

NORMAN REID

IBLA 2002-162

Decided November 3, 2004

Appeal from a decision issued by the Field Manager, Lander (Wyoming) Field Office, Bureau of Land Management, requiring compensation for a trespass and submission of a reclamation bond. WYW-152006.

Affirmed in part, set aside in part, and remanded.

1. Trespass: Generally

Under 43 CFR 2920.1-2(a), one who commits a trespass on public land is liable for (1) the administrative costs incurred by the United States as a consequence of such trespass; (2) the fair market value rental of the lands for the period of trespass; and (3) rehabilitation and stabilization of the lands that were the subject of such trespass. That regulation further provides that if the trespasser does not rehabilitate and stabilize the lands subject to the trespass within the period set by the authorized officer, the trespasser shall be liable for the costs incurred by the United States in rehabilitating and stabilizing such lands. A decision imposing administrative costs, rental, and a bond requirement to assure compliance with requirements for rehabilitation will be affirmed when an appellant has provided no evidence to support his allegation that BLM was arbitrary and capricious in its determination.

APPEARANCES: Jerry A. Yaap, Esq., Casper, Wyoming, for appellant; Jennifer E. Rigg, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

Norman Reid has appealed a December 10, 2001, trespass decision issued by the Field Manager, Lander (Wyoming) Field Office, Bureau of Land Management (BLM), directing him to sign and return a trespass settlement agreement and submit payment of \$9,180.17 (\$8,388.52 administrative costs through December 7, 2001, and \$791.65 rental).<sup>1/</sup> The decision also states that Reid had failed to comply with certain requirements of an approved reclamation plan and directed Reid to submit a reclamation bond in the amount of \$35,000 to assure compliance.

Reid had leased the North-half of section 35, T. 32 N., R. 87 W., 6th Principal Meridian from Ben France in 2000. This land is shown to be private on a BLM 1:100,000-scale contour map of the Rattlesnake Hills. Reid commenced construction of a house on a site north of a fence which had been used for grazing for more than 60 years, and in a location France had represented to be in the North-half of section 35. (Statement of Reasons (SOR), 2.) On May 29, 2001, BLM employees visited the area to evaluate a proposal submitted by Reid to improve access to his property. During their inspection of the site they discovered that Reid's developments were actually on public land in the NE1/4 of the SE1/4 of section 35. (Incident Report of Unauthorized Use, May 29, 2001.) On May 30, BLM issued a Notice of Trespass that referred to construction of a homesite, a road, and excavation of a location for tank storage. The notice stated that resolution of the unauthorized use would require the following:

reimbursement of all administrative costs incurred by [BLM] for work on the trespass, fair market rental value of the public lands, rehabilitating and stabilizing any public lands that were damaged by such trespass - including preparation and implementation of a reclamation plan to be approved by [BLM], establishing native vegetation and all archaeological survey and mitigation costs.

Reid met with BLM's Field Manager, and, in a June 22, 2001, letter to BLM, his attorney outlined his understanding that Reid was to prepare a reclamation plan for BLM's approval, reimburse BLM for its administrative costs, and pay the rental value for the land. He also requested an estimate of administrative costs and rental value. His attorney also stated that Reid was willing to trade a 40-acre tract (SE1/4NW1/4, sec. 34, T. 32 N., R. 87 W.) for a 10-acre tract in the area involved in the trespass action.

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<sup>1/</sup> The total is based on an annual rental rate of \$500, which is to be charged until the land is successfully reclaimed.

BLM responded in a letter dated June 28, 2001, stating that it was preparing an estimate of the administrative costs, and that Reid would be billed for the rental value of the land disturbed by the homesite and associated roads. With respect to reclamation, the letter stated:

Lastly, Mr. Reid will be responsible for the cost of full reclamation. This will include preparation of the reclamation plan that will be approved by the Bureau of Land Management, Lander Field Office, prior to any work being done in the field by Mr. Reid. The reclamation plan should be submitted for approval no later than August 1, 2001. The approval will include deadlines for implementation of the reclamation plan. There will be a representative of my staff on site during reclamation to assure that topsoil is salvaged and that the original topography is achieved.

Reseeding will be done as part of the final reclamation. The Bureau of Land Management will specify the native species and the amount of each to be included in the seed mix. Initial reseeded should not be undertaken prior to October 15, 2001, but needs to be completed prior to November 15, 2001, so that the seeds will have the full benefit of winter moisture. Mr. Reid will be responsible for any reseeded that needs to be done after this year until revegetation is determined to be successful by the Bureau of Land Management. We will base our determination on Mr. Reid's success at reestablishing comparable composition and density of vegetation using species native to the disturbed sites. Please be aware that this could take a number of years to accomplish and Mr. Reid will be responsible until successful revegetation is achieved.

The Field Manager's letter also stated that BLM had determined that the land exchange proposed by Reid would not be in the public interest.

In a letter dated August 13, 2001, BLM outlined the reclamation work it would require in greater detail. In a response dated September 4, 2001, Reid's counsel submitted a proposed reclamation plan. In a letter dated September 14, 2001, BLM outlined two additional reclamation requirements: post-reclamation weed control, and placement of a geo-textile type material, such as coconut matting, on top of the seeded area to hold the topsoil and seeds. The letter stated that Reid's September 4 letter and BLM's August 13 letter would be considered to be the approved

reclamation plan. Reid's counsel expressed his concurrence in a letter dated September 20, 2001.

In its December 10, 2001, decision, BLM stated that Reid did not drill the seed on the contour of the slope, did not place a geo-textile type of material on top of the seeded area to hold the seeds in place, and had not fenced the area to prevent the seed from being trampled by cattle. As a result of this noncompliance, Reid was directed to submit a reclamation bond.

Reid asserts that BLM's assessment of the rental at \$500 per year was arbitrary and capricious, stating that the "approximate 1 1/2 acre site is worth, at the most, \$600, if sold on the open market." (Statement of Reasons (SOR) at 3.) In its Answer, BLM states that after conducting an appraisal of the land it had assessed "the minimum amount BLM charges for small sites of less than five acres in rural areas of Wyoming." (Answer at 11; Attachment 3.) In almost all cases this Board will affirm a fair market value determination if an appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. See Parkway Retail Centre, LLC, 154 IBLA 246, 255 (2001). Reid's unsupported argument does not provide a sufficient basis for reversing BLM's decision.

Reid asserts that BLM's assessment of administrative costs is arbitrary and capricious and that no breakdown of the costs was furnished to him. In its Answer, BLM states that the breakdown of the costs was part of the administrative record which was available for Reid's review.<sup>2/</sup> The record contains a breakdown of labor costs totaling \$6,524.84, setting forth the participating BLM employees, their hourly rates, and their total hours. It also contains a breakdown of various vehicle costs totaling \$488.97. Indirect costs were calculated at a rate of 19.6 percent,<sup>3/</sup> bringing the grand total to \$8,388.52. In the absence of a showing of any error with respect to these costs, Reid has provided no basis for reversing BLM's decision.

Reid states that he seeded the area by scattering the seeds and used a drag mat to cover the seeds. Although he experimented with matting the area, the matting

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<sup>2/</sup> It would have been appropriate to attach the detailed accounting statement to the decision, and we suggest that BLM do so in the future. However, the failure to do so was not fatal to BLM's determination regarding the amount assessed as administrative costs.

<sup>3/</sup> Indirect costs are calculated on a Bureauwide rate and are intended to cover BLM's cost of providing administrative support services. See Sharon R. Dayton, 117 IBLA 162, 165 (1990).

blew away. Reid asserts that it was arbitrary and capricious for BLM to require that the seed be drilled on the contour of the slope and geo-textile material be placed on top of the seeded area. Reid asserts that he has spent more than \$50,000 in the reclamation process, that the topsoil was placed professionally, and that the site is in better condition than it was before it was disturbed. He contends that the grassing specifications were outside BLM's requirements for other lands and were more stringent than for other BLM projects.

We note that Reid had previously agreed to the conditions he now characterizes as arbitrary and capricious. BLM points out that reclamation of the site is more difficult than for the other projects to which Reid refers because Reid had not segregated the topsoil during the unauthorized activities, and that matting would be necessary to hold the shallow soil in place on the slope. (Answer, 3-4.) BLM also determined that the seeding needed to be drilled on the contour to intercept surface runoff, to increase the soil moisture available to seedlings, and to inhibit rill and gully formation. (Answer, 4.) When suitable amounts of topsoil are not present, special reclamation measures such as matting are needed to provide protection from erosion, and drilling is needed to retain moisture for seed germination and growth. (Answer, 8.)

BLM states that Reid never indicated that matting had been tried without success. (Answer, 9.) Even though Reid states that he attempted to cover the seeds by using a drag, BLM's visits "revealed no indication that a drag had been used." (Answer, 7 n.3.) In any event, Reid had been warned that no seeding was to be performed without cover materials to place immediately over the topsoil and seeds. (Answer, 5.)

BLM has submitted a declaration dated March 12, 2002, prepared by its soil scientist, Gary Bautz, who stated that he visited the site on February 7, 2002, and found seed coverage to be "quite sparse" with the few seeds present "laying on top of the soil" which was "compacted" with "little to no moisture present." He further stated: "[S]ome of the limited topsoil that was present has been lost due to wind erosion" and that "there has been livestock trampling of the area." Bautz concluded that the additional topsoil loss due to erosion during the winter makes it possible that the site will require additional efforts beyond those required by the original reclamation plan. In view of the conditions described in Bautz's declaration, we conclude that Reid has not established that the reclamation requirements were arbitrary and capricious.

Although Reid contends that the \$35,000 bond required by BLM is excessive and unnecessary, his failure to adhere to the reclamation requirements makes BLM's requirement of a bond a reasonable means to assure that the site will be reclaimed.

Reid states that the required fencing has not been completed because it has not been determined that reclamation has been completed, asserting that there would be no need for fencing if BLM required Ben France to move the existing fence back to his property line. (SOR, 4-5.) In making this argument, Reid overlooks the fact that the fencing was needed to prevent livestock from trampling the seeds needed to reclaim the land. The fencing requirement was neither arbitrary nor capricious.

[1] There is no dispute that Reid's use of the public land constituted a trespass, and under 43 CFR 2920.1-2(a), Reid is liable for (1) the administrative costs incurred by the United States as a consequence of such trespass; (2) the fair market value rental of the lands for the period of trespass; and (3) rehabilitating and stabilizing the lands that were the subject of such trespass. That regulation further provides that if the trespasser does not rehabilitate and stabilize the lands subject to the trespass within the period set by the authorized officer, the trespasser shall be liable for the costs incurred by the United States in rehabilitating and stabilizing such lands. In the instant case, Reid has provided no evidence to support his opinion that BLM was arbitrary and capricious in determining the administrative costs and rental, or in imposing the conditions required for rehabilitating and stabilizing the lands. Nor has Reid shown that the bond required to assure compliance with these requirements was unreasonable.

We finally turn to appellant's argument that BLM arbitrarily refused to exchange the 40-acre tract for a 10-acre tract in the area involved in the trespass action, "even though the public would have received four times the land requested by Appellant." (SOR, 3.) We also note that the 40-acre tract to which appellant refers appears to be surrounded by public land, and is the only private tract of land in sec. 34, T. 32 N., R. 87 W. On the other hand, the 10-acre tract would adjoin private land and has been fenced and mistakenly used as private land for 63 years.

BLM suggests that this determination is not properly subject to appeal because it was not part of the trespass decision under appeal, but it was addressed in a June 28, 2001, letter. (Answer, 13 n.6.) Nothing in the text of that letter gives any indication that the BLM considered it to be an appealable decision, and a proposal to exchange land is a relevant factor to be considered in resolving a trespass. E.g., Sharon R. Dayton, 117 IBLA 162, 164 (1990); Clive Kincaid, 111 IBLA 224 (1989); see also BLM Manual, BLM Handbook H-9232-1 "Realty Trespass Abatement," V.H. (Rel. 9-300, 8/14/89).

BLM asserts that it exercised its discretion in determining that an exchange would not be in the public interest, and it is correct in stating that it is a discretionary determination. However, an exercise of discretionary authority must still be supported by a rational basis.<sup>4/</sup> See Fallini v. BLM, 162 IBLA 10, 33-34 (2004), and cases cited therein.

In Dayton, we affirmed BLM's decision to reject a proposed exchange. This case differs from the Dayton case. In this case there is nothing in the record that could be used as a basis for a conclusion that the exchange would not be in the public interest. In Kincaid, the Board found that BLM's trespass decision lacked a rational basis because BLM had failed to give proper consideration to a proposed exchange, and vacated the BLM decision. Because nothing in the record supports the determination that an exchange would not be in the public interest, BLM's decision to reject the exchange is properly set aside to allow BLM an opportunity to reassess the proposed exchange, make a determination regarding whether the exchange would or would not be in the public interest, and make the assessment a part of the record supporting its decision.

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<sup>4/</sup> BLM also refers to our decision in Siesta Investments, Inc., 28 IBLA 118, 121 (1976), in which we quoted Lewis v. Hickel, 427 F.2d 673, 677 (9<sup>th</sup> Cir.), cert. denied, 400 U.S. 922 (1970): "The determination of 'public interest' is one committed by law to agency discretion and therefore unreviewable." If BLM is suggesting that its exercise of discretion is unreviewable by this Board, and therefore it need not provide a rational basis for its decision, its reliance on Siesta Investments is misplaced. In National Audobon Society v. Hodel, 606 F.Supp. 825, 833 (D.Alaska 1984), the court referred to Lewis and stated that "[m]ore recent authority establishes that agency public interest determinations are reviewable in several contexts." More important is the fact that Lewis was stating a standard of judicial review, not administrative review. When a timely appeal subjects a BLM decision to this Board's jurisdiction, our review authority is de novo in scope because it is our delegated responsibility to decide for the Department "as fully and finally as might the Secretary" appeals regarding use and disposition of the public lands and their resources. 43 CFR 4.1; see Ideal Basic Industries v. Morton, 542 F.2d 1364, 1367-68 (9<sup>th</sup> Cir. 1976); Forest Oil Corp., 141 IBLA 295, 306 (1997); Richard Bargaen, 117 IBLA 239, 245 n.3 (1991); United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983). We note that in Siesta, BLM provided a rational basis for its decision to decline the exchange in that case, in that the agency that would ultimately have acquired the land no longer had a need for it.

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 affirmed in part and set aside in part and the case remanded for further action consistent with this opinion.

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R.W. Mullen  
Administrative Judge

I concur:

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James F. Roberts  
Administrative Judge