that if the assessment of damages (or rental for a right-of-way) were to be based only on the fair market rental value of the tract, the amount received would not even cover the administrative costs incurred by the United States as a result of such trespass. One of the ways to assure that administrative costs are recouped in cases such as the grant of a right-of-way is to set a minimum rental to be charged. This ensures that the rental collected is sufficient to cover reasonable and customary administrative costs. For

example, the fair market rental value of the tract in question, using the appraisal method, would be 10 percent of the fair market sales value, or somewhere between \$ 11.20 and \$ 15.00 per year. It is easy to see that this amount would not cover administrative costs.

In a previous study undertaken for the purpose of ascertaining the minimum rental charge for rights-of-way, BLM determined that a minimum rental of \$ 350 per year should be levied. The basis for this determination was that this amount was typical for rental of small tracts. It is obvious that this amount would take into consideration the costs normally incurred in overseeing the right-of-way or lease as well as a fair return from the land, as it is not customary to charge an administrative fee in addition to the rental amount, other than a one-time application fee of \$ 70.

Having determined that a minimum rental should be charged, BLM made an accounting of all administrative costs it had incurred which were directly or indirectly related to appellants trespass. It would seem to be obvious in cases such as this that BLM should determine whether, under the circumstances, the costs actually incurred were, for some reason attributable to the appellant (as opposed to some mistake on its part), in excess of those costs it would normally incur as a result of the investigation of the trespass. <sup>1/</sup> If an unusual circumstance existed which would justify the assessment of additional charges, the additional charges could be assessed if properly documented and explained. However, as noted in the majority opinion, charges were improperly assessed because of a mistake on the part of BLM as to the extent of the trespass or were related to the attempt on the part of BLM to have appellant enter into a right-of-way agreement as a means of resolving the trespass. What happened, however, was that BLM assessed all charges incurred without taking into consideration whether those charges were related to the trespass or resulted from circumstances not normally incurred in the course of settling a trespass action involving a small tract for which a minimum rental would be charged. BLM merely totaled the administrative charges and added the amount to the minimum rental, thus billing Deaton for an additional \$ 870.45. When one adds this amount to the minimum rental from the time of trespass to the time of billing at a yearly rate of \$ 350, or \$ 656.33, the damages assessed by BLM totals \$ 1,526.78. This is the amount BLM determined to be a reasonable assessment of damages for a trespass on a tract with a fair market sales value of \$ 150. BLM clearly lost sight of the charges reasonably assessed for trespass and the majority have lost sight of the reason for charging a minimum rental, with the result that Deaton has been double charged for routine administrative costs customarily included in the minimum rental amount.

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<sup>1/</sup> It would seem unlikely that the investigation of a trespass of the nature of the one now being considered would be any more difficult or expensive than the investigation undertaken during the course of considering and administering the grant of a right-of-way for the same tract of land. In fact, BLM proposed the grant of a right-of-way as a means of settling the trespass and acted accordingly.

I had initially proposed that the case be remanded to BLM to allow for an evaluation of the administrative charges. In doing so I believed that BLM would either reduce the charges or present some factual basis for a conclusion that the costs incurred were other than routine. It is obvious that this proposal has been rejected. Instead, the majority concludes that additional charges may be assessed, without any consideration of whether those charges are reasonable or are for administrative duties customarily absorbed when overseeing a use for which a minimum charge has been assessed.

The majority does not share my concern and BLM is therefore not compelled to take the course of action I have outlined above. However, I hope that this expression of concern that charges appear to be very unreasonable on their face, when one considers the nature and extent of the trespass, will result in a reexamination of the basis for the charges previously assessed and any additional charges BLM may consider pursuant to the majority opinion.

R. W. Mullen  
Administrative Judge

