

KARRY K. KLUMP

IBLA 90-524

Decided July 23, 1992

Appeal from a decision of the Safford, Arizona, District Office, Bureau of Land Management, finding appellant to be in trespass for road construction and fixing restoration and administrative costs. A 24476.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations--Trespass: Generally

A mining claimant who constructs a road and clears land in a wilderness study area in connection with a post-FLPMA mining claim violates 43 CFR 3802.1-1 by failing to file a plan of operations and receive approval prior to beginning work. Such unauthorized actions constitute a trespass under 43 CFR 2801.3.

2. Mining Claims: Plan of Operations--Trespass: Generally

A mining claimant who constructs a road across public lands in connection with a mining claim without filing a notice of such action with BLM violates 43 CFR 3809.1-3(a). Such construction is unauthorized and constitutes a trespass under 43 CFR 2801.3.

3. Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations--Trespass: Generally

A mining claimant who violates 43 CFR 3802.1 by constructing a road in a wilderness study area in conjunction with a mining claim without filing and receiving approval of a plan of operations or who violates 43 CFR 3809.1-3(a) by constructing an access road across public lands to a mining claim without filing a notice of such action with BLM is liable for the costs of rehabilitating and stabilizing such lands and for costs incurred by the United States in the investigation and termination of such trespass.

APPEARANCES: Karry K. Klump, Bowie, Arizona, pro se; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Karry K. Klump has appealed from a decision of the Safford, Arizona, District Office, Bureau of Land Management (BLM), dated August 13, 1990, finding appellant to be in trespass for constructing 520 feet of road on public land and clearing natural vegetation on approximately 1 additional acre of public land. BLM's decision fixed appellant's liability for such actions at \$9,666 (restoration costs of \$5,800 plus administrative costs of \$3,866). As support for this assessment, BLM relies primarily upon the regulation at 43 CFR 2801.3.

Lands affected by appellant's actions are in secs. 15 and 16, T. 14 S., R. 27 E., Gila and Salt River Meridian, Cochise County, Arizona. The record shows that the subject road begins at a preexisting road in sec. 16, continues eastward into sec. 15, and ends there in the cleared area. The cleared area is contiguous with patented land owned by appellant. In a July 13, 1990, notice of trespass, BLM informed Klump that all of the subject road in sec. 15 was in the Dos Cabezas Mountain Wilderness Study Area (WSA) (AZ-040-65). 1/ The portion of the subject road in sec. 16 is on public land obtained by exchange from the State of Arizona in May 1988.

Klump does not deny constructing the road or clearing the land. He contends, however, that the "[a]rea is outside of any wilderness study areas" (Statement of Reasons, Sept. 24, 1990, at 1). The subject road was built in 1988, appellant maintains, and BLM has known about this road for 2 years, having been notified by appellant's 1988 affidavit of assessment work. Id. at 2. It appears from the record that the road, at least in part, crosses appellant's White Oak mining claim, 2/ which straddles the common boundary between secs. 15 and 16.

Appellant cites regulation 43 CFR 3802.0-5(f) as authority for his "right to improve and maintain access" to his claim. 3/ The dozer work

1/ Survey plats and maps in the record indicate that the cleared area is also within the WSA.

2/ The White Oak lode claim was located by appellant on July 30, 1987, after passage of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1988). The copy of the notice of location filed by appellant with the Board on Sept. 17, 1990, discloses that the east end line of the White Oak claim corresponds with the west line of the Cedar Tree patented mining claim in sec. 15. Thus, the cleared area may also lie within the unpatented mining claim.

3/ This section defines the term "mining operations" to mean

"all functions, work, facilities, and activities in connection with the prospecting, development, extraction, and processing of mineral deposits and

involved here, Klump states, has "everything to do with mining and assessment work." Appellant contends it is BLM's policy to provide private property owners reasonable means of access across public lands to their property. The record indicates that patented mining claims atop Cooper Peak adjacent to the White Oak mining claim are owned by appellant.

In support of his statement that the "[a]rea is outside of any wilderness study areas," appellant sets forth a copy of a map from page 447 of the Safford District Final Wilderness Environmental Impact Statement (EIS). Because of the very small scale of this map, it is not possible to determine whether the road and cleared area are within the WSA. A second map supplied by Klump (15-minute Dos Cabezas quadrangle) showing the White Oak claim also does not resolve this issue.

Because of this difficulty, BLM engineers Bob Pascoe and Scott DeBock surveyed the area in dispute, spending 5 days in doing so. Their plat shows that the subject road connects secs. 15 and 16 south of the quarter corner common to secs. 15 and 16. At the end of this road in sec. 15 lies the cleared area. Approximately 220 feet of the road and 0.84 acre of cleared land are within sec. 15, BLM found, and the remaining 300 feet of road are in sec. 16. A large-scale copy of the survey plat in the record is clearly marked to show the public lands in sec. 16 and the WSA in sec. 15 embraced within the asserted trespass, as well as the adjoining patented private land of the appellant.

Elsewhere in the record, BLM has displayed on a single topographic map the WSA boundaries, the road in dispute, and Klump's private lands on Cooper Peak. Because the scale of this map and of the survey plat are both considerably larger than that set forth in the EIS, it is clear that all of the disputed road in sec. 15 is within the WSA. At the end of this road in sec. 15 is the 0.84 acre of cleared land, also squarely within the WSA. That portion of the road in sec. 16 is outside the WSA.

This topographic map and plat of the Pascoe-DeBock survey were prepared by BLM prior to the decision on appeal. Appellant, however, has made no serious attempt to show error in these materials. He prefers instead to rely on a map which, because of its small scale, is inconclusive at best. The duty to show error in BLM's determination rests with appellant. United States v. Connor, 72 IBLA 254 (1983). Appellant's evidence in the record does not satisfy this burden.

Regulation 43 CFR 2801.3(a) provides that any use, occupancy, or development of the public lands that requires a right-of-way, temporary use permit, or other authorization, which authorization has not been obtained, is prohibited and shall constitute a trespass. See also 43 CFR 9239.7-1.

fn. 3 (continued)

all uses reasonably incident thereto including the construction and maintenance of means of access to and across lands subject to these regulations, whether the operations take place on or off the claim."

Authorization for construction of access facilities for unpatented mining claims within a WSA is obtained by BLM's approval of a plan of operations. See 43 CFR 3802.0-1. Regulation 43 CFR 3802.1-1(a) makes clear that "[a]n approved plan of operations is required for operations within lands under wilderness review prior to commencing any mining operations which involve construction of means of access." ^{4/} (Emphasis added.)

[1] The record contains no indication that appellant received approval of a mining plan of operations prior to constructing the subject road within the WSA in sec. 15. Indeed, the record does not reveal the existence of a plan of operations at all. Where, as here, road construction occurs in a WSA, a party performing such construction is required by 43 CFR 3802.1-1 to seek advance approval. Klump's construction without an approved plan was a trespass. See Richard C. Behnke, 122 IBLA 131, 139 (1992).

A similar analysis and conclusion is applicable to the acreage in the WSA cleared by appellant. Regulation 43 CFR 3802.1-1 requires advance approval of a plan of operations prior to commencing land clearing. Appellant's clearing of land without an approved plan was a trespass.

An operator is entitled to nonexclusive access to his mining operations in a WSA, but such access must be consistent with provisions of the mining laws and Departmental regulations. 43 CFR 3802.4-2(a).

[2] The road constructed by appellant in sec. 16 was outside of the Dos Cabezas WSA, and appellant was subject here to the surface management regulations at 43 CFR Part 3809. Assuming, arguendo, that appellant's mining operation caused a cumulative surface disturbance of 5 acres or less, ^{5/} he was required by 43 CFR 3809.1-3(a) to notify BLM before commencing road construction. Appellant's failure to file a notice with BLM subjected him, at the discretion of the authorized officer, "to being served a notice of noncompliance or enjoined from the continuation of such operations by a court order until such time as a notice or plan is filed." 43 CFR 3809.3-2(a). Road construction prior to filing this notice was not authorized by the regulations. This was also a trespass. 43 CFR 2801.3.

Regulation 43 CFR 3809.3-3 makes clear that an operator is entitled to access to his operations consistent with provisions of the mining laws. Where a notice is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. To minimize the number of such routes, the authorized officer may require the operator to use existing roads and, if practicable, to construct access roads within a designated transportation or utility corridor.

^{4/} Also relevant is regulation 43 CFR 3802.1-1(c), which calls for an approved plan of operations prior to commencing mining operations using tracked vehicles or mechanized earth-moving equipment, such as bulldozers or backhoes.

^{5/} BLM calculated that road construction in sec. 16 caused ground disturbance of 0.14 acre. In sec. 15, road construction disturbed 0.10 acre, and the cleared area totalled 0.84 acre.

Appellant also challenges the trespass decision on the ground that BLM and the State of Arizona unlawfully exchanged lands in sec. 16. Appellant here refers to Fain Land & Cattle Co. v. Hassell, 163 Ariz. 587, 790 P.2d 242 (1990), a decision of the Supreme Court of Arizona. This case held that a State exchange of school lands was not permitted by the Arizona Constitution, because such exchange would occur without the benefit of a public auction, contrary to article 10, section 3, of the State Constitution. 790 P.2d at 248.

In determining whether to give retroactive effect to its decision, the Supreme Court of Arizona found that the decision, if applied retroactively, might inflict great hardship on many innocent people and disrupt the economy of the State. It concluded, therefore, that "exchanges accomplished in compliance with the state's fiduciary obligations and with the 1936 exchange amendment to the Enabling Act and prior to the date of the opinion in Deer Valley are not void." 790 P.2d at 252.

Deer Valley Unified School Dist. v. Superior Court, 157 Ariz. 537, 760 P.2d 537 (1988), was decided by the Supreme Court of Arizona on June 30, 1988, and reconsideration was denied on September 20, 1988. A serial register page of the exchange in dispute indicates that title to sec. 16, T. 14 S., R. 27 E., was accepted by the United States on May 26, 1988. Accordingly, we must reject appellant's contention.

The road construction and land clearing in dispute are said by appellant to have occurred prior to the subject exchange, i.e., at a time when the State of Arizona owned the lands in sec. 16. This fact, if true, 6/ does not prevent BLM from maintaining a trespass action, because it is clear from the record that the road building was not authorized by the State and, hence, appellant's actions are in the nature of a continuing trespass. See Storey v. Patterson, 437 So.2d 491 (Ala. 1983). 7/ The Restatement (Second) of Torts § 161 cmt. e (1965) makes clear that a transferee of a possessory interest in land upon which a continuing trespass is occurring may maintain an action.

The United States has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. United States v. Osterlund, 505 F. Supp. 165, 167 (D. Colo. 1981). No authorization for road construction in sec. 16 has been granted to appellant by the State of Arizona.

[3] The remedy sought by the United States in the present case, restoration and rehabilitation of the lands in sec. 15 and 16, is plainly authorized by 43 CFR 2801.3. 8/ That section states at (b)(3):

6/ The record is inconclusive on the date of the road building and clearing activities. A copy of an affidavit of assessment work dated July 25, 1988, and tendered by appellant in support of his appeal indicates road work was done for the White Oak claim between July 1, 1987, and June 30, 1988.

7/ See also Rosenthal v. City of Crystal Lake, 171 Ill. App. 3d 428, 525 N.E.2d 1176 (1988).

8/ See also Richard C. Behnke, supra at 139.

Anyone determined by the authorized officer to be in violation of paragraph (a) of this section [prohibiting trespass] shall be notified in writing of such trespass and shall be liable to the United States for:

* * * * *

(3) Rehabilitating and stabilizing any lands that were harmed by such trespass.

BLM's decision of August 13, 1990, gives appellant the option to restore and rehabilitate the subject lands or have the agency contract for such work. As noted above, these costs total \$5,800.

Regulation 43 CFR 2801.3 also indicates at (b)(1) that a person determined to be in trespass is liable for "[r]eimbursement of all costs incurred by the United States in the investigation and termination of such trespass." These costs total \$3,866.

No argument is raised by appellant questioning the dollar amounts determined by BLM for restoration, rehabilitation, investigation, or trespass termination. Absent such, these amounts will not be disturbed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Safford District Office is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge