

QUALITY EARTH MATERIALS, LLC

IBLA 2001-351

Decided September 23, 2004

Appeal from a decision by the Las Vegas (Nevada) Field Office, Bureau of Land Management, assessing intentional trespass damages for occupying land and processing and removing mineral materials without a contract. N-74976.

Affirmed in part, vacated in part, and reversed in part.

1. Contracts: Construction and Operation: Construction Against Drafter--Contracts: Construction and Operation: Conflicting Clauses--Materials Act

Where a mineral materials sales contract contains two provisions, one allowing the purchaser 30 days after the expiration of the time for extraction and removal of minerals to remove his/her equipment, improvements, or other personal property from Government lands and a second allowing 60 days from expiration to remove equipment, improvements, and other personal property, the contract is properly interpreted to allow the purchaser 60 days to do so. A decision by BLM unilaterally changing that time limit is properly vacated as unauthorized.

2. Materials Act--Trespass: Generally--Trespass: Measure of Damages

The purchaser under a mineral materials sales contract commits occupancy trespass when it allows stockpiles of raw mineral material to remain on the lands and conducts substantial processing operations there beyond the expiration date of the contract. However, where neither

the contract nor the regulations provided for any measure of damages for such occupancy trespass, any damages should be assessed under 43 CFR 9239.0-8 and would be limited to the value of use of the surface of the lands covered by the stockpiles and processing equipment; the damages are accordingly not related to the value of any mineral material stockpiled on the claim during the term of the contract and subsequently removed.

3. Materials Act--Trespass: Generally

Where the purchaser under a mineral materials sales contract pays in advance for 10,000 tons of mineral material and extracts only 7,000 tons of mineral material from the ground (placing it in stockpiles) prior to the expiration date of the sales contract, it has not committed mineral trespass. Nor is it mineral trespass where the purchaser continues to process the previously-mined and stockpiled materials into sand products after expiration of the sales contract, as, by so doing, the purchaser is not taking more mineral materials than it is entitled to under the contract, but is instead merely moving the stockpiles, which were its personal property, as required by the terms of the contract.

APPEARANCES: Corwon J. Finley, Manager, Quality Earth Materials; Mark R. Chatterton, Las Vegas Field Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Quality Earth Materials, LLC (QEM), has appealed the July 25, 2001, decision of the Las Vegas (Nevada) Field Office, Bureau of Land Management (BLM), giving notice that QEM was in trespass as a result of having removed sand and gravel from Federally-owned lands.

On March 22, 2001, BLM and Dakota West, Inc. (DWI) <sup>1/</sup>, signed a contract for the sale of mineral materials contract under the Act of July 31, 1947, as amended (Materials Act), 30 U.S.C. §§ 601-604 (2000). DWI purchased 10,000 tons of sand and gravel at a total price of \$6,000, paid in advance. (Contract, §§ 1-3.) The site is described in the record as the “Grant claims site” in SW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub>, T. 25 S., R. 60 E., MDM. (Nevada 3600 Compliance Inspection Report dated July 9, 2001 (Compliance Inspection Report 1)). The contract expired 3 months later, on June 22, 2001. (Contract, § 10.)

On June 18, 2001, BLM conducted an inspection of the site; BLM’s Compliance Inspection Report states: “Dakota West’s operator was performing equipment maintenance (e.g., welding) on the site. Appeared to have no plans to move equipment (crane, dozer, front-end-loader, conveyor belts, grizzly) and other personal property off-site (e.g., operator inquired about constructing a gate).” (Compliance Inspection Report 1 at 1.)

By letter dated June 22, 2001, BLM informed DWI that its contract had expired that day and that, “per the stipulations of the contract,” it had “60 days from this date to remove equipment, improvements, trash, and other personal property from United States Lands.” BLM also pointed out that “no reports on quantities removed under the contract” had been submitted and requested that DWI do so within 15 days of receipt of the letter.

On June 27, 2001, <sup>2/</sup> QEM informed BLM that it had received the June 22, 2001, letter, but requested “additional time with which to complete our production.” QEM explained that “the first portion of our equipment did not arrive until May 5th” and that, in discussions with BLM personnel, “when we set that date as a starting date for production, I was mistaken in my impression that [it] was our starting date

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<sup>1/</sup> The case record does not identify the relationship between DWI and QEM, or between either of them and Keck and Associates (Daryl Keck). Keck, as described below, was present on site when BLM conducted inspections on June 18 and 30, 2001.

QEM is identified as the “operator” of the operation and its representatives had discussions with BLM personnel during the term of the contract. QEM does not dispute that it was the proper party to receive the trespass notice, but the record before the Board is insufficient to establish its liability under the contract. If it wishes to pursue trespass damages against QEM, BLM should cure this deficiency in the record. See Double J. Land & Cattle v. U.S. Dep’t of Interior, 91 F.3d 1378, 1383 (10th Cir. 1996).

<sup>2/</sup> The letter is dated June 28, 2001, but date stamped as received at BLM’s offices on June 27, 2001.

for the contract or I would have asked for an extension of time at that point.” It noted that it had “only today been able to power up” its crusher on the site, due to equipment suppliers not meeting promised delivery dates. Pointing out that all royalties due had been paid in advance, QEM sought more time “to complete the ten thousand ton limit of the referenced sale.” QEM requested approval to continue operations for 45 days from the June 22, 2001, expiration date.

QEM also enclosed a “sales detail” report listing shipments from May 15 to June 21, 2001, showing total sales of 2,858.8 tons. The report lists sales of two products, blend sand and plaster sand, apparently taken by purchasers from the site.

On June 29, 2001, BLM calculated the volume of material removed from the site, apparently using survey measurements of the excavated pit and stockpile taken during the June 22 inspection, finding that 4,800 cubic yards of material had been removed.

By letter dated July 17, 2001, BLM denied QEM’s request for additional time to operate, pointing out that 43 CFR 3610.1-7 (2001) <sup>3/</sup> allowed an extension of time only when a request had been made prior to expiration of the contract. That was also consistent with the terms of the contract, which required requests for extension to be made “in writing no less than 30 days \* \* \* before” the contract expired. (Contract, § 13.) BLM informed QEM that it would “need to remove all equipment from the site as required by [its] contract.”

On July 18, 2001, QEM filed a report showing sales by item for the month of June 2001. That report shows that both blend sand (374.02 tons) and plaster sand (102.75 tons) products were sold at the site on June 29, 2001, after the expiration date of the contract.

On July 25, 2001, BLM issued the decision on appeal, advising QEM that its contract from BLM (N-74315) had expired on June 22, 2001; that a request for extension had been denied on July 17, 2001; and that the company was “occupying [Federally-owned] lands and processing mineral materials without any authorization” and was, therefore, in trespass. BLM determined that QEM was in violation of several statutory provisions and 43 CFR 9239.0-7. BLM instructed QEM to immediately cease operations and to remove all equipment from the site within

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<sup>3/</sup> The regulations at 43 CFR Part 3600 governing mineral materials disposal have been revised. 66 FR 58892, 58901 (Nov. 23, 2001). The regulations at 43 CFR Part 3600 (2001) were in effect at the time of the contract and control the present matter.

2 days of receipt of the decision. It also required QEM to submit a final report within 10 days showing the amount of material removed after June 22, 2001.

On July 31, 2001, BLM conducted another compliance inspection. Two BLM inspectors visited the site and took photographs. The compliance inspection report identifies “Quality Earth Materials (Dakota West, Inc.)” as “operator” and states that “Keck and Associates were still occupying the site and appeared to have no plans to move equipment \* \* \* and other personal property off-site.” (Nevada 3600 Compliance Inspection Report dated Aug. 2, 2001 (Compliance Inspection Report 2), at 1.) The report also records that the BLM inspector informed “Keck and associates that a request for extension had been denied and they would be charged with willful trespass if they continued to produce without a contract,” and that “Mr. Keck informed [the inspector] that no production had occurred within the last two weeks and they had received” BLM’s July 25 letter the previous day. Id. The photographs indicate that the a sand processing operation involving numerous pieces of equipment had been set up on the site and that processed sand lay in stockpiles around the site. It also appears that unprocessed mineral material lay in stockpiles around the site. See id. at 1-3.

Also on July 31, 2001, QEM filed a timely notice of appeal of BLM’s July 25, 2001, trespass notice and requested a stay of the decision.

After receiving QEM’s notice of appeal, BLM inspectors again visited the site on August 1, 2001, and two inspection reports were prepared. One, entitled Nevada 3600 Compliance Inspection Report and dated August 2, 2001 (Compliance Inspection Report 3), states that, at 8:00 a.m. “Keck and Associates were actively processing and hauling material off the site” despite “the warnings given” the previous day. The second, entitled Nevada Trespass Compliance Inspection Report dated August 1, 2001 (Trespass Inspection Report), signed by a different BLM inspector, states that, when he visited the site the same morning, “[n]o equipment was running at the time of the inspection,” but, “[f]rom loader tracks on the ground, it was obvious that materials had been removed from a large pile of mineral materials that had been pushed up out of the pit (photos 1-3).” The inspector also reported that “Daryl Keck stated that they had removed materials from the pile and processed them through the equipment earlier this morning” and that he understood that “[t]hey were allowed to remove extracted materials since they had been paid for.” The inspector “told Mr. Keck that his understanding was incorrect” and informed him that “they were removing materials from the pile and processing them to create a product (photo 4); that “[c]reation of a product would be considered extraction”; and that he “believed this was a willful trespass.” (Trespass Inspection Report at 1.) Photo 1 assertedly shows material that was “pushed up directly out of the pit that

[had] not been previously processed.” Id. at 2. However, there is no probative evidence indicating when this material was removed (“pushed up”) from the pit.

In its notice of appeal/petition for stay (NA/PFS), QEM explained that the mining operation it initiated in early May had “produced approximately seven thousand tons of material of which approximately one half remains piled to the south of the equipment on site.” QEM asserted that the stockpile was personal property and that both its contract and BLM’s June 22, 2001, letter recognized that it was allowed 60 days “to remove [its] equipment and other personal property from the site.”

BLM’s response to the NA/PFS relies upon Section 3 of the contract, which states in part: “You receive title to the mineral materials only after you have paid for them and extracted them.” BLM understands the issues on appeal to concern the meaning of the term “extraction” and whether the stockpile QEM refers to “falls within that meaning.” (BLM Response at 2.) BLM points out that the pile of material which had been “pushed up” is “undifferentiated materials, of various sizes,” which is then “processed into product (in this case sand)” and removed from the site. Id. BLM explains its position as follows:

There is no definition of the term extraction in the 43 CFR 3600 [(2001)] regulations. A common dictionary definition is “to remove or take out”. The BLM would add “to process materials to produce a product” to that definition. The pile of undifferentiated materials were \* \* \* processed [by QEM] to make sand. Sand is the only product shown in QEM’s reports to have been extracted and removed from this site. It is this final product which would belong to [QEM]. If at the time of expiration of the contract, [QEM] were to have a stockpile of product at the end of [its] processing circuit, then that stockpile would belong to it. [QEM] would have had the right to remove it from the site within 60 days of the expiration of the contract. However, [QEM] does not have the right to continue to process the undifferentiated materials to extract the sand once the contract has ended, regardless of whether the materials have been paid for in advance.

(Id. at 2-3.)

QEM filed a statement of reasons (SOR) on August 30, 2001. It agrees with BLM that “extraction” means “to remove or take out,” but maintains that DWI’s “right to the initial stockpile of material was cemented as personal property once that material was moved.” (SOR ¶ 3.) In response to BLM, QEM points out that the

contract “does not require that the material be processed in order for it to qualify as a product to be removed” and that BLM acknowledges that a stockpile of product would belong to QEM and that it would be entitled to remove the stockpile from the site after expiration of the contract. (SOR ¶ 4.) QEM contends that the trespass notice was issued in error and that it should be allowed to remove its personal property from the site. (SOR ¶¶ 8 and 9.)

By order dated September 7, 2001, we granted in part and denied in part QEM’s stay request. We stayed the effectiveness of the decision insofar as it directed QEM to remove its equipment within 2 days, under threat of impoundment of equipment left on the site, pointing out therein that the sales contract is internally inconsistent because Section 14 allows 60 days from expiration “to remove your equipment, improvements, and other personal property,” while Stipulation 8 provides that the purchaser has “the right within thirty (30) days after the expiration of the time for extraction and removal of minerals \* \* \* to remove his/her equipment, improvements, or other personal property from Government lands or rights-of-way.” (Order at 2.) We interpreted the contract as allowing a minimum of 60 days from the date of expiration for removal of equipment,” so that we found no basis for BLM to shorten that time to 2 days. Id.

We also noted that since the contract required stockpiles of material to be removed on or before contract termination unless additional time was approved in writing by BLM (Contract, Stipulation 12), it appeared that maintaining stockpiles on the lands past the date of contract termination amounted to a trespass. (Order at 2-3.) However, as discussed below, the measure of damages for such trespass is at issue and does not correspond to the damages associated with removing mineral material in trespass.

Recognizing that QEM might have perpetrated a trespass by continuing to mine (“push up”) mineral material after the June 22, 2001, contract expiration date, we required QEM to report both the volume of mineral material which had been mined (“pushed up”) after that date as well as the volume of mineral material that had been processed (differentiated) from stockpiles in place on that date. QEM responded to our order on October 2, 2001.

[1] To the extent that BLM’s July 25, 2001, decision instructed QEM to remove all equipment from site within 2 days of receipt of the decision, it must be vacated. Stipulation 8 provides that the purchaser has “the right within thirty (30) days after the expiration of the time for extraction and removal of minerals \* \* \* to remove his/her equipment, improvements, or other personal property from Government lands or rights-of-way,” and Section 14 of the sales contract allows 60 days from expiration “to remove your equipment, improvements, and other

personal property.” We interpret these plainly conflicting provisions to allow 60 days for removal of equipment, improvements, and other personal property from the lease site, in keeping with the principle that ambiguities or uncertainties in the terms of a contract are construed against the drafter of the contract on the grounds that he is the party who caused the ambiguity. Ute Water Conservancy District, 106 IBLA 346, 359 (1989); OSM v. P & K Company, Ltd., 99 IBLA 257, 262 (1987); see also Bender v. Hearst Corp., 263 F.2d 360, 367 (2d Cir. 1959); Abady v. Hanover Fire Ins. Co., 266 F.2d 362, 364 (4th Cir. 1959); Myers Motors, Inc. v. Kaiser Frazier Sales Corp., 83 F. Supp. 716 (D. Minn. 1949). BLM initially granted QEM 60 days in its June 21, 2001, letter, or until August 21, 2001. BLM lacked authority to unilaterally modify those terms subsequently. Accordingly, to the extent that BLM ordered QEM to remove its personal property within 2 days of receipt of its decision, its decision is vacated.

[2] We can affirm BLM’s decision to the extent that it held that QEM committed trespass by “occupying [Federal lands] \* \* \* without any authorization.” There is no question that QEM allowed stockpiles of raw mineral material to remain on the lands and conducted substantial processing operations there well beyond the expiration date of the contract. That violated Stipulation 12(b) of the contract, which expressly provides “Stockpiles must be removed on or before contract termination unless additional time is approved in writing by the authorized officer.” It is also clear from the regulations that a mineral material sales contract gives the purchaser the right to “extract, remove, process and stockpile” material and to “use and occupy the described lands” only “until the termination of the contract.” 43 CFR 3601.1-3(a)(1) and (2). Violating that term was an occupancy trespass; further, maintaining personal property on the site past the August 21, 2001, deadline for removal was also an occupancy trespass.

However, neither the contract nor the regulations provided for any measure of damages for this occupancy trespass. Accordingly, any damages should be assessed under 43 CFR 9239.0-8 by BLM upon the return of this matter to it. However, it would appear that such damages for this occupancy would be limited to the value of the use of the surface of the lands covered by the stockpiles and processing equipment; the damages are accordingly not related to the value of any mineral material stockpiled on the claim during the term of the contract and subsequently removed. As in any holdover tenancy, damages would likely be limited to the rental value of the property for the term of the holdover. <sup>4/</sup> In view of the apparent

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<sup>4/</sup> Those damages would also apparently be limited to no more than the rental value for the 90 days that it appears QEM occupied the site beyond contract expiration, QEM having advised that it had removed its equipment from the site as of Sept. 21, 2001. (Response to Sept. 7, 2001, Order at 2-3.)

limited utility of the surface, we would not expect those damages to be high enough to be worth collecting.<sup>5/</sup>

[3] It remains to determine whether, as BLM held, QEM committed trespass by “processing mineral materials without any authorization.” (Decision at 1.) As discussed above, QEM had no authority to conduct processing operations on the site after the expiration of the contract, and to the extent that it occupied the premises to do so after the contract expiration, it committed occupancy trespass.

However, we do not agree with BLM that QEM’s processing of mineral material stockpiled on the claim was mineral trespass covered by the terms of either the contract or the trespass regulations.

The terms of the contract specifically address only post-expiration “extraction” (but not “processing”) of mineral materials. Thus, Section 11(b) of the contract provides that, “[i]f you [(the purchaser)] extract any mineral materials sold under this contract \* \* \* after the contract has expired \* \* \* , you have committed willful trespass and are liable for triple damages.” Stipulation 6 provides that, “[i]f Purchaser \* \* \* extracts [mineral] materials [sold under this contract] after expiration of the time for extraction, \* \* \* such extraction \* \* \* shall be considered both a willful trespass and a criminal trespass.” The measure of damages would be presumably three times the value of the mineral extracted in trespass. The importance of the matter is highlighted by the fact that such action is considered criminal and may bar the actor from receiving future contracts. In our view, those provisions are designed to prevent a contractor from exceeding the contractual limits on the amount of mineral material removed or mined from the ground.

QEM did not mine more material than authorized or fail to pay for any of the material that it did mine. To the contrary, the record shows that it did not come close to mining the 10,000 tons it was authorized to remove under the contract and which it paid for in advance. In these circumstances, where QEM actually paid for more material than it extracted, it is hard to imagine how it could be properly held to be liable for triple damages.

We find that QEM’s actions did not violate the terms of the contract, in that it did not “extract” any mineral materials without authority. The materials that QEM did extract, by removing them from the ground, were paid for in advance and extracted during the term of the contract, and it was fully authorized to extract them. QEM’s September 21, 2001, response to our order explains that it “used a D10 dozer

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<sup>5/</sup> Any subsequent BLM decision assessing damages would be subject appeal under 43 CFR Part 4.

to ‘push up’ material early in the month of May,” estimating the amount to have been 7,000 tons. (Response at 1.) That is consistent with BLM’s inspections reports and photographs, which show large piles of raw mineral material awaiting processing as of the expiration date of the contract. Nothing shows that material was “pushed up” after the June 22, 2001, expiration of the contract. <sup>6/</sup> In the absence of evidence to the contrary, we find that no material was extracted (“pushed up”) after June 22 and that there is no basis to conclude that QEM committed trespass because of such activity.

Nor, we hold, did QEM’s subsequent processing of stockpiled raw mineral materials into sand constitute “extraction” within the meaning of the contract. The contract as a whole reveals that “extraction” is used to refer to the act of removing mineral material from the ground. Although the terms “extract” and “extraction” are sometimes also used to refer to the processing of material to separate out a product, such as “extracting” gold from ore (see A Dictionary of Mining, Mineral and Related Terms at 404 (Paul W. Thrush ed., Bureau of Mines 1968)), we deem it illogical to extend the term to the act of processing mineral material into sand in the context of a contractual provision plainly intended to punish a party from stealing Government property by removing excess mineral material from the ground without paying for it. We cannot conclude that QEM’s actions in the present case, in which it paid in advance for more mineral material than it actually extracted, justified the imposition of triple damages or constituted criminal activity.

We must also address whether QEM committed a mineral trespass within the meaning of Departmental regulations. The regulations governing mineral materials disposal define “unauthorized use” in terms only of “extraction, severance, or removal of mineral materials” (but not “processing”):

Except when authorized by sale or permit under law and the regulations of the Department of the Interior, the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use. Unauthorized users shall be liable for damages to the United States, and shall be subject to prosecution for such unlawful acts (see subpart 9239 of this title).

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<sup>6/</sup> BLM’s Aug. 1, 2001, trespass inspection report (Photo 1) purports to show a “recently disturbed” pile of material that “was pushed up directly out of the pit.” That is insufficient to establish that extraction or severance of material occurred after the expiration date of the contract.

43 CFR 3603.1. Departmental regulations governing trespass generally also deal with unauthorized “extraction, severance, injury, or removal” (but not “processing”) of mineral materials:

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, and will be subject to prosecution for such unlawful acts.

43 CFR 9239.0-7.

First, QEM did not continue to extract mineral material (remove it from the ground) after the expiration date of the contract, and so did not commit trespass in that way. Although such activity would likely constitute “extraction” or “severance” under the meaning of the regulatory trespass provisions, we (as set out above) find no evidence in the record that QEM did this.

Second, the processing activities and removal of processed sand that QEM did undertake after the expiration date did not violate the terms of the regulations. As noted above, they were not “extraction” within the meaning of these trespass regulations; nor can we see that they amounted to “severance” or “injury” of mineral materials. To the extent that QEM “removed” minerals from the site after the expiration of the contract, it was fully authorized, and even required, to remove stockpiled material from the site. See Contract Stipulation 12. <sup>7/</sup> Under Section 3 of the contract, once the mineral material was severed from the ground, it became QEM’s personal property. <sup>8/</sup> See also Forbes v. Gracey, 94 U.S. 762, 765-66 (1877); Atlas Milling Co. v. Jones, 115 F.2d 61, 63 (10th Cir. 1940); Mid-Continent

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<sup>7/</sup> Stipulation 12 provides that “[s]tockpiles must be removed on or before contract termination unless additional time is approved in writing by the Authorized Officer” (emphasis omitted). Not only does the sentence imply that the purchaser owns stockpiles and is entitled to remove them, but it precludes an alternative analysis that the Government holds title. Thus, if stockpiles are Governmental property or become property of the Government upon expiration of a contract, the authorized officer would not have authority to grant additional time for their removal because he would be giving away the Government’s property.

<sup>8/</sup> Under that provision, QEM acquired ownership once material was both paid for and “extracted.” QEM paid the full amount due under the contract in advance. As noted above, the term “extracted” in the context of the contract refers to the act of removing the mineral material from the ground, which occurred before the expiration date of the contract.

Resources, Inc., 148 IBLA 370, 375 (1999); 6 Thompson on Real Property § 48.02(b) (Thomas edition, 1994); Barringer & Adams, The Law of Mines and Mining in the United States at 5 (Keefe-Davidson Co. 1900). Accordingly, as of the date of expiration of the contract, QEM owned the mineral material that it subsequently processed and removed. Although the terms of the contract specify that stockpiled materials (unlike other personal property, for which 60 days were allowed for removal) had to be removed no later than the expiration of the contract, that does not alter the fact that the stockpiles were QEM's property as of the date of termination of the contract. Accordingly, QEM was fully authorized by law to process their material and remove it, and the act of doing so was not a mineral trespass.<sup>2/</sup> BLM's decision is reversed to the extent that it concluded otherwise.

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 in part, vacated in part, and reversed in part.

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David L. Hughes  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

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<sup>2/</sup> As noted above, use of Federally-owned lands to process QEM's material was, however, an occupancy trespass.