

Appeal from a decision of the State Director, Utah, Bureau of Land Management, ordering removal of structures unintentionally placed in trespass on public land. U 62842.

Vacated and remanded.

1. Trespass: Generally

BLM may properly require the removal of structures unintentionally erected in trespass upon public land. However, a decision requiring removal of such structures, which are located in a riparian area, based on a conclusion that under BLM's Riparian Area Management Policy disposal would not be in the public interest, will be vacated where there is not a rational basis in the record to support such action.

2. Appeals: Generally--Rules of Practice: Appeals: Effect of

When a BLM decision has been properly appealed to the Board by an adversely affected party, BLM loses jurisdiction over the case and it has no authority to take further dispositive action on the subject matter of the appeal until the Board rules on the appeal. However, that does not mean that BLM is precluded from entering into settlement negotiations with the appellant. The rule regarding jurisdiction precludes BLM, however, from finally disposing of the matter without regaining jurisdiction from the Board. Therefore, where negotiations are successful and the parties agree on a settlement after the filing of an appeal, the proper procedure is for BLM to request that the Board vacate BLM's decision and remand the case to it to take formal dispositive action to implement the settlement agreement.

APPEARANCES: William J. Lockhart, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HARRIS

Clive Kincaid has appealed from the August 26, 1987, decision of the State Director, Utah, Bureau of Land Management (BLM), ordering Kincaid to remove all structures and improvements unintentionally placed in trespass on public land and to reclaim the land within 90 days of receipt of the decision. The structures and improvements listed in the decision are a portion of a partially completed stone house, a chicken coop, a dugout, a trash heap, building material, watering furrows, and non-native trees. The basis for the State Director's decision was his conclusion that the structures and improvements are located within the riparian zone of Deer Creek.

In 1983, Kincaid purchased a 20-acre parcel of private land in the NW<sup>^</sup> SE<sup>^</sup> sec. 9, T. 34 S., R. 5 E., Salt Lake Meridian, Garfield County, Utah. That parcel was part of a larger tract of land known as the Deer Creek Ranch, which consisted of approximately 280 acres located along the course of Deer Creek in secs. 4 and 9, T. 34 S., R. 5 E., Salt Lake Meridian. Kincaid identified the eastern boundary of his parcel on the basis of an existing fence, a stone monument, and a BLM sign which reads "Leaving Public Lands." Without a formal survey of his property, Kincaid commenced construction of his house. 1/

On September 29, 1986, the Cedar City District Manager, BLM, requested that Cadastral Survey perform a survey to determine the boundaries between Federal and private land in secs. 4 and 9, T. 34 S., R. 5 E., Salt Lake Meridian. 2/ On November 24, 1986, Cadastral Survey issued special instructions for the dependent resurvey of a portion of the section lines and the subdivisional survey of secs. 4 and 9. During the course of the survey conducted from December 9 through 18, 1986, the surveyors determined that Kincaid's house had been partially constructed on public land.

On December 19, 1986, BLM issued trespass notice UT-040-05-H22 to Kincaid charging him with trespass on public lands in the NE<sup>^</sup> SE<sup>^</sup> sec. 9. BLM orally advised him that the public land at issue was in the Steep Creek Wilderness Study Area (WSA). By letter dated January 19, 1987, Kincaid responded to the trespass notice, describing how he acquired his interest

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1/ It should be noted that on Apr. 29, 1986, the Garfield County Building Inspector issued a stop-work order to Kincaid because he had failed to secure the required building permit from the county prior to constructing his house (Case Record, Tab JJ).

2/ The request stated that

"[s]everal owners are involved in the private land. One individual (Grant Johnson) has begun a fence that is suspected of being partially on BLM land. He has been ordered to stop fence construction until an adequate survey is completed. Also, a partially built home (Clive Kincaid) may also be partially on BLM land (Steep Creek W.S.A.). Fence along southern boundary may not be on line. A survey is needed to clear up above problem as well as to determine exact boundary of this property to prevent further trespass problems."

in the parcel and how he determined the location of the eastern boundary of his property. He stated that by November 1985, he had completed 95 percent of the stone work on his house which included walls 22 inches thick. Appellant cited the difficulty of determining the boundary of the Steep Creek WSA and questioned whether his house really was in a WSA.

The Cedar City District Office did not respond to Kincaid's letter, rather it commenced preparation of an environmental assessment, and in February 1987, it issued a draft environmental assessment (DEA) for the stated purpose of resolving the trespass situation and ensuring proper management of the WSA. <sup>3/</sup> The DEA analyzed two alternatives, *i.e.*, removal of all structures and improvements within 90 days and "no action." After circulating that draft and receiving comments from the public, the District Office issued its final environmental assessment (FEA) on June 17, 1987.

In the FEA, BLM considered four alternatives, the two set forth in the DEA and two others. Alternative A, which had been the proposed action in the DEA, required removal of all structures and rehabilitation of disturbed areas within 90 days. Alternative B provided for issuance of a temporary use permit to authorize Kincaid's use of the land until Congress acted on the designation of the Steep Creek WSA. If the land were designated as wilderness, the removal of the structures would be required. If the land were not so designated, they would be offered for exchange. Alternative C would postpone further action regarding the trespass until Congress acted on the wilderness designation, differing from alternative B only in that no further development of the land would be allowed. Alternative D was the "no action" alternative, meaning that BLM would do nothing regarding the trespass. <sup>4/</sup>

The Cedar City District Manager issued a proposed decision record which accompanied the FEA. Therein, he selected alternative C as the preferred course of action. Kincaid filed a protest with the State Director, contending that the land at issue was not within the WSA so that it was unnecessary to wait until Congress made a decision on the wilderness status of the Steep Creek WSA before proceeding with an exchange. Thus, the only issue pre-sented by Kincaid's protest was whether or not the land in question was actually part of the Steep Creek WSA.

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<sup>3/</sup> In a letter to Reid C. Davis, Esq., dated Feb. 18, 1987, the Cedar City District Manager explained that the environmental assessment process was utilized "to address any surface disturbing activities within wilderness study areas" (Case Record, Tab R).

<sup>4/</sup> The FEA did not analyze a present sale or exchange because such disposition was not deemed prudent until final resolution of WSA status. A future sale was not considered because the FEA concluded that the land was located within the riparian zone of Deer Creek and the parcel therefore did not qualify for sale under BLM's riparian area management policy implemented in Utah by Instruction Memorandum (IM) UT-87-261 (May 15, 1987). However, as indicated, alternatives B and C anticipated an exchange, under the proper circumstances.

However, the State Director's decision did not turn on that issue. Prior to making the decision under appeal, the State Director visited the site of the trespass, a visit which he characterized in his decision as "most rewarding" (Decision at 2). He continued:

What I learned that I did not fully appreciate before is that all of the structures and developments in question are located within close proximity to Deer Creek, a perennial stream that, except in time of flood, runs clear and inviting in what is otherwise a largely arid and desert-like region. The stream is undoubtedly a great natural asset and attraction to the area, not for its water alone but also for the abundant green and lush vegetation that grows along its banks. Frankly, I was both surprised and offended by the placement, indeed intrusion, of manmade structures and developments as well as stacks of building material, rubble and refuse in the area so close to the stream bank. It quickly occurred to me that all of the structures and developments in the trespass area are likely within a riparian zone that BLM is required by its own Riparian Area Management Policy dated January 27, 1987, as well as related Executive Orders 11988 and 11990, both dated May 24, 1977, to protect and that their location there is both impermissible under and in conflict with those documents. I therefore, in company with another BLM employee who accompanied me on that occasion, inspected with considerable care the entire area of trespass, and tentatively concluded that most, if not all, of the structures and developments placed therein are within a riparian zone that BLM is charged to manage and protect. I later directed other BLM employees from the State Office to visit the area, including both the Deputy State Director for Lands and Renewable Resources and the Deputy State Director for Operations, for the purpose, among others, of generally determining the extent of the riparian zone associated with Deer Creek, and whether the structures and developments here in question are within that zone. They observed, as had I, that most of the developments actually lie within the flood plain of the stream, and that all of the structures and developments are located within the area of vegetation that is created by and dependent upon the water that flows in Deer Creek. A similar observation was earlier noted by the District Manager, Cedar City, and cited by him as a matter of concern in his proposed decision. Based upon this personal observation and knowledge, and that of other BLM employees who have inspected the area, I do now find and conclude that the structures and developments here under consideration and which are located in trespass on public land are within a riparian zone that the BLM is mandated to protect.

Under the circumstances, it appears obvious that the BLM cannot permit the continuance of the trespass in question. The structures and developments are clearly an intrusion in and a detriment to the riparian zone that the BLM manages and is required to protect. Indeed, the Riparian Area Management Policy dictates retention of riparian areas unless disposal would be

in the public interest. It is difficult to see how the public interest would be served by a transfer of the land in question to you.

(Decision at 2-3).

The State Director required the removal of all structures and improvements from public land within 90 days of the receipt of his decision. In addition, although he concluded that appellant was trespassing on public land designated as part of the Steep Creek WSA, the State Director considered that conclusion to be "irrelevant" because his decision was "based solely on the riparian zone considerations" (Decision at 3). Thus, the State Director, in resolving the protest, abandoned the basis for the actual initiation of the environmental assessment process (the WSA status of the land) and the conclusion reached by the District Manager as a result of that process. 5/

Kincaid filed an appeal of that decision, and, claiming surprise by the State Director's shift in rationale from WSA issues to riparian area issues, requested that we remand the case to provide him with an opportunity to confront those issues at the State Office level or to have a hearing on issues of fact. By order dated December 9, 1987, we denied Kincaid's request, noting that he would have the opportunity to address the riparian issues in his statement of reasons (SOR) in support of his appeal. In the order, we limited the issues in the appeal to (1) whether structures and improvements were placed in trespass on public land, and (2) whether BLM properly required appellant to remove them because they are in the riparian zone of Deer Creek.

We need not concern ourselves further with the trespass issue, since in his SOR, Kincaid states: "In order to save further expenditure appellant has subsequently accepted BLM's cadastral survey" (SOR at 8). The remaining issue is whether the State Director properly required appellant to remove his improvements because they are within the riparian zone of Deer Creek.

In order to address this issue, we must first confront the question of whether appellant's improvements are, in fact, within a riparian area.

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5/ We note that the record shows that by memorandum dated Apr. 29, 1987, the Cedar City District Manager forwarded to the State Director certain alternatives developed by the District Office staff in conjunction with the trespass. The description of those alternatives included the statement that "[t]he lands in trespass are in a riparian zone. The District Manager expressed his preference for the alternative identified therein as Alternative A, which in the FEA was the preferred alternative, alternative C (Case Record, Tab TTT). In a response dated June 2, 1987, the Deputy State Director, Lands and Renewable Resources, informed the Cedar City District Manager to "[c]hange the alternatives in the EA to those identified in Insert A" (Case Record, Tab BBB). Insert A is not included as a part of the record in this case, but presumably those alternatives were the ones which appeared in the FEA issued on June 17, 1987.

Although appellant concedes that some of the improvements lie within areas that may be properly classified as riparian, he challenges that characterization with respect to the area where the house is located. The BLM Director's Riparian Area Management Policy dated January 22, 1987 (SOR, Exh. R), defines riparian area as follows:

Riparian Area - an area of land directly influenced by permanent water. It has visible vegetation or physical characteristics reflective of permanent water influence. Lake shores and stream banks are typical riparian areas. Excluded are such sites as ephemeral streams or washes that do not exhibit the presence of vegetation dependent upon free water in the soil. [Emphasis in original.]

For such areas, the objective of the policy "is to maintain, restore, or improve riparian values to achieve a healthy and productive ecological condition for maximum long-term benefits." In order to meet this objective, the policy statement states that "the Bureau will to the extent practical \* \* \* [r]etain riparian areas in public ownership unless disposal would be in the public interest, as determined in the land use planning system."

Appellant has submitted a base map and overlays to illustrate his contention that the land on which his house is situated should not be considered riparian in character (SOR, Exh. B). A broad band of light green on overlay No. 1 shows what appellant calls the hydric riparian or streamside community (SOR at 31). He contends that beyond this community there is a noticeable absence of ground cover, with the predominant vegetation being sagebrush and pinion-juniper, although within the riparian community and extending beyond it are deciduous trees commonly associated with water. His stone house is situated within a stand of cottonwood trees. Appellant explains the presence of those trees, the largest of which, he alleges, are probably over 100 years old, as follows:

Clearly these [cottonwood] trees did not expand up the bank and away from the stream. This grove was apparently deposited in the late 1800's when the stream course was further west and before serious erosion and headcutting took the stream to its present depth and location. This explains both the age and the decadence of the trees, as well as their association with xeric shrubs. These trees should be considered a relict population.

The reason that any of these trees have managed to survive at all is not because of their association with Deer Creek, but because of the spring and runoff that drains from an arroyo to the west which is substantially higher than [the] creek, thus filtering some water through the otherwise dry bench of sand. After artificial irrigation (by diesel pump) during the summers of 1983- 86 these trees have responded with a remarkable increase in foliation. However, this alluvial benchland is not a viable long-term

riparian community unless it is irrigated and thus the mature trees will continue to decline rapidly.

(SOR at 32-33). In support of these observations, appellant has submitted photographs as Exhibit C to his SOR.

The FEA makes several references to the riparian character of the area and describes the affected environment as follows:

The affected public lands are in a small valley in the Deer Creek drainage. Deer Creek itself is about 40 feet east of the trespass dwelling. The soils are quite sandy. The vegetation is a riparian type. Typical plants are cottonwood, willow, rushes, and sedges. Riparian vegetation in desert country is very important for wildlife and livestock values. It also helps maintain water quality. These green belts through the red rocks are very scenic and attract recreationists.

(FEA at 4).

In a September 25, 1987, memorandum, a BLM hydrologist and a BLM wildlife biologist reported to the Cedar City Assistant District Manager for Resources, BLM, the results of their study of the riparian-floodplain values of the lands in question. During their study, they bored holes in the soil to bedrock in order to obtain data on groundwater-riparian vegetation interaction. Like Kincaid's analysis, their report notes a change in riparian vegetation at a point approximately 7 feet above the bottom of the stream channel. They stated that vegetative cover was 95 to 100 percent below that point, and that Kincaid's house was above that point. However, they explained:

The groundwater measurement holes were drilled to help determine if the area where the house is located is in a riparian zone. The intent was to meet the test of the Bureau's Riparian Policy which states, "A riparian zone is an area directly influenced by permanent water." The bored holes would prove the occurrence or absence of permanent water in the zone.

They concluded, based on the results of their test bores, that the house was within the Deer Creek riparian zone because it "sits in an area influenced by permanent water." The report additionally concluded that the house was not in the 100-year floodplain.

Appellant's arguments concerning the status and location of the cottonwood trees does not convince us that his house is outside the riparian area. Cottonwood trees could not survive without a permanent source of water. The fact that some of the older trees surrounding appellant's house are dying, and that irrigation has caused others to flourish, does not establish the nonexistence of a riparian area. Accordingly, we agree with BLM's determination that the lands in question are within the riparian zone of Deer Creek.

[1] We now turn to the question of whether the record supports the State Director's decision that application of BLM's riparian management policy requires removal of appellant's structures. Clearly, the structures which lie entirely on public land more greatly intrude in the riparian area and we find no reason why they should not be removed. Inasmuch as appellant has asserted that these structures are easily removable, we do not, nor does appellant, consider them to be the focus of the controversy in this appeal; rather, the matter at issue concerns the removal of the house.

In his SOR, Kincaid notes that the riparian management policy, relied on by the State Director, had not even been mentioned in the DEA, the focus of that document being the WSA status of the land. Kincaid points out, however, that the FEA considered other alternatives and analyzed the effect of the riparian management policy, concluding that while that policy, as identified in I.M. No. UT 87-261, dated May 15, 1987, would preclude sale of the lands, an exchange would still be feasible. <sup>6/</sup> In fact, Kincaid asserts, both alternative B and alternative C in the FEA contemplate an exchange if Congress does not designate the Steep Creek WSA as a wilderness. <sup>7/</sup> For alternative B, BLM stated in the FEA at page 3:

If Congress does not designate the subject land as wilderness they would be offered for exchange to Mr. Kincaid. Any such exchange would have to result in the federal government receiving lands with floodplain and riparian values greater than those given up. The exchange must also be on a value for value basis.

For alternative C, BLM concluded that if Congress did not designate the area as wilderness, "BLM would offer to exchange the land as described for Alternative B" (FEA at 3). BLM further stated in the FEA at page 5:

The property is located in the riparian area of Deer Creek. It is Bureau policy to retain and maintain riparian areas in a healthy condition for their multiple resource values. Riparian areas can be exchanged for land with higher riparian values. [Emphasis added].

Finally, BLM made the following evaluation of an exchange under the discussion of Environmental Consequences:

Riparian habitat and a floodplain area would be disposed of to a private individual. However, a larger amount of riparian land would be acquired. Thus, federal control of these critical land

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<sup>6/</sup> The State Director's decision cited the more general Bureauwide riparian management policy and the Executive Orders, but not the Utah State Office Instruction Memorandum relied on in the FEA.

<sup>7/</sup> While the quote is found under the section related to alternative B, as noted above, for purposes of an exchange, alternative B and alternative C are identical.

use areas would be increased, therefore, this action would be consistent with the Bureau's Riparian Area Management Policy. Since the structure itself is not within the base floodplain, the transfer would be in compliance with floodplain regulations. [8/]

(FEA at 7). The only factor identified as requiring postponement of an exchange was wilderness interim management policy.

The extent to which the State Director may have considered the possibility of an exchange is not clear from his decision. In its answer, BLM recognizes that the riparian policy provides for an exchange for lands of higher riparian value, but seeks to place the burden on appellant by stating: "Appellant has never offered any specific lands" (Answer to SOR at 5). However, in his SOR at pages 34-37, appellant had set forth a detailed discussion of why an exchange (with various parcels described and depicted on overlay No. 4) would be completely consistent with the goals and objectives of BLM's riparian management program as implemented through the Utah State Director's own guidelines in I.M. No. UT-87-261 (May 15, 1987). Although those guidelines disfavor disposition of riparian land, they make the following provision for exchanges:

Exchanges with private parties will not be permitted unless it can be definitely shown that riparian areas of superior public values are being acquired, riparian areas are being enhanced, or that the areas being exchanged are small, isolated and cannot be managed through agreement with State agencies, other Federal agencies, or interested conservation groups.

BLM's statement that appellant had not offered any land is not responsive to his argument regarding an exchange.

Following submission of BLM's answer, appellant filed a "Motion for Submission of Supplemental Statement." An attachment to that submission (Affidavit of Andrew F. Wiessner, dated November 11, 1988) detailed the efforts of a representative of appellant in 1988 to negotiate a settlement of the trespass. Therein, the representative states that (1) he met with the individual who was the Utah State Director at the time of issuance of the decision under appeal; (2) that individual did not rule out the possibility of an exchange; (3) that individual referred him to the new Cedar City District Manager; (4) he met with the Cedar City District Manager and other BLM officials; (5) a tentative exchange proposal was agreed upon; (6) negotiations were terminated when he received a letter dated August 1, 1988, from the Cedar City District Manager stating:

When the State Director's decision was appealed to the Interior Board of Land Appeals (IBLA), administrative authority of this

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[8/ Alternative B provided for the issuance of a temporary use permit to authorize the trespass until Congress acts on the wilderness designation for the Steep Creek WSA.

case transferred from BLM to the Department of the Interior. [9/] Until the IBLA issues a decision on the appeal BLM is precluded from negotiating a settlement of this matter.

Counsel for BLM did not challenge any of the statements in the affidavit; rather, he responded to appellant's motion by stating:

The decision which is here under appeal specifically considered the possibility of an exchange \* \* \* and concluded that such an exchange would not be in the public interest, but that these lands should remain under BLM management.

(Answer of Feb. 10, 1989, at 2). Counsel also stated that the Cedar City District Manager was clearly correct in terminating negotiations with appellant's representative because jurisdiction over the matter was removed from BLM and resided with the Board after the filing of the appeal, citing Sierra Club, 57 IBLA 288, 291 (1981).

Counsel's representation concerning the State Director's consideration of an exchange is not borne out by a review of the State Director's decision. Although the State Director concludes that "the Riparian Area

Management Policy dictates retention of riparian areas unless disposal would be in the public interest" (Decision at 3), his analysis of whether or not the public interest would be served is limited to his conclusory statement that "[i]t is difficult to see how the public interest would be served by a transfer of the land in question to you" (Decision at 3). Thus, while the decision, by implication, overrules the District Manager's proposed decision, by finding that any disposition of the land is not in the public interest, there is no rationale in the decision to support that finding. The District Manager arrived at his proposed decision following a review of all pertinent information, including the public comments received on the DEA. Therein, he stated that his decision "accomplishes the Bureau of Land Management's responsibilities under \* \* \* the Bureau's Riparian Area Management Policy" (Proposed Decision Record at 2).

As noted above, the real focus of this appeal concerns appellant's house and the State Director's determination that it should be removed from public land. The FEA, however, had rejected that alternative noting that it was "likely that the structure would simply be relocated onto the property owner's private land" (FEA at 6). Removal would be inconvenient and expensive for appellant, and the benefit to the public might be only minimal in that appellant could move his house less than 100 feet east and be entirely off public land but still be within the riparian zone of Deer Creek, as identified by BLM. Additionally, by directing removal of the house, the State Director was foregoing an opportunity to acquire substantially greater acreage of unarguably higher riparian quality.

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<sup>9/</sup> The District Manager obviously meant the Board of Land Appeals, rather than the Department of the Interior, since BLM, as well as the Board, is part of the Department of the Interior.

[2] Also, the statement that negotiations with appellant's representative were properly halted due to the appeal is incorrect. When a BLM decision has been properly appealed to the Board by an adversely affected party, BLM loses jurisdiction over the case and it has no authority to take further dispositive action on the subject matter of the appeal until the Board rules on the appeal. Melvin N. Berry, 97 IBLA 359, 361 (1987); Sierra Club, *supra*; AA Minerals Corp., 27 IBLA 1 (1976). However, that does not mean that BLM is precluded from entering into settlement negotiations with the appellant, as the Cedar City District Manager apparently believed. In fact, the Board encourages such action. Thus, in this case it was entirely proper for BLM to have negotiated with appellant during the pendency of the appeal. The rule regarding jurisdiction precludes BLM, however, from finally disposing of the matter without regaining jurisdiction from the Board. Therefore, where negotiations are successful and the parties agree on a settlement after the filing of an appeal, the proper procedure is for BLM to request that the Board vacate BLM's decision and remand the case to it to take formal dispositive action to implement the settlement agreement. In this case, BLM could have pursued negotiations regarding an exchange, and, if successful, requested that the Board vacate the State Director's decision and remand the case to it to execute the agreement.

Based on our review of the record, we must conclude that the State Director's decision is not supported by a rational basis and for that reason, we vacate that decision. 10/

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 vacated and the case remanded for further action consistent with this opinion.

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Bruce R. Harris  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

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10/ Appellant continues to maintain that the lands in question are not within the Steep Creek WSA. That issue, however, was not before this Board because the State Director specifically declined to base his decision thereon.