CM CONCEPTS OF NEVADA

IBLA 91-399 Decided May 4, 1993

Appeal from a decision of the Area Manager, Stateline Resource Area, Nevada, Bureau of Land Management, ordering payment of damages for mineral trespass. N 54677.

Affirmed as modified.

1. Trespass: Generally

When a mineral materials purchase and sales contract expire, subsequent removal of mineral material is an act of trespass.

2. Trespass: Measure of Damages

Evidence of knowledge that a violation is occurring or a reckless disregard for whether a violation is occurring is essential to a finding of willful trespass. Standing alone, knowledge that specific behavior is regulated will not support a finding that the violation was willfully committed or a finding that it was committed with reckless disregard. The test is the trespasser's actual intention at the time of the violation.

3. Trespass: Measure of Damages

The rule of damages applied for mineral materials trespass is the measure of damages prescribed by the laws of the state in which the trespass is committed. Both statutes and state court decisions prescribing mineral trespass damages are applicable.

APPEARANCES: CM Concepts of Nevada, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

In a July 1, 1991, decision, the Area Manager, Stateline Resource Area Office, Las Vegas, Nevada, Bureau of Land Management (BLM), directed CM Concepts of Nevada (CM Concepts) to pay $530.35 in trespass damages for removing mineral materials from the North Jean Lake Community Pit, Clark County, Nevada, without benefit of a mineral materials sales contract between June 2 and June 6, 1991. CM Concepts' action was deemed to be willful trespass because of CM Concepts' knowledge of the permitting process. CM concepts has appealed.

On May 3, 1991, CM Concepts entered into a contract to purchase mineral material from the North Jean Lake Community Pit pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1988). By its terms, the contract expired on June 2, 1991 (Page 2, Section 9). On June 7, 1991, Larry Monroe, BLM Stateline Area Geologist, inspected the pit and learned that CM Concepts had removed material from the pit after June 2, 1991. After determining that there was no contract for sale of mineral material from the pit, he issued a trespass notice charging CM Concepts with mineral trespass. The notice also directed CM Concepts to submit all records pertaining to removal of material from the pit during the period from June 3 through June 7, 1991.

The July 1, 1991, BLM decision finding CM Concepts in violation of 43 CFR 9239.0-7 was based in part upon a CM Concepts response to the BLM trespass notice. 1/ The decision noted that BLM presumed the evidence submitted by CM Concepts to be complete, and BLM based its findings on information CM Concepts had submitted. A November 6, 1989, mineral appraisal report was the foundation for BLM's trespass damages computation ($4.01 per cubic yard for "Type II" material, and $4.59 per cubic yard for "undefined" material). 2/ BLM determined that CM Concepts had removed 46.41 cubic yards of Type II material and 75 cubic yards of undefined material. Trespass damages totalling $530.35 were assessed.

On July 18, 1991, CM Concepts filed its notice of appeal and statement of reasons. It accepted the BLM assessment of damages for removal of Type II material, and submitted a check for $186.10 with its notice. The notice stated that the "undefined calculation is not clear to our firm. We do not know what your definition is for undefined material. Furthermore the tickets for material hauled are the only loads that left the pit on the days in question."

On July 26, 1991, a statement by Monroe was filed on behalf of BLM and served on CM Concepts. Monroe explained that as a part of the notice of trespass CM Concepts was required to submit haul records for the period from June 3 through June 7. He noted that CM Concepts had responded to his directive by submitting records for June 3, but had submitted no records for June 4 through June 7. He then stated that he had several telephone conversations with CM Concepts' employees after the appeal was filed

---

1/ The case file does not contain a copy of a response (see note 2 below). However, three scale tickets dated June 3 were attached to the decision.

2/ BLM's attention is called to section 1841.15A of the BLM Manual. The procedure set out in that section was not followed, and the case file sent to the Board was far from complete. For example, the mineral report used as the basis for computing damages is not in the file and we have nothing which would allow us to determine the meaning of the term "undefined material." If we were required to determine what portion of the removed mineral material was "undefined," we would have no option but to set aside the decision and remand the case to BLM for further action.

regarding the failure to submit haul records for the period in question, and that their response was that they knew of no further material being removed. However, he was able to obtain evidence that additional material had been removed, which was submitted with his statement. He states:

> In their Notice of Appeal dated 7/18/91 CM Concepts state that the submitted tickets for 6/3/91 "are the only loads that left the pit on the days in question." On 7/25/91, subsequent to the appeal, I obtained the enclosed scale tickets dated 6/6/91 and sighted scale tickets dated 6/5/91. A sequential list of tickets for those two dates is enclosed showing over 436 cubic yards of material removed on those two dates.

A list of ticket numbers and load weights, and copies of 16 tickets were attached. CM Concepts filed no reply.

[1] The contract expired on June 2, 1991, by its own terms. Any further removal of this mineral material was without the benefit of a mineral materials sales contract. The unauthorized extraction, severance, or removal of mineral materials subject to mineral materials sales contracts is an unauthorized use of the public lands. See 43 CFR 3603.1, which also specifies that unauthorized users shall be liable for damages to the United States as set out in 43 CFR Subpart 9239. In his July 1, 1991, decision the Area Manager cited 43 CFR 9239.0-7 in support of the conclusion that removal of mineral material from the pit after the expiration date of the contract was an act of trespass. 3/ That regulation provides that the "extraction, severance, injury, or removal of * * * 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 * * *."

[2] The exact nature of CM Concepts' trespass has direct bearing on the outcome of this decision. If there is a legal basis for determining mineral trespass damages in the laws of the State in which the trespass occurs, those laws are to be applied when determining damages. See 43 CFR 9239.5. The Nevada courts have long recognized a distinction between "willful trespassers" and those who "convert [minerals] under a bona fide, but mistaken, belief that they had the right to appropriate them." Patchen v. Keeley, 14 P. 347, 353 (Nev. 1887). When the mineral material is removed by a trespasser having a bona fide, but mistaken, belief that he had a right to remove it, the removal can be said to be a "nonwillful" trespass. 4/

3/ The decision cited 43 CFR 9239.0-7 (1990), which had been superseded effective Apr. 10, 1991. See 56 FR 10173, 10176 (Mar. 11, 1991). Both versions expressly provide that unauthorized removal of mineral materials from public lands is an act of trespass.

4/ The Department also recognizes the same two forms of trespass in other contexts. For example, 43 CFR 5400.0-5 defines willful trespass as "a knowing act or omission that constitutes the voluntary or conscious performance of a prohibited act or indifference to or reckless disregard for the law."

The U.S. Supreme Court has held that, in civil cases, evidence of knowledge that a violation is occurring or a reckless disregard for whether a violation is occurring is essential to a finding of willfulness in the commission of that violation. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126-27 (1985); see also 43 CFR 3160.0-5(e) (violations of oil and gas operating regulations) and 5400.0-5 (timber trespass). It is equally applicable when deciding whether a trespass was willful. See Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 F. 668, 679 (8th Cir. 1904) (mineral materials trespass); Herrera v. BLM, 38 IBLA 262, 268 (1978) (grazing trespass); Mountain States Telephone & Telegraph Co., 34 IBLA 154, 156-57 (1978) (right-of-way trespass).

It is evident that CM Concepts had knowledge of the permit process at the time of the trespass. Standing alone this fact would not establish that CM Concepts either knowingly removed the mineral material or acted in reckless disregard of its ownership. Mere knowledge that specific behavior is regulated by a statute or regulation (i.e., that the statute or regulation is "in the picture") does not support a finding that the violation was willfully committed, however. See Trans World Airlines, Inc. v. Thurston, supra at 127-28. As stated in Swiss Oil Corp. v. Hupp, 69 S.W.2d 1037, 1042 (Ky. 1934): "The test is not the trespasser's violation of the law in the light of the maxim that every man knows the law, but his sincerity and his actual intention at the time." See also United States v. Homestake Min. Co., 117 F. 481, 485-86 (8th Cir. 1902).

At the time of the trespass, CM Concepts was operating the North Jean Lake Community Pit. Weight or trip tickets in the record clearly indicate that CM Concepts' scales were used to weigh the material being removed from the pit, and its name is found at the top of each weight ticket printout in the file. If CM Concepts was weighing the material being removed and issuing weight tickets showing both the date and time of removal (at least in duplicate), it stands to reason that it had knowledge of the removal of the material. When directed to state the amount of material removed, it submitted three scale tickets issued on June 3, and no more. Subsequent inquiry disclosed the existence of no less than 38 additional tickets. The record supports BLM's finding that between June 3 and June 7, 1991, CM Concepts knew that material was being removed from the pit, and recklessly disregarded its obligation to obtain a contract for removal of mineral material. This disregard continued after it was directed to submit a statement of the amount of material actually removed. The evidence clearly points to knowledge that material was being removed without a contract.

If CM Concepts did not knowingly remove materials in trespass, it exhibited gross indifference. It submitted three weight slips as evidence of the amount removed, a gross understatement of the true amount removed.

---

fn. 4 (continued)
In turn, "nonwillful" is defined in the same code section as "an action which is inadvertent, mitigated in character by the belief that the conduct is reasonable or legal."

It retained (or should have retained) copies of those documents, and its submission of only three does not indicate a good faith effort to comply
by reporting the tonnage of material removed. The court in Dolch v. Ramsey, 134 P.2d 19, 22 (Cal. Dist. Ct. App. 1943), stated that the good faith of a mineral trespasser

> should be measured, not entirely by the words he used in testifying, but by those words when weighed in the light of information easily available to him and the reasonableness of his conclusion when measured by what was in plain sight and what he could have learned by the use of his natural senses and the employment of reasonable prudence.

See also Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co., 203 F. 795, 799 (8th Cir.), cert. denied, 231 U.S. 747 (1913) ("[I]f a person has the means of ascertaining facts, but refuses to use these means, and, reckless of the rights of the true owner, appropriates his property to his own use, the law will presume that he did it intentionally and willfully").

The failure to submit an accurate report of the material removed also indicates a reckless disregard of legal obligations regarding mineral materials owned by the United States--a willful trespass. See, e.g., Dolch v. Ramsey, supra. 5/ As the court said in Resurrection Gold Min. Co. v. Fortune Gold Min. Co., supra at 680: "An intentional or reckless omission to exercise care to ascertain * * * his victim's [rights], for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure as an intentional and willful trespass."

CM Concepts had entered into a contract for the purchase of mineral material the month before. The termination provision of that contract
was clear and unambiguous. CM Concepts' actions clearly indicate that its agents were familiar with the permit procedure and the permit terms and conditions. Considering the nature of CM Concepts' business, its actions between June 2 and June 7, and its subsequent actions, we are convinced that the removal of material between June 2 and June 7 was either intentional or was in reckless disregard of its obligation to gain authority for mineral material removal. See Frehner Construction Co., 124 IBLA 310 (1992); John Aloe, 117 IBLA 298, 301 (1991). CM Concepts has presented no evidence to refute that finding. Therefore, we affirm BLM's finding that CM Concepts' trespass was willful.

[3] Having found a willful trespass, we will consider the appropriate measure of damages. The applicable regulation, 43 CFR 9239.0-8 provides

---

5/ In Dolch, the defendant committed a willful trespass by removing ore from the plaintiff's patented mining claim because the defendant had no reasonable basis for believing that the claim was abandoned. The facts known to him would have caused a man of ordinary prudence to investigate the status of the claim. See 134 P.2d at 22.

that the "rule of damages to be applied in cases of * * * [mineral materials] trespass * * * will be the measure of damages prescribed by the laws of the State in which the trespass is committed." 6/ See Mason v. United States, 260 U.S. 545, 558 (1923); Instructions, 49 L.D. 4284 (1923).

The decision stated that Nevada law does not prescribe the measure for trespass damages for mineral material trespass, and stated that 43 CFR 9230.1-3 would be used as the basis for measurement of damages. We know of no Nevada statute prescribing mineral trespass damages, but state court decisions are applicable. See United States v. Marin Rock & Asphalt Co., 296 F. Supp. 1213, 1216, 1217-18 (C.D. Cal. 1969); John Aloe, supra at 299-301; Harney Rock & Paving Co., 91 IBLA 278, 284-85, 290, 93 I.D. 179, 183, 186 (1986). The Nevada Supreme Court addressed the question of appropriate mineral materials trespass damages in Patchen v. Keeley, supra. 7/ In Patchen v. Keeley, supra at 353, the court stated that, for willful removal of minerals from another's land, "no deductions were allowable for working expenses. In other words, in that case plaintiff was entitled to the enhanced value of the property taken." See also United States v. Wyoming, 331 U.S. 440, 458 (1947); R. A. Vinluan, Annotation, Measure of Damages for Wrongful Removal of Earth, Sand, or Gravel from Land, 1 A.L.R. 3d 801, 811 (1965); V. Woner, Annotation, Right of Trespasser to Credit for Expenditures on Producing, As Against His Liability for Value, Oil or Minerals, 21 A.L.R.2d 380, 391 (1952); 54 Am. Jur. 2d Mines & Minerals § 254 (1971); 43 CFR 9239.5 (mineral trespass). In Nevada, the willful trespasser is charged for the value of the material after it has been extracted and sold, with no deduction for the costs of extraction and marketing. This not only deprives the willful trespasser of the profits, but also penalizes him to the extent he cannot recoup the costs of his wrongdoing.

BLM used a November 6, 1989, mineral appraisal report as the basis for its trespass damages computation: $4.01 per cubic yard for Type II material; and $4.59 per cubic yard for undefined material. CM Concepts has raised no objection to the use of the appraisal as the basis for calculating damages, and has submitted no evidence that other values would be more representative. Therefore, we find no error in BLM's findings that the value of the mineral materials set out in the November 6, 1989, mineral report represent the value of the mineral material found in the North

---

6/ The regulation also states that Federal law prescribing or authorizing a different rule for measuring trespass damages will take precedence over State law. We know of no overriding Federal law governing mineral materials trespass damages.

7/ See also, Dinwiddie Construction Co. v. Campbell, 406 P.2d 294 (Nev. 1965), a case in which the court set the measure of damages for nonwillful mineral materials trespass. The measure of damages adopted by the court for nonwillful trespass was equivalent to the value of the mineral material in place. The court noted that, if the value of the mineral in place was not known, it could be determined by subtracting the cost of extracting and marketing the material from its market price.

Jean Lake Community Pit. See Pacific Power & Light Co., 45 IBLA 127, 140 (1980), aff'd, Pacific Power & Light Co. v. Andrus, No. C80-073K (D. Wyo. June 17, 1983).

The basis for the charge for undefined material was statements by an unidentified witness that five truckloads of material had been removed from the North Jean Lake Community Pit on June 6, 1991. In its notice of appeal CM Concepts referred to that pit as "our pit," and states that it had no knowledge of any unclassified material having left the pit during the period in question, and objects to being charged for removal of undefined material. It states that "[i]f you have information pertaining to hauling of unclassified material from our pit, we would appreciate your sharing this with us. Said information would be helpful in determining if trucks were hauling from our pit during off hours without our permission." All of the weight tickets in the record for June 3, 5, and 6 indicate that Type II material was being removed from the pit during the time in question, and there is no evidence of removal of the higher priced, undefined material. The weight of the evidence in the record supports the finding that only Type II material was being removed from the pit, and trespass damages should be assessed at $4.01 per cubic yard, the value of Type II material. To the extent that BLM used the value of undefined material for computing a portion of the damages, that decision is hereby modified.

The information BLM obtained subsequent to its July 1, 1991, decision allows us to recalculate the trespass damages for material removed on June 5 and June 6. On July 26, 1991, Monroe submitted a statement outlining information uncovered subsequent to the decision on appeal, which was premised upon the incorrect assumption that the information submitted by CM Concepts was accurate and complete.

The charge assessed for Type II material removed on June 3 was based upon three weight tickets submitted by CM Concepts, indicating removal of 64.98 tons of Type II material on that date. CM Concepts stated that "we are in agreement with the 'Type II' calculation in the amount of $186.10" (Notice at 1). The $186.10 was charged for removal of 46.41 cubic yards of Type II material. Therefore, we will use 0.7142 cubic yards per ton (46.41/64.98) as the basis for calculating the amount of Type II material removed on June 5 and June 6, 1991.

The table attached to the Monroe statement lists weight tickets for 38 trucks which hauled 611.33 tons of Type II material from the pit on June 5 and 6, and eight unaccounted-for weight tickets. Considering the blatant failure to comply with the trespass notice directive that CM Concepts submit information regarding material removed, we find it reasonable and justified to assume that the missing tickets also represent shipments of Type II material. Using an average of 16.09 tons per truckload for the trucks weighed during those 2 days, the unaccounted-for tickets represent an additional 128.72 tons of material.

CM Concepts removed 740 tons or 528.5 cubic yards of Type II material from the North Jean Lake Community Pit on June 5 and June 6, 1991. At $4.01 per cubic yard trespass damages of $2,119.28 should have been

assessed for material removed on those days, rather than $344.25. Therefore, we again find it necessary to modify the July 1, 1991, decision. The trespass damages should be $2,305.38 for removal of 574.91 tons of Type II material between June 2 and June 7, 1991. Of that amount $186.10 was submitted with the notice of appeal, leaving $2,119.28 due and owing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

R. W. Mullen
Administrative Judge

I concur:

David L. Hughes
Administrative Judge