

RON WILLIAMS CONSTRUCTION CO.

IBLA 92-190

Decided November 25, 1992

Appeal from a decision of the Stateline Resource Area, Las Vegas, Nevada, Bureau of Land Management, assessing damages for willful trespass of Federal sand and gravel. N-55098

Appeal dismissed.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Timely Filing

An appeal filed by means of a FAX machine is properly considered to have been transmitted on the day of filing in the absence of any evidence the notice of appeal was transmitted earlier. Hence, a notice of appeal received by FAX machine 1 day beyond the appeal period set forth in 43 CFR 4.411 will be dismissed as untimely where there is no indication that the notice of appeal was transmitted or probably transmitted before the end of the period in which it was required to be filed.

APPEARANCES: Stephanie Farr, Las Vegas, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ron Williams Construction Company has appealed from a decision of the Stateline Resource Area, Las Vegas, Nevada, Bureau of Land Management (BLM), dated December 6, 1991, assessing damages for mineral materials trespass N-55098. This decision was preceded by BLM's issuance of a trespass notice on November 7, 1991, reciting that a trespass had occurred on October 27-29, 1991, when appellant removed sand and gravel from public lands without a valid contract. The record indicates that appellant had previously entered into a contract with BLM for removal of sand and gravel from Lone Mountain Pit, which expired on October 27, 1991.

In the statement of reasons for appeal, appellant explains that the "alleged trespass" occurred because the employee charged with updating materials contracts did not do so in a timely manner owing to a serious family illness. Appellant does not take issue with the amount of trespass damages (\$836.68) calculated by the agency.

[1] As a threshold matter, it is necessary to consider a procedural issue that directly affects the jurisdiction of this Board. The record reveals that appellant was served with BLM's decision on December 7, 1991, and filed its notice of appeal on January 7, 1992. Under the terms of the regulation at 43 CFR 4.411(a), any notice of appeal submitted by appellant was required to be filed 1/ with BLM within 30 days after date of service. Having been served on December 7, appellant was required to file its notice of appeal on or before January 6, 1992. Accordingly, the notice of appeal, date stamped by BLM on January 7, 1992, was 1 day late.

Regulation 43 CFR 4.401 provides that a delay in filing a document will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. In the instant case, appellant's delay in filing may be waived if it is found that the notice of appeal was transmitted or probably transmitted on or before Monday, January 6, 1992.

The record indicates that appellant filed its notice of appeal and statement of reasons by means of a facsimile (FAX) machine. A cover page, designated a FAX transmittal, accompanies these documents. On this cover page bearing appellant's logo and address, BLM's date stamp appears, indicating that appellant's FAX was received on January 7, 1992, at 9:11 a.m. No other date suggesting an earlier transmittal appears on the cover sheet or accompanying documents. Accordingly, we must conclude that the appeal was transmitted by FAX machine on January 7.

All information of record indicates that appellant did not transmit its notice of appeal on or before the due date, Monday, January 6, 1992. Appellant does not, therefore, qualify for the grace period provided by 43 CFR 4.401.

This Board has consistently held that the timely filing of a notice of appeal is required to establish the jurisdiction of the Board to review the decision below and the failure to file the appeal within the time allowed mandates dismissal of the appeal. Lyman J. Ipsen, 96 IBLA 398, 400 (1987); Oscar Mineral Group #3, 87 IBLA 48, 49 (1985); Ilean Landis, 49 IBLA 59 (1980); see Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978); Pressentin v. Seaton, 284 F.2d 195, 199 (D.C. Cir. 1960). Although this Board is generally reluctant to take any action which would preclude review of appeals on the merits, the purpose of the rule is to establish a definite time when administrative proceedings regarding a claim are at an end

1/ Regulation 43 CFR 4.22(a) provides that a document is "filed" in the office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it. No extension of time may be granted for filing a notice of appeal. 43 CFR 4.22(f)(1); 43 CFR 4.411(c).

in order to protect other parties to the proceedings and the public interest, and strict adherence to the rule is required. See Browder, 434 U.S. at 264. Appellant's notice of appeal is, accordingly, dismissed as untimely.

Were we able to consider the merits of appellant's statement of reasons, we would have to conclude appellant has shown no grounds upon which relief can be granted. BLM's decision of December 6, 1991, identifies 43 CFR 9239.0-7 as the authority for the agency's assessment of trespass damages. This regulation states:

The extraction, severance, injury, or removal of timber or other vegetative resources or 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.

Appellant has pointed to no language in this regulation that would grant to BLM the discretion not to assess trespass damages. A similar conclusion follows upon examination of section 10(b) of the parties' contract. 2/

In fact, BLM did not assess treble damages. Rather, the decision of December 6, 1991, explains that BLM based the measure of damages on the value of the material removed without reduction for the costs of removing and marketing the material. The BLM decision found that the law of the State of Nevada did not prescribe a measure of trespass damages for minerals or mineral materials. Absent a different measure of damages prescribed by state law, damages for willful mineral trespass are generally measured by the value of the mineral extracted without deduction for the expenses of production or marketing. 3/ See 43 CFR 9239.5-1, -2, and -3; cf. Harney Rock & Paving Co., 91 IBLA 278, 284, 93 I.D. 179, 183 (1986) (absent contrary provision of state law, measure of damages for inadvertent or unintentional trespass is the value of the mineral before severance).

2/ Section 10(b) reads:

"Sec. 10. Violations, suspensions, and cancellation.

* * * * *

"(b) If Purchaser extracts or removes any mineral materials sold under this contract during any period of suspension, or if Purchaser extracts any of such material after expiration of the time for extraction or the cancellation of this contract, such extraction or removal shall be considered a willful trespass and render Purchaser liable for triple damages."

(Emphasis in original.)

3/ Research discloses that this measure of damages has been applied to mineral trespasses in the State of Nevada in the past. Thus, with respect to a willful mineral trespass on a mining claim, the Nevada Supreme Court held that no deductions are allowed for the trespasser's expenses of removal. Patchen v. Keeley, 14 P. 347, 353 (Nev. 1887).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge