

M. L. PETERSEN

IBLA 95-556, 96-415, 96-532

Decided February 8, 2000

Separate appeals from a decision of the Acting Stateline Resource Area Manager, Bureau of Land Management (BLM), Nevada, assessing trespass damages (N-59925) (IBLA 95-556) for the unauthorized removal of mineral materials from the Lone Mountain Community Pit from June to November 1994, from two decisions of the Assistant District Manager, NonRenewable Resources, Las Vegas, Nevada, BLM, Nevada (N-60744 and N-60745) (IBLA 96-415), assessing damages for the unauthorized removal of mineral materials from the Lone Mountain Community Pit during September 1995 and January 1996, and from the decision of the Assistant District Manager, Las Vegas, BLM (IBLA 96-532), which determined that BLM would cease to do business with appellant at the conclusion of her then-current contract, and ordering her to remove all her equipment, improvements, and personal property from the Lone Mountain Community Pit.

IBLA 95-556 affirmed as modified; IBLA 96-415 affirmed; IBLA 96-532 affirmed.

1. Materials Act–Trespass: Generally–Trespass: Willful Trespass

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.

2. Trespass: Measure of Damages

Evidence of knowledge that a violation is occurring or of a reckless disregard for whether a violation is occurring is essential to a finding of willful trespass. Standing alone, knowledge that specific behavior is regulated will not support a finding that the violation was willfully committed or a finding that it was committed with reckless disregard. The test is the trespasser's actual intent at the time of the violation.

3. Trespass: Measure of Damages

The rule of damages applied for mineral materials trespass is the measure of damages prescribed by the laws of the state in which the trespass occurs. Both statutes and state court decisions prescribing mineral trespass damages are applicable.

APPEARANCES: M. L. Petersen, Las Vegas, Nevada, pro se (IBLA 95-556 and IBLA 96-415); Patrick K. McKnight, Esq., Las Vegas, Nevada, for Appellant (IBLA 96-532); Gary Ryan, Assistant District Manager, Las Vegas, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

M. L. (Marley) Petersen, d/b/a P & P Sand & Gravel and/or Big Horn Materials Company (Appellant or Petersen), has appealed several decisions by the Bureau of Land Management (BLM) arising from her mineral materials operations at the Lone Mountain Community Pit in Clark County, Nevada, near the city of Las Vegas. First, an appeal was taken from a decision by the Acting Area Manager, Stateline Resource Area, Nevada, BLM, dated May 31, 1995, finding Petersen had engaged in an act of willful trespass (N! 59925), as a result of the unauthorized removal of 3,856 cubic yards of mineral materials during the period from June through November 1994, and directing her to pay trespass damages in the amount of \$19,191. This appeal was docketed by the Board as IBLA 95! 556. Second, two appeals were taken from decisions by the Assistant District Manager, NonRenewable Resources, Las Vegas District, Nevada, BLM, dated May 22 and 28, 1996, finding Petersen had engaged in two acts of willful trespass (N! 60744 and N! 60745), as a result of the unauthorized removal of 2,168 cubic yards of mineral materials during September 1995 and January 1996, and directing her to pay trespass damages in the amount of \$13,732.56. These two appeals were docketed together as IBLA 96! 415.

Finally, referring to seven charges of trespass at the Lone Mountain Community Pit, during the period from May 1994 through January 1996, including the three at issue in IBLA 95! 556 and 96! 415, and an earlier trespass at the Salt Lake Highway Community Pit, the Assistant District Manager issued a July 18, 1996, decision, in which he concluded that, because of the "chronic trespass problem[,] * * * BLM has decided not to continue to do business with Petersen." (Decision at 2.) He thus directed that following expiration of current contract (No. 960000256) on July 24, 1996, Petersen was to cease all operations and to remove all equipment, improvements, and personal property from the Lone Mountain Community Pit, and complete removal within 30 days after the end of the 30! day period for taking an appeal. Finally, the Assistant District Manager made clear that BLM did not intend to issue any other materials sales contracts to Petersen: "Future Sales Denied." Id. at 1 (emphasis omitted). Her appeal from this decision was docketed as IBLA 96! 532.

Because of the interrelatedness of the factual and legal matters at issue in all these appeals, and especially because the three acts of willfull trespass serve as part of the basis for BLM's decision to preclude Petersen from engaging in additional mineral materials operations on public lands, we consolidated these appeals for resolution by the Board in our Order dated July 22, 1999.

Petersen had petitioned the Board for a stay of the effect of all of the BLM decisions at issue. We have issued two Orders, dated August 23, 1995 and 1996, staying the effect of the Acting Area Manager's May 31, 1995, decision involving trespass N! 59925, and the Assistant District Manager's May 22, 1996, decision involving trespass N! 60745, and need not revisit the question of a stay in those cases. Petersen also sought to stay the effect of the Assistant District Manager's July 18, 1996, decision, requiring her to cease all operations and remove all property from the Lone Mountain Community Pit, and not to issue any future materials sales contracts. In our July 22, 1999, Order, we denied the requested stay of the July 18, 1996, decision. We also dismissed as untimely Appellant's appeal of the Assistant District Manager's May 28, 1996, decision in N-60744 (part of IBLA 96-415) finding Petersen had engaged in a willful act of trespass and directing her to pay trespass damages.

IBLA 95-556

In her notice of appeal (NOA) from the May 31, 1995, decision by the Stateline Resource Area Manager, which found that she had removed 3,856 cubic yards of material between June 24, 1994, and November 24, 1994, in excess of that authorized by existing contract and assessed her \$19,191 for willful trespass (N-59925), Petersen generally denied the allegations by stating: "I believe upon review of all evidence in regard to this case, I will be vindicated of all the allegations set forth in the decision." (NOA at 1.) She also asserted that her operation at the Lone Mountain Community Pit is the primary source of her income and that she employs several individuals. She further alleges that if she is required to pay the amount assessed she may be unable to continue operations, to the detriment of herself and her employees. Id.

Between June and November 1994, Petersen entered into a series of seven materials sales contracts with BLM for the purchase and sale of sand and gravel located in the Lone Mountain Community Pit, pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994). ^{1/} Petersen agreed to pay 77 cents per cubic yard and an additional 56 cents per cubic yard to reimburse BLM for the costs of reclamation (31 cents) and of mitigating the impact of removal activities on the desert tortoise,

^{1/} The Lone Mountain Community Pit is situated in the NE¹/₄ sec. 1, T. 20 S., R. 59 E., Mount Diablo Meridian, Clark County, Nevada.

a Federally listed endangered species (25 cents). Petersen paid the full purchase price called for in each of the seven contracts at issue in IBLA 95-556 in advance of mineral removal.

Each of the seven contracts was to expire when the allocated amount of mineral material had been removed, or 30 days after contract inception, whichever occurred earlier. Section 20 of the "General Stipulations" attached to each Contract required a "Monthly Report of Material Removed Under Contract," to be filed with BLM within 10 days of contract completion. The Monthly Report was to list the number of trucks, their size and total volume of mineral materials extracted from the Lone Mountain Community Pit for each hauling day during the contract period.

BLM observers monitored accuracy in the contractors reporting practices by periodically visiting the Lone Mountain Community Pit and recording the number of trucks and the volume of mineral materials removed during the period of observation, which was usually less than a full work day. When the number of trucks and the amount of sand and gravel observed to have been removed exceeded the number and volume reported by Petersen for specific days in the Monthly Report, the failure to accurately report was deemed to represent intentional and fraudulent misreporting, and she was held to be in willful trespass.

In the Monthly Report dated June 26, 1994, Peterson reported that she had removed 2,448 cubic yards of material under Contract No. 9400000164 (2,500-yard contract) between June 2 and June 15, 1994. However, the sum of the daily report numbers is 2,292 cubic yards. The following table compares the number of trucks and tonnage removed from the pit as shown on the reports submitted by Appellant and the count made by BLM:

<u>Peterson Report</u>		<u>BLM Count a/</u>		
<u>Trucks</u>	<u>Cubic yards of material</u>	<u>Trucks</u>	<u>Cubic yards of material b/</u>	
6/6/94	20	240	13	337
6/8/94	15	180	51	694
6/9/94	18	216	21	293
6/15/94	38	456	78	1105

a/ The BLM count does not represent the amount removed on a given day, as the observer was not on the site the entire work day.

b/ The observer based volume on the size of the trucks observed. In her report Peterson calculated the volume at 12 cubic yards per truck.

During the 4 days that the removal was monitored, 1,378 cubic yards of material were removed in excess of the reported amount. In determining the number of yards that should be subject to damages, BLM subtracted 2,292 cubic yards (amount reported) from 2,500 cubic yards (amount prepaid

with the contract) and subtracted this amount (208 cubic yards) from the unreported volume removed to determine that 1,170 cubic yards were removed in trespass.

In its report dated June 27, 1994, Petersen reported removal of 1,998 cubic yards of mineral materials under Contract No. 940000172 (2,000 cubic yards) during the period June 16 through June 27, 1994. On June 22, 1994, the BLM employee observed Appellant remove 52 cubic yards in 4 truckloads. Appellant reported two 12 cubic yard truckloads for a total of 24 cubic yards as having been removed on that date, but provided no haul slips as required for this contract period. In determining the volume removed in trespass, BLM subtracted 1,998 cubic yards (amount reported) from 2,000 cubic yards (amount prepaid with the contract) and subtracted the remainder (2 cubic yards) from the unreported volume and found that 26 cubic yards were removed in trespass.

On August 1, 1994, Appellant reported removing 1,998 cubic yards under Contract No. 940000188 (2,000 cubic yard contract) during the period July 8 through July 22, 1994. The discrepancies in this report are illustrated by comparing the reported amount of mineral material removed and the BLM observations set out in the following table:

<u>Date</u>	<u>Peterson Report</u>		<u>BLM Count a/</u>	
	<u>Trucks</u>	<u>Cubic yards of material b/</u>	<u>Trucks</u>	<u>Cubic yards of</u>
7/14/94	9	108	28	348
7/15/94	8	96	11	140

a/ The BLM count does not represent the amount removed on a given day, as the observer was not on the site the entire work day.

b/ The observer based volume on the size of the trucks observed. In her report Peterson calculated the volume at 12 cubic yards per truck.

In determining the volume removed in trespass, BLM subtracted 1,998 cubic yards (amount reported) from 2,000 cubic yards (amount prepaid with the contract) and subtracted this amount (2 cubic yards) from the volume known to have been removed during this period in excess of that reported ($156 + 108 + 44 - 2$) to find 306 cubic yards removed in trespass. However, BLM miscalculated the amount removed. On July 14, 1994, the difference between the amount reported on the Monthly Report and the amount the BLM employee observed being removed was 240 cubic yards, rather than 156 cubic yards, which represented the difference between the volume listed on the incomplete haul slips provided by Appellant and the amount observed being removed. The amount removed without a contract was 390 cubic yards rather than 306, and the BLM decision is modified accordingly.

On August 5, 1994, Appellant reported removal of 1,988 cubic yards under Contract No. 940000200 (2,000 cubic yard contract) during the

period July 23 through August 4, 1994. A BLM employee observed removal of 31 cubic yards in 2 truckloads on July 29, 1994. Appellant's report listed no removal on that date. On August 1, 1994, the BLM observer counted 29 of Appellant's trucks leave the Pit containing 387 cubic yards of mineral materials. Appellant's Monthly Report listed 24 trucks containing 282 cubic yards of mineral materials for that date. In determining the volume removed in trespass, BLM subtracted 1,988 cubic yards (amount reported) from 2,000 cubic yards (amount prepaid with the contract) and subtracted the remainder (12 cubic yards) from the excess volume known to have been removed (105 + 31 - 12) to find that 124 cubic yards had been removed in trespass.

On September 26, 1994, Petersen reported removal of 2,000 cubic yards under Contract No. 940000227 (2,000 cubic yards) during the period August 25 through September 23, 1994. The sum of individual figures provided by Petersen reflected 2,016 cubic yards were removed, however. The known discrepancies in this report are illustrated by comparing the reported amount of mineral material removed and the BLM observations set out in the following table:

<u>Date</u>	<u>Peterson Report</u>		<u>BLM Count</u>	
	<u>Trucks</u>	<u>Cubic yards of material</u>	<u>Trucks</u>	<u>Cubic yards of material</u>
8/7/94	6	72		19
8/19/94	7	84		11
				288
				148

In determining the amount of mineral materials known to have been removed in trespass, BLM subtracted 2,000 (amount prepaid with the contract) from 2,016 (amount reported) and added this amount (16 cubic yards) to the volume removed in excess of the reported volume, concluding that 296 cubic yards were removed in trespass.

In an October 25, 1994, Report, Appellant reported removing 1,992 cubic yards under Contract No. 940000259 (2,000 cubic yard contract) during the period September 26 through October 21, 1994. Again, the known discrepancies in this report are illustrated by comparing the reported amount of mineral material removed and the BLM observations:

<u>Date</u>	<u>Peterson Report</u>		<u>BLM Count</u>	
	<u>Trucks</u>	<u>Cubic yards of material</u>	<u>Trucks</u>	<u>Cubic yards of material</u>
9/30/94		474		132
10/11/94	6	72	5	85
10/13/94		96		122
10/21/94	8	96	24	320
10/24/94		133		120
10/25/94		None	4	48

For the days that disparities were observed, BLM determined that at least 1,869 cubic yards of mineral material in excess of the amount reported had

been removed. In determining the volume removed in trespass, BLM subtracted 1,992 cubic yards (amount reported) from 2,000 cubic yards (amount prepaid with the contract) and subtracted this amount (8 cubic yards) from the unreported volume to find the volume (1,861 cubic yards) removed in trespass. However, the record shows that an addition error was made in calculating the volume removed in trespass, resulting in 1,835 cubic yards. We modify the BLM findings accordingly.

The last Monthly Report relevant to IBLA 95-556, dated November 22, 1994, reported the removal of 1,998 cubic yards of mineral materials under Contract No. 950000020 (2,000 cubic yard contract) during the period October 26 through November 21, 1994. The BLM employee monitoring this contract on November 4, 1994, observed the removal of 13 cubic yards in 1 truckload. The Monthly Report states that no mineral material was removed on that date. The haul slips provided to BLM reflect that, on November 18, 1994, Appellant removed 60 cubic yards in 5 truckloads, while Appellant's Monthly Report listed no mineral material as having been removed on that date. During those 2 days, 73 cubic yards of unreported material were removed. In determining mineral material removed in trespass, BLM subtracted the amount reported from 2,000 cubic yards (amount prepaid with the contract) and deducted this amount (2 cubic yards) from the unreported volume (73 cubic yards) to find the mineral material (71 cubic yards) that was removed in trespass.

In his May 31, 1995, decision the Area Manager cited 43 C.F.R. § 9239.0-7 (1990) in support of his conclusion that Petersen removed an additional 3,856 cubic yards of sand and gravel from the Lone Mountain Community Pit in 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 C.F.R. § 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, Petersen 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.)

The decision stated that on January 21, 1993, a Mineral Appraisal Report (Serial Number NV050-93-1) was prepared by BLM in conjunction with an investigation of willful trespass in five Community Pits, including Lone Mountain. The Area Manager explained that to assess the value of a willful trespass 12 primary suppliers were contacted. These suppliers provided the actual sales prices for the types of material appraised. (Decision at 2.) Based on the information gathered during this appraisal process, willful trespass values were set for the various commodities removed from each Community Pit. The values set for the Lone Mountain Community Pit were

\$6.50/cubic yard for Type II, \$8/cubic yard for Power Sand and \$4.30/cubic yard for Pit Run mineral material. Using these values, the Area Manager calculated damages for willful trespass as follows:

Type II	– 1146.00 cubic yards x \$6.50/cubic yard = \$7,449.00
Power Sand	– 24.00 cubic yards x \$8.00/cubic yard = \$192.00
Pit Run	– 2686.00 cubic yards x \$4.30/cubic yard = \$11,550.00
	Total Value = \$19,191.00

(Decision at 2.)

[1] Mineral material trespass is defined by 43 U.S.C. §§ 1732, 1740 (1994), and by 43 C.F.R. § 3603.1 which states:

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).

In turn, 43 C.F.R. § 9239.0-7 provides:

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 of such unlawful acts.

It can be seen that removal of mineral materials without a sales contract or permit is an act of trespass. Jim Wilkins Trucking, 142 IBLA 44, 48 (1997); Richard Connie Nielson v. BLM, 125 IBLA 353, 363 (1993); Frehner Construction Co., 124 IBLA 310, 312 (1992); Curtis Sand & Gravel Co., 95 IBLA 144, 161, 94 I.D. 1, 10 (1987).

[2] The nature of Petersen's trespass has direct bearing on the measure of damages to be assessed for her trespass. If there is a legal basis for determining mineral trespass damages in the laws of the State in which the trespass occurs, those laws are to be applied when determining damages. See 43 C.F.R. § 9239.5. The Nevada courts have long recognized a distinction between "willful trespassers" and those who "convert [minerals] under a bona fide, but mistaken, belief that they had the right to appropriate them." Patchen v. Keeley, 14 P. 347, 353 (Nev. 1887). When the mineral material is removed by a trespasser having a bona fide, but mistaken, belief that he had a right to remove it, the removal can be said to be a "nonwillful" trespass. Conversely, 43 C.F.R. § 5400.0-5 defines "willful" as "a knowing act or omission that constitutes the voluntary or conscious performance of a prohibited act or indifference to or reckless disregard for the law."

In civil cases, evidence of 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 C.F.R. § 3160.0-5(e) (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).

It is evident that Petersen had knowledge of the contracting process at the time of the alleged trespasses, as she had been operating under mineral materials contracts in the Lone Mountain Community Pit at least since October 1993. Standing alone, this fact would not establish that Petersen knowingly removed the mineral material or acted in reckless disregard of its ownership. 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 sincerity and his actual intention at the time." See also United States v. Homestake Min. Co., 117 F. 481, 485-86 (8th Cir. 1902).

Weight or trip tickets in the record clearly indicate that the Main Truck Scales at the Lone Mountain Community Pit were used to weigh the material as it was removed from the pit, and Petersen's name is found at the top of each weight ticket printout in the file. If Petersen was receiving the weight slips showing the date and time that the material was being removed and the weight of the material removed, it stands to reason that Petersen had knowledge of the removal of the material. Paragraph 20 of the stipulations attached to the mineral materials contract provides, in pertinent part:

20. Purchaser will furnish this office with a monthly report of mineral materials removed under this contract (see Attachment "B"). These copies must be furnished monthly and must itemize, including operator name and volume of materials, all sales on site to other sand and gravel operators. They are due in this office (Las Vegas District Office) not later than the 10th of each month or the first business day thereafter if the 10th falls on a weekend or holiday.

Peterson was required to report the quantity of the materials removed. The record demonstrates that she consistently submitted grossly inaccurate and understated monthly reports to BLM. Between June 2 and November 21

Petersen repeatedly removed mineral material from the pit in quantities well in excess of those authorized in the contracts, in reckless disregard of her obligation to obtain a mineral material sales contract before removal of that material. The evidence strongly supports the conclusion that she was removing mineral material with knowledge that she had no contract allowing her to do so.

If Petersen did not knowingly remove materials in trespass, she exhibited gross indifference. She submitted monthly reports stating the amounts removed which were found to be gross understatements of the true amount removed, based on a tally of the number of trucks loaded and volume of material observed going out of the pit on randomly selected occasions during the periods covered by the seven contracts. She retained (or should have retained) copies of all haul slips, and her submission of but a few of these slips to BLM upon request, and the gross misreporting of volumes removed on monthly reports, in the face of the direct observations by BLM employees, totally refutes any argument that there was any good faith effort to comply with the terms of the mineral materials sales contracts by accurately reporting the volume of material removed. The gross failure to submit an accurate report of the material removed also indicates a reckless disregard of legal obligations regarding mineral materials owned by the United States—a willful trespass. *See, e.g., Dolch v. Ramsey*, 134 P.2d 19, 22 (Cal. Dist. Ct. App. 1943). 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.

Petersen had entered into a number of contracts for the purchase of mineral material before entering into the seven contracts in issue here. The provisions of each of these mineral materials contracts with BLM were clear and unambiguous. Considering the nature of Petersen's business and the history of her prior contracts with BLM, we are convinced that the unauthorized removal of excess material between June and November 1994 was either intentional or in reckless disregard of her obligation to gain authority for and to keep accurate records of mineral material removal. *See Frehner Construction Co.*, 124 IBLA 310 (1992); *John Aloe*, 117 IBLA 298, 301 (1991). Petersen has presented no evidence to refute this finding. Therefore, we affirm BLM's finding that Petersen's trespasses were willful.

[3] Having found the trespasses to be willful, we will consider the appropriate measure of damages. The applicable regulation, 43 C.F.R. § 9239.0-8 provides 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." *See Mason v. United States*, 260 U.S. 545, 558 (1923); *Instructions*, 49 L.D. 484 (1923).

The decision stated that Nevada law does not prescribe the measure for trespass damages for mineral material trespass, and stated that 43 C.F.R. § 9230.1-3 would be used as the basis for measurement of damages. We know of no Nevada statute prescribing mineral trespass damages. However, 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, *supra* at 299-301; Hamey Rock & Paving Co., 91 IBLA 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, *supra*. In Patchen v. Keeley, *supra* at 353, the court stated that, for willful removal of minerals from another's land, "no deductions were allowable for working expenses. In other words, in that case plaintiff was entitled to the enhanced value of the property taken." See also United States v. Wyoming, 331 U.S. 440, 458 (1947); R. A. Vinluan, Annotation, Measure of Damages for Wrongful Removal of Earth, Sand, or Gravel from Land, 1 A.L.R. 3d 801, 811 (1965); V. Woner, Annotation, Right of Trespasser to Credit for Expenditures on Producing, As Against His Liability for Value, Oil or Minerals, 21 A.L.R.2d 380, 391 (1952); 54 Am. Jur. 2d Mines & Minerals § 254 (1971); 43 C.F.R. § 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 that the trespasser cannot recoup the costs of his wrongdoing.

As noted in the decision, BLM used a January 21, 1993, Mineral Appraisal Report as the basis for its computation of damages for willful trespass at the Lone Mountain Community Pit: \$6.50/cubic yard for Type II, \$8/cubic yard for Power Sand and \$4.30/cubic yard for Pit Run. Petersen has raised no objection to the use of the appraisal as the basis for calculating damages, and has submitted no evidence that other values would be more representative. Therefore, we find no error in BLM's findings that the values of the mineral materials set out in the January 21, 1993, Mineral Appraisal Report represent the value of the mineral material found in the Lone Mountain Community Pit.

We affirm the Area Manager's May 31, 1995, decision that Peterson was required to pay the full market value of the mineral removed from the Lone Mountain Community Pit in trespass. However, because of the modification of that decision to adjust the amount of mineral material removed for errors made when calculating the volume of material removed, the actual measure of damages is modified as follows:

	BLM calculation Of Volume	Adjusted volume in Cu.Yd.	Unit Cubic Yards	Price	Amount Owing
Type II	1,146	1,146		\$6.50	\$ 7,449.00
Power Sand	26	26		\$8.00	192.00
Pit Run	2,686	2,744		\$4.30	<u>11,799.40</u>
			Total		\$ 19,440.40

The stay issued by this Board is dissolved and the full and fair market value of \$19,440.40 is due and payable within 30 days of receipt of this decision.

IBLA 96-415

Petersen has also appealed the Assistant District Manager, NonRenewable Resources, Las Vegas District Office's May 22, 1996, decision (May 22 Decision) which found that she had committed acts of willful trespass at the Lone Mountain Community Pit, Clark County, Nevada, between January 15 and January 27, 1996, under Contract No. 960000106, and between January 26 and January 28, 1996, without the benefit of a contract. That decision provides, in pertinent part:

You removed 347 cubic yards of material in excess of the amount purchased under Contract 960000106. During the time period of January 26 through January 28, 1996 you removed 683 cubic yards of material without the benefit of a contract. By your continued operations in the community pit without the benefit of a minerals materials sales contract and your previous knowledge of the permitting process it is our opinion that you have committed an act of willful trespass.

* * * * *

The value for Type II material, Power Sand and Pit Run is \$6.50, \$8.00 and \$4.30 per cubic yard, respectively. The records submitted by you indicates that you have removed 1,064 cubic yards of material without the benefit of a contract. A volume breakdown of the types of materials removed follows:

The following value has been calculated based on the above stated volume:

Type II – 543.00 cubic yards x \$6.50/cubic yard = \$3,529.50
Power Sand – 191.00 cubic yards x \$8.00/cubic yard = \$1,528.00
Pit Run – 296.00 cubic yards x \$4.30/cubic yard = \$1,272.80
Total Value = \$6,330.30

(May 22 Decision at 1, 2.)

In her NOA, Petition for Stay filed with BLM on June 4, 1996, Appellant states the following:

The Trespass decision is adverse to my business, and we believe it to be incorrect, based on the following:

- 1) Our calculation based on a per ton conversion with the water added for processing and additional water added on the trucks for dust abatement, does not indicate an excess of material removed under contract #960000106.
- 2) During the time period of Friday January 26 to Sunday January [28] we show that we had a contract.

3) There was no Willful Intent on my or my company's part to remove any material, without a contract in place.

(NOA, Petition for Stay at 1.)

The Las Vegas District Office filed an Answer to the Appellant's NOA, stating in pertinent part:

Ms. Petersen has not submitted any supporting documentation to the Bureau of Land Management concerning the amounts of water added to their product. There is no indication on the haul slips that were submitted as to the weight of water added. Ms. Petersen does not give her customers a break on the weight sold based on water added. I base this on the fact that there are no indications on the haul slips, and according to Mr. Kay, there are no contracts with clients who purchase materials. At most it could not add more than 1 or 2 percent weight to the end product which would still leave them in trespass. However, it could add less depending on the length of time materials are stockpiled. As a normal business practice the BLM does not deduct water weight for any mineral materials contracts sold.

Contract #960000106 was used up on January 25, 1996. The appellant's own records show that this was so. The next contract, #960000114, was not purchased until January 29, 1996. Therefore, materials removed on January 26, and 27, 1996 were without the benefit of a contract.

I believe the removal of the materials was willful. Ms. Petersen has purchased contracts on a regular basis from the BLM since October of 1993. She had knowledge of the BLM's regulations and stipulations in regards to mineral material sales. A number of trespasses (6) of a similar nature have been incurred by her in the past.

(Answer at 1.)

In determining that Appellant had removed mineral material in excess of that authorized in Contract No. 960000106 in willful trespass, BLM compared the volume stated in the Monthly Report submitted on this 5,000 cubic yard contract and the volume established by the haul slips submitted to BLM by Appellant. Just as in IBLA 95-556, the contract at issue here authorized removal of mineral material for a period of 30 days or until the 5,000 cubic yards were removed, whichever came first. We will not repeat the law with respect to trespass and willful trespass, set forth above. It is equally applicable to this contract.

The evidence of record, the Monthly Report and haul slips submitted for Contract No. 960000106, establish that at least 5,105 cubic yards of mineral material had been removed by the end of January 25, 1996, 105 of

which was removed in trespass. At least 242 additional cubic yards of mineral materials were removed by the close of business on January 25, 1996, but not reported. The disparity between the Appellant's figures reported in her Monthly Report and the haul tickets submitted is as follows: January 17 (22.29 tons without haul slips), January 20 (302.67 tons without haul slips), January 22 (22.15 tons without haul slips), January 24 (44.86 tons without haul slips) and January 25 (76.63 tons without haul slips). Using a 1.94 tons per cubic yard conversion factor, the 468.6 tons removed during these 5 days equates to 242 cubic yards removed in trespass. An additional 629 cubic yards were removed in trespass on January 26, 1996, and 54 cubic yards on January 27, 1996. The calculation of damages in the amount of \$6,330.30 is properly set forth in the May 22 Decision.

We next examine Appellant's defense that the water it added for dust abatement accounted for the additional weight in mineral materials that caused it to appear to be in trespass. We note that the material removed in trespass was 20 percent more than the total amount of material authorized in the contract. Appellant has provided no evidence other than Petersen's unverified statement that she did water the sand and gravel, or if she did, when and to what extent in terms of the percentage of total weight. We simply find no merit in Appellant's claim that the water added, if water actually was added, constituted more than a minute percentage of the total weight of the sand and gravel. Appellant has the burden of showing the May 22 Decision is in error, and has simply not carried her burden.

We find no evidence that Appellant had a valid contract for removal of mineral materials after January 25, 1996. Under her contract, the authority to remove mineral materials expired upon removal of 5,000 cubic yards. This event occurred, at the latest, sometime on January 25th. Appellant was in possession of the haul slips for each day in which removal occurred under the contract, and the cumulative record of volume removed was in her custody. As noted in our discussion of the trespasses described in IBLA 95-556, Appellant has entered into mineral materials purchase contracts on a regular basis starting in 1993, and had been found to have committed a number of similar trespasses in the past, either through gross neglect or through willful disregard of the contract provisions. Considering the ongoing pattern of the practice of trespass demonstrated by these cases, we find Appellant to have committed an act of trespass in this case and Appellant is liable in damages to the United States in the amount of \$6,330.30. The stay issued by the Board on August 23, 1996, is dissolved, and Appellant is ordered to pay this amount within 30 days of receipt of this decision.

IBLA 96-532

In IBLA 96-532, Appellant has appealed from the July 18, 1996, decision (July 18 Decision) of the Assistant District Manager, Las Vegas District, BLM, stating his conclusion that, because Appellant had a "chronic trespass problem[," * *

* BLM has decided not to continue to do business

with Petersen." ^{2/} (July 18 Decision at 2.) He stated that, following expiration of her then-current contract (No. 960000256), she was to immediately cease all operations and to remove all equipment, improvements, and other personal property from the Lone Mountain Community Pit, and to complete removal within 30 days after the end of the 30-day period for taking an appeal. It is clear from the July 18 Decision that BLM would not issue any further materials sales contracts to Petersen: "Future Sales Denied." Id. at 1. This Board denied Appellant's Petition for Stay of the Assistant District Manager's July 18 Decision in its Order dated July 22, 1999.

In her Statement of Reasons (SOR) for appeal, Petersen first claims the reason for the BLM determination to do no further business with her arose from an incident in a neighboring pit owned by Sharon and Ron Finger. (SOR at 2.) According to Petersen, an individual assisting in the removal of a piece of equipment at that site was fatally shot by Ron Fingers when a violent dispute arose between the Fingers and the owner of the equipment. Two of Appellant's employees had participated in the removal of the equipment. Id. Operations in the Fingers' pit and the Appellant's pit were both shut down. Appellant also claims that after she appealed the suspension to the Board, BLM lifted the suspension without explanation, thus mooting the appeal. Id. Three weeks later, Appellant contends, BLM announced the decision to enter into no future contracts with Petersen for the removal of mineral materials from the Lone Mountain Community Pit, citing contract violations, and that this action shut her down "without an opportunity to have a hearing and present evidence on her behalf." (SOR at 3.)

Appellant argues that although a Government agency may be under no obligation to enter into contracts with private operators, once it has done so and continues to renew those contracts, "the governmental agency may not refuse to renew those contracts for a reason which is arbitrary or capricious, and may not refuse to renew the contracts without notice and a full opportunity to be heard." Id., citing Myers and Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (1975).

^{2/} In addition to Trespass Nos. N-59925, N-60744, and N-60745, which came before the Board in IBLA 95-556 and IBLA 96-415, BLM relies on four willful trespass decisions involving the unauthorized removal of 2,221 cubic yards of mineral materials, which were never appealed and not subject to review by the Board: N-58550, N-58910, N-59569, and N-59725. Of these, Trespass No. N-58910 is a consolidated trespass involving seven separate contracts in which there were trespass violations. According to BLM, Petersen removed materials from the Salt Lake Highway and Lone Mountain Community Pits, under various short-term contracts with BLM, between June 24, 1993, and May 28, 1995 (Salt Lake), and between Oct. 12, 1993, and July 24, 1996 (Lone Mountain). (July 18 Decision at 1.)

Appellant claims she has been denied a hearing prior to the BLM refusal to grant her further contracts in violation of her due process rights. Id. Petersen claims that had a fair and impartial hearing been granted, "it would have been shown that the reasons for refusing to renew her were arbitrary and capricious, as there are other pit operators who have had more violations than her who have not been shut down." (SOR at 4.)

In its Answer, BLM states that the various trespasses were the only factor which guided BLM in determining that future sales would be denied. BLM explains that due to its limited staffing, it was unable to conduct an audit of Petersen's activities in the Lone Mountain and Salt Lake Highway Community Pits at an earlier time. (Answer at 1.) BLM asserts that when an audit was completed, the evidence established that Petersen had a chronic trespass problem that has not improved. Id.

In our review of the record of this case, we find that the Assistant District Manager has initially referred to six charges of trespass at the Lone Mountain Community Pit, and an earlier trespass at the Salt Lake Highway Community Pit. These trespass notices were issued to Appellant during the period May 1994 through May 1996. Trespass No. N-58910, issued June 22, 1994, of the six trespass decisions issued for material removal at the Lone Mountain Community Pit, is an aggregate of seven separate trespasses involving seven separate contracts: 940000046; 940000062; 940000081; 940000109; 940000129; 940000135; and 940000145. (July 18 Decision at 2.) In his decision, the Assistant District Manager notes that since May 22, 1994, "approximately 31 percent of [Appellant's] contracts have resulted in trespass." Id. We find that this record of trespass more than supports the BLM decision to not enter into further contracts with Appellant.

Finally, Petersen requests a hearing with respect to the Assistant District Manager's July 18, 1996, decision. She argues, citing Myers & Myers, Inc. v. United States Postal Service, supra, that the Department is required to afford her notice and an opportunity for a hearing before "refus[ing] to renew" her material sales contracts, in order to satisfy her "due process rights."

As we found in our July 22, 1999, Order denying Appellant's Petition for Stay, we can discern no violation of Petersen's due process rights. She has not been deprived of a property right by BLM's decision to not enter into (not refusing to renew) any more short-term contracts for the sale and removal of mineral materials. In particular, we note that, even in Myers, supra, the Circuit Court did not hold that the plaintiffs were necessarily entitled to a hearing by virtue of the Postal Service's refusal to renew mail delivery contracts, but left that to the District Court on remand. See 527 F.2d at 1258-60, 1262.

When considering whether to exercise our discretionary authority to order a hearing pursuant to 43 C.F.R. § 4.415, our concern is whether an appellant has demonstrated a material question of fact that may affect the

outcome of the appeal, and which warrants our ordering a hearing. After careful review of the BLM trespass decisions appealed in IBLA 95-556 and IBLA 96-415, and the specific mineral material trespasses for which Appellant has been cited which are not a part of these two cases, we conclude, as we did in our July 22, 1999, Order, that Petersen has failed to demonstrate a material issue of fact in connection with the BLM decision to not issue her another materials sales contract. Denial of Petersen's request for a hearing has resulted in no due process violation. See Pine Grove Farms, 126 IBLA 269, 275 (1993); Woods Petroleum Co., 86 IBLA 46, 55 (1985).

In any event, Petersen is afforded adequate due process of law by virtue of her ability to appeal to this Board. P & K Co. Ltd., 135 IBLA 166, 168 (1996).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R § 4.1, IBLA 95-556 is affirmed as modified, and IBLA 96-415 and IBLA 96-532 are affirmed.

James P. Terry
Administrative Judge

I concur.

R. W. Mullen
Administrative Judge

