

NORMA C. JOLLEY

IBLA 88-522

Decided March 12, 1990

Appeal from a decision of the Boise, Idaho, District Office, Bureau of Land Management, rejecting desert land entry application I-6474.

Set aside and remanded.

1. Desert Land Entry: Applications

A decision to reject a desert land entry application because the lands identified in the entry cannot be farmed as an economically feasible operating unit will be set aside and the case remanded where there is no support in the record for the soil classification information utilized by BLM in its computer analysis which formed the basis for its decision, and where utilization of the soil classification information for which there is record support dramatically favors the applicant's position.

APPEARANCES: Rudy Barchas, Esq., Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Norma C. Jolley has appealed from a decision of the Boise, Idaho, District Office, Bureau of Land Management (BLM), dated June 6, 1988, rejecting her desert land entry (DLE) application I-6474 for 320 acres described as the S $\frac{1}{2}$  SW $\frac{1}{4}$  sec. 28 and the W $\frac{1}{2}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  sec. 33, T. 7 S., R. 5 E., Boise Meridian, Idaho. The rejection was based on BLM's determination, in accordance with 43 CFR 2520.0-8(d)(3), that it would be impractical to farm the lands sought in the entry as an economically feasible operating unit.

These same lands had been the subject of a DLE application filed in 1968 by appellant's husband, Tony Jolley. BLM classified the lands as suitable for desert land entry, and on December 19, 1968, it allowed Tony Jolley's application. Correspondence in the record indicates that because of illness, Tony Jolley relinquished the entry in 1972 so that his wife could apply for the land, which she did on December 27, 1972.

In her application, appellant proposed to cultivate 160 acres each of potatoes and grain using a sprinkler system with water pumped from an

underground well to be drilled on the land. She estimated a net income from the land of \$93,990.

In a memorandum to the file dated September 14, 1977, a BLM realty specialist reported that in 1976 a soil survey had been conducted on the lands described in appellant's application by a former Soil Conservation Service (SCS) soil scientist, and that the survey showed that the lands consisted of the following soil types: 6.53 acres of class II soil, 293.87 acres of class III soil, and 9.80 acres each, of class VI and VII soils. The BLM realty specialist also stated that (1) based on the soil survey, BLM conducted an economic analysis determining that a farming operation would be marginal, having an annual profit of \$4,038; (2) the analysis was sent to the Denver Service Center for review and comment; (3) the Denver Service Center commented that the analysis had not utilized updated farm costs; (4) employing those costs resulted in a net annual loss of \$1,680.29; (5) Tony Jolley submitted an economic feasibility report for I-6474, which contained a soil classification completed by a soil scientist showing 220 acres of class I soil, 70 acres of class II soil, and 30 acres of class VI soil, and which indicated an annual net return of \$24,489.72. The BLM realty specialist concluded his memorandum by recommending that action on the application be postponed pending further development of the economic analysis procedure by the Denver Service Center.

In a letter to appellant dated November 14, 1980, BLM stated that it was commencing analysis of DLE applications and that

[b]ecause of the uncertain farm economic outlook and the current shortage of power for irrigation purposes, and because it is recognized that only the "best" lands (those with mostly Class I and Class II soils along with low water lifts) might be economically sound for new development, these "best" lands will be used as a guide for our initial application processing effort.

BLM attached a sheet of questions, including whether the applicant was still interested in pursuing the application.

On December 11, 1980, appellant filed her response indicating she desired to pursue her application; that the land contained "mostly class I soil"; and that she had an approved water right, power, and fuel. She stated also that her water "lift" was "only 150 feet from an artesian strata of very good water."

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1/ The file contains Idaho State Department of Water Resources Permit No. 51-7015, approved Dec. 6, 1968, allowing the Jolleys to appropriate subterranean water by means of an electric turbine pump and sprinkler system. The Idaho State Department of Water Resources twice extended the time for the Jolleys "to submit proof of beneficial use of water." The last extension allowed until Dec. 1, 1983. The file does not disclose that proof was ever submitted or the present status of the Jolleys' right to appropriate water.

On May 18, 1981, appellant filed a revised plan of development for her application in which she proposed to devote 100 acres each to corn and grain, and 120 acres to potatoes. She projected a net annual income of \$148,198.76.

Thereafter, BLM undertook a new economic analysis to determine the practicality of farming the lands described in appellant's application. BLM sought to determine if the land applied for constituted an economic-ally feasible operating unit in accordance with 43 CFR 2520.0-8(d)(3). The analysis consisted of running figures for projected costs, revenues, and other variables for a standardized crop distribution through a com-puter model developed by BLM and the Idaho Department of Water Resources. BLM stated that the analysis utilized data obtained from appellant's application, from the University of Idaho, local extension agents, fertilizer companies, and local bank agricultural specialists, among others.

In its computer analysis of I-6474, dated March 1, 1988, BLM util-ized a figure of 310 farmable acres with a soil classification of 3 percent class III and 97 percent class IV soils. The analysis concluded that there would be an annual net loss from the operation of \$73,444.20.

The case record shows that on March 15, 1988, BLM ran a second com-puter analysis of I-6474, substituting a figure of 290 farmable acres with a soil classification of 3 percent class II and 97 percent class III soils. 2/ That analysis concluded that there would be an annual net loss of \$5,863.07.

By notice dated March 22, 1988, BLM informed appellant that as a result of its economic analysis it had determined that appellant's operation would result in an annual net loss of \$73,444.20, and that based on its analysis her proposals did not meet the requirements of 43 CFR 2520.0-8(d). However, BLM allowed her 30 days within which to present new or additional information to dispute the results of the analysis. No mention was made in the decision of the results of the second computer run.

On April 13, 1988, Tony Jolley visited the BLM office and asked for 30 days to prepare a response to BLM's analysis. BLM granted that request and although no information was filed directly by appellant or her husband, on May 12, 1988, the Owyhee County Extension Agricultural Agent, University of Idaho Cooperative Extension Service, submitted information regarding crop yield data for sugar beets, barley, winter wheat, and potatoes. He utilized county figures for the years 1985 and 1986 for the first three crops and for the years 1983 and 1984 for potatoes. The estimated yields utilized by BLM were lower for all those crops and for sugar beets, barley, and winter wheat significantly lower than those submitted by the agent, who, in his cover letter accompanying the data, stated, "I believe the indicated yields are reasonable for the land Mr. Jolly wishes to have

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2/ These percentages approximate the acreage totals from the 1976 soil classification, although the total acres of class II and III soils from the 1976 survey were 300.40 acres. In the second computer run, BLM entered a figure of 290 acres into the computer.

evaluated." 3/ In addition, he also presented a 1987 Southwestern Idaho Crop Enterprise Budget for alfalfa hay production. That budget showed estimated production of 5 tons per acre. BLM's estimate was 4.55 tons per acre. On the budget the agent noted, "This is a conservative estimate for the area in question." 4/

In its June 6, 1988, decision, BLM rejected appellant's application explaining that the source of the data received from the University Extension Service had been examined during the preparation of BLM's feasibility analysis, and that this data was not used because it represented county averages, whereas the data in BLM's computer model was keyed to soil types. The decision further stated:

The county averages are based on yields from soils that are generally better than those available for Desert Land Applications. Therefore, we used current soils data on each Desert Land Application and the yield figures appropriate to them.

Recently, new information was inserted in the computer model regarding production costs. We reran the analysis for your application to see if the results would be more favorable. There was an improvement, but the analysis still shows a loss of \$53,245.

BLM concluded that the proposed entry would not be an economic farm unit and that "the lands applied for will not be classified as suitable for entry." 5/

Appellant argues on appeal that the land was classified as suitable for farming; farming is economically feasible; BLM's expense figures are "disproportionately high"; and its production and income figures are "exceedingly low." Appellant also asserts that the land applied for is near similar land which is being successfully farmed.

[1] Section 1 of the Desert Land Entry Act of 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 states

3/ Those figures are as follows:

<u>CROP</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>BLM</u>
SUGAR BEETS (tons)					24.6 29.6 12.39
BARLEY (bu)	94.0	103.9	60.90		
WINTER WHEAT (bu)					110.4 99.2 56.20
POTATOES (cwt)	336	330			302.25

4/ He also provided information concerning yields for alfalfa hay establishment and dry beans.

5/ Despite this statement, there is no evidence in the record that the 1968 classification of this land as suitable for desert land entry was ever revoked. Without a revocation of that classification, the land remains open to desert land entry.

that the entered tracts of land shall be "managed satisfactorily as an economic unit." 43 U.S.C. § 321 (1982). Accordingly, the applicable regulation, 43 CFR 2520.0-8(d)(3), provides 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."

The question of economic feasibility, according to the BLM Manual at 2520.0-6(A)(4) (Oct. 21, 1974), quoted in Sally Ann Lana Henderson, 107 IBLA 193, 195 (1989), 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.

Where the evidence has established that the land sought cannot be farmed as an "economically feasible operating unit," we have affirmed BLM's rejection of a desert land entry based on that rationale. Id.; see Roger K. Ogden, 77 IBLA 4, 90 I.D. 481 (1983). However, in circumstances where BLM's decisions have been based on the use of computer analysis as an aid in projecting economic viability, we have stated that BLM must also "ensure that its decision is supported by a rational basis and that such basis is stated in the written decision and demonstrated in the record." Roger K. Ogden, supra at 7-8, 90 I.D. at 483-84; see David V. Udy, 81 IBLA 58, 60-61 (1984).

Also, the Board has set aside BLM decisions rejecting DLE applications where review of the record has shown that BLM failed to give proper consideration to the specific plans for development presented by the applicant. G. V. (Pete) Cope, 109 IBLA 226 (1989); Leroy R. Davis, 107 IBLA 204 (1989); Frederic C. Tullis, 102 IBLA 215 (1988). In Leroy R. Davis, the Board criticized BLM for relying "totally on its computer analysis to reach its conclusion that the application is unacceptable because the land cannot be farmed as an economically feasible operating unit," without taking into consideration "the specific crops appellant proposed to cultivate." 107 IBLA at 208. In G. V. (Pete) Cope, the Board stated that BLM relied "too heavily on its computer model in arriving at its decision." 109 IBLA at 236. In that case, we found that BLM should have considered the crop rotation proposed by the applicant, citing Appendix 1 of the Idaho State Office User's Manual H-2520-1, Economic Feasibility Analysis of Desert Land Applications, which stated that

"[i]f the application is found not to be feasible, analyze the application using the rotation proposed by the applicant if such rotation is determined to be reasonable and suitable [sic]." 16/

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16/ "Reasonableness means that crops used in such rotation have been proven to be adaptable to the soil and the climate in the project area. Sustainable [not "suitable"] means that such proposed rotation will not excessively mine the fertility of the soils, promote erosion, stimulate plant disease build-up, or

deteriorate the physical or chemical properties of the soil over a 15 to 20-year period. Applicant should submit testimonies/ expert opinions from SCS, county agents, or other experts with credentials acceptable to IDWR [Idaho Department of Water Resources] and BLM on the reasonableness and sustainability of their proposed rotation. [Emphasis in original.]

109 IBLA at 239-40. The Board also identified cost-saving elements inherent in the applicant's proposal that had not been considered by BLM, as well as noting the conflicting appraisals of the soils on the tract and the failure of the record to disclose "the limitation the soils on this tract pose for the crops appellant proposes to plant or of the productivity of those crops on these soils." 109 IBLA at 240.

As we have noted in our decisions involving desert land entries, the ultimate burden of establishing the economic feasibility of farming the land rests with the applicant. G. V. (Pete) Cope, 109 IBLA at 240, Frederic C. Tullis, 102 IBLA at 223. Although appellant's statement of reasons consists of conclusory assertions and is unaccompanied by any further data to dispute the data utilized by BLM, the present record does not support BLM's decision.

In the decision under appeal, in which it dismisses the viability of the crop yield data submitted by the University Extension Service, BLM states that its computer model is "keyed to soil type." Although BLM asserts that it utilized "current soil data" in its computer analysis, the only soil classification information in the case file is the results of the 1976 classification set forth in the September 14, 1977, memorandum to the file. That classification showed the vast majority of soil in I-6474 to be of class III, and when BLM ran its model using 97 percent class III soils, it showed an annual net loss of \$5,863.07. However, BLM did not employ that soil data in the computer analysis cited as the basis for rejection of appellant's application; it used 3 percent class III and 97 percent class IV. Nowhere in the record is there any explanation of the reasons for such a change. 6/

Clearly, such a change is critical in this case. When BLM first used its revised soil classification data in the computer, it resulted in an annual net loss for the operation of \$73,444.20. However, utilizing that same information, but inserting new production cost information in its computer model resulted in a reduction in the annual net loss of more than \$20,000 to \$53,245. If BLM had applied the new production cost figures to the model, while retaining the original soil classification data,

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6/ Nor does the record contain any analysis by BLM of the soils information included in the undated "Economics and Project Feasibility Report," submitted by appellant and apparently prepared by one Adrian Nelson who represented that he was a soil scientist. That information, including a map, showed 220 acres of class I soil, 70 acres of class II soil, and 30 acres of class VI soil.

appellant's operation would apparently have shown a profit. We cannot affirm BLM's decision on the basis of the present record.

Where an applicant for a DLE has waited more than 15 years for adjudication of the DLE application, it is incumbent on BLM to evaluate all aspects of the applicant's proposal, and the record must support that adjudication upon challenge and review by this Board. Since BLM's decision is not supportable on this record, it must be set aside and remanded. On remand, BLM must determine the proper soil classification for the land in question and that classification must be supported by record documentation. <sup>7/</sup> If, on the basis of BLM's computer analysis with that information, BLM determines that the operation is not feasible, the record must reflect that BLM has taken the action required by Appendix 1 of the Idaho State Office User's Manual H-2520-1, as quoted, supra, from G. V. (Pete) Cope.

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 set aside and remanded for action consistent with this opinion and issuance of a new decision.

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Bruce R. Harris  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge

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<sup>7/</sup> The file contains an unsigned, undated note attached to a computer data worksheet dated Jan. 14, 1988, setting forth the soil classification of I-6474 as class III--9 acres and class IV--211 acres. That note states, "Tony has already been to the W.O. [BLM Washington Office] with this. We better explain the soil difference (classification) from the 1977 (John Jorenby Memo) [Sept. 14, 1977, memorandum] and now." This warning was not heeded.