Editor's note: 94 I.D. 1

CURTIS SAND & GRAVEL CO.
ESTATE OF CLARE SCHWEITZER

IBLA 85-711 Decided January 12, 1987

Appeals from decisions of the District Manager, California Desert District, Bureau of Land Management, requesting settlement of trespass damages for unauthorized removal of mineral material. CA-060-4272.

Affirmed as modified in part; set aside in part and remanded.

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

   Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

2. Appraisals -- Trespass: Measure of Damages

   BLM may, consistent with State law, establish trespass damages for a nonwillful trespass resulting from the unauthorized removal of sand and gravel reserved to the United States in accordance with the royalty value of the material removed set forth in a private lease of that material, as long as the lease was an arm's-length transaction. However, the royalty value must represent only the value of the privilege of mining and removing the material and such use of the surface reasonably incident to mining or removal, as that is the interest reserved.

3. Act of July 31, 1947 -- Materials Act -- Trespass: Generally

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), and its implementing regulations.

4. Estoppel -- Materials Act -- Trespass: Generally

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

APPEARANCES: Joseph C. Malpasuto, Esq., Glendale, California, for the Curtis Sand & Gravel Company; Thomas G. Baggot, Esq., Torrance, California, for the Estate of Clare Schweitzer; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Curtis Sand & Gravel Company (Curtis) and William P. Willman, Executor of the Estate of Clare Schweitzer (Willman), have appealed from two decisions of the District Manager, California Desert District, Bureau of Land

Management (BLM), dated March 26, 1985, entitled Notices of Demand, requesting the settlement of trespass damages for the unauthorized removal of mineral material.

On October 9, 1984, BLM issued two Trespass Notices (CA-060-4272) to appellants regarding the unauthorized removal of "mineral material" from the SE 1/4 SE 1/4 sec. 9, T. 4 N., R. 14 W., San Bernardino Meridian, Los Angeles County, California, in Soledad Canyon. That land had been patented by the United States (Patent No. 1068545) on March 14, 1934, pursuant to section 1 of the Stock-Raising Homestead Act (SRHA), as amended, 43 U.S.C. § 291 (1970) (repealed effective Oct. 21, 1976, by section 702 of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2787). The patent was made subject to a reservation of "all the coal and other minerals" to the United States, in accordance with section 1 of SRHA. The record indicates Willman, as executor of the estate of Clare Schweitzer, successor-in-interest of the original patentee, leased the land to Curtis pursuant to a 15-year lease dated November 21, 1983. Under the lease, Curtis has the right to conduct "rock, sand and gravel production and operations," subject to the payment of a minimum royalty of 20 cents per ton of "rock, sand and/or gravel material originating and excavated, and removed from the Leased Premises." 1/ The lease also accorded Curtis the option to purchase the land upon the expiration

1/ The lease reserved to the lessor, "All minerals, oil, gas and other hydrocarbons (rock, sand and gravels not being minerals), and the right to explore for or mine and extract same" (November 1983 Lease at 4). The attached land description represented that the SE 1/4 SE 1/4 sec. 9 "is subject to no other reservations other than oil or gas and is free and clear and unencumbered."

of the lease term, at the price of $ 1.2 million, and included an assignment of an April 16, 1982, "Easement Agreement" regarding the use of adjacent private land.

By memorandum dated February 4, 1985, the District Manager endorsed a Mineral Report, also dated February 4, 1985, which recommended initiation of steps to recover trespass damages for the period between July 22, 1983, and October 9, 1984, based on a royalty of 14.5 cents per ton of "sand and gravel" removed from the land during that time period. 2/ The mineral report stated Curtis had reported the removal of a total of 377,947.35 tons. The report discounted the minimum royalty of 20 cents per ton under the November 1983 lease between Willman and Curtis. Rather, the report, in arriving at the royalty of 14.5 cents per ton, relied on a comparable sand and gravel operation (Gillibrand), Curtis' only competition in the Soledad Canyon area. The report took the 17 cents per ton royalty paid by Gillibrand and decreased that figure by factoring in either the lower price received or the longer hauling distance experienced by Curtis, when compared with Gillibrand.

An evaluation of the Mineral Report, dated February 26, 1985, which was adopted by the Deputy State Director, Mineral Resources, on March 12, 1985, concluded there was "no justification" for reducing the royalty below 20 cents

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2/ Pursuant to BLM Instruction Memorandum (IM) No. 84-183, dated Dec. 21, 1983, trespass damages were deemed actionable from and after July 21, 1983, 45 days after the June 6, 1983, Supreme Court decision in Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), that "sand and gravel" were reserved minerals under a SRHA patent. With limited exceptions, trespass damages prior to this time period have been waived by BLM as an "exercise of prosecutorial discretion." IM No. 84-183 at 1; Harney Rock & Paving Co., 91 IBLA 278, 282, 93 I.D. 179, 181 (1986).

per ton. The Deputy State Director, in a March 13, 1985, memorandum to the District Manager, stated trespass damages could be calculated using either the royalty value of minerals extracted or the value of the minerals less production costs, in accordance with the court's opinion in United States v. Marin Rock & Asphalt Co., 296 F. Supp. 1213 (C.D. Cal. 1969). The Deputy State Director concluded trespass damages should be calculated using a royalty of 20 cents per ton unless the other approach would result in a "higher" figure.

In his March 1985 decisions, the District Manager requested appellants to settle trespass damages, "preliminarily estimated" at $ 75,600 (378,000 tons times 20 cents per ton). The District Manager instructed appellants each to submit a "settlement offer [Form 9239-1 (July 1972)], including initial payment, within 30 days of your receipt of this notice." 3/ The District Manager also informed Curtis:

> Following our acceptance of your offer, we will be prepared to issue you a non-competitive material sale [contract] to authorize the operation of the Soledad plant after October 9, 1984. Without such authorization the removal of material after October 9, 1984 must be considered willful trespass. 4/

3/ The settlement offer form contains a section (B) where the trespasser can indicate that it is either paying trespass damages in full or in part, with certain installments to follow on or before specific dates, or submitting a promissory note.

4/ In an Apr. 23, 1985, letter to Curtis' counsel, the District Manager stated a noncompetitive material sale contract would authorize the sale of only 100,000 cubic yards "at the appraised fair market value which has been determined to be 20 cents per ton," and that additional material could be offered "on a competitive basis." The District Manager further stated the contract would be offered after receipt of the settlement offer or the posting of a guarantee bond in the same amount in the case of an appeal. The record indicates appellants posted the necessary bond and by letter dated

Both appellants have appealed from the March 1985 BLM decisions, and have raised a number of issues. They do not contend that the land was patented under SRHA, with a mineral reservation in favor of the United States, however.

[1] Both appellants contend first that sand, which Curtis asserts is 50 percent of the material processed at the Soledad Canyon site, is not a mineral reserved to the United States under the SRHA patent, and thus its removal does not constitute a trespass. The Regional Solicitor, on behalf of BLM, argues that sand is a reserved mineral. We have already addressed this question in Browne-Tankersley Trust, 76 IBLA 48 (1983), in which we held that, to the extent they have independent commercial value, deposits of sand are reserved to the United States in a SRHA patent. As we stated in Browne-Tankersley, this holding is consistent with the Court's reasoning in Watt v. Western Nuclear, Inc., supra, which concluded that commercial deposits of gravel are reserved. Cf. Millsap v. Andrus, 717 F.2d 1326 (10th Cir. 1983) (reservation of "other minerals" construed broadly to include limestone and dolomite); Spurlock v. Santa Fe Pacific Railroad Co., 694 P.2d 299 (Ariz. Ct. App. 1984). There is no dispute the sand extracted and removed by Curtis has an independent commercial value. Between July 21, 1983, and October 9, 1984, Curtis mined 377,947 tons of sand, which was sold at an average price of $ 3.18 per ton. Mineral Report, dated February 4, 1985, at 5. This deposit of sand must be deemed reserved to the United States. Cf. Pacific Power &

(fn. 4 (continued)
June 3, 1985, the District Manager offered a contract (No. CA-060-MP5-3) for the removal of 50,000 tons of sand and gravel at a "fair market value" of 18 cents per ton. This value had been calculated in a May 29, 1985, Mineral Report, approved by the Deputy State Director on May 31, 1985.

Light Co., 45 IBLA 127 (1980) (scoria reserved under SRHA patent), aff'd, Pacific Power & Light Co. v. Watt, Civ. No. C 80-073K (D. Wyo. June 17, 1983).

[2] Appellants next challenge the calculation of trespass damages. The measure of damages is defined by 43 CFR 9239.0-8 to be that "prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized." In Harney Rock & Paving Co., supra at 287, 93 I.D. at 184 (quoting from Knife River Coal Mining Co., 70 I.D. 16, 18 (1963)), we concluded that, under the regulation, "BLM should make damage determinations for Federal mineral trespass by the method most favorable to the trespass victim, unless it can be said 'with certainty' that state law requires a different method."

California law does prescribe a measure of damages, which in actuality is an "election of remedies." United States v. Marin Rock & Asphalt Co., supra at 1219. In the case of an innocent or nonwillful trespass, the Government may elect to receive either the royalty value of the mineral material removed or the market value of the mineral material removed, less the costs of production. Id.

The District Manager in his March 1985 decisions has elected to recover the royalty value of the sand and gravel removed by appellants as damages for the trespass. BLM thereby recovers the value of the sand and gravel which would have otherwise been paid to the United States had BLM formally granted appellants the privilege of mining and removing the reserved mineral, including such use of the surface reasonably incident to mining or removal of the

mineral. See 43 U.S.C. § 299 (1982). Appellants are permitted to retain whatever net profit they would have otherwise been entitled to under such an arrangement. See United States v. Marin Rock & Asphalt Co., supra at 1219. Appellants do not dispute the royalty method of calculating trespass damages, but challenge the 20 cents per ton royalty established by BLM.

Appellants both contend the 20 cents per ton royalty is unjustified because the mineral deposit is not "economically viable" due to the lack of water, space for settling ponds, and vehicular access on the property. Curtis states the sand and gravel have "little, if any, value to the United States," and thus the trespass has resulted in no compensable loss. We are not persuaded that the profitability of mining the sand and gravel has any direct bearing on the requirement that there should be some payment for unauthorized removal. If the material were not removed it would remain in place and be available for removal at some later date when a profitable operation could be undertaken. The removal bars recovery at some future date. To hold otherwise would deny BLM recovery of any trespass damages despite the fact appellants admittedly extracted and removed a considerable amount of sand and gravel between July 21, 1983, and October 9, 1984, without payment to the owner.

In United States v. Marin Rock & Asphalt Co., supra at 1219, the court recognized that the royalty method of calculating trespass damages is specifically designed to ensure some compensation to the United States "even where the trespasser's operations have proved unprofitable." Moreover, the royalty method is also designed to compensate an owner for the unauthorized removal

of his minerals even in circumstances where the landowner could not himself have profitably removed the minerals at the time of removal. As the court stated in Hughett v. Caldwell County, 230 S.W.2d 92, 96 (Ky. Ct. App. 1950): "Where the owner could not extract the minerals himself in any practical or feasible way * * * the value is as it lay in the ground. All he could expect to receive is the usual and customary royalty." These holdings merely recognize that, at the very least, the United States has been denied the benefit of royalties it would have received had it granted appellants the privilege of mining the sand and gravel. These royalties are clearly a compensable loss.

We are aware, as Curtis points out, that, if Curtis is required to ultimately pay the trespass damages, this may constitute a double payment for the same 378,000 tons of sand and gravel, presuming Curtis is unable to recoup all or part of any royalty paid to Willman under the November 1983 lease. This will undoubtedly cause financial hardship. However, in his March 1985 decisions, the District Manager merely requested appellants to make an offer of settlement with regard to a trespass for which appellants "share responsibility." The District Manager intimated that appellants are jointly and severally liable for the trespass. We agree. The trespass consisted of the unauthorized "extraction, severance, injury, or removal of * * * mineral materials from public lands" (43 CFR 9239.0-7) by Curtis, pursuant to a lease issued by Willman. See 54 Am. Jur. 2d Mines and Minerals § 220 (1971); 75 Am. Jur. 2d Trespass §§ 30-32 (1974). In view of this joint and several liability, BLM may properly proceed against both parties for the collection of trespass damages. However, this Department is not the proper

forum for adjudication of any right of contribution which may exist. The Department is only concerned with the payment of damages. Thus, the submission of the "settlement offer" and payment by either appellant would satisfy the Government claim against the other. The offer may take the form of a cash payment, promissory note, or installment contract. 43 CFR 9239.0-9(b). Submission of an amount determined to be compensation for damages incurred by reason of the trespass by one of the appellants will constitute compliance, but the failure of either appellant to submit an offer and make payment or arrangements for payment would result in further administrative sanctions against either or both of the appellants.

Curtis next argues the 20 cents per ton royalty is "unreasonable" because it is higher than the royalty paid by Gillibrand under its lease with the Forest Service and higher than the "average royalty" paid to Willman. BLM argues that 20 cents per ton is in fact the minimum royalty set in section 9(a) of the November 1983 arm's-length lease between Willman and Curtis, which states "in no event shall the rate per ton ever be less than twenty cents ($ .20) per ton."

A royalty will be considered a "permissible measure of damages for extraction of sand and gravel by a good faith trespasser under California law" as long as the royalty is "reasonable." United States v. Marin Rock & Asphalt Co., supra at 1218. It is also said that a landowner is "allowed the amount for which [it] could sell the privilege of mining and removing the minerals under the customary lease * * * of the mineral rights." Annot., 21 A.L.R. 2d 373, 384 (1952). The customary royalty may be judged by the royalty set in comparable leases of public or private land in the vicinity of

the trespass land. However, in each case there is the problem of ensuring comparability. See Western Nuclear, Inc., 35 IBLA 146, 166 (1978), aff'd, Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654 (D. Wyo. 1979), rev'd, 664 F.2d 234 (10th Cir. 1981), rev'd sub nom. Watt v. Western Nuclear, Inc., supra. Thus, generally where the trespass land is already the subject of a lease derived from an arm's-length transaction with an established royalty, that royalty will be considered the best evidence of the customary royalty. Cf. Reed Z. Asay, 55 IBLA 157 (1981) (trespass damages constitute the Government's share of income computed on the basis of the average price of severed crop, actually received by the trespasser).

In the present case, the 20 cents per ton is the minimum royalty set by appellants specifically with respect to the Soledad Canyon mining operation. There is no evidence the November 1983 lease was not an

arm's-length transaction. In Marin Rock, the court upheld an assessment of trespass damages in favor of the United States using the royalty set by the defendants in a private lease of the Federal sand and gravel, implicitly adopting the royalty as "usual and customary." The court also relied on the conclusion that the Government, as the "true owner of the land," was "subrogated" to the contractual rights of the putative private lessor: "Among the true owner's rights is the right to affirm such a contract made by a trespasser and claim its profits." Id. at 1220; see also Alaska Placer Co. v. Lee, 553 P.2d 54, 61-2 (Alaska 1976).

Nevertheless, we must set aside the March 1985 BLM decisions and remand the case to BLM for a recalculation of the royalty rate used in the computation of trespass damages because we find sufficient evidence the royalty set

forth in the November 1983 lease does not constitute the "usual and customary" royalty for the removal of the sand and gravel and incidental surface use. The royalty rate set forth in the lease and subsequently used by BLM was negotiated in the context of a private lease which grants more than just the right to remove sand and gravel and incidental surface use. Under that lease, Curtis is required to pay royalty "as consideration for the use and possession of the Leased Premises and the rights conferred upon Lessee hereunder." November 1983 Lease at 9. Such "rights" include assignment of the April 1982 easement agreement, an option to purchase the land at a fixed price, certain water rights deemed essential to processing the gravel (see letter, dated Oct. 26, 1984, from Joseph C. Malpasuto to BLM at 3), and use of the land for processing and manufacturing operations. November 1983 Lease at 4, 6, 8-9, 20. There is no indication in the record if or how the parties to the lease took these factors into account in setting the royalty rate. 5/ However, these factors clearly represent more than the "usual and customary" rights granted for the removal of the sand and gravel and incidental surface use.

In essence, we are looking for the fair market royalty value, i.e., that value which would have been set by a willing buyer and seller through the "haggling of the market." Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949). Moreover, that value should only reflect the value placed on

5/ It could logically be argued that a "premium" royalty would be paid for the use of the land for processing and manufacturing facilities. By paying an additional royalty, rather than "renting" the necessary additional surface lands, the operator avoids payment of rentals at such time or times when the market conditions do not warrant operating the facility. There would be no "rental" payment at a time when there is no cash flow.

the removal of the sand and gravel and incidental surface use. The aim, as noted supra, is to compensate the United States for the value of the sand and gravel had BLM formally granted appellants the privilege of mining and removing the reserved mineral, which privilege would have included use of the surface reasonably incidental to mining or removal. The United States is simply not entitled to be compensated for the value of rights and privileges which it could not have granted. In determining trespass damages, BLM must factor out such private rights and privileges to the extent they affected the royalty rate set in the private lease BLM relies upon. Because determining if and how these factors were taken into account by the private parties is problematical, especially as it relies on the ex post facto opinions of the parties, the best approach may be to determine the fair market royalty value using the comparable sales approach. See Uniform Appraisal Standards for Federal Land Acquisitions, Interagency Land Acquisition Conference, 1973, at 9-11.

In a January 4, 1985, memorandum, the District Manager concluded the fair market royalty value was 14.5 cents per ton, and stated:

> Some case might be made that FMV is 20 ton. Our assessment of this, however, is that more rights were included such as reimbursement for destruction of the surface and an option to purchase the land in fee. It appears that the 14-1/2 figure represents a fair return for the in-place value.

Likewise, the February 1985 Mineral Report recommended trespass damages be assessed at the rate of 14.5 cents per ton, calculated by using the comparable sales approach, and noted:

> The current royalty rate, 20 cents per ton, that Curtis Sand and Gravel pays to the private landowner, obviously cannot represent the fair market value of the aggregate materials, because this royalty rate includes the option to purchase the land and the right to use the surface of the adjacent fee land.

Mineral Report at 6. Despite the conclusions of the appraiser and the District Manager, the Deputy State Director concluded, without any explanation, that there was "no justification" for a reduction in the assessed royalty value from 20 cents per ton. We cannot agree. The November 1983 lease obviously includes rights of use and occupancy that cannot be granted by the United States. We, therefore, must set aside the March 1985 BLM decisions and remand the case to BLM for a recalculation of the royalty rate used in the computation of trespass damages. We express no opinion on the adequacy of the valuation made in the February 1985 Mineral Report. 6/ Finally, in light of the remand, it is unnecessary to act on a request by Curtis for a hearing on the question of whether 20 cents per ton is a reasonable measure of damages. That evidence may be submitted to BLM on remand.

[3] Curtis also contends the proposed noncompetitive material sale contract is inadequate to meet its projected annual production and sales. Curtis argues BLM has the authority to enter into a "long-term material lease" sufficient to cover the projected production and sales. The Regional Solicitor argues that "any sales of sand and gravel by the Bureau must comply with the provisions of 43 CFR Part 3610."

6/ The 14.5 cents per ton royalty was based upon the Forest Service lease. Deductions were made for other usage granted in the Curtis lease. However, there is no evidence of consideration of other rights granted by the Forest Service which could not be granted to Curtis by BLM because of the split estate. Further, there is an indication the royalty on the Forest Service lease has been increased. Mineral Report of May 29, 1985, at 1.

In its March 1985 decision with respect to Curtis, BLM stated that it was prepared to issue a noncompetitive sale contract following settlement of the trespass damages. Appellant essentially protested this proposed action in an April 10, 1985, letter. In its April 1985 letter to appellant's counsel, BLM effectively denied the protest, and stated that the sale would be limited to the "purchase of 100,000 tons of material." BLM also indicated that it was willing to "offer for sale on a competitive basis, tonnage sufficient to meet your client's yearly requirements." Both proposed actions were made contingent on either settlement of the trespass damages or the posting of a guarantee bond. Appellant has posted the bond in accordance with 43 CFR 9239.0-9(b)(3), but continues to challenge the competitive sale.

Departmental regulation 43 CFR 9239.0-9 restricts the authority which BLM otherwise has to "sell" mineral materials to a trespasser. The regulation provides in subsection (b) that BLM "may refuse to sell to a trespasser * * * materials" if the trespasser fails to make a "satisfactory arrangement for payment of the debt due the United States" after demand for payment and there is reason to believe payment will not be made. 43 CFR 9239.0-9(b). 7/ Subsection (c) of the regulation provides that, "[n]otwithstanding the provisions of paragraph (b) of this section," BLM

> may sell to a trespasser * * * materials * * * despite lack of a satisfactory arrangement for payment if [the authorized] officer establishes in writing that:

7/ Satisfactory arrangement is defined to include payment, execution of a satisfactory promissory note or installment agreement "so long as the agreed-upon payments are made on schedule," delivery of a guarantee bond, or discharge of the debt in bankruptcy. 43 CFR 9239.0-9(b).

> (1) There is no other qualified bidder or no other qualified bidder will meet the high bid, and
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> (2) The sale * * * to the trespasser is necessary to protect substantial interests of the United States either by preventing deterioration of, or damage to, resources of the United States or by accepting an advantageous offer, and
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> (3) The * * * resource management program of the United States will not be adversely affected by the action.

43 CFR 9239.0-9(c).

Prior to the promulgation of the above regulation in 1970, BLM was expressly prohibited from selling materials to a trespasser unless specified conditions were satisfied: "No sale of * * * material will be made * * * to a trespasser who has not satisfied his liability to the United States, except where: * * *." 43 CFR 288.12(b) (18 FR 4913 (Aug. 18, 1953)). The enumerated conditions included filing a guarantee bond and making the written finding now set forth in 43 CFR 9239.0-9(c). Id. The current regulation essentially retains the prohibition on sales to a trespasser unless one of the currently specified conditions is satisfied. However, BLM is not required to sell materials to a trespasser even though one of the specified conditions is met. The authority to sell is discretionary.

In addition to the sale of materials to a trespasser, 43 CFR 9239.0-9 provides for the "lease" of materials. However, mineral materials subject to disposal under sections 1 and 2 of the Act of July 31, 1947, as amended, 30 U.S.C. §§ 601, 602 (1982), including "common varieties" of sand and gravel (30 U.S.C. § 601 (1982)), are not considered materials subject to leasing under the mineral leasing laws. See 30 U.S.C. §§ 181, 352 (1982). As the

Deputy Solicitor observed in Solicitor's Opinion, M-36575 (Aug. 26, 1959), section 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), provides that such materials "may be disposed of only in accordance with the provisions of this Act." See also 43 CFR 3603.1 (unauthorized use of "mineral materials" except when authorized by "sale or permit"). Accordingly, BLM is only entitled to sell the sand and gravel involved herein to Curtis under 43 CFR 9239.0-9 (and under 43 CFR Part 3610). There is simply no statutory or regulatory authority to lease the sand and gravel pursuant to the Mineral Leasing Act.

[4] BLM may sell the sand and gravel to Curtis under 43 CFR 9239.0-9(c). However, there has been no written determination in accordance with that regulatory provision and appellants have presented no evidence supporting such a determination. Therefore, BLM properly offered to sell the sand and gravel to Curtis upon the delivery of a guarantee bond or settlement of the trespass damages under 43 CFR 9239.0-9(b). Curtis fulfilled the condition for a sale set forth in that regulation by delivering the guarantee bond.

However, satisfaction of the condition for a sale under 43 CFR 9239.0-9(b) only authorizes BLM to engage in a sale consistent with the provisions of the Act of July 31, 1947, and its implementing regulations. BLM may dispose of mineral materials pursuant to that Act by competitive or noncompetitive sale where disposal "would not be detrimental to the public interest." 30 U.S.C. § 601 (1982). Under the Act the Secretary is required to dispose of such materials to the "highest responsible qualified bidder,"

but is authorized to contract for the disposal of "property for which it is impracticable to obtain competition." 30 U.S.C. § 602(a) (1982). 8/

Competitive sales are governed by 43 CFR 3610.3 and noncompetitive sales by 43 CFR 3610.2. Assuming the statutory prerequisites of a noncompetitive sale have been met (see 43 CFR 3610.2-1(a)), under a noncompetitive sale contract, the permittee "[s]hall not remove mineral materials until advance payment is made." 43 CFR 3610.1-3(a)(1). The record is clear the removal of sand and gravel since October 9, 1984, has not been pursuant to a sale contract for which advance payment has been made. Such removal, which is not "authorized by law and the regulations of the Department," is technically a continuing "act of trespass." 43 CFR 9239.0-7; see 43 CFR 3603.1. Because of the condition leading to the trespass, including the belief that ownership of the sand and gravel had vested with the patent, BLM endeavored to provide retroactive approval for such trespass. However, there is no statutory or regulatory provision which authorizes BLM to issue a retroactive noncompetitive sale contract. 9/

Nevertheless, we conclude that under the circumstances BLM is precluded from claiming the continuing trespass is willful. The original October 9, 1984, trespass notices stated that the sand and gravel operations "must stop immediately." (Emphasis in original.) However, the record contains an

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8/ Any notice of competitive sale would necessarily contain a description of the limitations and restrictions which would arise as a result of the split estate.
9/ In IM No. 84-183, the Director, BLM, instructed field offices "to strive to prevent the unnecessary shut down of operations," but only by issuing "use authorizations" to permit continued operations.

October 10, 1984, memorandum to the files by a BLM employee which refers to a conversation which took place at the time of delivery of the trespass notice to "Ben W. Curtis of Curtis Sand & Gravel":

> I told him that our intent is to collect damages for removal of material since last July and for the sale of future material, even though the notice makes it sound like we're trying to shut them down.
>
> I told him that if they (meaning he and Willman) cooperate we would be looking at no shutdown of the operation. This would mean giving us past records on tons removed and money paid to Willman, and paying us an initial amount of a promissory note for past damages and future sale.

During a meeting held on October 25, 1984, BLM received Curtis' records of sand and gravel sold between July 1983 and September 1984. Handwritten notes of the meeting indicate BLM was again attempting to make arrangements "to keep Curtis going."

Curtis' counsel summarized the meeting in an October 26, 1984, letter to BLM:

> As evidence of Mr. Curtis' good faith in this matter, Canyon Country Enterprises, the present operator and lessee of the property, agreed to execute a promissory note in favor of the Government, the terms of which are to be agreed upon at a later date. Because of the complexity of this matter, the terms of the note will be flexible, as to both terms and amounts. You indicated that you would be seeing the Bureau of Land Management's attorney, Mr. Burt Stanley on Tuesday of next week and that, hopefully, sometime in the latter part of that week we could meet and work out the terms of the note.
>
> You also were kind enough to indicate that in the meantime, Curtis can continue to operate its Soledad facility without being subject to a Government claim or charge for wilfull trespass.

> Canyon Country Enterprises will, as it and its predecessors in interest have over the last 17 or 18 years, continue to account for all material removed from the Soledad plant.

There is no evidence other than the initial notices that Curtis was ever ordered to halt the continued extraction and removal of sand and gravel, despite the fact BLM knew operations were continuing. On May 9, 1985, BLM received from Curtis an accounting of tons shipped "from our Soledad Canyon Plant from July 21, 1983 to the end of April 1985." Moreover, in a May 24, 1985, letter to Curtis, the District Manager refers to the October 1984 meeting with Curtis:

> At that time we agreed to allow your operation to continue without charge for willful trespass until an appraisal of the value of the mineral material could be completed. Our intent was not to allow an unauthorized operation to continue indefinitely.

The record is unclear as to what conditions Curtis was to meet in order to continue its mining operations after October 9, 1984, but it seems clear BLM agreed to let operations continue. In such circumstances, we hold that in the interest of fundamental fairness, BLM is precluded from finding the continuing operations, which remained in trespass in the absence of prior formal authorization, constituted a willful trespass. Cf. State of Oregon, 78 IBLA 255, 91 I.D. 14 (1984), appeal dismissed in part, State of Oregon v. Bureau of Land Management, Civ. No. 85-646LE (D. Or. Apr. 17, 1986). Accordingly, trespass damages, for the period of time after October 9, 1984, should be calculated in the same fashion as those damages incurred between July 21, 1983, and October 9, 1984. As noted in footnote 3, the record indicates that

for this period of time, the royalty was tentatively set at 18 cents per ton. 10/ While trespass damages chargeable for the period after October 9, 1984, were not the subject of the March 1985 BLM decisions appealed from, we find that calculation of a fair market value for the product in the manner described herein rather than retroactive approval of the material sale contract is the legally proper means of determining the trespass damages.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified in part and set aside in part and remanded to BLM for further action consistent herewith.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

10/ Future sales of sand and gravel are subject to advance authorization pursuant to the Act of July 31, 1947, and its implementing regulations, either by means of a competitive or noncompetitive sale. Noncompetitive sales are limited as to volume under 43 CFR 3610.2-1, whereas competitive sales are not so limited. As previously noted, a noncompetitive sale may only be undertaken where disposal of the sand and gravel would constitute such disposal of property "for which it is impracticable to obtain competition." 30 U.S.C. § 602(a) (1982); see 43 CFR 3610.2-1(a). 43 CFR 3610.1-2 also provides: "No mineral materials shall be sold at less than fair market value as determined by appraisal."