

**Editor's note: Reconsideration denied by Order dated Oct. 21, 1993**

LAWRENCE SMART TRUST

IBLA 93-313

Decided July 20, 1993

Appeal from a decision of the Deschutes Area Manager, Bureau of Land Management, issuing land use permit OR-46802.

Appeal dismissed.

1. Administrative Procedure: Generally--Administrative Procedure: Administrative Review--Rules of Practice: Board of Land Appeals: Generally--Rules of Practice: Dismissal--Rules of Practice: Jurisdiction--Rules of Practice: Motions--Rules of Practice: Stay

An appeal from a BLM decision to issue a land use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the United States, but is instead owned by the applicant.

APPEARANCES: Thomas R. Benke, Esq., Portland, Oregon, for appellant; Donald P. Lawton, Esq., Assistant Regional Solicitor, Pacific Northwest Region, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Lawrence Smart Trust (the Trust) has appealed from a March 10, 1993, decision by the Deschutes Area Manager, Bureau of Land Management (BLM), to issue land use permit OR-46802. The decision here under review granted use of land near the Deschutes River in Wasco County, Oregon, to the trustee, United States National Bank of Oregon, on behalf of appellant Trust. The land at issue was the site of a summer home used by Lawrence V. Smart, Jr., under a permit that expired in January 1992. The record before us indicates that Smart died some time before that permit reached its term. The permit now at issue before us is due to expire on July 30, 1993, and was issued on March 10, 1993, in response to an application by the Trust that was submitted to BLM (without objection to any requirements stated by BLM during the application process) on February 16, 1993.

Appellant has asked that we stay the BLM decision of March 10, expedite consideration of this appeal, and require an evidentiary hearing to permit evidence to be taken concerning ownership of the land that is the subject of the permit, which appellant now contends is not public land. The Board

declines to order a stay or a hearing, but agrees that expedited consideration of this appeal is warranted in view of our conclusion that this appeal must be dismissed.

In a statement of reasons (SOR) filed on June 11, 1993, the Trust objected to a statement appearing in the February 4, 1993, letter of transmittal of the proposed permit to the Trust. This statement was to the effect that the Trust should either arrange for a land exchange with BLM if the Smart cabin was desired to be retained by the Trust, or else remove the cabin when the permit term ended and relinquish management of the property to BLM. Additionally, the Trust SOR recited that a dependent resurvey approved by BLM in 1965 was run in error, but for which error the record of land ownership of the land in the Smart use permit would show that title to the property to be properly held by the Smart Trust or the Deschutes Club, a recreational fishing organization of which Smart was a member. The SOR was supplemented on June 24, 1993, by an averment that renewal of the land use permit for the Smart cabin is not considered an issue in this case by appellant. The thrust of this appeal is not, therefore, directed to issuance of land use permit OR-46802. Instead, the Trust seeks to use issuance of the permit as a vehicle to attack the 1965 survey so as to show that the cabin is not located on public land.

[1] It is the position of the Trust on appeal that the land at issue "is legally and rightfully held by the Smart Trust and/or Deschutes Club" (SOR at 1). This position cannot be maintained in the context of the present appeal. The Trust is attempting to challenge a permit issued in response to an application made by the Trust itself. Even granting that BLM had stated as a condition to issuance of the permit that it desired the Trust to elect whether to exchange other property for the Smart cabin or relinquish the land on which it was situated after the permit expired, this condition was not incorporated in the permit as issued. If the Trust objected to the terms of the permit as proposed, it should not have signed the permit application tendered with the conditional offer and returned it without objection to BLM on February 16. In the event, the subsequent March 10 decision to issue the permit as applied for by the Trust, from which appeal was taken, did not condition permit issuance on an election to exchange properties or surrender possession of the Smart cabin, so that matter is not directly before us on appeal. But whether the condition that the Trust complete an exchange or vacate the property might nonetheless be raised as an issue basic to permit issuance is no longer material to our consideration of the propriety of the permit issuance, in view of the contention by the Trust that BLM does not own the permitted land.

Inasmuch as the land permit at issue in this appeal was issued to the Trust on its own application without objection, it is anomalous now for the Trust to contend that BLM exceeded its authority by granting the permit because the United States did not own the permitted land. *Cf. Benton C. Cavin*, 83 IBLA 107, 109 n.2 (1984) (an applicant for color-of-title relief necessarily admits that the United States possesses legal title to the land for which application is made). The Trust cannot have it both ways: the application for land use was an admission that the United

States owned the land for which a permit was sought. The applicant for such a permit is not in a position to challenge title to the land sought to be permitted, and may not by such a subterfuge maintain an appeal to this Board seeking relief from a claimed error in a BLM land survey approved in 1965. We simply lack authority to entertain such an appeal based on matters that are irrelevant to the decision from which the appeal was ostensibly taken.

The record indicates that an earlier attack on the 1965 survey was abandoned by Lawrence V. Smart, Jr., after he was notified by BLM that the 1965 survey had revealed his cabin on the Deschutes River was built in trespass. Instead of then pursuing the claim of ownership that is now asserted by the Trust as his successor, he elected to apply for a special land use permit, which was granted, and thereafter made successive applications for such permits which were granted to him until his death. The record before us includes documents relating to the initial trespass complaint, subsequently issued special use permits, and documents relating to the 1965 survey on which they were based, (and also records of a survey run by Roger J. Wilhelm, Wasco County Surveyor, dated April 27, 1953, upon which appellant now relies in arguing that the BLM survey erroneously located the southeast corner of sec. 12, T. 6 N., R. 13 E., Willamette Meridian, Oregon, so as to show, in error, that the Smart cabin was on public land). These documents show that no trespass action is currently pending against the Smart Trust.

Nonetheless, the Trust has made clear in the supplemental SOR filed on June 24, that a challenge to legal ownership of the land is intended, and that this appeal should now be considered to be in the nature of a quiet title or disclaimer of interest action. While the Office of the Solicitor, in a letter filed June 28, 1993, has indicated the Solicitor's Office will "take appropriate action to eliminate any unauthorized occupancy of BLM land," it is not explained how such action can be taken in the absence of a finding by BLM that the Trust is in trespass on the permitted land (a finding that is not possible during the term of the existing use permit).

On the record before us, therefore, it is clear that appellant cannot now maintain this appeal on the grounds stated in the supplemental SOR because, since 1976 when the first use permit was granted to Smart, nothing in the use granted by the permit has been adversely affected by any action taken by BLM. While the Solicitor seems to suggest that our review could proceed without prior initiation by BLM of a trespass claim against the trust, to do so is inconsistent with our review authority, which limits action by the Office of Hearings and Appeals to "review functions of the Secretary." See 43 CFR 4.1. We must, therefore, dismiss this appeal in order to permit BLM to initiate whatever action is appropriate, after the permit has expired, in light of the allegations made by the Trust in the supplemental SOR, after consideration of the present circumstances of this case. The arguments that the Trust has made in prosecuting this appeal may be evaluated by BLM when consideration is given to further action concerning management of the land where the Smart cabin is presently situated.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the requests for stay and an evidentiary hearing are denied, but expedited consideration of the appeal is allowed, and the appeal is dismissed.

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Franklin D. Arness  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge