

Editor's note: Reconsideration denied by order dated March 31, 1997

MIKE McCALL

IBLA 94-510

Decided February 26, 1997

Appeal from a decision of the Area Manager, Coast Range Area (Oregon), Bureau of Land Management, assessing \$374.73 in trespass damages for unauthorized commercial use of roads. OR 50486.

Affirmed in part, set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Permits—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way—Rights-of-Way: Generally—Trespass: Generally

Mistaken or inadvertent unauthorized commercial use of a BLM-controlled road on Oregon and California Railroad and Reconveyed Coos Bay Grant Lands without a permit is nonwillful trespass.

2. Administrative Procedure: Administrative Record—Administrative Procedure: Administrative Review—Appeals: Generally—Rules of Practice: Appeals: Generally—Trespass: Generally—Trespass: Measure of Damages

When the decision and record are silent as to how BLM arrived at a factor used to determine trespass damages, the Board is incapable of complying with the review requirements statutorily mandated by the Administrative Procedure Act. When the validity of the agency's action is not sustainable on the administrative record compiled by that agency, the Board is obligated to vacate the agency decision and remand the matter for further consideration.

APPEARANCES: Mike McCall, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mike McCall has appealed a May 9, 1994, decision by the Manager of the Coast Range Area (Oregon), Bureau of Land Management (BLM), assessing \$374.73 in trespass damages for unauthorized use of 0.40 miles of BLM Road No. 18-6-35 and unauthorized use of 0.35 miles of BLM Road No. 18-6-35.2 in

sec. 35, T. 18 S., R. 6 W., Willamette Meridian, Lane County, Oregon. ^{1/}

In its decision BLM found that Road No. 18-6-35 and Road No. 18-6-35.2 are managed by BLM pursuant to exclusive road easement RE-E-521 and Federal land ownership, and that McCall had used both roads to haul timber without obtaining a permit, as required by 43 CFR 2812.1-3.

On February 25, 1994, the Coast Range Area Manager, BLM, issued a trespass notice to McCall, advising McCall that BLM had learned that he had hauled logs over the roads without an O. & C. logging road right-of-way permit. In its notice BLM informed McCall of the penalties for willful and nonwillful trespass, as defined at 43 CFR 2800.0-5(u), (v), and (w), and directed McCall to submit the information needed "to determine the amount of fees and payments that will be required to resolve the unauthorized use" (Trespass Notice at 2).

The record indicates that McCall responded to the trespass notice, advising BLM of the volume of timber (237.44 Mbf (thousand board feet)), his contractor had hauled over the two BLM-controlled roads during the period of the unauthorized use. This oral response was followed by a March 8, 1994, letter stating that:

We were surprised when we read your recent letter which stated that we had trespassed on a road we have used daily for the past 13 years. Both Creat and Matlock roads are county-named roads. We were not aware these are BLM controlled roads which require a permit for log hauling purposes. We believed that we had followed the required procedures by hiring a logging contractor and filing the necessary logging permits. ^[2/]

Over the past 13 years we have maintained these roads by buying truck loads of gravel, by personally hauling gravel and filing [sic] pot holes, and by paying for a grader to grade the roads. We are surprised after putting so much time and effort into these roads that BLM would ask us to reimburse them for road maintenance.

^{1/} Road No. 18-6-35 is also designated as the Creat Road and Road No. 18-6-35.2 is also designated as the Matlock Road. Both roads cross BLM managed lands identified as Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands (O. & C. lands). See 43 CFR 2812.0-5(e).

^{2/} The case file contains a printout identified as a real property account summary for Lane County, Oregon, dated Jan. 19, 1994. Michael and Shari McCall are listed as owners of 20 acres in sec. 35, T. 18 S., R. 6 W., Willamette Meridian, Lane County, Oregon. Correspondence in the record identifies McCall's home address as 85016 Matlock Lane, Veneta, Oregon. The record also contains a letter from Shari McCall to the Coast Range Area Manager, BLM, filed on Feb. 10, 1994, thanking BLM for its efforts "in getting Creat Road restored to good condition." The letter states that Creat Road had deteriorated "when the rain and freezing weather arrived [and] * * * logging vehicles * * * weakened the road surface and created potholes."

On the basis of BLM staff investigations and information submitted by McCall, the Coast Range Area Manager adopted the following recommendation regarding the nature of McCall's unauthorized use and trespass:

After reviewing this case, I am convinced that [McCall] did indeed believe that he had all the permits necessary to log his land. I do not believe that he knew he was in trespass by using BLM roads without a permit. I recommend that we do not assess willful trespass penalties for his use of BLM roads and bill for road use, maintenance, and administrative costs for both roads.

(Unauthorized Use Investigation Report dated Mar. 7, 1994).

Regulations for determining liability for unauthorized use of an O. & C. road in nonwillful trespass are found at 43 CFR 2801.3. Paragraph 2801.3(b)(1) provides for the "[r]eimbursement of all costs incurred by the United States in the investigation and termination of such trespass * * *." Paragraph 2801.3(b)(2) provides that a person who commits trespass shall be liable to the United States for "[t]he rental value of the lands * * * for the current year and past years of trespass, or where applicable, the cumulative value of the current use fee, amortization fee, and maintenance fee as determined by the authorized officer for unauthorized use of any road administered by the BLM * * *." Paragraph 2801.3(c)(1) provides that "[f]or all nonwillful trespass * * * an amount [shall be assessed] equal to the rental value and for roads, an amount [shall be assessed] equal to the charges for road use, amortization and maintenance which have accrued since the inception of the trespass." 3/

Using the 237.44 Mbf figure McCall had submitted and the total distances travelled in trespass (0.75 miles), BLM calculated nonwillful trespass damages, and sent a request-for-payment letter to McCall on March 29, 1994, giving McCall 30 days to submit the amount due. When McCall disputed the damages and failed to submit the amount deemed due by April 28, 1994, BLM issued its May 9, 1994, decision, explaining its rationale and computations as follows:

(1) We are charging a maintenance fee for Road No. 18-6-35 at the rate of \$1.39/MBF/mile because our maintenance crew has maintained this road periodically in the past and most recently following the Martilla's, McCall's and BLM's timber hauling

3/ 43 CFR 2801.3(d) provides:

"In no event shall settlement for trespass computed pursuant to paragraphs (b) and (c) of this section be less than the processing fee for a Category I application for [sic] provided for in § 2808.3-1 of this title for nonwillful trespass * * *. In all cases the trespasser shall pay whichever is the higher of the computed penalty or minimum penalty amount." The application fee for a Category I temporary use permit is \$125. 43 CFR 2808.3-1.

operations in 1993. We are not charging a maintenance fee for Road No. 18-6-35.2, as our maintenance crew has not maintained this road in a long time. [4/]

(2) The Road use fee's [sic] that you are being assessed is an allowance made to BLM for the replacement (amortization) cost of the road. This system road use fee of \$0.90/MBF/mile is used for short term permits under 3 years. [5/]

(3) The administrative cost that you are being assessed is reimbursement to the BLM for processing this action, as required by our regulations. [6/]

McCall appealed and submitted a statement of reasons (SOR) challenging the maintenance portion of the assessment as "unrealistic," and asserting that he had maintained Road No. 18-6-35 and Road No. 18-6-35.2 "equally" for the past 13 years. McCall stated that his maintenance on the two roads included "having rock hauled and spread, hiring a grader to level the road, hauling rock in our own personal pick-up truck to fill potholes, and using our own personal tractor to scrape the road." McCall argued that, having maintained both roads, he could not understand why he was being charged a maintenance fee for one and not the other. He also disputed BLM's claim that it maintained Road No. 18-6-35 consistently and regularly (SOR at 1). McCall asked that in considering his appeal the Board "look beyond the regulations and look to the thousands of dollars in materials and labor we have put into these roads over the past 13 years" (SOR at 2).

We do not dispute McCall's assertion that he has expended time and money maintaining the BLM roads for 13 years. However, McCall's property and interest have also benefitted from his efforts. The record shows that BLM performed maintenance on Road No. 18-6-35 (Creat Road) in late 1993. See Trespass Decision at 2 and Shari McCall's Feb. 7, 1994, Letter to Coast Range Area Manager.

[1, 2] The regulations at 43 CFR 2801.3(b)(1) and (2) and 43 CFR 2801.3(c)(1) explicitly delineate the nature of trespass resulting from unauthorized use of roads on O. & C. land and specify penalties to be levied for that trespass. Neither BLM nor the Board has jurisdiction to

4/ The maintenance fee for Road No. 18-6-35 was \$132.97. There is nothing in the record explaining how the \$1.39/Mbf/mile amount was determined.

5/ The road use fee for Road No. 18-6-35 was \$85.48, and the road use fee for Road No. 18-6-35.2 was \$75.98.

6/ The assessment for administrative cost was \$80.30. The record includes a log of the names, hourly pay rates, and time spent by the three BLM employees who investigated and prepared the trespass case. The hourly pay rates were adjusted for benefits and a leave surcharge.

exercise the discretion to "look beyond the regulations" and consider McCall's road maintenance as an offset against the trespass penalties assessed by BLM. ^{7/}

For its part, BLM is obliged to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision and demonstrated in the administrative record that accompanies that decision. Larry Brown & Associates, 133 IBLA 202 (1995). BLM has fully demonstrated in the record and in its decision that McCall's trespass was nonwillful pursuant to 43 CFR 2800.0-5(w). BLM has adequately substantiated the procedures and computations it followed, pursuant to 43 CFR 2801.3(b)(1) to calculate costs incurred in the investigation and disposition of McCall's nonwillful trespass. Additionally, the record and BLM's decision clearly delineate the formula and rationale for computing the user fee penalties charged McCall for unauthorized use of the two BLM roads pursuant to 43 CFR 2801.3(b)(2) and 43 CFR 2801.3(c)(1). Accordingly, we affirm BLM's finding of nonwillful trespass, of administrative costs amounting to \$80.30 and the road use fee for Road 18-6-35 of \$85.48 and the road use fee for Road 18-6-35.2 of \$75.98, and the calculation of the maintenance fee for Road No. 18-6-35.2 (no maintenance fee because there had been no maintenance expenditures for many years).

[3] We cannot, however, affirm the road maintenance fee calculated by BLM for Road 18-6-35. There is nothing in the record that substantiates this fee. In its May 9, 1994, trespass decision, BLM states that the road maintenance fee is \$1.39/Mbf/mile (Decision at 2), but the decision and record are silent as to how BLM arrived at that figure.

[T]he agency case file must be complete as it may be subject to direct judicial scrutiny. It is well established that, absent a complete record, this Board and a reviewing court are incapable of complying with the review requirements statutorily mandated by the Administrative Procedure Act. See, e.g., Higgins v. Kelley, 574 F.2d 789, 792 (3rd Cir. 1978). When the validity of the agency's action is not sustainable on the administrative record

^{7/} Section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1764(g) (1994), directs BLM to assess the holder of a right-of-way the fair market rental value of the right-of-way. However, there are certain instances in which the Department, in its discretion, may reduce the rental for a FLPMA right-of-way "[w]hen a holder [of a right-of-way] provides, without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." 43 CFR 2803.1-2(b)(2)(ii). See Blue Mesa Road Association, 89 IBLA 120 (1985). Unauthorized use, occupancy, or development provisions at 43 CFR 2801.3 do not grant discretionary authority to reduce trespass penalties by offsetting claims of valuable benefit to the public or to BLM or Department of the Interior programs against the trespass damages.

compiled by that agency, courts are obligated to vacate the agency decision and remand the matter for further consideration. See Camp v. Pitts, 411 U.S. 138, 143 (1973).

Shell Offshore, Inc., 113 IBLA 226, 233-34, 97 LD. 73, 77-78 (1990), and cases cited therein. For this reason we find it necessary to set aside that portion of the decision assessing damages based upon a maintenance fee for Road No. 18-6-35.

In accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's May 9, 1994, decision is affirmed in part and set aside in part and remanded for recalculation and substantiation of that portion of the trespass damages based upon maintenance fees for trespass on Road No. 18-6-35.

R.W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

