FREHNER CONSTRUCTION CO., INC.

IBLA 91-57 Decided November 4, 1992

Appeal from a decision of the Area Manager, Stateline Resource Area, Nevada, Bureau of Land Management, levying trespass damages for unauthorized removal of mineral material. NV-050-4-575.

Affirmed.

1. Materials Act--Trespass: Measure of Damages

When the record supports a finding that the purchaser under a mineral materials sale contract committed a willful trespass by removing sand and gravel in excess of the volume limitation in the contract, a BLM levy of trespass damages determined in accordance with applicable state law will be affirmed.

APPEARANCES: John R. Pedigo, Frehner Construction Co., Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Frehner Construction Company, Inc. (Frehner), has appealed from an October 24, 1990, decision of the Area Manager, Stateline Resource Area, Nevada, Bureau of Land Management (BLM), levying $25,968.60 in trespass damages for unauthorized removal of 11,340 cubic yards of mineral material from the Lone Mountain Community Pit.

On September 26, 1990, Frehner and the United States entered into a materials sales contract (Contract) for the purchase and sale of 10,000 cubic yards of sand and gravel from the Lone Mountain Community Pit, pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1988). 1/ Frehner agreed to pay 75 cents per cubic yard and an additional 75 cents per cubic yard to reimburse BLM for the cost of reclamation (50 cents) and of mitigating the impact of removal activities on the desert tortoise, a Federally listed endangered species (25 cents). Frehner paid the full $15,000 in advance.

The Contract was to expire when 10,000 cubic yards of material had been removed, but in any case no later than October 26, 1990. Section 24 of the "General Stipulations" attached to the Contract required a "Monthly Report

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1/ The Lone Mountain Community Pit is situated in the NE¼ sec. 1, T. 20 S., R. 59 E., Mount Diablo Meridian, Clark County, Nevada.

of Material Removed Under Contract." In its report dated October 22, 1990, Frehner reported removal of 21,340 cubic yards of material during the period from October 1 through October 8, 1990, noting the total number of 20-yard trucks leaving the pit and the quantity of material removed each day. On the same day Frehner submitted $17,010 as payment for the additional 11,340 cubic yards of material it had removed from the pit.

In his October 1990 decision the Area Manager cited 43 CFR 9239.0-7 (1990) in support of his conclusion that Frehner's removal of an additional 11,340 cubic yards of sand and gravel from the pit was an act of trespass. That regulation provided 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." He also noted that 43 CFR 9239.0-7 (1990) provided that "[t]respassers will be liable in damages to the United States," and stated that in the absence of any State-prescribed measure of damages, Frehner would be charged for the "full value of the material at the time of sale (conversion) without a deduction for labor bestowed or expense incurred in removing and marketing the material" (Decision at 1-2). 2/

The Area Manager concluded that the sand and gravel taken from the pit should be valued as "[p]it run (unprocessed) material," noting that BLM had determined that the removed material was valued at $25,968.60 (11,340 cubic yards X $2.29 per cubic yard). 3/ Frehner was directed to pay $8,958.60 ($25,968.60 less the $17,010 previously paid), within 30 days of the date of receipt of the decision.

On November 7, 1990, Frehner submitted an offer of settlement of the trespass on the basis of the "regular purchase price" for the additional material removed, which would be the $17,010 previously submitted plus an additional $100 as a "penalty for not understanding the regulations." 4/ An additional $100 was tendered with its offer. Frehner offered the following explanation for its trespass:

> The [un]authorized removal * * * was done through a misunderstanding of the regulations with no intention of defrauding the BLM. The material was being used as fill on a project

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2/ The Area Manager cited 43 CFR 9230.1-3 (1988) (correct citation -- 43 CFR 9239.1-3 (1988)) as the basis for assessing damages for a "minerals trespass" (Decision at 1). That regulation provides that in the case of a willful trespass, that the measure of damages will be "the full value of the property at the time and place of demand, or of suit brought, with no deduction for labor and expense." 43 CFR 9239.1-3 (1988). However, the regulation is applicable only to timber trespass.

3/ See the Dec. 13, 1989, Supplemental Mineral Appraisal Report for the evaluation.

4/ The $17,010 was derived by multiplying the amount of additional material removed by the total per-yard payment under the September 1990 Contract ($1.50 per cubic yard).

where material from two other sources was also being delivered. I actually did not know how much material would be available from the alternate sources but intended to make up the shortfall with the BLM material. I believed what I bought would be very close to the amount I would need to complete the work. As soon as the fill was completed and I could verify the quantities, I brought the completed report and a check for the material used over what I had purchased. This was done well before the time limit for extraction had expired, which was what I thought was the critical requirement.

BLM considered Frehner's offer of settlement as an appeal from the Area Manager's October 1990 decision.

At the outset we note that the fact that mineral material was removed from the public lands, the quantity of the material removed, and the fact that the removal was not authorized are not in dispute. Frehner committed an act of trespass and is liable in damages to the United States. 43 CFR 9239.0-7 (1990). See also 43 CFR 3603.1 (1990).

In Frehner's settlement offer, it states the erroneous belief that the Contract had not expired when it submitted its October 22, 1990, offer. Section 8 of the Contract clearly stated that it expired when 10,000 cubic yards of material had been removed. Thus, when Frehner had extracted 10,000 cubic yards, the Contract expired by its terms. According to Frehner's monthly report, the Contract expired on October 4, 1990. Its removal of sand and gravel after that time was not authorized by the expired Contract.

The only remaining question is whether appropriate damages were assessed for Frehner's trespass. Frehner asserts that the contract price for the sand and gravel, i.e., $1.50 per cubic yard, plus a $100 "penalty" is the proper basis for determining damages. The Area Manager concluded that the fair market value of the sand and gravel, i.e., $2.29 per cubic yard, should be used.

[1] At the time of the trespass, 43 CFR 9239.0-8 (1990) provided 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." 5/ See Mason v. United States, 260 U.S. 545, 558 (1923); Instructions, 49 L.D. 484 (1923).

We can find 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, 117 IBLA 298, 299-301 (1991); Harney Rock & Paving Co., 91 IBLA

5/ The regulation also states that Federal law prescribing or authorizing a different rule for measuring trespass damages will take precedence over State law, but no overriding Federal law governing mineral materials trespass damages existed at the time.

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, 19 Nev. 404, 14 Pac. 347 (1887). 6/ In Patchen the court stated that if the parties removing the minerals from another's land were willful trespassers, "no deductions were allowable for working expenses. In other words, in that case plaintiff was entitled to the enhanced value of the property taken." Patchen v. Keeley, supra at 53. 7/ 21 A.L.R.2d 391 (1952); see also United States v. Wyoming, 331 U.S. 440, 458 (1947); 1 A.L.R.3d 801, 811 (1965); 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.

In his October 1990 decision the Area Manager concluded that Frehner's trespass was willful because of its "continued operations in the community pit without benefit of a mineral materials sales contract and [its] previous knowledge of the permitted process" (Decision at 1). 8/ Frehner concedes that its removal of excess mineral material was unauthorized but argues that it had "no intention of defrauding the BLM."

The U.S. Supreme Court has held that, in civil cases, evidence of either 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)

6/ 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.

7/ This rule accords with the provision for trespass liability in section 5 of the "General Stipulations" attached to the Contract: "The willful trespass will render Purchaser liable for the actual value of the materials at the time of conversion (sale by the Purchaser)."

8/ Section 5 of the "General Stipulations" attached to the Contract provides that

"if Purchaser extracts any mineral materials * * * after expiration of the time for extraction, * * * or in excess of the amount of materials purchased, such extraction or removal shall be considered * * * a willful trespass. A willful trespass will render Purchaser liable for the actual value of the materials at the time of conversion (sale by the Purchaser)."

BLM used this provision as a basis for imposing trespass damages, and could not contractually obviate the need to demonstrate the factual premise for a finding of willfulness, as a basis for applying the harsher rule on damages.

(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).

When Frehner had removed the volume of sand and gravel stated in the Contract, it expired by its own terms. Any further removal of this mineral material was "without the benefit of a mineral materials sales contract." Standing alone this would not establish that Frehner either knowingly removed the excess sand and gravel intending to exceed the Contract limitation, or that it removed the excess sand and gravel in reckless disregard of the ownership of the material in place.

Frehner was in the construction business and had made previous purchases of BLM material. From this, and the lack of evidence to the contrary, we conclude that it had "previous knowledge of the permitted process" (Decision at 1). 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 actual intention at the time." See also United States v. Homestake Min. Co., 117 F. 481, 485-86 (8th Cir. 1902). Thus, Frehner's knowledge of the "permitted process" for sand and gravel removal does not, standing alone, establish that it actually knew it was taking excess material.

Of greater importance to this determination is the fact that Frehner had experience in volumetric measurement, and it was easy to estimate the volume removed by counting truck runs. Frehner knew that the Contract limited the quantity of sand and gravel it could remove. It not only exceeded the contract amount, the quantity mined without a contract (11,340 cubic yards) exceeded the quantity Frehner could mine under the Contract (10,000 cubic yards). Frehner was using 20 ton trucks to haul material from the pit. It removed 192 truckloads on October 1, 177 truckloads were removed on October 2, and 108 truckloads were removed on October 3. At the end of the third day Frehner had hauled 9,540 yards of material from the pit, leaving less than 460 yards (23 truckloads) remaining under the Contract. On October 4 and 5, Frehner removed 205 truckloads of material each day, and on the following Monday, October 8, 180 truckloads of material were removed.

The stated reason for removing excess material was that Frehner "did not know how much material would be available from the alternate sources." (Emphasis in original.) It "intended to make up the shortfall with the BLM material." Frehner stated the belief that the Contract amount "would be very close to the amount I would need to complete the work." He apparently

did not monitor the removal from the various pits, however, until after the fill had been completed, when he "brought the completed report and a check for the material used over what I had purchased."

The record supports BLM's finding that Frehner was (or at the very least should have been) aware that it had exceeded the Contract limitation or recklessly disregarded the Contract limit between October 4 and October 8, 1990. Accepting the truth of Frehner's settlement offer, it is clear that Frehner initially miscalculated either the total quantity of sand and gravel it would need to complete the job, or miscalculated the amount of material available from other sites. We accept that it was initially expected that the quantity of material that would be needed from the Lone Mountain Community Pit would be within the Contract limitation. However, the evidence clearly points to knowledge excess material was being removed from the Lone Mountain Community Pit at some point. Frehner removed 570 truckloads of excess material. Had the number been smaller, we might find Frehner's argument that it was unaware that excess mineral material was being removed to be credible.

We also find that, if these facts did not support a finding that Frehner knowingly removed materials in trespass, it exhibited gross indifference to the fact that it was exceeding the limitation. In its settlement offer, Frehner indicates that it did not determine the quantity of material removed from the subject until the fill project was completed. Frehner could have easily estimated the quantity of sand and gravel removed from the pit using the count of trucks leaving the site. The report of material removed based the tonnage of material removed on a daily truck count, and Frehner obviously possessed the information readily at hand at all times during the period of trespass. Thus, Frehner could have determined exactly when the Contract limitation was exceeded, and thus avoided any excess removal.

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").

There is no evidence that Frehner made any effort to monitor the quantity of sand and gravel being removed. Frehner knew that the United States owned the sand and gravel and that its Contract permitted removal of no more than 10,000 cubic yards. There is nothing to indicate that

Frehner ever attempted to meet the Contract restriction or attempted to reopen the Contract to allow removal of additional material. The information for monitoring the quantity of material removed was gathered at least daily. The calculation of the amount removed was merely a matter of multiplying the total number of truckloads leaving the pit by 20 cubic yards. The failure to do at least this much amounts to a reckless disregard of legal obligations regarding mineral materials owned by the United States -- a willful trespass. See, e.g., Dolch v. Ramsey, supra; 9/ Warren Stave Co. v. Hardy, 198 S.W. 99, 100 (Ark. 1917); 10/ J. Leonard Neal, 66 I.D. 215, 218-19 (1959). 11/ Considering the quantity of excess material removed, its failure is also a reckless disregard of the Contract limitation. 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." Frehner's trespass must be considered willful.

Generally speaking, when a person knew or should have known that the trespass was occurring, failure to take reasonable steps to prevent trespass justifies a finding that the trespass was willful. See Holland Livestock Ranch, 52 IBLA 326, 347, 88 I.D. 275, 287 (1981), vacated on other grounds, Holland Livestock Ranch v. United States, 543 F. Supp. 158 (D. Nev. 1982), aff'd, 714 F.2d 90 (9th Cir. 1983) (grazing trespass); Mountain States Telephone & Telegraph Co., supra at 156-57. If Frehner did not know, it should have known, that excess sand and gravel was being removed. This is especially true considering the quantity removed. See

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9/ 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.

10/ In Warren Stave a man named Jolly cut and removed timber from land, with permission of the purported owner, making no effort to ascertain whether Turner had title. When finding that Jolly had committed willful trespass, the court stated:

"If Jolly had exercised any diligence to find out who was the owner of the lands from which he cut and removed the timber, he could easily have ascertained that Turner, from whom he claimed to have purchased, had no title. It was at least incumbent upon him to put forth some honest endeavor in that direction before he went upon and cut valuable timber from the lands belonging to the [true owners]. Under the circumstances Jolly would not be heard to say that he went upon the lands in good faith and was innocent of any wrongdoing."

198 S.W. at 100; see also Gray v. Alabama Fuel & Iron Co., 113 So. 35, 40 (Ala. 1926).

11/ In Neal, the Deputy Solicitor found a rancher's failure to consult with the Government range manager before exceeding authorized use indicative of the lack of good faith, and thus of willfulness. See 66 I.D. at 218-19.

Santa Fe Sand & Gravel Co. A-30657 (Apr. 25, 1967) at 6, aff'd, Santa Fe Sand & Gravel Co. v. Rasmussen, No. 7135 (D.N.M. May 28, 1968).

Therefore, the facts also support the finding that Frehner's trespass was the result of a reckless disregard of the expiration of the Contract upon removal of 10,000 cubic yards of material, and was therefore willful. See John Aloe, supra at 301. BLM is entitled to measure trespass damages according to the value of the sand and gravel after it was extracted and sold, with no deduction for the costs of extracting and marketing it. See 21 A.L.R.2d at 391.

BLM found the enhanced value of the sand and gravel to be $2.29 per cubic yard. Frehner has submitted no evidence to the contrary. Therefore, we find no error in BLM's findings that the enhanced value of the sand and gravel removed in trespass was $2.29 per cubic yard, or that based upon this determination the value of the 11,340 cubic yards removed in trespass was $25,968.60. See Pacific Power & Light Co., 45 IBLA 127, 140 (1980), aff'd, Pacific Power & Light Co. v. Andrus, No. C80-0073 (D. Wyo. June 17, 1983).

Therefore, we affirm the Area Manager's October 1990 decision requiring Frehner to pay the full fair market value of the sand and gravel removed from the Lone Mountain Community Pit in trespass.

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.

R. W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge