

INTERIOR BOARD OF LAND APPEALS

Tom Watson

154 IBLA 140 (February 5, 2001)

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TOM WATSON

IBLA 2000-206

Decided February 5, 2001

Appeal from a decision of the Taos, New Mexico Resource Area Field Office of the Bureau of Land Management, finding a trespass and requiring removal of personal material from a right-of-way. (NM-102575).

Affirmed.

1. Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Rights-of-way issued under Title V of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1761 (1994), and implementing regulations, 43 C.F.R. Part 2800, do not give the right-of-way holder the rights of a private landowner to the public land subject to the ROW grant.

2. Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Nature of Interest Granted

A right-of-way grant for a road and parking area, sought by the applicant on public lands for the purposes of accessing his private property across a river, does not authorize use of the right-of-way for purposes other than those expressly sought and received. A right-of-way sought for parking vehicles on Federal land for purposes of crossing a river cable to private land does not include a use for storage of personal property.

3. Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Nature of Interest Granted

A right-of-way holder's assertion that he used Federal property for certain uses prior to acquisition of the right-of-way, does not change the nature of the use applied for and received in the right-of-way grant.

APPEARANCES: Thomas Watson, pro se, Embudo, New Mexico; Ron Huntsinger, Field Office Manager, Taos Resource Area, Taos, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Thomas Watson appeals from a March 13, 2000, decision of the Field Office Manager of the Taos (New Mexico) Resource Area of the Bureau of Land Management (BLM). The challenged decision is entitled "Trespass Decision/ Notice to Remove" (Trespass Decision) and initiates trespass proceedings against Watson for the storage of items located on Federal land for which BLM had issued Watson Right-of-Way (ROW) NM-68431 for a "parking area." The order states that the existence of the items constitutes unlawful trespass under 43 C.F.R. § 2801.3, and orders Watson to remove them on or before April 15, 2000, 33 days after the date of the order. The items to be removed are "described as one bus approximately 37 feet in length, one Airstream trailer, one green pickup bed, two rolls of cable, desks, chairs, and other unidentifiable personal property * * *." (Trespass Decision at 1.)

Watson sought a stay at the time he filed his Notice of Appeal. This Board granted a stay of the Trespass Decision on May 24, 2000, permitting Watson to delay implementing BLM's order and granting him an extension of time in which to file his Statement of Reasons (SOR). At the same time, the order indicated that we were "dubious about Watson's likelihood of success" and directed him to "explain[] how [his] characterization fits within the terms of his ROW" and the regulations. (May 24, 2000, Stay Order at 2.) Watson filed an SOR on June 14. BLM filed no response.

BACKGROUND

While this appeal is only recently filed, the matters in dispute between Watson and BLM have a long history which bears repeating. Watson owns a parcel of land, on which a residence is located, in sec. 19, T. 23 N., R. 10 E., New Mexico Prime Meridian. (Administrative Record Case File NM-68431 Documents (ROW File Docs.) S and W.) ^{1/} This residence is located on the north side of what appears on a map to be Embudo Creek, id., but is called simply "the river" in documents throughout the record. According to Watson, since the late 1960's he has been crossing the river to his property from a road and parking area located on BLM lands on the south side of the river. (ROW File Doc. W.) According to Watson, he drove along a 1,000 foot length of BLM road, parked his vehicle(s) and crossed the river using a cable stretched across the river. He states: "The road was used for access, and the floodplain was used for parking." (SOR at 3.)

^{1/} The record consists of two separately indexed files; one is the case file for ROW-68431; the other is the file for the trespass action, NM-102575. For clarity, this decision will refer to the former as ROW File and the latter as Trespass File.

On August 4, 1987, at BLM's insistence and, as Watson concedes (SOR at 3), to avoid trespass, Watson applied for an ROW "for existing use of road and parking area that [Watson had] used and maintained for more than 20 years." (ROW File Doc. W.) BLM conducted a National Environmental Policy Act (NEPA) Categorical Exclusion Review and Land Report, dated October 11, 1988, which recommended that the ROW be granted. *Id.* at Doc. U. ^{2/} BLM offered the ROW to Watson with special stipulations on October 20, 1988. *Id.* at Doc. T. The ROW with special stipulations was signed by both parties and became effective on December 5, 1988, for a term of 20 years. *Id.* at Doc. S. Of particular importance here, the stipulations stated that the "[s]ite shall be kept clean, free of litter, and excess junk." *Id.* at Doc. S, ROW Stipulation 1.

According to pictures in the record taken some time between ROW review and approval, *id.* at Doc. V, pictures 2 and 3, and 1997, Watson began to store various immobilized vehicles and materials on the site. Pictures taken on August 5, 1997, show a property littered with a green bus and what is described as a "parts truck," 5 to 6 chairs, some sort of metered device, a log, a propane tank, odd bits of what look to be electrical devices, tires, file cabinets, plywood, burnt timbers and two-by-fours, and other random unidentifiable pieces of equipment and trash. *Id.* at Doc. I. By 1998, the site hosted, in addition to the bus and parts truck, an Airstream trailer, 7 or 8 additional chairs, a metal table, random file cabinets, what appears to be a mobile platform, and other unidentifiable material. *Id.* at Doc. H. It is not clear between the two sets of pictures the extent to which specific things photographed in 1997 remained or had been removed.

On September 11, 1998, the BLM Taos Resource Area, Acting Field Office Manager, sent Watson a letter stating that the storage of these materials was not authorized by the ROW, and that they violated the stipulation that the site be kept "clean, free of litter, and excess junk." BLM stated in that letter what remains the crux of the parties' dispute. "The use authorized by the right-of-way is only for parking for the purpose of reaching your private property across the river. The parking area is not meant to be a storage yard." In the letter, BLM demanded that Watson remove the excess material or else BLM would cancel the ROW and/or fine Watson. *Id.* at Doc. G.

Thence ensued a volley of meetings and letters in which BLM persisted in its attempts to obtain compliance, as BLM saw it, with the parking area restriction of the ROW, and Watson disagreed that personal storage was improper under the ROW. *Id.* at Docs. C-F. On November 13, 1998, the Acting Field Manager sent a letter to Watson verifying the parties' failure to

^{2/} In general terms, NEPA requires agencies, in undertaking actions, to consider significant impacts on the human environment. 42 U.S.C. § 4332(2)(C) (1994).

agree, and their agreement that the parties would reach a point at which the issue could be appealed to this Board. Id. at Doc. C. On November 10, 1999, BLM (Taos) issued a decision to amend the size, terms and conditions of the ROW. Id. at Doc. B.

In IBLA No. 2000-76, Tom Watson appealed from this November 10, 1999, decision. Id. at Doc. A. On December 27, 1999, BLM filed a request that we remand the case because BLM had issued a decision on December 21, 1999, which purported to rescind the decision under appeal. The December 21 decision also notified appellant that BLM was initiating trespass proceedings concerning the original ROW. (Trespass File Doc. M.) These proceedings presumed the November 10, 1999, amendment order was rescinded. By order dated January 5, 2000, this Board vacated BLM's December 21 decision because of BLM's lack of jurisdiction to render it, and set aside the November 10 decision under appeal. Further, pursuant to BLM's request, we remanded the case to BLM.

BLM pursued the trespass action. On both January 7 and March 9, 2000, BLM photographed the site. On January 7, the site contained, the same bus, trailer, file cabinets, and junk, plus rolled up insulation and some sort of black padding, rolled cable, cardboard, an oil drum, what look like compressor units, a green car-trailer unit with a compartmentalized box on top, and other products of indeterminate nature and vintage. (Trespass File Doc. K.) The two March photos generally show the same materials, including the green trailer, the Airstream trailer, bus, desk, truck and random articles for which we attempted description above, though these pictures, from a greater distance and fewer in number, cannot attest as to whether the total array of materials remained unchanged during the two months. Id. at Doc. C. The March photos show what appears to be a usable vehicle that may belong to BLM or to Watson. Id. During the months from January through March, the record shows phone calls between the parties, id. at Doc. L, and two trespass decisions dated January 10 and February 11, spanning BLM's receipt of this Board's order of remand in IBLA No. 2000-76, dated January 5, 2000. Id. at Docs. E, G, H, I, and J. BLM attempted to serve the February order on Watson five times, to no avail. Id. at Doc. F.

Finally, BLM issued and served the March 13, 2000, Trespass Decision regarding ROW NM-68431, which is challenged here. Id. at Doc. B. The decision stated that the existence of the disputed personal items on the ROW constitutes "unlawful trespass" pursuant to 43 C.F.R. § 2801.3, and ordered Watson to remove such property.

ANALYSIS

Despite various arguments which deserve mention below, the clearly stated point of Watson's appeal is to test whether ROW NM-68431 gives him the right of a private property owner to store his personal property on the parking area of the site. Thus, Watson does not dispute his storage on the ROW parking area of personal materials not used for road transportation to his own property. In his Notice of Appeal in IBLA 2000-76, Watson conceded

that he parked on the ROW "vehicles and equipment, and used it as a 'bridge head' to store building materials and other 'stuff.'" In his SOR in this case, he admits to using the floodplain for "stockpiling materials, working on materials, such as peeling & drying [logs]." (SOR at 3.)

Watson argues that the existence of the ROW for the parking area gives him the right to use BLM land as his own property, at least with regard to the topics of storage and "stockpiling" and "working on materials." Watson thus argues that "BLM Taos does not appreciate the limitations imposed upon it by the U.S. Constitution, to wit: the government does not have the right to deprive a person of his property without due process." *Id.* at 1. ^{3/}

Testing his point, however, does not benefit Watson. An ROW is not the equivalent of private property. Nor does Watson's specific ROW implicitly grant the uses Watson assumes.

[1] In alleging that BLM Taos has erred because "the government does not have the right to deprive a person of his property" (SOR at 1), Watson confuses an ROW with a full patent. A patent transfers title to the land transferred from the United States; at this juncture the Department of the Interior no longer has the authority to manage the land. *See, e.g., Eddie S. Beraldo, et al.*, 123 IBLA 156, 158 (1992), citing *Virgil Horn*, 117 IBLA 10, 11-12 (1991); *Lone Star Steel Co.*, 101 IBLA 369, 374 (1988); *Goodnews Bay Mining Co.*, 81 IBLA 1, 6 (1984); and *Germania Iron Co. v. United States*, 165 U.S. 379 (1897). Watson did not receive a patent, the rights to manage and control private property transferred by patent, nor does the relevant statutory authority purport to equate an ROW with a patent.

The ROW at issue here was issued pursuant to Subchapter V of the Federal Land Policy and Management Act of 1976 (FLPMA), and specifically 43 U.S.C. § 1761 (1986). (ROW File Doc. S, ROW-68431 at paragraph 1.) That statute permits the Secretary of the Interior, through the authority delegated to BLM, the discretionary authority to issue ROWs over public lands for varying purposes, including as applicable here, for "such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through such land." 43 U.S.C. § 1761(a)(7). ^{4/} FLPMA defines an ROW as

^{3/} In a phone conversation between Watson and BLM on Jan. 6, 2000, BLM records that "Watson said he was unmovable and believes the intent of the right-of-way is to use as he would use his private property." (Trespass File Doc. L.)

^{4/} Title 43 U.S.C. § 1761 was amended in 1986 and 1992, but the amendments did not alter subpart (a)(7). We will not apply the 1992 amendments to the 1988 ROW, or amendments related to the Secretary of Agriculture, but point out that Congress further clarified limitations on ROWs issued by the Secretary of Agriculture which are consistent with the outcome of this decision. *See, e.g.,* 43 U.S.C.A. § 1761(c)(3)(B), (C), and (D) (2000 Supp.)

"an easement, lease, permit, or license to occupy, use, or traverse public lands granted for the purpose listed in Subchapter V of this chapter." 43 U.S.C. § 1702(f) (1986) (emphasis added).

This emphasized limitation is entirely consistent with the regulations under which Watson's ROW was issued. An "ROW grant" is defined in BLM regulations as "an instrument issued pursuant to [FLPMA] * * * authorizing the use of a right-of-way over, upon, under or through public lands for construction, operation, maintenance and termination of a project." 43 C.F.R. § 2800.0-5(h). The ROW itself is the "public lands authorized to be used or occupied" by the grant. Id. at subpart (g).

BLM regulations confirm also that the ROW grant retains the rights of the landowner in the United States. "All rights in public lands subject to a [ROW] * * * not expressly granted are retained and may be exercised by the United States." 43 C.F.R. § 2801.1-1(a); see also § 2801.1, generally. It follows that Watson's view that he has obtained full private property rights to manage and use the land on which parking space has been authorized for his convenience, by virtue of which BLM's administration of the space violates the United States Constitution, contradicts the plain terms of FLPMA and BLM regulations.

[2] While this analysis answers Watson's central thesis, it does not answer the underlying question of what rights the ROW itself authorizes. Presumably, Watson would assert that the ROW authorizes storage, and "stockpiling" and "working on materials," uses he claims existed in 1988, plus any additional uses to which he puts the land today. We turn to the ROW, the application, and BLM approval documents to answer this question.

At the outset, we note that neither FLPMA nor its implementing regulations authorize ROW grants purely for the "purpose" of storage and stockpiling of materials. We need not address the general question of whether subsidiary storage authorization may be given in connection with ROW grants for other purposes, however, because ROW NM-68431 does not expressly or impliedly do so. The ROW itself grants "a right to construct, operate, maintain, and terminate * * * an existing road approximately 1000 feet long and 10 feet wide, ending in a parking area," with the stipulated agreement that it be "kept clean, free of litter, and excess junk." (ROW File Doc. S at 1 and Stipulation 1 (emphasis added).)

While conceding that one man's garbage is another man's gold, we fail to see any argument by Watson that the material on this site meets the terms of the stipulation. The pictures show, growing through high grass, what Watson does not deny is a "parts truck" and randomly placed junk, including a bus and trailers not in vehicular use. However valuable the materials to Watson, the ROW site does not appear "clean" or "free of litter" and it seems full of "excess junk." "Excess" in the context of the ROW must be seen as excess to its stated parking purpose. Watson's admission that he stowed on the ROW "vehicles and equipment, and used it as a

'bridge head' to store building materials and other 'stuff'" (ROW File Doc. A, Notice of Appeal in IBLA 2000-76 at 1), cannot fit within the ROW's permission of "parking" in a clean spot, without excess junk, free of litter.

Thus, even accepting Watson's semantic argument for a moment that "parking" does not mean simply a vehicle for transportation to his property north of the river (SOR at 2), does not change "parking" into "storage." Watson's ROW application did not ever suggest he was seeking "parking" of storage material, building material, scrap material, inoperable vehicles or anything other than "parking" of vehicles for transportation as used in the common vernacular. To the contrary, he effectively denied such an intention in his application. There, Watson answered question 13c which required him to "[g]ive explanation as to why it is necessary to cross Federal lands." His sole response was: "It is the only access to my home." (ROW File Doc. 20 at 2, question 13c.) In response to question 17, which required him to state the environmental effects of the proposed ROW on "visual impact" and "the surface of the land, including vegetation * * *," *id.*, he stated simply "[n]o impact."

Watson's statement that he wanted an ROW for "existing use" is not enough to impute the storage uses he attributes to the ROW today for two reasons. First, he never sought storage use; the single enterprise he identified as a reason for crossing public lands was to get to his home. His post-hoc argument in the Notice of Appeal in IBLA 2000-76 that "[s]tockpiling of items was one of the intended purposes of the * * * parking area as granted" (ROW File Doc. A at 3), misstates the only purpose Watson himself stated to BLM. Second, he cannot identify in the ROW any other existing use authorized by BLM. Rather, BLM's NEPA categorical exclusion document indicates that the ROW was excluded from NEPA review because it did not establish "a precedent for future action or represent a decision in principle about a future consideration with significant environmental affects." (ROW File Doc. U.) Somewhere in its analysis, BLM would have been required to identify the surface occupancy of storage, stockpiling and using random materials, and to consider that in its NEPA documentation, to be construed now to have permitted an impact not identified during NEPA review.

Watson's stated belief that his use now is consistent with "existing use" in 1988 is also not borne out by the facts. In the application, he stated a desire for "existing use of road and parking area that I have used and maintained for more than 20 years." (ROW File Doc. W, ROW Application at question 7.) But this question asked for a full description of the project including "type," "temporary work areas needed," and "related structures and facilities." Watson identified nothing that would be needed other than a "parking" site and road access. Most significantly, the sole reason given for use of the public lands was to access his home north of the river. *Id.* at question 13c. BLM was hardly unreasonable to grant the ROW for the purpose he asked.

Moreover, the uses identified now are not even consistent with those he asserts occurred in the pre-ROW days. In his Notice of Appeal in IBLA No. 2000-76, he asserts that those uses were to "use it as a 'bridge head' to store building materials and other 'stuff.'" (ROW File Doc. A at 1.) In his SOR, he states that the "floodplain was used for parking, stockpiling materials, working on materials, such as peeling and drying [logs]." (SOR at 3.) This bears no relation to the uses he has claimed to BLM. In a September 16, 1998, meeting with BLM, he stated that "the bus is being transformed into an RV for his travels, the silver [Airstream] trailer is his work office, and the red pickup is a parts vehicle." (ROW File Doc. F.) Nonetheless, he tells us in his SOR that "[n]o one was living at my place" in 1998 (SOR at 2), but in his Notice of Appeal in IBLA No. 2000-76, he told us that "storing items until river access is feasible is a purpose of the parking area," implying he was planning to move all of his "stuff" to his own land. (ROW File Doc. A at 3, point 6 (emphasis in original).)

Giving Watson the benefit of the doubt on these various stories – and ignoring whether he is actually using his own property which was the purpose for which the ROW was granted in the first place – it is evident that the purposes served by the parking area now are not consistent with those stated, even now, by Watson as true in 1988. He never indicates now nor indicated then a plan to refurbish a recreational vehicle on public land for traveling the country, or that he needed an office. His ROW was never granted, even as Watson identifies his 1988 intentions, for the purpose the parking area serves now.

[3] That he may have, over the course of the 20-year period prior to the ROW's issuance, used the site for storage, does not change the terms of the ROW he received. It was incumbent on Watson to seek what he wanted from BLM in the ROW. We do not answer whether BLM would or could have authorized some storage, or what type, if it had been identified as a need on public land. Nor can we speculate whether, twelve years ago, fear of a negative answer prompted the limited statement of necessity in Watson's application. ^{5/} In signing his ROW Stipulation to keep the area clean and litter free without excess junk, Watson agreed to the terms of the ROW.

Moreover, the fact that Watson used the land prior to the ROW does not mean he was not then or could not become a trespasser. See Mesa Wind Developers, 113 IBLA 61, 67 (1990) (no enforceable rights created by prior casual use, not embodied in an ROW). Watson claims to have purchased his own property in 1964 and used Federal lands with BLM's alleged knowledge. Whether or not this was true in 1964 does not change that FLPMA was

^{5/} We note that storage of excess junk and immobile car parts has been held to be improper surface use constituting undue surface degradation of the public lands, under FLPMA, 43 U.S.C. 1732(b) (1994), even in connection with authorized mining. United States v. Lee Jesse Peterson, 125 IBLA 72, 75 (1993), reconsideration denied by order dated May 20, 1993.

enacted in 1976 by the United States Congress to improve and ensure adequate management of the public lands, including those Watson was using without express permission. His claimed use in 1964 does not mean that his then-use was not in trespass, or that his acquisition of an ROW would immunize him from trespass for acts not expressly authorized by the ROW. Watson's statement that "I was granted a ROW so that I would not be a trespasser" (SOR at 3), is only true insofar as the extent of the ROW grant. Anyone with an ROW grant can be guilty of trespass if he or she exceeds the grant and enters into the area of use retained within the control of the United States. 43 C.F.R. § 2801.1-1(a).

In sum, Watson's approved ROW grants no more than what he as an applicant sought; it is not a blank check for expansion into matters not expressly authorized. BLM's conclusion that Watson's use exceeds the terms of the ROW is affirmed.

Before concluding, we turn briefly to several other points raised in the SOR. Watson argues throughout his SOR that he was somehow mistreated by BLM. He accuses BLM of taking pictures for the wrong reason (SOR at 3), of misleading him to make him believe that his storage and use of the parking space were acceptable to BLM, of misleading him into believing his actions "satisfied the BLM" or that his arguments "were convincing," and of advising him that he was sure to win his appeal. *Id.* at 3-4. All of these arguments are subjective views and reactions and beliefs, none of which are sustained on this record. Every post-1996 document in this record shows a consistent statement by BLM that Watson was in trespass, and letters to Watson, described above, indicated that BLM could not agree with him. Nothing in BLM's notes and letters to Watson suggests that Watson's asserted interpretations of BLM's views could be perceived as accurate.

In any event, a person following oral advice acts at his peril. An appellant "is properly charged with constructive knowledge of *** implementing regulations." *Mt. Gaines Consolidated*, 144 IBLA 49, 52 (1998), citing *John Plutt, Jr.*, 53 IBLA 313, 319 (1981). Thus, notwithstanding what Watson may have inferred from BLM employees' actions or statements, the laws and regulations governing his ROW remain unchanged. Even if Watson could demonstrate that his inferences were correct, such proof would not estop BLM from enforcing the terms of law and regulations. *Salmon Creek Association*, 151 IBLA 369, 372 (2000). In short, whenever Watson chose to enter BLM lands, he was obligated to familiarize himself with applicable regulations and his own potential liability for failing to follow them.

Second, Watson claims that BLM has decided he is allowed to own only one vehicle. Nothing in BLM's decision states this. Rather, the clear import of BLM's decision is that he is to remove inoperable vehicles that he does not use for driving to and from the parking area in order to cross the river to his site. Watson has never asserted that any vehicle or material BLM asks to be removed is operable and used, or could be used, in this manner.

Third, Watson repeatedly confuses this action with a criminal matter. While penalties may flow from failure to comply with the order, as described in the Trespass Decision at 2, this challenged order is an administrative order. If Watson complies, the consequences will not follow. He has been charged with no misdemeanor to date.

Finally, in affirming BLM's decision, we note several outstanding questions. At one point, Watson asserts that the material sits on the parking site waiting "until river access is feasible." (ROW File Doc. A, Notice of Appeal at 3.) To the extent Watson means to suggest that he may convey all of the stored material across the river, he is free to do so. He may readily conduct his office activities and RV construction on his own land without BLM intervention, subject to state or local law. If this is feasible, then this appeal should be of little consequence to Watson. However, conversely, in his SOR in this case, he states that he was not living at his place in 1998. If this in any way means that he was not and is not using his own property, or using the parking area for access to his own property, then the entire stated purpose for the ROW has vanished. Whether the ROW is in use for the purpose authorized should be verified.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision of the BLM is affirmed. Watson shall comply with the order within 60 days of receipt of this decision.

Lisa Hemmer
Administrative Judge

I concur:

John H. Kelly
Acting Chief Administrative Judge