

SO. WAY CO.  
d.b.a. SOUTHWAY CONSTRUCTION CO., INC.

IBLA 89-379

Decided May 21, 1992

Appeal from part of a decision of the Canon City, Colorado, District Office, Bureau of Land Management, assessing triple trespass damages for the unauthorized removal of mineral material. CO-050-4410.

Affirmed in part; set aside and remanded in part.

1. Materials Act--Trespass: Generally

A for-profit corporation which does not qualify for the free use of mineral materials under the provisions of the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1988), and its implementing regulations, 43 CFR Part 3600, is properly cited for trespass for the unauthorized removal of mineral materials when it removes aggregate from a BLM pit without prior payment in violation of the terms of its material sales contract and 43 CFR 3610.1-3, even though it asserts that it was told by BLM personnel that it would not have to pay royalty for the material since the material was to be used on a BLM road surfacing project. Reliance on such representations, although insufficient to grant appellant rights not authorized by law, may, however, demonstrate that the trespass was innocent, not willful, and an assessment of triple damages for such trespass will be set aside and the case remanded for reevaluation of the appropriate measure of damages.

APPEARANCES: Thomas E. Downey, Jr., Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

So. Way Co., d.b.a. Southway Construction Co., Inc. (Southway), has appealed from that part of a decision of the District Manager, Canon City, Colorado, District Office, Bureau of Land Management (BLM), dated February 17, 1989, assessing triple damages in the amount of \$3,600 for trespass in violation of the Materials Act of July 31, 1947, as amended,

30 U.S.C. §§ 601-604 (1988), 43 CFR 3603.1, 43 CFR 9239.0-7, and section 3 of materials sales contract No. CO-050-MS-87-4. BLM based the trespass notice (CO-050-4410) in part on the unauthorized removal of 4,000 tons of mineral material (aggregate) from the King Pit located in sec. 31, T. 28 S., R. 73 W., sixth principal meridian, Alamosa County, Colorado. 1/ Southway used this aggregate for BLM contract No. CO-910-CT7-034, Blanca Road Surfacing. 2/

The San Luis Resource Area, BLM, and Southway entered into material sales contract No. CO-050-MS-87-4 on March 5, 1987. The contract authorizes the removal of a total of 15,000 tons (10,000 cubic yards) of sand and gravel aggregate from the King Pit. Section 3(b) of the contract requires that payment installments be made prior to the removal of the aggregate and specifically provides that

[i]f any additional installment payment is not made by the time required under this section, operations under contract shall be suspended immediately and no materials may be removed from contract area during the period of such suspension. Materials severed, extracted, or removed during any such period of suspension shall be deemed taken in trespass and charged to and paid for by Purchaser at triple the unit contract price therefor, or at triple the reappraised unit price if a reappraisal has been made. Resumption of taking will be authorized, in writing, by the Authorized Officer only after such required payments have been made.

On August 27, 1987, Southway was awarded the Blanca Road Surfacing contract (contract No. CO-910-CT7-034) based on its bid of \$24,000. Part II of the contract, entitled "Schedule of Items," provided that the contractor would "[f]urnish necessary labor, equipment, supervision, supplies and materials to provide items listed below" and listed 4,000 tons of crushed aggregate surfacing as the only item (Contract at 3). The contract described the work included as: "Furnishing labor, equipment, supplies, and materials to surface Blanca Road with crushed aggregate" (Contract at 26), and as "Furnishing, Placing, Grading and Compacting crushed aggregate on roads indicated on the attached drawing" (Contract at 30). The contract also specified the standards that the "Contractor-Furnished Crushed Aggregate" was required to meet. Id. This contract was administered from BLM's Grand Junction Zone Engineering Office.

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1/ BLM's decision also cited Southway for four additional incidents of trespass involving the unauthorized removal of a total of 12,922.5 tons and 1,640 cubic yards of aggregate. By decision dated Mar. 16, 1989, BLM accepted Southway's offer of settlement for these four trespass violations, thereby relieving Southway of any further obligation for these materials under trespass No. CO-050-4410. Accordingly, these incidents of trespass are not in issue in this appeal.

2/ Southway cites the Blanca Road Surfacing contract as contract No. CO-910-RFP7-041. That number is the proposal solicitation number; the actual contract number is CO-910-CT7-034.

In the February 17, 1989, decision and trespass notice, BLM found that Southway had removed the 4,000 tons of aggregate for the Blanca Road Surfacing project in violation of the Materials Act of July 31, 1947, as amended, 30 U.S.C. §§ 601-604 (1988), 43 CFR 3603.1, 43 CFR 9239.0-7, and section 3 of material sales contract No. CO-050-MS-87-4, and assessed trespass damages in the amount of \$3,600, triple the reappraised unit price for the aggregate.

On March 6, 1989, Southway responded to the trespass action with a "settlement offer" in which it denied owing royalty for the 4,000 tons of aggregate used for the Blanca Road surfacing. Southway asserted that no royalty was owed because

[t]he royalty [sic] now being asked for was for materials used on BLM project CO-910-RFP7-041, Blanca Road Surfacing. At the time the project was being shown we were told by BLM personnel that funds were limited to \$25,000.00. We told BLM personnel that the work would cost more than that but could be done if the royalties [sic] were waived for the project. They informed us before bidding that the royalties [sic] would be waived. We reduced our bid price from \$6.50/ton to \$6.00/ton to reflect this condition. We completed the work and both BLM in the construction division and Area office told us not to include the quantities in those for royalty [sic] payments. We believe we have sufficient documentation to prove this.

By decision dated March 16, 1989, BLM refused the "settlement offer of no obligation" for the 4,000 tons of material used for the Blanca Road Surfacing project, finding it "completely unacceptable in this situation." BLM stated its decision to proceed with applicable trespass procedures since essentially no settlement offer had been made for this material.

In its statement of reasons for appeal (SOR), Southway reiterates the circumstances under which it decided to offer a pre-bid conference price of \$6 rather than \$6.50 per ton in order to meet BLM's limit of \$25,000 for the Blanca Road Surfacing contract. Southway contends that BLM personnel in the construction division and the area office in Alamosa, Colorado, informed it that the BLM royalty would be waived on materials removed from the King Pit for the Blanca Road project because the materials were to be used by a governmental entity for a public project. Southway asserts that based upon the representation that a free use was to be granted for the Blanca Road project, it submitted a bid of less than \$25,000. Southway maintains that it was informed by the BLM area office in Alamosa, Colorado, "that the 4,000 tons for the Blanca project should not and would not be included in the Materials Contract No. CO-050-MS-87-4" (SOR at 1-2). Southway concludes that the removal of the 4,000 tons for the Blanca Road project cannot be a violation and trespass of materials sales contract No. CO-050-MS-87-4 because that removal was not included under the contract. Southway requests that trespass notice No. CO-050-4410 be vacated and that the penalties assessed against Southway under the trespass notice be dismissed.

Southway has also requested that the case be assigned to an Administrative Law Judge for a hearing.

By order dated May 31, 1991, the Board directed Southway to proffer the evidence it would produce at a hearing to support its claim that the 4,000 tons of aggregate should not be included in material sales contract No. CO-050-MS-87-4 for royalty purposes. The Board requested that Southway submit any relevant documents and a list of witnesses expected to be called along with a summary of their expected testimony and how the anticipated testimony demonstrates that the disputed 4,000 tons of material were included in the Blanca Road project and that the removal of the aggregate was authorized. 3/

In response to the request for supplemental information, Southway has submitted a copy of the cover sheet of the solicitation for bids on the Blanca Road Surfacing project which contains the handwritten notation "No royalty on BLM job," and a handwritten breakdown of the components of the \$6.50 per ton bid, i.e., "2.50 haul[, ] 0.50 finishing[, and] 3.50 materials." Southway has also identified the witnesses it intends to call at a hearing, including: its employee who met with BLM personnel about the Blanca Road Surfacing contract to testify about the discussions concerning the project and that he was told by BLM that the materials would be royalty free and that he should bid accordingly; the two BLM employees who participated in the discussions to testify about those conversations and concerning BLM's current common practice of giving free use permits to county and state governments; a Bureau of Reclamation (BOR) employee to testify that BOR is exempt from royalty when using materials from BLM pits; and one of Southway's officers to testify generally about Southway's business and the contract at issue.

BLM has filed an objection to the hearing request, contending that Southway's response shows that a hearing will not elicit any further information relevant to the proper resolution of this appeal. BLM argues that parol evidence cannot be used to modify the clear and unambiguous terms of a written contract. It asserts that the Blanca Road Surfacing contract clearly requires Southway, as the contractor, to provide the materials necessary for completion of the work, and that the contract neither states nor implies that Southway will have the right to use free of charge any materials found in lands administered by BLM or any other Federal agency. According to BLM, since the contract clearly and unambiguously provides that the contractor is to furnish the aggregate to be used in surfacing

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3/ The Board also ordered BLM to submit a copy of material sales contract No. CO-050-MS-87-4, the King Pit trespass case file (CO-050-4408), and a copy of the Feb. 17, 1989, letter-decision accompanying trespass notice No. CO-050-4410. We note that the copy of the Feb. 17, 1989, letter-decision submitted in response to our order, while legible, appears to be missing some text at the top of page 2. The lack of this text does not affect our ability to decide this appeal.

the Blanca Road, a hearing to determine what might have been said in pre-contract meetings and what BLM has done in other instances and could have done here is unnecessary.

In reply Southway argues that a traditional exception to the parol evidence rule applies when evidence is offered to establish fraud, mutual mistake, mistake of law, or fraudulent inducement. Southway asserts that it acted in reliance on BLM's representations that the materials would be royalty free, and that this evidence should be allowed to show fraudulent inducement, fraud, mutual mistake, or mistake of law.

This appeal involves two distinct contracts: material sales contract No. CO-050-MS-87-4 and contract No. CO-910-CT7-034, Blanca Road Surfacing. Southway essentially argues that it did not violate the material sales contract by removing 4,000 tons of aggregate from the King Pit without prior payment because BLM personnel administering the Blanca Road Surfacing contract had represented that royalty would be waived on the materials removed from the King Pit for use on the Blanca Road project. We disagree.

[1] BLM issued material sales contract No. CO-050-MS-87-4 under the authority of the Materials Act of July 31, 1947, as amended, 30 U.S.C. §§ 601-604 (1988), and the regulations found at 43 CFR Part 3600. The Materials Act authorizes the Secretary, "under such rules and regulations as he may prescribe," to dispose of mineral materials on public lands if the disposal of such material "(1) is not otherwise expressly authorized by law, \* \* \* (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest." 30 U.S.C. § 601 (1988). The Act further provides:

Such materials may be disposed of only in accordance with the provisions of this subchapter and upon the payment of adequate compensation therefor, to be determined by the Secretary: Pro-vided, however, That, to the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this subchapter, for use other than for commercial or industrial purposes or resale. [Emphasis in original.]

30 U.S.C. § 601 (1988).

The implementing regulations authorize the sale of mineral materials and provide that "[n]o mineral materials shall be sold at less than fair market value as determined by appraisal." 43 CFR 3610.1-1, 43 CFR 3610.1-2. They further require that, under a mineral material sales contract, advance payment must be made before the removal of mineral material. 43 CFR 3610.1-3(a). The removal of mineral materials from public lands except when authorized by sale or permit under the

law and regulations constitutes unauthorized use, and unauthorized users are liable for damages to the United States in accordance with 43 CFR Subpart 9239. 43 CFR 3603.1.

The regulations recognize the Secretary's discretionary authority to permit free use of mineral materials by any Federal or State governmental agency, unit, or subdivision, including municipalities, or any nonprofit corporation, but emphasize that the "Materials Act does not permit these materials to be used for commercial or industrial purposes, resale or barter." 43 CFR 3600.0-3 (emphasis in original); see also 43 CFR 3621.1-4(c). The rules governing free use permits are found at 43 CFR Subpart 3621. Under these regulations, an application for a free use permit must be filed by the governmental agency, unit, or subdivision, or nonprofit organization qualified to hold a free use permit, and the permit must be issued before mineral materials may be removed. 43 CFR 3621.1. Although a free use permittee may allow an agent to remove the mineral materials, "[t]his agent shall not charge the permittee for the materials extracted, processed or removed." 43 CFR 3621.1-5.

When viewed against the statutory and regulatory backdrop, Southway does not qualify for free use of the 4,000 tons of aggregate removed from the King Pit for the Blanca Road Surfacing project. Southway, as a corporation for profit, is not entitled to the free use exemption. See Ukpeagvik Inupiat Corp., 68 IBLA 359, 362 (1982). Furthermore, the record contains no indication that the BLM unit responsible for administering the Blanca Road Surfacing contract applied for or received a free use permit for the 4,000 tons of aggregate removed from the King Pit. In any event, the Blanca Road Surfacing contract clearly requires the contractor to provide the materials to be used to surface the road, and based on the notations on the bid solicitation cover sheet for the project, Southway charged BLM for the aggregate removed from the King Pit and used to surface the road. Thus, even if a free use permit had been issued to the BLM construction division, Southway would have failed to comply with the provisions of 43 CFR 3621.1-5 which require that the permittee's agent not charge the permittee for the materials removed.

Southway's claim that BLM personnel represented that royalty would be waived on the material does not justify a different result. BLM's and Southway's parol evidence arguments relate to the terms of the Blanca Road Surfacing contract. While parol evidence may, in some instances, be used to demonstrate fraud, mutual mistake, mistake of law, or fraud in the inducement, the goal of such evidence is usually reformation of the subject contract. See, e.g., Boyles Brothers Drilling Co. v. Orion Industries Ltd., 761 P.2d 278, 281 (Colo. App. 1988). In this case, however, the issue is the lack of authority in the form of a permit for free use of materials in the King Pit under the regulations at 43 CFR Part 3620. The construction contract for improvement of the road was not a free use permit issued pursuant to these regulations and could not be a vehicle for conferring this authority. Accordingly, the request for a hearing is denied.

The language of the Materials Act and the regulations establish that Southway is not legally entitled to free use of the aggregate from the King Pit, and Southway could gain no rights not authorized by law by relying on the erroneous advice of a BLM employee. See Western States Contracting, Inc., 119 IBLA 355, 357 (1991); Magness Petroleum Corp., 113 IBLA 214, 217 (1990). Therefore, we find that BLM properly determined that Southway's removal of the 4,000 tons of aggregate from the King Pit for use on the Blanca Road project without prior payment was unauthorized and affirm its conclusion that this unauthorized removal constituted trespass.

We conclude, however, that BLM's assessment of triple damages for this trespass must be set aside. The triple damage assessment was apparently based on BLM's conclusion that the trespass was willful. While Southway's assertion that it relied in good faith on the representations of BLM personnel that no royalty would be due for the 4,000 tons of material used for the Blanca Road project is insufficient to entitle it to free use of that material, it does suggest that Southway's unauthorized removal of the material may have been innocent and not willful. Cf. Western States Contracting, Inc., supra; Curtis Sand & Gravel Co., 95 IBLA 144, 163, 94 I.D. 1, 11-12 (1987). On remand BLM should reassess the appropriate amount of damages for Southway's trespass in light of Southway's claim of reliance and any other relevant factors. 4/

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 in part, set aside in part, and remanded for action consistent with this decision.

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Gail M. Frazier  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge

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4/ We note that the other incidents of unauthorized use cited in trespass notice No. CO-050-4410 were settled at single damages, not triple damages.