

TERRY JONES  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 2003-244

Decided November 7, 2006

Appeal from a decision of Administrative Law Judge Marcel S. Greenia affirming a decision by the Bureau of Land Management assessing damages for nonwillful grazing trespass.

Affirmed.

1. Contracts: Construction and Operation: Generally--  
Grazing: Generally--Trespass: Nonwillful

A letter granting a party “official authorization to conduct maintenance activities on existing public land reservoirs, pits, and spreader dikes within” a grazing allotment, and requiring that party, “[p]rior to beginning construction work on any projects \* \* \* to notify [BLM] of the location of the projects that you will be maintaining,” is properly interpreted as requiring that BLM be notified and approve the construction work, where the record shows that both the party and BLM believed that the party would inform BLM in advance before commencing work. Where the party notified BLM of his intention to undertake construction on a dam/reservoir within a wilderness study area and BLM expressly notified the party not to proceed until the validity of the construction could be confirmed, the party was not authorized to proceed with the construction.

2. Cooperative Agreements--Grazing: Generally--Trespass: Nonwillful

A party is not authorized to undertake construction activities on a dam/reservoir within a wilderness study area by virtue of a cooperative agreement authorizing and obliging its predecessor-in-interest to conduct maintenance on the dam/reservoir where BLM documentation shows that it was abandoned in 1972, where there is no reference to it in BLM's record assignments of cooperative agreements after 1970 (including assignments to the party itself), where it was not listed in a 1980 wilderness inventory, and where the party lacked knowledge of its existence.

3. Administrative Practice--Bureau of Land Management--Grazing: Generally--Words and Phrases

“Abandonment.” Abandonment of a property interest results from the failure of the holder of a right to exercise that right over an extended period, and abandonment of an interest granted by BLM may thus generally occur without BLM's knowledge. While the BLM Manual states that grazing “[r]esource improvements and treatments cannot be abandoned or removed without authorization,” it provides that BLM “may require a permittee/lessee or cooperator to remove a project and rehabilitate the site,” but does not require such action. Since abandonment generally occurs over a long period of time, so that BLM may not be aware that it has occurred, it may not be in a position to issue a decision authorizing the abandonment and requiring rehabilitation in every case. Even where BLM is aware of the abandonment, it may not deem it necessary to issue a decision authorizing the abandonment and requiring rehabilitation in every case, such as where abandonment in place without rehabilitation is a satisfactory conclusion to the project. BLM's failure to notify the holder of a grazing right or interest that it has been abandoned is without significance.

## 4. Grazing: Generally--Trespass: Nonwillful

A charge of unintentional trespass is not negated because the trespasser acted on the basis of a mistaken belief. At best, acting on a mistaken belief establishes that the trespass was inadvertent or nonwillful.

APPEARANCES: Marc R. Stimpert, Esq., Cheyenne, Wyoming, for appellant; John R. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HUGHES

Terry Jones (appellant) has appealed the April 14, 2003, decision of Administrative Law Judge Marcel S. Greenia affirming the December 20, 2000, decision by the Worland (Wyoming) Field Office (WFO), Bureau of Land Management, holding that work performed by appellant in 1999 on a retention dam and reservoir and an associated access route within the boundaries of the Red Butte Wilderness Study Area (WSA) were prohibited acts under 43 CFR 4140.1(b)(2) and constituted a non-willful trespass under 43 CFR 2800.0-5(u) and 2801.3 (2004). <sup>1/</sup> (ALJ Decision at 2 and 7.) We affirm.

Judge Greenia found, and the record shows, <sup>2/</sup> that the dam/reservoir (referred to as the Agate dam/reservoir or simply "Agate") was constructed by BLM and completed in August 1956 as a stock water dam for better livestock distribution to improve grazing conditions. (Ex. R-26 at 5, 8 and 9.) By September 1, 1957, the Agate dam/reservoir was functioning, and a permanent BLM marker was placed on the project. (Tr. 64). <sup>3/</sup> As noted above, the lands on which the Agate dam/reservoir is located were included in the Red Butte WSA, created in 1983.

<sup>1/</sup> The regulations governing right-of-way trespass, 43 CFR Subpart 2801, were recently revised and redesignated. 70 FR 21058 (Apr. 22, 2005). The citation is to the Oct. 1, 2004, volume of 43 CFR, the last volume containing the regulation as it was in effect at times relevant to the present dispute.

<sup>2/</sup> The following recitation of the facts derives from Judge Greenia's findings of fact, supplemented occasionally from portions of the records he cited in his decision.

<sup>3/</sup> This project marker consisted of a stake driven into the ground with an aluminum metal cap bearing the name of the project, project number, the year it was created, and the legal description of the location. (Tr. 63-64, 110, 161; Ex. R-7.)

The project had been identified by three different project numbers on BLM documents: "1166," "1516," and "1602." (Exs. R-26 at 1 and R-28.)

Judge Greenia's findings of fact indicate that, starting in 1994 or 1995, appellant began working with Cameron Henrichsen, a BLM Rangeland Management Specialist, and that appellant "requested BLM permission" from Henrichsen "to perform maintenance work on the range improvements assigned to" appellant. Henrichsen asked appellant to submit a list of reservoirs he wanted to maintain, but appellant did not do so, instead continuing "to ask Henrichsen for permission to perform maintenance work" on a case-by-case basis as he located improvements. (ALJ Decision at 3-4.)

In early July 1999, Henrichsen became aware that appellant was doing reservoir work "close to, if not inside," the boundary of the Sheep Mountain WSA. (ALJ Decision at 4; Tr. 56, 105, 654.) He contacted appellant and "informed him of the concerns of venturing into a WSA," faxing him maps showing the boundaries of both the Sheep Mountain and Red Butte WSAs and instructing him "not to do any work until the matter could be reviewed." (ALJ Decision at 4; Tr. 57-58.)

Appellant first became aware of the Agate dam site within the Red Butte WSA in late July or early August 1999, when he and Don Schlaf, like appellant a member of the New Burlington Group, <sup>4/</sup> flew over the area. After the discovery, appellant drove to the dam/reservoir area, which did not appear on BLM's maps, and "noticed a project marker identifying the area as Agate Retention Dam" and "discovered a spillway with a head-cut partially through it." (ALJ Decision at 4.)

After that site visit, appellant "called Henrichsen and wanted to begin maintenance on the reservoir," but Henrichsen "determined that Agate was within the Red Butte WSA" and told "Appellant that he could not work on anything in the WSA until Henrichsen had an opportunity to consult with Dave Baker, a BLM employee in the [WFO] who had expertise on WSAs." (ALJ Decision at 4-5; Tr. 61.) A meeting was scheduled "on July 30, 1999 to include Appellant, Baker, and Henrichsen." <sup>5/</sup>

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<sup>4/</sup> Judge Greenia found that the "New Burlington Group is an organization of seven individual ranchers who each hold a permit issued by BLM for grazing on the" New Burlington Group allotment. (ALJ Decision at 2.)

<sup>5/</sup> Henrichsen testified that appellant contacted him twice to notify him of his intention to conduct maintenance on the site.

In the "initial conversation" that took place "toward the end of July," appellant "called [Henrichsen] and told [him] he had been flying with Don Schlaf in the Burnt Wagon Pasture and had spotted a reservoir southwest of Red Butte, an old reservoir that he wanted to work on." Henrichsen testified that he looked at his "topographic maps, and they did not show any reservoir in that area." He testified that he told

(continued...)

but Henrichsen could not attend because of an emergency fire fighting detail, and, when Henrichsen returned, Baker had been called away on an emergency fire fighting detail. (ALJ Decision at 5.)

Judge Greenia's findings on what transpired next are central to the matter in dispute, and it is appropriate to quote them fully:

On August 2 or 3, 1999, Appellant went ahead and performed work on Agate. Appellant testified he knew that he had been told by BLM not to do any work in the WSA. Taking a rubber tire four wheel drive backhoe one mile into the WSA, Appellant bladed the trail through two separate gullies and a third area to improve his access to the site. At the reservoir, Appellant scraped off sagebrush and grass growing in the sediment at the bottom of the reservoir and pushed the material into a breach in the dike through which a natural channel ran. Following that, he filled the old spillway with material and cut a new spillway on another stone formation on the side. According to the Appellant, he piled clean sediment in layers to the height of the original height. He added an extra foot of material on top of the dike to serve as a safety freeboard. The reconstructed dam was about 200 feet long, 15 feet high, and 10 feet wide at the top and created an impoundment of approximately 250 feet at the high water mark. As the work was completed after dark, the dam and spillway were rough, and, unconsolidated sagebrush and other vegetation stuck out of the face of the dam. Appellant planned to return to do final grooming on the reservoir.

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<sup>5/</sup> (...continued)

appellant, "We need to get a better location to find out if it's inside the Wilderness Study Area or not." (Tr. 61.)

Henrichsen testified that the second conversation between him and appellant occurred "a few days later"; that appellant identified the project by name, provided a legal description of it, and notified him that "there was a BLM project marker on it." Henrichsen testified that he plotted the legal description on his topographic maps and, although the project "was not on there," the site "was clearly within the Wilderness Study Area." He testified that he advised appellant that "he could not work on anything in the Wilderness Study Area until [he (Henrichsen)] had time to consult with" BLM's wilderness specialist and that "we [(BLM)] would have to look at it on the ground before he could work on it." Finally, he testified that a meeting was scheduled for July 30 for appellant, himself and BLM employee Baker "to go look at this one and some others that he said he wanted work on within the Wilderness Study Area." (Tr. 62 and 63.)

Appellant called Henrichsen a few days after the project was completed to ask if he was cleared to start working on reservoirs within the WSAs. Henrichsen once again told Appellant “no” because Dave Baker was still unavailable and had not been able to review the sites. Appellant became very upset, stating that he had the use of his brother’s backhoe and, with the drought and with his cattle running out of water, he needed to be “working on the reservoirs.” At this time, Appellant asked to speak with someone else and Henrichsen suggested Joe Vessels, his supervisor.

Appellant met with Henrichsen and Vessels later that same day. Vessels reiterated that no work could be performed in the WSAs until it was reviewed by a BLM specialist. At this time Appellant informed BLM personnel that he had completed work on Agate reservoir. Appellant indicated to them that he did not think it was going to be a “big deal” to obtain authorization and therefore he went ahead and worked on it.

(ALJ Decision at 5 (citations to record omitted).)

Following a meeting with appellant at the Agate site, BLM personnel researched its records and were unable to locate any record of Agate in its computer database, in its 1972 allotment management plan, in assignment forms for the assignment of range improvement projects to Appellant or to his father, or in maps showing results of the 1979-80 wilderness inventory for the Red Butte WSA, and that “no engineering feasibility study, cultural resource clearance, or water-rights filing with the State of Wyoming filed with the State of Wyoming Engineer’s Office existed for the Agate reservoir.” (ALJ Decision at 6.) Accordingly, on “September 28, 1999, Baker advised Appellant of his determination that the Agate reservoir had been abandoned and that Appellant’s work constituted new construction in a WSA.” Id.

Between September 1999 and November 2000, appellant and BLM traded letters on the question of appellant’s authorization to maintain the Agate dam/reservoir. BLM issued a decision prohibiting appellant from maintaining the site (Ex. R-23); appellant protested (Ex. R-24); BLM initially rescinded its decision pending further examination (Ex. R-25); following a review of its records showing that the dam/reservoir was “abandoned 1/72,” BLM proceeded with the decisions at issue here. (ALJ Decision at 6.)

Thus, on November 1, 2000, BLM issued a proposed decision stating that Jones’ work on the Agate dam was a prohibited act under 43 CFR 4140.1(b)(2) and a trespass under 43 CFR 2801.3 (2004). (Ex. R-34.) Jones filed a protest against the proposed decision on November 15, 2000, and amended it on November 20, 2000.

(Exs. R-35 and R-36.) BLM issued a final decision on December 20, 2000, finding appellant in violation of 43 CFR 2801.3(a) (2004) and in nonwillful trespass under 43 CFR 2800.0-5(u) (2004) and ordering that the disturbed areas be allowed to be reclaimed naturally. (Ex. R-37.) The matter was appealed to the Hearings Division, Office of Hearings and Appeals (OHA), and assigned to Judge Greenia, who upheld the Field Manager's decision. The present appeal ensued.

The basis of BLM's trespass decision is that appellant lacked authority to perform the work and disregarded specific and repeated instructions by BLM personnel not to take any action without BLM approval, that is, until knowledgeable personnel had an opportunity to analyze whether such work was appropriate, given the stringent standards governing activities in WSAs. Appellant maintained before Judge Greenia and on appeal that he had authorization to maintain the Agate Dam in a functioning condition pursuant to both a May 8, 1956, cooperative agreement (CA) between BLM and his predecessor-in-interest and a June 29, 1998, letter from BLM.

Judge Greenia rejected that argument, ruling that neither the 1956 CA nor the June 29, 1998, letter gave Jones authority to conduct maintenance on the Agate dam/reservoir. He also ruled that Jones had "never looked to the [CA] or the Authorization letter as carte blanche authority to repair a range improvement until shortly before, or more likely after, undertaking repair of Agate reservoir," noting Jones' testimony that he had come to that opinion only after completing repairs, based on a conversation with his brother. (Decision at 9.) He noted that, after issuance of the 1998 letter, Jones had sought and obtained permission before undertaking other range improvement/maintenance activities. (Decision at 8-9.) Judge Greenia suggested that neither document could have been seen as authorizing the action that Jones had taken, emphasizing that "repair of the Agate reservoir was not just another routine repair," but "had been preceded by significant information indicating that it was unusual" both because Jones "had been specifically instructed not to work on Agate reservoir until proper clearances had been obtained" and because "all parties knew it was located in the Red Butte WSA." (Decision at 9-10.)

[1] BLM's authority to take the action in question is not challenged. Under section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (2000), the Department is authorized to "do any and all things necessary to \* \* \* preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." See also 43 U.S.C. § 1740 (2000). While compliance with provisions of the Taylor Grazing Act and the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1701 et seq. (2000), relating to rangelands is committed to the discretion of the Secretary, implementation is delegated to BLM. Kelly v. BLM, 131 IBLA 146, 151 (1994); Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein.

We first address whether the June 29, 1998, letter gave appellant authority to conduct maintenance on the Agate dam/reservoir. The letter states as follows:

This letter will serve as your official authorization to conduct maintenance activities on existing public land reservoirs, pits, and spreader dikes within the New Burlington Group Allotment No. 00509. This will include work such as cleaning out reservoirs which are silted in, and repairing washed out dikes. You will be required to confine all surface disturbing activities to the area which was affected by construction of the original project.

All maintenance work performed will be subject to the standard cultural resource stipulation, as follows:

Cultural Resources, Standard Stipulation. The holder of this authorization shall immediately bring any object or resources of cultural value discovered as a result of operations under this authorization to the attention of the authorized officer. The authorized officer will evaluate, or will have evaluated, such discoveries not later than five working days after being notified, and will determine what action shall be taken with respect to such discoveries. The decision as to the appropriate measures to mitigate adverse effects to significant cultural resources will be made by the authorized officer after consulting with the holder. [BLM] shall be responsible for the cost of any investigations necessary for the evaluation, and for any mitigative measures.

Prior to beginning construction work on any projects, you will be required to notify this office of the location of the projects that you will be maintaining. You must provide the legal description of the project, and the name and BLM project number, if available.

(Ex. R-5.) Appellant argued before Judge Greenia that this 1998 authorization granted him the right to maintain any improvement he found on the allotment, provided only that he notify BLM prior to beginning construction, and that he did not require any additional authorization from BLM to commence construction. Thus, Jones claimed, BLM's Rangeland Management Specialist Henrichsen did not have authority to modify the authorization letter to require that any construction on range improvements had to be approved by BLM. Noting that this argument was "curious in light of all the times [Jones] sought Mr. Henrichsen's approval" and citing

testimony of the Manager of Henrichsen's BLM Field Office that Henrichsen "did have authority to act on these kinds of issues," Judge Greenia rejected that argument. (Decision at 10.)

Appellant reiterates this argument before us, claiming that this letter "provide[d] all the legal authorization necessary for [him] to maintain Agate." (SOR at 8, 15.) In essence, he views the letter as authorizing him to conduct maintenance on "all existing reservoirs within the New Burlington Group Allotment" or other improvements he located on his allotment any time after June 29, 1998, simply by notifying BLM that he was initiating maintenance, without waiting for BLM approval or recognizing BLM's authority to stop activities it did not approve. (SOR at 8 and 16.)

We reject appellant's interpretation of the authorization letter, which authorized appellant "to conduct maintenance activities on existing public land reservoirs, pits, and spreader dikes within the New Burlington Group Allotment No. 00509." (Ex. R-5.) It does not, in fact, authorize appellant to conduct maintenance activities on "all" existing range improvements that he found on the allotment. Nor do we see that appellant's unilateral notification of BLM that he was about to commence maintenance activity would render BLM powerless to stop the activity. The letter is more reasonably interpreted to authorize him to conduct maintenance activities on existing range improvements, provided that he notified BLM and did not receive a disapproval or other objection from BLM. <sup>6/</sup>

Further, the record shows that both BLM and appellant expected that Jones would inform BLM in advance before commencing work, with the added proviso that Jones was expected to put in writing which sites he wanted to work on in the form of a list. Henrichsen testified that, in 1994 or 1995, Jones "started telling me that he wanted to start maintaining some of the reservoirs in the allotment, and he asked how to go about doing that"; that he told Jones "to give me a list of the ones that he wanted to work on and I would go out and look at them and see what we could do." (Tr. 52-53.) From this it is clear that the 1998 letter confirmed a procedure already in place whereby Jones would notify BLM in writing in advance and await its response before undertaking any improvements.

In operation, following issuance of the June 1998 authorization letter, BLM did not always require advance written notice before Jones undertook to repair or

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<sup>6/</sup> This conclusion does not condone any "oral modification" of the letter's terms, as appellant asserts. (SOR at 16 and 17.) It means that the letter had always so provided. Accordingly, appellant's arguments that BLM somehow "modified" the terms of the letter without granting him a right of appeal are unavailing.

maintain improvements he found in the area. Nevertheless, Henrichsen testified that, in the fall and winter after receiving the June 1998 authorization letter, appellant worked on “roughly 20” reservoirs in the Horse Flat and Cow Camp Pastures of the allotment, and that he “was calling me and, and asking me, or telling me which ones he wanted to work on, and I was giving him verbal okay on the phone.” (Tr. 55-56.)<sup>7/</sup> Similarly, on cross-examination, Henrichsen agreed that appellant “needed to call and ask [him] to work on” reservoirs in the Allotment, explaining that he (Henrichsen) “wanted to know what he [(appellant)] was doing out there, and which ones, which reservoirs he was working on, and what he was doing to them.” (Tr. 128.)

Moreover, this conclusion is supported by Jones’ own actions concerning the Agate dam/reservoir, which show that he understood that BLM’s approval of or acquiescence in his actions was necessary. Jones did not simply notify BLM and commence maintenance, but instead notified BLM and, when its representatives noted problems with his proposed action, agreed to a meeting, the purpose of which could only have been to secure BLM’s approval. When that meeting was delayed because of fire fighting duties, Jones decided not to squander the opportunity to use his brother’s backhoe and to proceed despite BLM’s objections. Only afterwards did he justify his actions by asserting that he was authorized to proceed simply by unilaterally giving BLM notice, without waiting for its response. (ALJ Decision at 6 and 9.)

The facts demonstrate that BLM neither approved nor acquiesced in Jones’ maintenance activities here.<sup>8/</sup> When appellant notified Henrichsen that he wanted

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<sup>7/</sup> Henrichsen also testified that at the “beginning,” presumably of the period following the June 1996 agreement, appellant “was calling me up and telling me which reservations he wanted to work on, and if I was familiar with them I said, ‘Okay, go ahead.’” (Tr. 102.) That is consistent with his testimony that he regarded approval from BLM, even though verbal and “informal,” as necessary. (Tr. 103.)

<sup>8/</sup> It was possible under this arrangement for BLM’s silence following receipt of oral notice from appellant that he was about to proceed to be regarded as acquiescence or tacit approval of the proposed maintenance activity. Appellant asserts on appeal that he “maintained Orono Reservoir [in] May of 1999, over two months prior to maintaining Agate Reservoir”; that “Orono Reservoir [is] in the Sheep Mountain WSA”; that appellant “notified Mr. Henrichsen of all his efforts, and Mr. Henrichsen did on the ground inspections of these reservoirs”; that “[t]hus, Mr. Henrichsen knew that [appellant] maintained Orono Reservoir over two months before Mr. Henrichsen maintained Agate, and either knew or should have known that Orono Reservoir was in a WSA”; and that “[d]espite these facts, Mr. Henrichsen never notified [appellant]” (continued...)

to begin maintenance on the Agate dam/reservoir, Henrichsen told appellant “that he could not work on anything in the WSA until Henrichsen had an opportunity to consult with Dave Baker, a BLM employee in the [WFO] who had expertise on WSAs.” (ALJ Decision at 4-5.) We agree with Judge Greenia that BLM’s disapproval could not have been clearer.<sup>2/</sup> We accordingly find that appellant’s subsequent maintenance work was not authorized under the terms of the June 29, 1998, authorization letter.

[2] Appellant also reiterates on appeal his argument, rejected by Judge Greenia, that he was “authorized and obligated” by the 1956 CA between BLM and his predecessor-in-interest to maintain Agate in a functioning condition (SOR at 2), and that the CA remains in effect and is legally binding. (SOR at 14.) That CA was executed by the secretary of the New Burlington Group and by BLM’s District Manager:

It is also agreed that the following range improvements, consisting of one retention reservoir to be placed upon the following described lands NW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> [sec.] 23, T. 49 [N.], R. 95 [W.], 6th P. Mer., County of Big Horn, State of Wyoming, will be constructed by [BLM (the party of the first part)]. It is further agreed that for and in consideration of the benefit received from this range improvement, [The New Burlington Group (the party of the second part)] agrees to maintain said improvement in good and serviceable condition.

The party of the second part hereby agrees that, when the improvement contemplated under this agreement is completed, the title to the improvement, together with all labor and materials furnished by the party of the second part in constructing the improvement, shall be in the United States; that the improvement may be removed by agreement or consent of the parties hereto, or by the direction of the

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<sup>8/</sup> (...continued)

that he had any concern with the maintenance of Orono Reservoir.” (SOR at 18-19 (citations and footnotes omitted.)) However, it is enough to note that there was no tacit approval in the present case.

<sup>2/</sup> Appellant asserts on appeal that, “[a]t most, the record shows that Mr. Henrichsen voiced his general concern to Mr. Jones that the BLM may need to do further evaluations prior to maintaining reservoirs in a WSA, but that Mr. Henrichsen was confused or unsure as to what must be done.” (SOR at 19.) Even accepting that this was so, such statement was sufficient to instruct Jones not to proceed until Henrichsen was able to ascertain what to do. As we have held, Jones was not authorized under the 1998 agreement to proceed without BLM approval.

party of the first part, the removal to be made by the party of the second part, and all expenses incident thereto will be borne by the party of the second part. It is mutually agreed that, should the improvement to be constructed under this agreement be removed by common consent, or by direction of the party of the first part, the salvage materials will revert to the parties contributing the same in proportion to their contribution.

(Ex. A-2 at 2.) The CA is silent as to abandonment of the reservoir: It neither provides guidelines for determining when and if abandonment occurs nor specifies the parties' obligations in the event of abandonment.

Judge Greenia found that the CA "has never been rescinded by formal notice to the parties and is maintained in Appellant's BLM grazing operator file. (Ex. A-16)." (ALJ Decision at 3.) Nevertheless, he concluded that the Agate dam/reservoir had been abandoned, and that the "abandonment, in fact, [was] attributable to the [permittee's] failure to maintain the range improvement." Judge Greenia noted:

A review of BLM records [made after April 10, 2000,] uncovered a file on Agate reservoir in a box of archived abandoned projects. In the file, notations were made by unknown persons depicting the words "abandoned 1/72". Other such markings were found within the file of unknown origin and time. An examination of the former database system used by BLM, the Resource Development and Conservation Inventory, revealed a 1969 printout with markings, by unknown persons, near the Agate project number as well as near another project number which bore the mark "aband 1/72".

(ALJ Decision at 6 (citations to record omitted).) He added:

[T]he record contains no evidence of human activity at the Agate reservoir since approximately 1972 as documented by "abandonment" records, notations and in one photograph in the BLM records. Agate reservoir does not appear on the 1972 AMP; it does not appear on any of the three assignments of range improvements; it does not appear on any of the maps of the allotment; it does not appear in either the current RIPs database or its antecedent RDC Inventory file; and was not observed, recorded, mapped or otherwise identified during the 1979-1980 Wilderness inventory of the Red Butte WSA.

(ALJ Decision at 8 (citations to record omitted).) <sup>10/</sup> Following the abandonment, Judge Greenia found, appellant “‘discovered’ Agate reservoir and decided to repair it,” having “had no personal knowledge of Agate reservoir prior to his airplane view in July or August of 1999.” *Id.* at 8 (citations to record omitted).

Appellant argues that the facilities were in “perfect condition” and functioning “as a valuable livestock improvement until it was maintained in 1999” (SOR at 2), thus challenging Judge Greenia’s finding that the facility had been abandoned and left to ruin more than 20 years earlier. Jones actually testified that “the dam was in perfect shape,” but the “spillway just needed to be repaired.” (Tr. 659.) Judge Greenia found that appellant had in fact spent a full day’s work with a backhoe filling a breach in the dike, filling the old spillway area with material, cutting a new spillway, piling clean sediment in layers to the original height of the dam, and providing another foot of material as a “safety freeboard.” (Decision at 5.) The amount of work performed by appellant both on the spillway and the dam itself (which is amply shown in photographs in the record (Ex. R-7)) belies his assertion concerning the condition of the dam, as does the fact that appellant’s maintenance/

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<sup>10/</sup> The record does contain testimony by Leonard Zierlein indicating that the Agate improvements held water in May 1977. Although Judge Greenia generally discounted that evidence (ALJ Decision at 8), the record shows that Agate was still capable of impounding some water even as late as 1999, long after it was abandoned. Thus, Schlaf testified that, in 1999, he observed a 6-8 foot diameter pool of water that had been retained by a gate dam and had been actively used by wild horses as a water source. (Tr. 532-535.) The reservoir was found in 1999 precisely because some impounded water was visible from the air.

However, Zierlein testified that in 1977 he found no more than a reservoir that had some water in it: “I have, couldn’t make a detailed description of what I found in [May 1977] because I wasn’t concerned about reservoirs other than it had water in it.” (Tr. 555 and 724.) The fact that there may have been some water in the reservoir as late as 1977 does not mean that the Agate dam had not been abandoned prior to that time, a fact that is otherwise well supported by the record.

Along these lines, we note aerial photographs submitted by appellant from 1966, 1975, 1984, and 1989 show that the Agate dam held very little water, a fact highlighted by comparing them to the 2001 aerial photograph of the site following reconstruction of the dam. (Ex. A-24.) The analysis accompanied that exhibit acknowledges that “[i]n none of these summertime photographs (June 1966 to July 1989 \* \* \*) is the presence of a full-capacity lake seen at Agate Dam or other nearby dam sites,” and that “the area’s retention dams and stream breaks did impede some measure of surface water runoff in August 1984.” Again, the presence of “some measure of surface water” does not mean that the Agate dam had not been abandoned prior to that time.

improvement clearly greatly increased the amount of water impounded by the Agate dam. See Ex. A-24.

[3] Appellant equates “cancellation” or “revocation” with “abandonment,” arguing that the authorization provided by the CA could not have ended without BLM having taken action and having provided notice and opportunity for a hearing. (SOR at 14.) Abandonment of a property interest results from the failure of the holder of a right to exercise that right over an extended period. Abandonment of an interest granted by BLM may thus generally occur without BLM’s knowledge.<sup>11/</sup> Accordingly, it cannot reasonably be expected that BLM would be able to notify an interest holder that he has abandoned his interest, and BLM’s failure to provide such notice is without significance.<sup>12/</sup> Instead, it can be seen that it is possible to look back and determine that a right or interest had been abandoned as of a certain date without knowing exactly when the abandonment occurred. That is exactly what Judge Greenia did here.

We note that the terms of the CA impose no obligation on either party, BLM or the permittee, to take any action where the permittee abandons the improvement. In

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<sup>11/</sup> Thus, abandonment of the interest granted by the 1956 CA was not a unilateral act by BLM, as argued by appellant. (SOR at 3.) Instead, it was the result of inaction on the part of the permittee to maintain the improvement, coupled with BLM’s inaction in requiring that this dam/reservoir be maintained.

<sup>12/</sup> Thus, we reject appellant’s assertion that “improvements can only be abandoned and cooperative agreements can only be revoked upon issuance of a final decision subject to notice and appeal.” (SOR at 3 and 12.) We do not deem 43 CFR 4120.3-6(a), prohibiting removal of range improvements without authorization, as applicable to abandonment of such improvements.

While the BLM Manual states that “[r]esource improvements and treatments cannot be abandoned or removed without authorization,” it provides that BLM “may require a permittee/lessee or cooperator to remove a project and rehabilitate the site,” but does not require such action. The Manual specifies the content of any decision on abandonment and the identification of who is responsible for salvage and rehabilitation, provided that BLM deems it necessary to issue such decision. Again, since abandonment generally occurs over a long period of time, such that BLM may not be aware that it has occurred, BLM may not be in a position to issue a decision authorizing the abandonment and requiring rehabilitation in every case. Even where BLM is aware of the abandonment, it may not deem it necessary to issue a decision authorizing the abandonment and requiring rehabilitation in every case, such as where abandonment in place without rehabilitation is a satisfactory conclusion to the project. By contrast, if BLM determines that rehabilitation is necessary following abandonment, it may be appropriate to issue a decision requiring it.

these circumstances, the Department must evaluate the facts of each particular case to determine whether abandonment has occurred. Judge Greenia did a thorough job of reviewing the evidence on this question, considering and weighing the documents and evaluating the credibility of witnesses and their testimony.

We conclude that any interest provided by the 1956 CA was abandoned by the interest holders; that the abandonment resulted in the loss of whatever rights and interests the CA provided; and that the abandonment/loss of the rights and interests occurred notwithstanding BLM's failure to issue a proposed or final decision subject to appeal. <sup>13/</sup>

Appellant makes much of variations in the listings of group allotment projects or improvements on the New Burlington allotment in historic BLM documents over the years. <sup>14/</sup> The presence or absence of a project on a BLM assignment form is not, by itself, controlling as to whether the project has been abandoned. Although the fact that the listings were not absolutely correct means that they may not be conclusive by themselves, considered as part of the totality of the evidence, the absence of the Agate project on the lists of improvements incorporated into any of the assignment forms (including those assigning interests to Jones) nonetheless supports Judge Greenia's conclusion that it was abandoned. The latest reference to the Agate in BLM's assignment forms concerning CAs appears to be in an attachment from a January 1970 assignment from Ron Yorgason to Joe Yorgason. (Ex. A16 at 57 and 60.) That is completely consistent with the fact that the reservoir was subsequently abandoned in 1972.

Appellant stresses that, from "1982 until the present, the 1956 cooperative agreement for Agate has remained a permanent part of [his] operator file." (SOR

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<sup>13/</sup> It appears that appellant's immediate predecessor-in-interest, E. Paul Jones, received interests in the CAs affecting the Allotment from Elsie P. Bosch in November 1977 (Ex. R-1) and assigned them to appellant in June 1982. (Ex. R-2.) It also appears that appellant succeeded to the interests of the Joe Yorgason Estate in June 1999. (Exs. R-3 and R-4.)

<sup>14/</sup> Appellant points out that the 5 Mile Retention Dam and Reservoir was constructed in 1956 on the Allotment pursuant to a CA; that this project was not on the list included in the 1972 allotment management plan; that BLM's records show the project was in excellent condition in 1979; that BLM's 1980 wilderness inventory lists the project in the Red Butte WSA inventory; that the project was not included on a list of range improvements assigned to appellant in 1982; that the project was included on the list attached to the assignment of range improvements to appellant in 1999; and that BLM ultimately concluded that the 5 Mile Retention project was abandoned in 1972. (SOR at 23-24.)

at 7.) The fact that BLM retained a copy of that document for its historic records did not prevent the interest from being abandoned. Indeed, BLM's historical records also affirmatively show that the interest was abandoned, in that the file on Agate reservoir was placed in a box of archived abandoned projects along with notations "abandoned 1/72" and "aband 1/72." We also deem it very significant that appellant himself had no knowledge of the existence of the site prior to discovering it in July 1999. We also find it very relevant that BLM did not identify the project during its wilderness inventory conducted between 1979 and 1980, a result consistent with the conclusion that interests under the 1956 CA had been abandoned prior to the inventory.

Along these lines, we note that it is not surprising that the precise extent of existing improvements on the New Burlington Group Allotment was not reflected in BLM documentation in 1982, when appellant succeeded to his father's share of the allotment, or at other times. The 1998 agreement was apparently intended in part to allow that documentation to be updated when appellant found interests that BLM could authorize action on, that is, improvements that had not been abandoned or otherwise become unavailable to appellant.<sup>15/</sup> However, the critical fact here is that BLM did promptly notify appellant here that it did not authorize improvements on the Agate dam/reservoir, implicitly but nevertheless clearly because that he was not authorized to do so.

Appellant refers on appeal to an improvement that he found within the Sheep Mountain WSA on the allotment and maintained in May 1999 after notifying BLM and receiving no indication that BLM "had any concern with the maintenance without waiting for BLM's approval." See SOR at 18-19. The details of that action are not before us. It is sufficient to note that BLM's authority to enforce a public right or protect a public interest is not vitiated or lost by its failure to act in other matters. 43 CFR 1810.3(a). Nor would the authorization of another improvement in another WSA, even if in violation of governing WSA non-impairment standards, estop BLM from taking action as appropriate in the present case, as BLM is not bound or estopped by the acts of its officers when they enter into an arrangement or agreement to do or cause to do what the law does not sanction or permit. 43 CFR 1810.3(b).

The second element of Judge Greenia's decision concerns the fact that the Agate dam/reservoir are located in the Red Butte WSA. BLM concluded that Jones' construction violated the mandatory non-impairment standards applicable to WSAs. As we have found that appellant was not authorized to take action to maintain Agate

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<sup>15/</sup> In the future, BLM would be well advised to promptly issue documentation formally acknowledging authorization to use any improvements which appellant locates where BLM authorizes maintenance.

to any degree, it is unnecessary to consider whether the actions taken by appellant exceeded what was allowed under the non-impairment standards of FLPMA.

[4] We affirm Judge Greenia's holding affirming BLM's finding that appellant's unauthorized improvements constituted trespass:

Granting Appellant the benefit of every doubt as to the mistaken assumption of authority to take such action, it is still no defense to a charge of unintentional or inadvertent trespass on public lands that the trespasser acted on the basis of a mistaken belief. Fred Wolske d/b/a F. K. W. Logging Co., 137 IBLA 211 (1996).

He accordingly affirmed the Field Manager's December 20, 2000, final decision. (Decision at 11.)

A charge of unintentional trespass is not negated because the trespasser acted on the basis of a mistaken belief. At best, acting on a mistaken belief establishes that the trespass was inadvertent or nonwillful. Fred Wolske, 137 IBLA at 216. BLM has not alleged that the trespass was other than inadvertent or nonwillful here. The elements of the governing regulations were violated by appellant's unauthorized maintenance and improvement of the Agate dam/reservoir. Judge Greenia's decision is properly affirmed.

Any arguments raised by the parties not specifically addressed herein have been considered and rejected.

Accordingly, 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.

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David L. Hughes  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge