

**Editor's note: Reconsideration denied by Order dated Oct. 3, 1988**

FREDERIC C. TULLIS  
KATHLEEN E. TULLIS

IBLA 86-643

Decided May 10, 1988

Appeal from a decision of the District Manager, Boise District Office, Idaho, Bureau of Land Management, rejecting desert land entry applications. I-17811, I-17812.

Set aside and referred for hearing.

1. Desert Land Entry: Applications -- Rules of Practice: Appeals: Hearings

Where, on appeal from a BLM decision rejecting a desert land entry application because it is considered not economically feasible to farm the land sought, the applicant presents evidence contradicting crucial aspects of BLM's economic analysis, including the anticipated yield of a particular crop and the cost of securing electricity for a water pump, sufficient to raise questions of fact, the BLM decision will be set aside and the case referred for a hearing and subsequent decision by an Administrative Law Judge.

APPEARANCES: Frederic C. Tullis, Kathleen E. Tullis, pro sese.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Frederic C. Tullis and Kathleen E. Tullis have appealed from a decision of the District Manager, Boise District Office, Idaho, Bureau of Land Management (BLM), dated February 21, 1986, rejecting desert land entry applications I-17811 and I-17812 based on determinations, in accordance with 43 CFR 2520.0-8(d)(3), that it would be impracticable to farm those lands sought in each application which had been classified as suitable for desert land entry as economically feasible operating units.

On July 9, 1981, Frederic C. Tullis filed desert land entry application I-17811 for 320 acres of public land situated in secs. 21 and 28, T. 2 N., R. 3 W., Boise Meridian, Canyon County, Idaho, pursuant to section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1982). In his application, Tullis proposed to devote 100 acres each to sugar beets and wheat, 80 acres

to corn, and 40 acres to alfalfa hay, and to irrigate the land by means of a sprinkler system with water pumped from a well drilled on the land. Using estimated annual production costs and revenue, Tullis projected an annual profit of \$ 72,597.

Similarly, on July 9, 1981, Kathleen E. Tullis filed desert land entry application I-17812 for 320 acres of public land situated in secs. 27 and 28, T. 2 N., R. 3 W., Boise Meridian, Canyon County, Idaho, pursuant to section 1 of the Act of March 3, 1877. In her application, she proposed to devote 200 acres to wheat, and 120 acres to sugar beets, and to irrigate the land by means of a sprinkler system with water pumped from a well drilled on the land. Using estimated annual production costs and revenue, she projected an annual profit of \$ 84,272.

Since the lands sought by the Tullises had not previously been classified as suitable for desert land entry, the desert land entry applications constituted petitions for classification of the lands pursuant to section 7 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315f (1982). By letter dated May 7, 1984, Assistant Secretary Carruthers notified Frederic C. Tullis that approximately 290 acres encompassed by his desert land entry application had been classified as suitable for desert land entry. 1/ Likewise, by letter dated July 25, 1984, Assistant Secretary Carruthers informed Kathleen E. Tullis that 180 acres of the lands sought by her had been classified as suitable for desert land entry. 2/ In both cases, the land deemed unsuitable for desert land entry was considered to be mineral in character. Both classifications constituted the final decision of the Department. 43 CFR 2450.5(c); Guy A. Martin, 26 IBLA 254 (1976).

Following classification of the land as suitable for desert land entry, BLM proceeded to adjudicate whether the Tullises were qualified under section 1 of the Act of March 3, 1877, and its implementing regulations. See David V. Udy, 81 IBLA 58, 60 (1984); 43 CFR 2450.8 ("petitioner-applicant is entitled to a preference right of entry, if qualified"). In evaluating the applications, BLM undertook an economic analysis in order to determine the practicability of farming the classified lands. BLM sought to determine whether those lands were economically feasible operating units, in accordance with 43 CFR 2520.0-8(d)(3). BLM analyzed each application as a separate operating unit. The analysis consisted of running figures for projected costs, revenues, and other variables for a particular crop distribution through a computer model developed by BLM and the Idaho Department of Water Resources, resulting in a calculation of total net revenue for each operating unit. In each case, the total net revenue was a negative figure. As a general matter, we have approved use of such computer analyses as an aid in decisionmaking. See Roger K. Ogden, 77 IBLA 4, 8, 90 I.D. 481, 484 (1983).

---

1/ Those 290 acres are described as the E 1/2 SW 1/4 SE 1/4, NW 1/4 NE 1/4, E 1/2 SW 1/4 NE 1/4, NE 1/4 NW 1/4, E 1/2 NW 1/4 SE 1/4 sec. 21 and the W 1/2 NE 1/4, E 1/2 SE 1/4 NW 1/4, NW 1/4 NW 1/4 NW 1/4, S 1/2 N 1/2 NW 1/4 sec. 28, T. 2 N., R. 3 W., Boise Meridian, Canyon County, Idaho.

2/ Those 180 acres are described as the S 1/2 SE 1/4 SW 1/4 sec. 27 and the E 1/2 E 1/2 sec. 28, T. 2 N., R. 3 W., Boise Meridian, Canyon County, Idaho.

BLM subsequently informed the Tullises of the results of the economic analysis. In response, they submitted a "Feasibility Report for Desert Entry," dated April 17, 1985, and prepared by C. Wilson Gray, an agricultural economist with the University of Idaho (Gray Report). The report analyzed the economic feasibility of farming all of the land sought by the Tullises. Gray estimated a "gross margin" for the first and second years of operation for a particular crop distribution, given projected production costs and revenues (Gray Report at 3). The "gross margin," according to Gray, represented gross revenue minus production costs, *i.e.*, that revenue which would be "available to pay for investment and ownership costs, and provide for other expenses, and net profit." <sup>3/</sup> *Id.* Gray described the process of deriving the "gross margin" as "cash flow analysis." *Id.* at 2. In each case, the "gross margin" was a positive figure. In an April 17, 1985, cover letter which accompanied his report, Gray stated that ultimate profitability of the farming venture would be dependent on good management, as well as actual crop prices and pumping rates, but that, because actual yields are "normally \* \* \* above average the first two or three years on new farm ground, the potential exists for net receipts to be higher than projected during that period."

In rejecting the applications in its February 1986 decision, BLM primarily relied on the fact that BLM's economic analysis had disclosed that neither application "would result in an economic farm venture" <sup>4/</sup> (Decision at 1). BLM also reviewed the Gray report and concluded that, taking into account "ownership and development costs," Gray's economic feasibility analysis would yield a negative figure the first year. <sup>5/</sup> The Tullises appealed from the February 1986 BLM decision.

[1] Section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1982), provides for the patenting of tracts of desert land not exceeding 320 acres to persons who make satisfactory proof of reclamation of the land and pay the required purchase price. The statute specifically provides that entered tracts of land shall be "managed satisfactorily as an economic unit."

---

<sup>3/</sup> Ownership costs included "depreciation, interest, property taxes, [and] insurance," presumably with respect to ownership of the land, while investment costs apparently included debt service on farm equipment (Gray Report at 2). Other expenses consisted of the cost of clearing and leveling the land and other associated expenses. *Id.* None of these expenses was accounted for in Gray's calculation of the "gross margin." *Id.*

<sup>4/</sup> BLM noted that its economic analysis had taken into account the fact that 54 percent of the lands sought by the Tullises contained class IV or VI soils: "The Class IV soils are poorly suited for agricultural production due to the high potential for erosion once disturbed. The Class VI soils are not suited for agricultural production due to steepness of slope and bedrock characteristics" (Decision at 3).

<sup>5/</sup> BLM listed, as ownership and development costs, debt service on the pumping and irrigation system, interest on operating capital, machinery and tractor ownership costs and "land charges (filing fees, clearing and leveling)" (Decision at 2).

43 U.S.C. § 321 (1982). Accordingly, the applicable regulation, 43 CFR 2520.0-8(d)(3), states that in determining whether to allow a desert land entry, the authorized BLM officer will take into account various factors, including the "practicability of farming the lands as an economically feasible operating unit." See 24 FR 363 (Jan. 15, 1959). The question of economic feasibility, according to the BLM Manual at 2520.0-6(A)(4) (Oct. 21, 1974), is whether the land

can be developed into a profitable operation on a 'permanent' basis. The value of the increased production of a given tract of land must be sufficient to provide a profit after all costs have been deducted. This profit must be large enough to ensure the expectation of continued cultivation. \* \* \* The concern is with the stability of the farming operation.

Therefore, where the evidence has established that lands sought in a desert land entry application could not be farmed as an "economically feasible operating unit," we have affirmed BLM's rejection of the application based on that rationale. See Roger K. Ogden, supra. In the present case, appellants have raised various questions regarding the validity of BLM's economic analysis. For the following reasons, we must set aside the BLM decision and refer the case to the Hearings Division, Office of Hearings and Appeal (OHA), for assignment of an administrative law judge.

In their statement of reasons for appeal (SOR), 6/ appellants first dispute the selection of crops used in BLM's economic analysis, contending that, with the exception of alfalfa hay, the crops are "marginal". The distribution of crops in BLM's analysis was as follows: 5 percent alfalfa hay; 17 percent winter wheat; 17 percent barley; 1 percent alfalfa hay establishment; 22 percent potatoes; 17 percent sugar beets; and 21 percent dry edible beans. Appellants contend that a proper distribution would be approximately 85 percent alfalfa hay; 11 percent hard red spring wheat; 2 percent carrot seed; and 2 percent onion or asparagus seed. 7/ In his report, at 1, Gray had recommended that

a crop pattern of corn silage, potatoes, spring wheat (followed with alfalfa hay establishment in the fall) and vegetable seed establishment in the initial year followed by a crop pattern of

---

6/ Appellants filed no document with the Board specifically denominated a SOR. However, the reasons for their appeal are for the most part contained in a Mar. 26, 1986, letter to Congressman Craig, copies of which were filed with the Board, and served in accordance with 43 CFR 4.413. We will treat that document as appellants' SOR.

7/ Appellants actually stated that they wanted "400 + acres of alfalfa hay, 50 acres of HRSW [hard red spring wheat], 10 acres carrot seed, 10 acres of onion, or asparagus seed. We want approx 84% of the ground in hay. Thus, eliminating the less productive crops and the need for so much machinery" (SOR at 2). Those acreage figures translate to the percentages set forth in the text.

corn silage, potatoes, alfalfa hay and vegetable seed would be potentially the most profitable.

According to Gray, the distribution of crops in the first year should be 28 percent potatoes; 27 percent corn silage; 43 percent spring wheat followed by alfalfa hay establishment; and 2 percent vegetable seed establishment. In the second year, gray recommended 28 percent potatoes; 27 percent corn silage; 43 percent alfalfa hay; and 2 percent vegetable seed. Gray's cash flow analysis was based on this crop distribution.

There is no way to determine from the present record what the proper crop distribution for the lands in question should be. However, the Gray report would tend to support a greater emphasis on alfalfa hay than BLM used in its computer model. Nevertheless, Gray's figure of 43 percent alfalfa hay for the second year is still about half of the percentage appellants proposed in their SOR.

Appellants also dispute BLM's projected yield for their respective tracts of land of 2.68 and 4.00 tons of alfalfa hay per acre, at a selling price of \$ 71.15 per ton. 8/ Appellants, relying on a March 26, 1986, letter from R. Robert Romanko, an agronomist with the University of Idaho, contend that the average yield should be 6 to 10 tons of alfalfa hay per acre, at a selling price of \$ 60 to \$ 80 per ton.

BLM's decision to favor potatoes, winter wheat, barley, sugar beets, and dry edible beans is apparently based on its figures which indicate that these crops will yield higher revenues per acre than alfalfa hay, where only 2.68 tons of alfalfa hay are produced per acre. 9/ Even if the subject land were to yield 10 tons of alfalfa hay per acre, selling at a price of \$ 80 per ton, according to BLM's calculations, potatoes and sugar beets would still yield higher revenues per acre than alfalfa hay. However, the disadvantage with potatoes, winter wheat, barley, sugar beets, and dry edible beans, as revealed in BLM's figures, is the higher projected production costs per acre associated with such crops. 10/ Thus, it is evident that given a yield of 7 tons of

---

8/ Appellants actually state that BLM projected a yield of 2.67 and 3.17 tons of alfalfa hay per acre. However, the figures taken from BLM's computer flow sheets are 2.68 and 4.00 tons per acre for the Frederic C. Tullis and Kathleen E. Tullis tracts of land, respectively.

9/ The record indicates that in the case of the production of 2.68 tons of alfalfa hay from Frederic C. Tullis' tract of land, revenues per acre would be as follows: \$ 190.61 for alfalfa hay; \$ 197.03 for winter wheat; \$ 232.91 for barley; \$ 1,298.69 for potatoes; \$ 860.63 for sugar beets; and \$ 442.60 for dry edible beans. With a yield of 4 tons of alfalfa hay per acre from Kathleen E. Tullis' tract of land, only potatoes, sugar beets, and dry edible beans have greater revenues per acre.

10/ In the case of Frederic C. Tullis' tract of land, BLM projects production costs per acre as follows: \$ 375.61 for alfalfa hay; \$ 422.58 for winter wheat; \$ 442.52 for barley; \$ 1,384.74 for potatoes; \$ 1,029.69 for sugar beets; and \$ 511.48 for dry edible beans.

alfalfa hay priced at \$ 60 per ton or 6 tons of alfalfa hay priced at \$ 70 per ton, both of which fall within appellants' projected yield and price ranges, per acre production of alfalfa hay would yield a positive net revenue, even using BLM's projected production costs. This agrees with the analysis for alfalfa hay production contained in Gray's report, which indicates that, with a yield of 6 tons of alfalfa hay per acre priced at \$ 65 per ton, the operation would provide a positive net revenue exceeding both projected operating and ownership costs.

Thus, appellants' evidence raises questions of fact regarding the proper distribution of crops, as well as about the quantity of alfalfa hay which could reasonably be expected to be produced from the lands in question. <sup>11/</sup> Resolution of these questions is crucial to determining whether agricultural operations on either tract of land sought by appellants are economically feasible.

Appellants also dispute BLM's assessment of the cost of an electrical hook-up to a 600 horsepower (HP) pump, which would draw water out of a single well centrally located in the NE 1/4 sec. 28, and then direct it through

---

<sup>11/</sup> BLM's assessment of lower yields per acre may be tied to its conclusion regarding classification of the soils within appellants' tracts of land. As BLM stated in its February 1986 decision, at 1, the "computer economic model projects poorer yields on poorer soils." Appellants, however, dispute BLM's conclusion that "54 percent (256 acres) of the lands applied for are predominantly Class IV and Class VI soils" (Decision at 3). They contend that Soil Conservation Service (SCS) maps of the land indicate that 13 percent (1.6 acres) are Class VI and 8.5 percent (41 acres) are Class IV. However, appellants have provided no SCS maps to support that claim. Rather, they submit a copy of an April 13, 1986, letter of Clair H. Leavitt, an SCS supervisor, who, based on an inspection of the land, states that the "major portion of [the] soil [on appellants' land] is Scism silt loam with 3 to 7% slopes [and] has a capability class of IIIe." See also Letter of Brent Merritt at 1 ("over 80% \* \* \* is class 3 soil"). In addition, appellants have provided copies of letters written by other people following inspection of the claimed land. In one of those, Barry Larsen, an agricultural consultant and farmer, states that the land "should be capable of producing 7-9 ton alfalfa [hay]," while Loren W. McIntyre, a local farmer, states that he had "5.5 ton alfalfa hay on this type soil."

The record contains soil maps of the land sought by appellants, prepared by BLM from SCS surveys. These maps indicate the number of acres in each soil class, as follows: 20 acres (4.26 percent) Class II; 281 acres (59.79 percent) Class III; 124 acres (26.38 percent) Class IV; 44 acres (9.36 percent) Class VI; and 1 acre (.21 percent) Class VIII. Thus, only approximately 35, rather than 54, percent of the land has Class IV and Class VI soil. Despite BLM's incorrect statement in its decision, the record indicates that it used the correct percentages in running its computer program with respect to each tract of land. However, the real dispute is not over the proper soil classification of the land, but the anticipated yield of alfalfa hay, as well as other crops, from the land.

appellants' irrigation lines to all of the land. The record indicates that BLM used a figure of \$ 129,000 as the cost of the electrical hook-up. 12/ That figure was derived from an estimate, dated February 20, 1986, prepared by Kenneth K. Pon, an engineer with Idaho Power. Pon estimated that \$ 123,000 alone would be needed to upgrade 3 miles of electrical line in order to accommodate a 600 HP pump. The remaining \$ 6,000 represents the cost of running an electrical line to appellants' pump. Appellants contend, however, that the cost of the electrical hook-up will be at most \$ 420. In support of their contention, appellants submit an estimate, dated March 25, 1986, prepared by Gary Betts, reported to be an engineer with Idaho Power. That estimate indicates that \$ 420 represents the cost of running an electrical line 60 feet from an existing pole and setting a pole, presumably near appellants' pump. There is no suggestion that any electrical line needs to be upgraded.

The crucial question, therefore, in terms of the cost of the electrical hook-up, is whether an electrical line needs to be upgraded in order to accommodate appellants' pump or pumps. In view of conflicting record evidence, we must conclude that there is a question of fact whether upgrading is necessary. Resolution of this question is important because this cost represents a significant expenditure. 13/

Appellants challenge BLM's determination regarding their equipment needs. They assert that they do not need all of the equipment projected by BLM and that they "own most of the machinery needed" (SOR at 4). Appellants have submitted a list of their existing equipment (Item 7 attached to SOR.)

BLM's economic analysis contains a list of required equipment for each intended crop, under the heading of projected production costs. We note that some of the equipment is apparently already owned by appellants. If appellants do, in fact, own equipment needed to farm the subject land, we conclude that BLM should not include the costs of purchasing such equipment in its projection of production costs. 14/

---

12/ This figure also appears on the "DLE Economic Analysis Data Worksheet" with respect to each tract of land, which worksheet provides a breakdown of \$ 61,250 plus \$ 129,000 as the cost of pumps, motors, and electrical hook-up. The record elsewhere indicates that \$ 61,250 represents the cost of the 600 HP pump. The cost of the electrical hook-up was apparently revised from an earlier Idaho Power estimate of \$ 160,000. On appeal, however, appellants assert that Idaho Power informed them that they could "run the equivalent of 600 H.P. by any one of several combinations such as 2-300 H.P. motors, 3-200 H.P. motors etc. & as long as they were hooked up to start at intervals of at least a few seconds they would work & there would be no or a minimum charge of \$ 420.00 \* \* \*" (SOR at 3.)

13/ Appellants state that the District Manager, Boise District Office, "told us that the project would still be feasible if it wasn't for the Idaho Power charge of \$ 160,000 to hook-up the pump" (SOR at 3).

14/ Appellants also state that they will drill the necessary well, such that their only costs in this respect will be "casing and fuel [and] other minimal

A determination of whether it is economically feasible to farm a tract of land must, to a certain extent, take into account the particular circumstances of the desert land entry applicant, just as it takes into account the actual characteristics of the land and existing market conditions, because all of those factors influence the determination of economic feasibility. See David V. Udy, *supra* at 64. In this case, one of those circumstances, apparently is preexisting ownership of equipment needed in the farming operation. 15/

Finally, in its economic analysis, BLM ran a separate computer program with respect to each of appellants' tracts of land. It is apparent, however, that appellants, a husband and wife, have demonstrated subsequent to classification of the land their intention to farm both tracts as a single operation. Under the plan of operations assessed by BLM in its economic analysis, water would be pumped from a single well and distributed to all of the lands. Appellants have also indicated that they intend to use the same farm equipment on all the lands. Moreover, Gray's economic feasibility analysis, submitted by appellants, covered the agricultural development of both tracts of land.

In Ewing T. Skinner, A-30468 (Apr. 5, 1966), the Assistant Secretary permitted the aggregation of land applied for under a desert land entry application with adjacent patented land owned by the applicant's father for purposes of making a determination of economic feasibility, where the applicant intended to farm all of the land as a "joint operation." *Id.* at 4. See also James Leland Wallace, 100 IBLA 70, 71-72 n.3 (1987). We conclude that aggregation is also appropriate where land applied for under a desert land entry application is intended to be farmed in conjunction with adjacent land also applied for under a desert land entry application. We find nothing in the applicable statute and Departmental regulations which specifically precludes such aggregation for purposes of determining whether to allow an entry. Accordingly, in determining economic feasibility, appellants' tracts of land should be considered one "operating unit."

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 referred to the Hearings Division, OHA, for

---

fn. 14 (continued)

costs" (SOR at 4). We presume that appellants mean that they have drilling equipment and do not need to contract for or purchase the equipment. to the extent that appellants can save money by using their own equipment, this projected cost should be reduced. However, the cost of drilling should reflect at least the cost of appellants' labor.

15/ Appellants also dispute BLM's projection of costs for equipment, contending that there is a "buyers' market where new equipment or like new is selling from 1/10 on up of its list price" (SOR at 5). Appellants have provided no evidence in support of this contention, or indicated how BLM's cost figures differ from appellants' projections. At the hearing ordered herein, appellants will be permitted to offer evidence challenging BLM's cost figures.

assignment to an administrative law judge. The judge shall consider evidence relating to the issues discussed in this opinion, as well as any other issues deemed necessary to resolve whether or not it is economically feasible to farm the lands sought by appellants. At the hearing, appellants shall have the ultimate burden of establishing the economic feasibility of farming the lands. 16/ The judge's decision shall be final subject to the right of appeal to this Board.

---

Bruce R. Harris  
Administrative Judge

We concur:

---

Wm. Philip Horton  
Chief Administrative Judge

---

Will A. Irwin  
Administrative Judge

---

16/ While we order a hearing, BLM and appellants are, of course, at liberty to engage in negotiations in an attempt to resolve this case. In the course of such negotiations, appellants could provide evidence to BLM in support of their various challenges to the prior BLM economic analysis. BLM could then evaluate the evidence and make any necessary revisions in its analysis. Such a course might spare all parties the time and expense of a hearing.