

JOHN ALOE AND LIBERTY MASONRY, INC.

IBLA 90-174

Decided January 17, 1991

Appeal from a decision by the Grand Junction, Colorado, District Manager, Bureau of Land Management, assessing damages for conversion of building stone. COC 50746.

Affirmed as modified.

1. Trespass: Measure of Damages

The proper measure of damages for intentional conversion of decorative building stone taken from Federal lands in the State of Colorado is the value of the stone without deduction for extraction costs. The measure of damages to be used is derived from state law, in the absence of Federal law authorizing imposition of a different rule.

2. Trespass: Measure of Damages

Consistent with Colorado law, damages for intentional trespass involving stone on Federal lands require payment of full value of the stone taken without deduction for labor or expense in removing and marketing the stone.

3. Board of Land Appeals

The Board of Land Appeals may assess damages for trespass in the exercise of its de novo review authority which includes the right to determine any factual or legal question necessary to adjudicate an appeal. Where the record on appeal establishes the proper measure of damages but the amount of material taken is shown to be less than was assessed, the correct amount of damages is assessed by the Board.

APPEARANCES: John Aloe, Avon, Colorado, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

John Aloe and Liberty Masonry, Inc., have appealed from a decision by the Grand Junction, Colorado, District Manager, Bureau of Land Management (BLM), dated December 18, 1989, assessing damages for intentional

trespass in the amount of \$2,000 for removal of 10 tons of building stone from Federal lands in sec. 24, T. 4 S., R. 84 W., sixth principal meridian, Colorado. BLM determined that the stone was taken by intentional trespass because, in order to remove it from the Federal lands, the masonry company truck driver was obliged to pass through a gate bearing a sign reading "Entering Public Lands" and stating that materials such as the building stone taken could not be removed without authorization from BLM.

In a statement of reasons (SOR) filed with BLM, appellants contend that no more than 5 tons of material were taken by their driver, the remaining amount having been taken from private property adjacent to the public land administered by BLM. Appellants suggest that BLM should obtain more information concerning this aspect of the case from the investigator who detected the trespass, since the employee who gathered the stone has since left their employ. The SOR also contends that the measure of damages used by BLM to calculate the bill for the material removed was incorrect, and argues that a bill for stone removed pursuant to a lease with the U.S. Forest Service (FS) showing that 10 yards of stone cost appellants \$45 in June 1987 provides a better measure of value. Appellants also argue that their employee did not intentionally take Federal property without authorization to do so, but that, because of the proximity of private land with similar material, that the taking was accidental.

When assessing the measure of damages to be applied, BLM first determined, according to records in the case file, that there was no Colorado law to be applied. This finding appears in the decision issued on December 18, 1989, which states, pertinently:

Under the regulations at 43 CFR 9239.0-9, 9239.5-1, and 9239.5-3, the measure of damages for willful trespass of mineral materials is full value of the material at the time of conversion without deduction for labor bestowed or expense incurred in removing and marketing the material. Our investigation has determined that the full value of the the material removed is \$200.00 per ton.

Id. at 1. The investigation into damages conducted by BLM consisted of a telephone call to appellant Aloe, who responded, in answer to questions about the value of the type of stone taken, that the cost of such material to a retail customer would be "\$200 per ton, with a ton being a pallet of rock about 4x4x3 feet in size. This would be the price if [the customer] picked it up and installed it."

[1] Under Departmental regulation 43 CFR 9239.0-8, BLM should apply "the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized." When they determined that there was no Colorado law to apply, however, the BLM employees reviewing this case were mistaken. As we observed in Harney Rock & Paving Co., 91 IBLA 278, 93 I.D. 179 (1986), this is a frequent error that may require corrective action. In this case, however, the error was harmless.

Summarizing the Colorado law on the subject, Kroulik v. Knuppel, 634 P.2d 1027, 1030 (Colo. App. 1981), a case involving a sand and gravel trespass, states:

When a non-willful trespasser appropriates mineral, the measure of damages is the value of the minerals in place. * * * Such value may be calculated by ascertaining the amount of royalties the landowner would receive or could have received from the trespassing appropriator. * * * Use of a royalty-based valuation permits the landowner to recover the amount the landowner would have realized by contracting for removal of the minerals, without unduly penalizing the merely negligent trespasser. However, this damages measure permits the extractor to retain the profit, if any, realized from the mining venture. [Citations omitted.]

Another means for determining the value of the minerals in place--calculation of the value at the surface less the direct costs of extracting them--does not allow the excavator to retain profits. This measure of value has been employed in trespasser cases. United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 P. 1045 (1897); St. Clair v. Cash Gold Mining & Milling Co., 9 Colo. App. 235, 47 P. 466 (1896). Furthermore, a willful or intentional trespasser may be required to recompense the land-owner for the value of the minerals at the surface without deductions for extraction costs. United Coal Co. v. Canon City Coal Co., *supra*.

In United Coal Co. v. Canon City Coal Co., *supra* at 1047, a coal trespass case, the court held that:

The defendants being willful trespassers, it was proper to allow the full value of the coal mined, without deduction for their labor and expense in mining the same; the rule of damages being the value of the ore at the time and place it is severed from the realty. If the court had found that the trespass of the defendants was innocent in character, the rule would have been the value at the time of the conversion less the amount which the defendants by their labor had added to that value.

Similarly, the St. Clair decision, *supra*, states the rule that

if the defendants had taken out the ore, not as the result of an honest mistake or an honest intention, but under circumstances which showed that they had knowledge of the situation, or the circumstances were such as to legally charge them with this knowledge, they are entitled to no such deduction [for costs of production], and they may not reduce the amount of recovery by proving the costs of mining.

Id. at 47 P. 468.

BLM overlooked these Colorado cases and applied Departmental regulation 43 CFR 9239.5-3(2) which establishes, for a willful trespass, that

the measure of damages is "the full value of the coal at the time of conversion without deduction for labor bestowed or expense incurred in removing and marketing the coal." ^{1/} This standard, the same standard that would have been applied under Colorado law, was applied in the decision of December 18, 1989. Consequently, the error made when determining the law to be applied was harmless, because the State rule was the same, in this case, as the rule established by regulation.

[2] Although appellants contend that their employee must have taken the Federal stone by mistake, they have offered no proof to rebut the circumstance described by BLM showing that the location where the stone was taken was marked so that a mistaken taking was unlikely. No effort is made to explain how appellants' employee was able to overlook the fence and signs erected by BLM on the Federal land. On appeal to this Board, the burden of proof by a preponderance of evidence is on the party appealing to show that BLM has committed an error: in the absence of such a showing, BLM will be affirmed. Galand Haas, 114 IBLA 198 (1990); Richard A. Willers, 101 IBLA 106 (1988); accord, see Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co., *supra* at 803. In the absence of proof to show that the taking was unintentional, we therefore find that BLM correctly determined that the trespass was willful in this case.

Similarly, appellants have offered nothing to show that the measure of damages they contend should be applied, \$45 for 10 yards of stone, is applicable. It is true, as pointed out in Kroulik v. Knuppel, *supra* at 1030, that Colorado law supports use of a measure of damages based on a royalty valuation, similar to the charge imposed by the FS in the 1987 billing offered by appellants with their SOR, but this measure of damages is reserved for cases where the trespass was unintentional. *Id.*

[3] Concerning the finding by BLM that 10 tons of material were removed, however, the record is insufficient to support a finding that more than 5 tons of material had been removed from Federal lands. In Benton C. Cavin, 83 IBLA 107 (1984), we found that error in a BLM appraisal required that the Board, "in the exercise of our de novo review authority, which includes the right to determine for ourselves any factual or legal question necessary to adjudicate an appeal" should itself establish the value of the property subject to review. *Id.* at 125. So too, in this case, we are required to evaluate the amount of damages due because of appellants' trespass on Federal lands in light of the evidence of record concerning the quantity of stone taken.

^{1/} The regulation cites a case arising in Colorado involving a metallic ore, Liberty Bell Gold Mining Co. v. Smuggler-Union Co., 203 F. 795 (8th Cir. 1913), as the source for the rule stated. This decision approved an instruction to the jury that if the conversion of ore was intentional, there could be no allowance made for expenses in refining the ore, because "in that event the plaintiff is entitled to recover the full amount realized by defendant from the conversion of the ores to its own use, regardless of the expenditures incurred." *Id.* at 806.

As appellants point out, the BLM investigator who initiated this trespass action found that 5 tons of stone had been taken from Federal lands marked by the sign "Entering Public Lands." He did not determine that there had been a total of 10 tons of such material removed from Federal property, although he suspected that may have been the case and suggested further investigation into the question whether there had been an additional 5 tons removed by appellants' driver. Subsequent investigation by other BLM staff members established the value of the stone removed but failed to include an inquiry into whether an additional 5 tons of stone was taken from the Federal land. Although it appears that appellants did not purchase similar stone from a nearby landowner, as they claimed to have done, the record is silent concerning the origin of the additional 5 tons. The record before us simply does not support a finding that this stone came from Federal land, although it is possible that it may have originated there. As a result, no more than 5 tons of rock may be charged to appellants, there being no proof on the record before us that more than 5 tons of Federal stone were taken. Edmund Key, 117 IBLA 274 (1991); Soderberg Rawhide Ranch Co., 73 IBLA 260 (1982). Having determined that only 5 tons of the material taken are shown on the record before us to have come from Federal land, we modify the decision under review and assess damages for intentional trespass in the amount of \$1,000 for removal of 5 tons of rock valued at \$200 per ton.

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 by this decision.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge