

SHARON R. DAYTON

IBLA 89-622

Decided December 13, 1990

Appeal from a July 26, 1989, notice of trespass/notice to remove issued by the Kemmerer Resource Area Manager, Bureau of Land Management. WYW-112151.

Affirmed as modified and remanded.

1. Trespass: Generally

BLM may properly require the removal of structures unintentionally erected in trespass upon public land.

2. Trespass: Measure of Damages

Pursuant to 43 CFR 2920.1-2(a)(1) anyone determined to be in trespass on public lands shall be liable for the administrative costs incurred by the United States as a consequence of the trespass. When the record on appeal does not support all of the administrative costs assessed by BLM, the assessment will be reduced to reflect only those costs supported by the record.

APPEARANCES: Sharon R. Dayton, Cokeville, Wyoming, pro se; Lowell L. Madsen, Esq., Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Sharon R. Dayton, d.b.a. Magic Mountains Outfitters, Inc., has appealed a July 26, 1989, notice of trespass/notice to remove issued by the Kemmerer (Wyoming) Resource Area Manager, Bureau of Land Management (BLM). 1/ The notice states:

As stated to you in past meetings and correspondence, we have determined that you have a cabin, pole fences, an outhouse,

1/ On July 25, 1989, BLM also issued a notice of trespass/notice to remove to appellant. Dayton states in his statement of reasons that he did not receive a copy of the July 25, 1989, decision and the record supports this statement. However, because the second decision vacated and replaced the first, appellant was not prejudiced.

and other various items in trespass on public land on Hobble Creek. You were advised that you were liable to the United States for:

1. The administrative costs incurred by the United States as a consequence of the trespass;
2. The fair market value rental of the land in trespass for the current year and past years (through 1969), and;
3. Removal of all structures in trespass on public land and the rehabilitation and stabilization of the land or the costs incurred by the United States for doing so.

We have determined the administrative costs to be \$2,747 and the total rental, 1969 to present, to be \$2,000. Enclosed is a breakdown of the liabilities.

(Notice of July 26, 1989, at 1). Appellant appealed the BLM decision on August 22, 1989.

In his statement of reasons Dayton describes how the cabin was located and how it is utilized. He indicates that prior to a 1988 survey it was believed the cabin was located on private land and he had payment arrangements with what he believed were the landowners. Appellant states since 1985 he has held a commercial outfitting permit which applies to the site of the cabin as well as other nearby lands, and he also has permits from the United States Forest Service and the Wyoming Game and Fish Department authorizing recreational activities in the area. Appellant concludes from the permits that the land is suitable for outfitting. Dayton requests that he not be required to move the cabin as it would suffer severe damage and offers to pay \$100-per-year rental in the future for the right to leave the cabin on Government land. He argues that moving the cabin is contrary to the public interest and will be an economic hardship. Appellant also contends the administrative costs are unreasonable as they are more than he made from his ranching and outfitting operations combined in 1988.

John W. Dayton, mayor of the town of Cokeville, Wyoming, submitted a letter opposing BLM's decision on the grounds that the cabin is utilized by many different people, is good for the area economy, and could save the life of someone caught in a bad storm. Other letters objecting to the BLM decision have been submitted by Representative Clyde E. Wolfley and Senator Boyd L. Eddins of the Wyoming State Legislature, U.S. Senator Malcolm Wallop, and the 1990 graduating class of the Cokeville High School.

BLM has submitted a series of documents arguing that appellant currently holds an economic advantage over other area outfitters because all outfitting permits, including Dayton's, prohibit the construction of permanent structures on public land and that adequate consideration has been given to other possible resolutions of the conflict such as land exchange.

BLM also requests "expeditious review" of this matter because Dayton's current permit expires in January 1991 and we have therefore taken the case ahead of its turn.

BLM has forwarded to the Board certain case files, in addition to the trespass file, which contain information relevant to our decision. On November 18, 1986, appellant requested a lease of tract 70B, sec. 34, T. 28 N., R. 118 W., sixth principal meridian, which he believed at the time was adjacent to his cabin. This request was denied on January 21, 1987, by the Resource Area Manager. Dayton sought review of the denial by the State Director. On February 23, 1987, the State Director issued a decision affirming the denial of appellant's lease application. The State Director's decision referred to BLM Manual 2920.11.A.4 which prohibits authorization of new recreational cabin sites or residences. It also states the requirements for outdoor recreation concessions were not met, allowing a nonconforming use on public land is not justified when private lands are nearby, and neither a sale nor a long-term lease of the land is in the public interest.

On March 6, 1987, appellant proposed to exchange 114.4 acres within secs. 9 and 10, T. 25 N., R. 119 W., sixth principal meridian, for 119.59 acres described as tracts 63D, 69, 70B, T. 28 N., R. 118 W., sixth principal meridian. Appraisals valued both the offered and selected lands at \$7,000. A land report recommended against the proposed exchange, finding the public benefits lost by the exchange would outweigh the advantages gained by it. One factor in this finding is that Hobble Creek, upon which appellant's cabin is located, is a habitat for the Bonneville Cutthroat Trout, which was, at the time of the land report, a candidate for designation as a threatened or endangered species. The Game and Fish Department of the State of Wyoming was opposed to the exchange due to its negative impact on fisheries.

[1] BLM may properly require the removal of structures unintentionally erected in trespass upon public land. Clive Kincaid, 111 IBLA 224 (1989); Juliet Marsh Brown, 64 IBLA 379, 382 (1982); James E. Billings, 38 IBLA 353 (1978); see also Constitution Petroleum Co., 78 IBLA 3 (1983). Dayton concedes that his cabin is in trespass on public land and presents nothing on appeal which would cause us to reverse the BLM decision to require removal of the cabin. According to the BLM Manual, 2920.11.A.4., "Unauthorized recreational residence and recreational cabin site occupancies must be terminated as soon as practicable." Alternative resolutions of the conflict have been considered by BLM and rejected. See Juliet Marsh Brown, supra at 382. We find no error in BLM's decision to require cessation of the trespass.

[2] Appellant does not object to the amount of rental assessed, but does compare his income to the administrative costs and concludes that the administrative costs are too high. Pursuant to 43 CFR 2920.1-2(a)(1) any-one determined to be in trespass on public lands shall be liable for the administrative costs incurred by the United States as a consequence of the trespass.

The method to be utilized in calculating administrative costs under 43 CFR 2920.1-2(a)(1) is set forth in the BLM Manual at H-9232-1, Chapter VII.E. Three components of administrative costs are described -- labor costs, operation costs, and indirect costs. Labor costs cover personnel salaries and benefits, calculated on the basis of the hourly rates for the employees involved. Operation costs must include "[a]ll direct costs such as travel, appraisals, transportation, and contracts * * *. Equipment purchase costs should not be included in the calculation unless the equipment purchase is necessary to resolve the specific trespass case" (BLM Manual at H-9232-1, Chapter VII.E.2). A similar definition of operation costs is found in the BLM Manual at H-1681-1, Chapter II.C.2., 2/ which reads: "All costs such as travel; transportation; project specific rent, communications and utilities; printing and reproduction; supplies and materials; and contracts must be included. No equipment costs should be included in the estimate unless the equipment purchase and ownership is specifically addressed in the reimbursable agreement." Chapter VII. E. 3. of the BLM Manual provides, under the heading Indirect Administrative Costs:

After the labor costs and direct operation costs have been calculated, add the Bureauwide indirect cost rate. This rate covers the Bureau's cost of providing administrative support services (including those which cannot be identified as a direct cost) incurred as a result of the trespass. This rate is calculated and provided to Field Offices each year by the Bureau's WO [Washington Office] Division of Finance.

Attached to the BLM decision of July 26, 1989, is a breakdown of the \$2,747 in administrative costs that were charged. Labor costs of \$1,097 are based on 70.75 hours of work. The 70.75 figure is supported by several time sheets (BLM Form 1323-1, "Reimbursable Project Log"). One of the time sheets includes a \$72 travel charge, although it is not designated as an operation cost. Rather, the \$1,231 operation costs component is based on 80 hours, assessed at the same rate as labor. The record does not support a labor assessment for more than 70.75 hours. Moreover, given the definitions of operations costs, it is not apparent how such costs can be measured in hours.

Because we consider the \$72 travel charge to be the only operation cost supported by the record, we reduce the operation cost component of the administrative costs from \$1,231 to \$72. This reduces the sum of the labor and operation costs to \$1,169 and this, in turn, reduces the indirect costs, calculated in the breakdown at 18 percent of this sum, from \$419 to \$210, for a total administrative cost figure of \$1,379.

2/ Chapter VII. E. of the BLM Manual refers to "Chapter II of the Annual Work Plan (AWP) Handbook (H-1681-1)" for definitions of labor costs, operation costs, and indirect administrative costs and for calculations for determining total administrative costs.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the notice of trespass/notice to remove of July 26, 1989, is affirmed as modified.

Will A. Irwin
Administrative Judge

I concur:

John H. Kelly
Administrative Judge