

INTERIOR BOARD OF LAND APPEALS

Franklyn Dorhofer and Edward J. McGowan, et al.

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FRANKLYN DORHOFER  
EDWARD J. MCGOWAN, ET AL.

IBLA 2001-84

Decided May 8, 2001

Appeal from a decision of the Field Manager, Butte (Montana) Field Office, Bureau of Land Management, approving an application for renewal of Small Tract Lease MTM-013724.

Affirmed, stay denied as moot.

1. Federal Land Policy and Management Act of 1976: Leases--Rules of Practice: Appeals: Burden of Proof

Where a lessee of a small tract lease challenges provisions in the lease renewal decision prohibiting assignments and limiting the duration of the lease to the lifetime of the lessee, the burden is upon the lessee to prove, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the determination is contrary to the relevant laws and regulations.

APPEARANCES: Franklyn Dorhofer, Edward J. McGowan, and Stephen J. McGowan, Butte, Montana, pro sese.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Franklyn Dorhofer, the lessee of Small Tract Lease MTM-013724, has appealed from a November 9, 2000, decision of the Field Manager, Butte (Montana) Field Office, Bureau of Land Management (BLM), approving his application for renewal of the lease. Dorhofer, Edward J. McGowan and others 1/ appeal particular provisions stipulating that the lease is not assignable and is limited to the lifetime of the lessee, and the decision

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1/ One notice of appeal/statement of reasons, signed by Edward J. McGowan and Franklyn Dorhofer, list the following as interested relatives represented by Edward J. McGowan: Frank Dorhofer, Jr., Katherine Dorhofer Matthews, Steven J. McGowan, Steven G. McGowan, and Edward J. McGowan. (Hereafter, all these parties will be identified along with Dorhofer as "appellants").

to retain the land in public ownership. (Notice of Appeal at 2.)<sup>2/</sup> In addition, in a separate notice of appeal/statement of reasons, Steven J. McGowan asserts that the development of the leasehold was a partnership between McGowan and Dorhofer, that the lease should not automatically terminate on Dorhofer's death, and that the lease should be assignable.

The parcel in question, Lot 4, sec. 34, T. 2 N., R. 12 W., Principal Meridian, Deer Lodge County, Montana (4.87 acres), was classified for lease as a cabin site on June 17, 1954, under Small Tract Classification Order No. 3. That classification order, issued pursuant to the Small Tract Act of 1938, as amended, 43 U.S.C. § 682a (1976), established that 23 such parcels would be offered in a lottery to veterans who enjoyed a preference under 43 U.S.C. § 279 (1976). Dorhofer was a successful applicant and was issued a 5-year lease for the subject parcel, serialized MONTANA 013724, effective December 1, 1954. The record shows that prior to lease expiration, a cabin was built on the lot. Over the next several decades, the lease was renewed several times, i.e., 1959 (5 years), 1964 (6 years), 1970 (5 years), and 1975 (5 years). Dorhofer on several occasions requested that the lot be reclassified for sale, but his requests were denied as BLM had concluded in its management plans that this lot should be retained in the public inventory due to high recreational and wildlife values.

In 1976, the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 (1994), was enacted by Congress to establish a new management profile for the public lands. The Small Tract Act, supra, was repealed by section 702 of FLPMA, 90 Stat. 2787, in favor of a general management authority affording the Secretary discretion in allowing use, occupancy, and development of the public lands through easements, permits, leases, licenses, or other instruments. See 43 U.S.C. § 1732 (1994); Arthur G. Lane, Jr., 38 IBLA 297, 298 (1978). In 1980, Dorhofer applied for and received, under FLPMA authority, a renewal of the lease for a 10-year period. The lease was corrected in 1985 to provide for a term not to exceed the lesser of (a) Frank Dorhofer's lifetime or (b) 20 years, and to stipulate that it was not subject to renewal upon expiration. See December 19, 1985, Memorandum to File; March 9, 1981, Letter to Dorhofer from Chief, Lands Adjudication Section, Butte District Office, BLM. The term reflected BLM's policy:

It has been the District's policy for several years to terminate those small tract leases in the Big Hole area as soon as reasonably possible. Those leases are to be renewed only so long as the applicant is living and complies with the terms of the lease. Leases are to be terminated if the applicant dies, no longer complies with the terms of the lease, or wishes to relinquish the lease.

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<sup>2/</sup> Dorhofer requests a stay of the decision, explaining that his death before the appeal is considered would complicate disposition of improvements on the subject tract. The stay request is rendered moot by our decision.

March 11, 1981, Memorandum to State Director, Montana State Office, BLM, from District Manager, Butte District Office, BLM. <sup>3/</sup>

BLM, however, accepted and considered Dorhofer's lease renewal application received November 2, 2000. <sup>4/</sup> In his decision, the Field Manager approved the lease renewal for the period of Dorhofer's lifetime: "This lease shall automatically terminate upon the lessee's death. Lessee shall instruct his estate representative to notify the Bureau of Land Management within 30 days of that event. This lease is not assignable to the lessee's heirs." (Decision at 1.)

In a combined statement of reasons (SOR) filed with BLM on December 6, 2000, appellants assert:

The basic tenets of our argument are directed toward the Dillon Management plan which has stipulated the parcel to be of high public recreational value and high wildlife values. Neither wildlife nor the public benefit[s] with the discontinuance of the tract lease to the heirs of Mr. Frank Dorhofer. We argue that [t]he opposite would be true. The wildlife habitat will not change, hunter access will be the same, and public recreation will not increase. Only the recreation that we enjoy will disappear. It should be noted that the strip of BLM through this drainage is surrounded by private ownership and is transcended by a well used Deer Lodge County roadway, as an easement to said private lands.

The BLM property, which is contingent to private lands to the east and west, will be void of the only remaining stewards, proven to uphold the ideals and spirit of the Small Tract Lease. As a family we have resisted sprawl, have kept a clean well lighted place, and have maintained an open door policy for one and all. As managers of the land it must be clear that the desires of the Bureau are being met with the Dorhofer lease.

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<sup>3/</sup> This memorandum was written in response to Dorhofer's request to include his spouse, Carolyn Dorhofer, as an applicant on the subject lease. The District Manager also reported that

"[o]ther small tract lessees have requested their heirs be included in their leases or be assigned the lease in the event of their death. We have not granted their requests upon the logic of the policy memo included in each case file for small tracts. Therefore, for the same reasons the District does not want any new individuals included in Mr. Dorhofer's lease."

<sup>4/</sup> "In consideration of the lessee's age, and his desire to continue using this tract, a decision was made in 2000 to renew the lease only for his lifetime." (Dec. 7, 2000, Memorandum to File.)

In addition, Steven J. McGowan in a separate SOR avers that he has an interest in the lease as he has "shared half of the expenses with Frank since the beginning, \* \* \* half of the lease each year, half of the taxes each year and half of the electric bill each month." He suggests that in fairness the lease should recognize his relationship to the lease. Adding support, the other appellants explain that Steven J. McGowan was also successful in the preference lease lottery but agreed with Dorhofer, his brother-in-law, to build only one cabin for their two families. He relinquished his right to a lease, according to appellants, "in the hopes that another veteran would be afforded the same opportunity."

[1] It is well established that BLM must ensure that any decision issued is supported by a rational basis and that such basis is demonstrated in the administrative record accompanying the decision. The Navajo Nation, 150 IBLA 83, 88 (1999); Eddleman Community Property Trust, 106 IBLA 376, 377 (1988); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). The recipient of a BLM decision is entitled to a reasoned explanation of the basis for the decision, such that the decision may be understood and accepted or, alternatively, appealed and challenged before the Board. Id. A party appealing to this Board must show, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM acted on the basis of a rational connection between the facts found and the choice made. International Sand & Gravel Corp., 153 IBLA 295, 299 (2000); Utah Trail Machine Association, 147 IBLA 142, 144 (1999); Mountain Home Highway District, 147 IBLA 222, 226-27 (1999). Thus, the burden of proof is on an appellant to show error in the decision appealed; if the appellant fails to demonstrate error, the decision will be affirmed. See American Stone, 153 IBLA 77, 81 (2000); William Schweiss, 139 IBLA 10, 12-13 (1997).

The target of appellants' challenge here is BLM's exercise of the discretion afforded by Congress to allow private use of public lands. See 43 U.S.C. § 1732, supra. A BLM decision, made in the exercise of its discretionary authority, generally will be overturned by the Board only when it is arbitrary and capricious, and thus not supported on any rational basis. Judy K. Stewart, 153 IBLA 245, 251 (2000); William D. Danielson, 153 IBLA 72, 74 (2000); Four Corners Expeditions, 104 IBLA 122, 125-26 (1988). In order for us to hold that BLM acted in an arbitrary and capricious manner, the record must demonstrate that BLM

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance, 463 U.S. 29, 43 (1983), quoted in International Sand & Gravel Corp., 153 IBLA at 299. Appellants' challenge may be categorized as (1) an objection to planning provisions stating that recreation and wildlife values are better served by terminating this lease, and (2) a request to include the elder McGowan as a named lessee.

As noted, authority to manage this lease emanates from section 302 of FLPMA, 43 U.S.C. § 1732 (1994). Under subsection (a), 43 U.S.C. § 1732(a) (1994), the Secretary is to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans \* \* \*." <sup>5/</sup> Under subsection (b), 43 U.S.C. § 1732(b) (1994), the Secretary is granted authority to "regulate, through easements, permits, leases, licenses, \* \* \* the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize the public lands for habitation, cultivation, \* \* \*." See also 43 U.S.C. § 1733(a) (1994) (directive to issue regulations implementing provisions of FLPMA with respect to management of public lands). Under Departmental regulation, 43 C.F.R. § 2920.1-1, "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part [Part 2920]." This regulation further provides that "[l]eases shall be used to authorize uses of public lands involving substantial construction, development, or land improvement \* \* \*." 43 C.F.R. § 2920.1-1(a). Such leases "shall be issued for a term, determined by the authorized officer, that is consistent with the time required to amortize the capital investment." Id.

In its own set of management rules, the BLM Manual, <sup>6/</sup> BLM provides that "[l]eases or permits are granted only if there are compelling reasons for continued BLM control during or after the lease term." BLM Manual, 2920.11.A. For "occupancy leases," BLM must include a provision prohibiting transfer and should issue the lease for the life of the current occupant. Id., 2920.11.A.2. <sup>7/</sup> BLM further instructs its personnel to respond as follows to inquiries regarding cabins: "Residential occupancy of public lands for full or part-time personal use is not consistent with BLM policy for management of public lands and is not permitted." BLM Manual, 2920, Appendix 1, at 1. Moreover, "[a]ll decisions in land-use authorizations must conform to the provisions of applicable land-use plans." BLM Manual, 2920.21.B.4.

The record discloses that BLM has repeatedly established in its land-use planning that the subject tract should be retained in Federal ownership.

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<sup>5/</sup> "Land use plan means resource management plans [RMPs] or management framework plans [MFPs] prepared by [BLM] pursuant to its land use planning system." 43 C.F.R. § 2920.0-5(f).

<sup>6/</sup> The provisions of the BLM Manual do not have the force and effect of law; nevertheless, as this Board has held on numerous occasions, they are binding on BLM. Arizona Silica Sand Co., 148 IBLA 236, 243 (1999); Howard B. Keck, Jr., 124 IBLA 44, 55 (1992), and cases cited therein.

<sup>7/</sup> This part of the BLM Manual does include a category titled "Recreational Residences and Recreational Cabin Sites," BLM Manual, 2920.11.A.4, but this section pertains to existing sites "which are authorized under 43 C.F.R. [Part] 21." As the referenced regulations concern "use of conservation and recreation areas under private cabin permits," 43 C.F.R. § 21.1, the instant situation is not affected.

In development of the Rochester Management Framework Plan, we discussed with the public the future management of the small tract leases \* \* \*. The comments received all indicated that the tracts should not be sold and eventually should be terminated \* \* \*.

Because of the public demand for use of public owned land in the Rochester unit, it is my decision that management for small tract leases will be as follows:

\* \* \* \* \*

8. Renewal leases for \* \* \* Franklyn Dorhofer \* \* \* would be for a period not to exceed the lesser time of: (a) their lifetime or (b) 20 years, and not subject to renewal upon expiration.

(June 26, 1973, Memorandum from Manager, Dillon District Office.)

The Dillon Management Framework Plan (DMFP), completed in 1979, identified resource values on the tract, particularly recreation and wildlife, and the decision was that it should remain in public ownership.

(November 9, 2000, Categorical Exclusion/Decision Record, at 1.)

With respect to appellants' challenge to the relevant MFPs, both past and present, we note that such planning determinations are not appealable to this Board. See 43 C.F.R. § 1610.5-2(b) (decision final for Department); Friends of the River, 146 IBLA 157, 163 (1998); Petroleum Association of Wyoming, 133 IBLA 337, 341-42 (1995). The MFP has been succeeded by the RMP as BLM's planning tool, but the current regulations for planning found in 43 C.F.R. Part 1600 are applicable to both. See 43 C.F.R. § 1610.8. As we stated in National Wildlife Federation, 150 IBLA 385, 401 (1999):

Both are land use plans in which, among other things, "[a]llowable resource uses (either singly or in combination) and related levels of production or use to be maintained" are designated \* \* \*. An MFP or RMP is not, however, "a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." 43 C.F.R. § 1601.0-5(k)(2), final paragraph. Thus, an MFP or RMP is not the document in which any site-specific or individual leasing decisions would be made.

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fn. 7 (continued)

See 43 C.F.R. § 21.3(a), (b) (definitions of "recreation area" and "conservation area").

As the MFPs here are not implementing decisions affecting a specific parcel of land or the right of individuals to use Federal lands, the policies and plans espoused are not appealable at this time. See Joel Stamatakis, 98 IBLA 4, 6 (1987); Harold E. Carrasco, 90 IBLA 39, 41 (1985). Thus, the district-wide proscription of leasing for private cabin lands deemed valuable for recreation and wildlife is not subject to review by this Board. Rather, what is reviewable here is BLM's implementation of its policy announcement.

We find that appellants have failed to carry their burden of proving, by a preponderance of the evidence, that BLM acted in an arbitrary and capricious fashion. Nor have they made any effort to show that BLM acted contrary to any applicable Federal statute or regulation, and we discern no such violation. We also note that a mere difference of opinion, the essence of appellants' presentation, is insufficient to establish error on BLM's part. See Mack Energy Corp., 153 IBLA 277, 284 (2000); Blue Mountains Biodiversity Project, 139 IBLA 258, 267 (1997).

Finally, with respect to appellants' assertion that Steven J. McGowan should be made a lessee of record, we must decline the invitation to express our views simply because the Board does not render advisory opinions. See Gabriel Energy Corp. v. Office of Surface Mining Reclamation and Enforcement (OSM), 122 IBLA 316, 323 (1992); Oregon Cedar Products Co., 119 IBLA 89, 92 (1991); Edgar W. White, 85 IBLA 161 (1985). While the Board exercises review authority delegated by the Secretary, 43 C.F.R. § 4.1, we do not undertake initial adjudications of matters that are required to be submitted to and decided by the agency with jurisdiction of the subject matter under consideration. See Gabriel Energy Corp. v. OSM, 122 IBLA at 323. The record does not reflect that appellants have ever approached BLM with this matter. Without BLM's review and its determination on the merits, there is nothing we may properly review as an appeal from a BLM decision. See 43 C.F.R. § 4.410 (right to appeal decision of BLM officer). We therefore dismiss this aspect of the appeal, but do so without prejudice to appellants taking their presentation on the matter to BLM for review.

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 appealed from is affirmed.

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James P. Terry  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge