

TEXACO, INC.

IBLA 80-700

Decided October 26, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, holding appellant liable for trespass damages. WY-06-4114.

Hearing ordered.

1. Administrative Procedure: Decisions -- Appeals -- Trespass:  
Generally

The Board of Land Appeals will not dismiss or set aside a decision by the Bureau of Land Management holding an appellant liable for an innocent mineral trespass solely because a notice of trespass cited a criminal statute.

2. Mineral Lands: Mineral Reservation -- Patents of Public Lands:  
Reservations -- Public Lands: Administration -- Stock-Raising  
Homesteads -- Trespass: Generally

Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976), contemplates that the Department of the Interior retains continuing jurisdiction and administration of mineral deposits reserved by that Act.

3. Mineral Lands: Mineral Reservation -- Patents of Public Lands:  
Reservations -- Public Lands: Administration -- Stock-Raising  
Homesteads -- Surface Resources Act: Applicability -- Trespass:  
Generally -- Words and Phrases

"Public lands." Under 43 CFR 9239.0-7 which defines a trespass, the term "public

lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976).

4. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads

The mineral reservation in a patent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 291 (1976), includes mineral substances which can be taken from the soil and which have a separate value, including those marketable minerals found at or near the surface, and which have no rare or exceptional character, regardless of whether they are subject to disposition under 30 U.S.C. § 601 (1976) or other existing statutory authority.

5. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads

Scoria which is valuable for surfacing roads is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976). However, in a case where scoria is used no differently from common earth, the record must demonstrate that the deposit of scoria has commercial value independent of such use.

APPEARANCES: Milas C. Bradford, Jr., Esq., and Marvin G. Twenhafel, Esq., for appellant; Marla E. Mansfield, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE LEWIS

Texaco, Inc. (Texaco), has appealed from a May 13, 1980, decision of the Wyoming State Office, Bureau of Land Management (BLM), finding that Texaco had committed an innocent trespass involving the severance of 227,557 cubic yards of scoria and assessing \$18,204.56 as damages. Texaco has moved to dismiss this proceeding.

The land on which the trespass is alleged was patented in 1925 under the provisions of the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970). The patents issued under that statute are required to reserve to the United States "all the coal and other minerals in the

lands so entered and patented, together with the right to prospect for, mine, and remove the same." 43 U.S.C. § 299 (1976) (emphasis added). The principal issue in this appeal is whether appellant's excavation of scoria constituted a trespass of this reserved mineral estate.

In its statement of reasons, appellant explains the circumstances leading to its excavation of scoria. Texaco states that it had acquired from Reynolds Mining Corporation title to the subject land, a coal lease for this land, together with other lands and leases, water rights, the DeSmet Reservoir and the appurtenant facilities for the purposes of developing the coal and water resources. Appellant further notes:

As part of such acquisition, Texaco agreed with Reynolds to enlarge the reservoir capacity of Lake DeSmet Reservoir. In 1974 Texaco Inc. engaged the services of Green Construction Company to construct inlet/outlet facilities, a new "South Dike" for the reservoir and to re-route and construct a new roadway for a county road. Additional construction was undertaken but was not directly related to the excavation of scoria which is the subject of the State Director's Decision herein appealed from. After such construction work had commenced, an addition to the bid was let for the excavation of a slurry-trench/cut-off dike northward from the southeast corner of the South Dike of the reservoir. The area traversed by the slurry-trench excavation consisted of pervious "clinker" materials which, in the opinion of the State Water Engineer of Wyoming, might not contain sufficient sealing soil materials to serve as a natural reservoir bank. The removal of the unconsolidated clinker materials was necessary to construct a core or dike below the surface of the land comprised of clay material obtained from other lands of Texaco. The required removal of such excavated materials is the act of alleged trespass on public lands.

\* \* \* \* \*

\* \* \* There has been no finding that the scoria, clinker and other materials excavated by Texaco Inc. for construction of the slurry-trench, dike abutment was a commercially valuable deposit. The facts are that the excavated materials were a liability. Texaco Inc. expended considerable monies to remove the materials so that clay and other impervious materials obtained elsewhere could be replaced in the trench. By Texaco's best estimates, of the 347,445 cubic yards of materials excavated from the trench, 136,322 cubic yards were replaced in the trench and 195,696 cubic yards were placed on that portion of the South Dike and county roadbed which lie within the W-1/2 of NW-1/4 of Section 27, and only 15,427 cubic yards of the excess excavated materials were placed on the South Dike

and roadway bed outside of the lands in question rather than spoiling the same on Section 27.

Statement of Reasons at 2-5.

The Solicitor, however, characterizes appellant's use of the scoria somewhat differently:

In order to construct the South Dike of the reservoir and the cutoff dike northward from the southeast corner of the South Dike of the Reservoir, mineral materials were necessary. If such materials were not found during the excavation of the slurry trench, they would have had to have been acquired elsewhere. The extraction of the materials -- even if they are viewed as a detriment in place to the trench -- benefited the dike building. Therefore, they were used in a manner identical to commercial uses of scoria. Moreover, the scoria is now in a structure that is more or less permanent. No further use may be made of it by the Federal Government.

Reply to Statement of Reasons at 1-2.

Initially, however, Texaco moved to dismiss this proceeding, alleging that the initial trespass notice issued on November 25, 1975, was defective. That notice cited appellant for mining and removing mineral materials from public lands under the jurisdiction of the Department of the Interior in violation of Title 18 U.S.C. § 641 (1970), which makes it a criminal offense to embezzle, steal, purloin, or knowingly convert any property of the United States. The notice also cited 43 CFR 9239.0-7, which provides:

§ 9239.0-7 Penalty for unauthorized removal of material.

The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

In support of its motion to dismiss, appellant notes that the trespass notice cites the violation of a criminal statute, and that the quoted regulation specifically states that a trespasser will be subject to prosecution for such unlawful acts. Appellant correctly notes that instead of instituting criminal action for this violation, BLM determined that appellant had committed an innocent trespass and has assessed money damages on that basis. Indeed, the fact that the decision under appeal characterizes appellant's trespass as innocent clearly recognizes the noncriminal nature of appellant's trespass.

[1] Appellant's contention that the assessment for damages in an innocent trespass should be dismissed because the Department is not proceeding criminally is without merit. The regulation quoted on the notice clearly states that trespassers will be liable for damages; accordingly, the decision under review is a determination of what those damages are. As the Solicitor points out, the notice was sufficient to apprise appellant of the legal and factual issues involved, a matter which is clearly evident by the correspondence appellant has attached as exhibits to its statement of reasons. Appellant has not been denied due process. We note that due process does not require notice and a right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final. State of Alaska, 46 IBLA 12 (1980); see generally Mathews v. Eldridge, 424 U.S. 319 (1976). Timely appeal to the Board of Land Appeals suspends the effect of the BLM's decision pending the outcome of the appeal, so due process is satisfied when this Board orders a hearing after a material issue of fact has been presented. Thus, while it is clear that the Department has decided not to proceed criminally against appellant, this does not prevent the Department from assessing damages as liability for an innocent trespass. Accordingly, we deny appellant's request to dismiss BLM's decision.

[2, 3] Appellant notes that the trespass regulation cited above refers to "public lands under the jurisdiction of the Department of the Interior." Appellant contends that the decision cannot stand in the absence of evidence that the United States has legal title to the surface estate of the lands in question (Statement of Reasons at 8), and that the issuance of the patents segregated the surface estate from the public domain (Statement of Reasons at 9). Nevertheless, the Department's authority to assess damages for trespass against its reserved mineral interest is clear. Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976), contemplates that the Department of the Interior retains continuing jurisdiction and administration of mineral deposits reserved by that Act. Pacific Power & Light Co., 45 IBLA 127 (1980); Western Nuclear, Inc., 35 IBLA 146, 85 I.D. 129 (1978), *aff'd*, Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654 (D. Wyo. 1979). The cited decisions make clear that under the Department trespass regulations such as 43 CFR 9239.0-7, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act.

Appellant notes that disposal authority for surface minerals exists only where the United States has retained the surface estate title. Appellant further contends:

It is submitted that the classes of public lands which are referred to in the above cited Materials Disposal Acts can only be those which the United States has retained the surface estate title and therefor retains ownership of and jurisdiction over the materials which comprise the substance of the surface thereof. Congress cannot by definition or

otherwise claim the surface estate title of patented lands and assume jurisdiction over the embracing surface and subsurface resources thereof.

Statement of Reasons at 11.

Like the appellants in Pacific Power & Light Co., supra, and Western Nuclear, Inc., supra, appellant appears to have confused the scope of the Department's disposal authority with the scope of its jurisdiction over reserved mineral deposits. As we stated in Pacific Power & Light Co., supra at 139:

To sustain the instant trespass action we need not decide whether the Surface Resources Act authorizes disposal of scoria on lands patented under the Stock-Raising Homestead Act; we need only decide, as we do, that appellant's prior appropriation of the scoria was not consistent with the Surface Resources Act or any other statutory authority which is arguably relevant. The question of whether the Department may authorize the exploitation of this scoria is not before us in this proceeding.

[4] We now turn to the real issue in this appeal: whether the scoria excavated by appellant is a mineral reserved to the United States under the Stock-Raising Homestead Act. The basic principles for determining this issue are set forth in the majority opinion in Pacific Power & Light Co., supra. Although appellant would have us accept the dissenting opinion in that case and reject the principles espoused by the majority, we decline to do so. In that decision, we held that in determining whether scoria is included in a mineral reservation in a patent issued under the Stock Raising Homestead Act, supra, the interpretation of the reservation must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve. Such a patent was not generally intended to give the grantee the right to use the land for mineral development, but mineral development was to proceed only under the mineral laws. We held that the mineral reservation in a patent issued under that Act includes mineral substances which can be taken from the soil and which have a separate value, including those marketable minerals found at or near the surface, which have no rare or exceptional character, regardless of whether or not they are subject to disposition under existing statutory authority. In that case, we concluded that scoria which is valuable for surfacing roads is a mineral reserved to the United States.

We took care to note, however, that not every excavation of scoria constitutes a trespass:

Of course, noncommercial sand, rock, clay and other such mineral materials which comprise the substance of surface belong to the owner of the surface estate, and may be used by him. Not every cluster of rock or patch of sand

may be considered to fall within the purview of the reservation. As we stated in United States v. Isbell Construction Co., *supra*, 4 IBLA at 222, 78 I.D. 394, "[I]t is our further opinion that the sand and gravel deposits here in question did not pass to the State of Arizona but were reserved to the United States, conditioned only upon a finding that the said deposits are valuable." [Emphasis added in original.]

Id. at 138.

[5] Like Pacific Power & Light Co., Texaco contends that this scoria has no commercial value. In Pacific Power & Light Co., *supra*, it was not disputed that appellant used the material for road surfacing in conjunction with coal mining activities on adjacent lands, and that this was precisely the type of commercial use for which scoria is bought and sold in the subject area of Wyoming. Because it was clearly established that the scoria was removed from the soil and had a separate value for Pacific Power & Light as a road surfacing material, we classified it as a reserved mineral. Id. at 135. Texaco, however, contends that its use of scoria has been quite different. Because of scoria's porosity, Texaco contends its presence rendered the land unsuitable for the enlargement of the reservoir and the construction of the slurry trench which had to be lined with a less permeable material. This would be irrelevant, of course, if appellant had dedicated the excavated scoria to a use which gave it value separate from the soil, such as for roadsurfacing. In this case, however, Texaco contends that it simply piled the material on a dam rather than spoil it elsewhere, something for which common earth may be used, perhaps with even better effect. Unlike the use of scoria for surfacing roads, Texaco's use does not automatically qualify the scoria as reserved because that use does not give it value separate from the soil. In order to establish that the scoria was a reserved mineral in a case in which it was used no differently from common earth, the record must demonstrate that the deposit has commercial value independent of appellant's use. Although the comparable sales provide a basis for determining the fair market value for scoria, they do not establish the marketability of this particular deposit.

Because several issues of fact must be resolved in order to determine whether Texaco's excavation and disposition of the scoria constituted a trespass, it is appropriate to refer the case to an Administrative Law Judge for a hearing pursuant to 43 CFR 4.415.

At the hearing, BLM shall have the burden of establishing the facts sufficient to support the trespass charge. In this particular case, BLM must show that Texaco used the material in a way which gave it a value separate from the soil itself, i.e., that the scoria was dedicated to a use for which soil would not have sufficed. Otherwise BLM must show that the material in question was marketable independent of the use to which appellant dedicated it, and the failure of BLM to establish the marketability of the material in question must result in

dismissal of the trespass charge. 1/ We note that the decision did not make a final determination of the amount excavated. 2/ This should also be determined. The Administrative Law Judge should make findings and a decision on these and any other issues raised by the parties relevant to the disposition of the case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the case is transferred to the Hearings Division for assignment to an Administrative Law Judge.

Anne Poindexter Lewis  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Bruce R. Harris  
Administrative Judge

---

1/ In determining the issue of marketability, the Administrative Law Judge shall apply the traditional test used by the Department which was approved in United States v. Coleman, 390 U.S. 599 (1968).

2/ The decision left the volume subject to adjustment:

"As a point of clarification, please note that Texaco is not being charged for material removed during the relocation of the county road, since we were not able to determine what volume, if any, was removed from the new road for use on the dike. The volume of 227, 557 cubic yards represents that material removed from the trench at the base of the dike and subsequently put on the dike. It is our understanding that the trench was filled with clay. If Texaco can demonstrate that some of the severed volume was replaced in the trench, we will adjust our trespass bill accordingly. This adjustment can be made at any time. It is certainly not our intention go to extremes to recover 8 cents per cubic yard for every last yard of material."

