

RICHARD CONNIE NIELSON
v.
THE BUREAU OF LAND MANAGEMENT

IBLA 89-623

Decided March 30, 1993

Appeal from a decision by Administrative Law Judge Ramon M. Child finding 13,421 cubic yards of gravel to have been removed in excess of the quantity allowed by contract; determining \$0.35 per cubic yard to be its fair market value; concluding that because removal had been authorized by BLM any trespass was innocent and not willful; and declining to assess damages because the value of the gravel had been previously paid.

Affirmed in part; reversed in part.

1. Administrative Procedure: Administrative Review-- Appraisals--Rules of Practice: Appeals: Hearings-- Rules of Practice: Evidence

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an Administrative Law Judge does not clearly apply this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

2. Evidence: Credibility of Witnesses--Rules of Practice: Witnesses

An appraiser's interest in a case is a proper subject for cross-examination, however, a claim of bias on the part of an appraiser must be based on personal interest rather than employment.

3. Administrative Procedure: Burden of Proof--Appraisals-- Evidence: Weight--Rules of Practice: Witnesses

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the Administrative Law Judge who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

4. Administrative Procedure: Hearings--Hearings--Rules of Practice: Hearings

In referring a case for a hearing, the Board will normally identify the subject matter and one or more issues. Such instructions do not preclude an Administrative Law Judge from receiving evidence on and considering all relevant matters. The fact the Board does not comment on or rule upon all aspects of a case when referring it for a hearing does not mean that they are accepted as correct or made the law of the case.

5. Materials Act--Trespass: Generally

The regulations at 43 CFR 3603.1 and 43 CFR 9239.0-7 prohibit the removal of mineral material except when authorized by a sale or permit issued under the Materials Act and Departmental regulations. A finding that no trespass occurred because BLM authorized the removal of gravel by means other than issuance of a permit or sales contract will be reversed.

6. Administrative Authority: Estoppel--Materials Act-- Trespass: Generally

When BLM has indicated to a trespasser that gravel extraction operations may continue, there is no basis for concluding that the continued operations were unreasonable or lacked good faith. Absent evidence showing knowledge that the violation is occurring or a reckless disregard for whether a violation is occurring, there is no justification for imposing what are essentially punitive damages for willful trespass. In such a case the Board will find, in the interest of fundamental fairness, that BLM is precluded from charging that the operator, who remained in trespass with permission to continue operations, but absent formal authorization, was in willful trespass.

7. Materials Act--Trespass: Measure of Damages

Absent clearly controlling state law, damages for unintentional gravel trespass may be based on either the value of the gravel in place or the market value at the site of the processed gravel, less the expenses of severing and processing it, whichever is greater.

APPEARANCES: Grant L. Vaughn, Esq., Office of the Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; George A. Hunt, Esq., R. Scott Howell, Esq., Salt Lake City, Utah, for Richard Connie Nielson.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

By a decision dated September 19, 1985, the District Manager of the Moab District Office, Utah, Bureau of Land Management (BLM), assessed Richard Conway ("Connie") Nielson \$24,157.80 as treble damages for willful trespass for removing 13,421 cubic yards (cy) of sand and gravel from the Bluff pit located in the SE 1/4 NW 1/4, sec. 28, T. 40 S., R. 22 E., Salt Lake Meridian, San Juan County, Utah, after he had removed 7,996 cy under a sales contract dated April 28, 1981 (UT-060-4501). 1/

Nielson appealed the decision to this Board. On review, we concluded that the record did not clearly show that the calculation of the volume of material removed and the appraised fair market value were proper. Connie Nielson, 102 IBLA 195, 199 (1988). Exercising discretionary authority under 43 CFR 4.415, we referred the case

for a hearing and decision as to the volume of sand and gravel removed by appellant in excess of the original contract volume of 8,000 cy; for a determination of the fair market value of the sand and gravel removed in trespass; and for computation of the trespass damages for which appellant is liable.

Id.

The hearing was conducted by Administrative Law Judge Ramon M. Child in Salt Lake City, Utah, on April 5 and 6, 1989. Judge Child concluded that 13,421 cy of gravel had been removed from the pit after expiration of the April 28, 1981, contract; that its fair market value was \$0.35 per cubic yard; that removal of the gravel had been authorized by BLM, though not by contract; and that, because any trespass was at worst innocent and not willful, no damages would be assessed because the \$4,697.35 value of the gravel had been paid by Nielson on March 7, 1985.

1/ The case file shows that Nielson was served with a notice of trespass on Oct. 10, 1984. Following a meeting between Nielson and BLM personnel on Oct. 22, 1984, BLM issued a demand letter dated Nov. 30, 1984, and a bill for collection (A 307673) requiring payment of \$36,236.70. The amount was calculated based on the removal of 13,421 cy at an appraised value of \$0.90 and assessing treble damages. The documents were returned to BLM unclaimed. BLM then sent Nielson a series of letters notifying him that payments had not been made on the bill for collection. By letter dated Mar. 7, 1985, Nielson responded enclosing a check for \$4,697.35 as payment for the 13,421 cy at the rate of \$0.35 per cubic yard, which was accepted by BLM as partial payment. On Mar. 19, 1985, Nielson again met with BLM personnel. Through his attorney, Nielson provided BLM with a list of four sales in the area. BLM then conducted a second appraisal and issued the Sept. 19, 1985, decision and a new bill for collection (A-314121) in the amount of \$24,157.80, less Nielson's payment, giving a balance of \$19,460.45.

BLM has appealed the decision. BLM argues that the Judge erred in not applying the appraised value of \$0.60 per cubic yard for the material removed and in not imposing treble damages (Statement of Reasons (SOR) at 5-14). BLM also contends that the Judge exceeded his authority by making findings of fact and conclusions of law concerning matters other than the volume of material removed, its value, and the computation of trespass damages (SOR at 3-4). BLM requests that all other findings and conclusions be vacated.

This case arises under the Materials Act, 30 U.S.C. §§ 601-603 (1988), its implementing regulations, 43 CFR Part 3600, and the regulations governing trespass, 43 CFR Part 9230. As the party appealing from Judge Child's decision, BLM has the burden of demonstrating that his decision was erroneous. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 129 (1990). The Board, however, has authority to make de novo review of the entire administrative record and make its findings based thereon. United States v. Dunbar Stone Co., 56 IBLA 61, 68 (1981).

The first issue for which we referred the case for a hearing was the volume of excess sand and gravel removed. We agreed with Nielson that he had not had an opportunity to challenge BLM's calculations or the surveys from which the volume of excess material had been derived. Connie Nielson, supra at 198. We also found that the record lacked an explanation why BLM had concluded that the volume of excess material was 13,421 cy rather than 11,386 cy, a number also appearing on the computation sheets. Id. At the hearing, Robert Dalla, the BLM civil engineer technician responsible for the surveys, maps (Exh. A-7), and calculations (Exh. R-6) testified at length. Nielson did not present any conflicting evidence. Judge Child concluded that BLM's evidence clearly preponderated, and accepted 13,421 cy as the volume of excess material removed (Decision at 3). Nielson has not challenged this finding and we see no reason to disturb it.

We also referred the case for a hearing for a determination of the fair market value of the excess sand and gravel removed. In reviewing the appraisal and arguments presented, we concluded that "a more complete record needs to be developed, with evidence presented to resolve this issue." Id. at 199. Patricia Powell, the BLM employee who prepared the appraisal, testified on behalf of BLM. She described her qualifications as having attended "a three-day course in how to do comparable sale to mineral materials to determine fair market value for mineral materials" at BLM's Phoenix Training Center (Tr. 112). It was her first appraisal and she had no other training or experience in appraising (Tr. 112). Based on the information in her appraisal, she stated that in her opinion the value of the sand and gravel was \$0.60 per cubic yard (Tr. 121). Larry R. Richmond, a qualified and experienced real estate appraiser (Tr. 218-22), testified on behalf of Nielson. He had not previously appraised gravel and had no special training in gravel appraisals (Tr. 223, 232). He stated that to prepare himself and acquire data he had contacted competing pit owners, BLM personnel, State of Utah geological personnel, and others (Tr. 223-24). Based on the information he acquired, he testified that, in his opinion, the value of the gravel at the Bluff site in 1985 was \$0.25 per cubic yard, the same value it had from 1982 to 1984 (Tr. 249-51).

Judge Child gave little weight to the witnesses' testimony. He noted that BLM's appraisal had not been performed by "a disinterested person" and that Powell was "minimally qualified" to make the appraisal (Decision at 4). He stated that it was not clear whether the prices of the comparables used in the appraisal "were for materials in place or stockpiled at the point of sale" and that in some instances it was unclear "whether a delivered price may or may not have been reflected." Id. He characterized Richmond's testimony as "long and diffuse," noting that it had been his "first attempt to appraise gravel." Id.

Instead, Judge Child based his finding of fair market value on testimony concerning a contract Powell had presented to Nielson at a meeting held at the Bluff pit (Exh. A-5). After a compliance check in February 1983 had indicated that the 7,996 cy allowed under the 1981 contract may have been removed, Powell telephoned Nielson to determine whether Nielson thought he was approaching his limit (Tr. 23, 122). BLM also contacted its engineer to determine the volume of material removed. The engineer conducted a ground survey on April 27 and in May informed the district office that the volume had been "somewhat exceeded" (Tr. 23, 65). Powell telephoned Nielson, informing him that the volume he had removed was in excess of his contract (Tr. 23, 26, 45, 122). At that time the excess was about 900 cy (Tr. 124). In June, Powell and Nielson met at the Bluff pit (Tr. 125). She brought along a new contract for the sale of 28,570 cy at \$0.35 per cubic yard (Exh. A-5). In her words, they "discussed the trespass situation and the fact that the material had been removed and what we were going to do about it, what we were going to do now" (Tr. 126). Nielson objected to the price because he believed that BLM had agreed in 1981 to sell 50,000 cy at \$0.25. ^{2/} Nevertheless, he signed the contract (Tr. 124, 178-80).

BLM intended to have the new contract include the excess material (Tr. 23-24, 122, 124-26), but did not execute the document because Herb Clark, who held a mining claim to the land, would not sign a release (Tr. 24-25, 45-48). The contract remained unsigned by BLM in March of 1984 when it sent Nielson a "Certificate Terminating Mineral Materials Sale Contract" and a letter stating: "Enclosed is a copy of a certificate terminating your sales contract number UT-060-MP1-2 near Bluff. As you know the amount of material you contracted for had been removed by May 1983 and you are no longer authorized to continue to extract gravel at the site" (Exh. R-2; see Tr. 29-30, 48).

Judge Child's decision emphasized BLM's willingness to enter into the contract and Nielson's having acceding to its terms by signing it. The Judge noted that, had \$0.35 "not approached a fair market value, BLM would have stood guilty of not protecting the public interest if the figure was too low, and appellant would have presumably gone elsewhere to obtain available material if the price was too high" (Decision at 4). Applying

^{2/} The parties differ as to whether such an agreement was actually reached. The matter is discussed in relation to the issue of trespass.

the classical definition of fair market value as the price at which a willing seller not compelled to sell will accept from a willing buyer not under compulsion to buy, both having reasonable knowledge of the relevant facts, Judge Child concluded that, under the facts of the case, \$0.35 per cubic yard was the fair market value of the excess material which had been removed from the Bluff site. Id.

[1] On appeal BLM argues that the Judge erred in not following the rule that an appraisal will not be set aside unless an appellant shows error in the appraisal method used by BLM or shows by convincing evidence that the charges are excessive, citing Chalfont Communications, 108 IBLA 195, 196 (1989), and Denver & Rio Grande Western Railroad Co., 101 IBLA 252, 254 (1988). BLM addresses three matters concerning the appraisal about which the parties have differed. BLM also criticizes the Judge for disregarding the appraisal because it was performed by an employee and points out that even Powell's minimal qualifications were sufficient.

While we agree with BLM that Judge Child did not apply the standard of review cited by BLM, after examining the evidence presented at the hearing and considering the arguments of the parties, we conclude that the result he reached was not erroneous.

The appraisal utilized the market data approach to determine the fair market value of the subject material. Powell initially considered six sales. She rejected two. Sale 2 at \$0.05 was rejected because it was a 1974 state lease which required an annual payment as well as a payment per cubic yard (Exh. R-8 at 6) and sale 4 at \$0.25 was rejected due to the close relation between the parties and additional benefits the seller received (Exh. R-8 at 7-8). The remaining four sales were deemed comparable to the Bluff site in terms of the year of sale, the quantity of material sold, the quality of the gravel, the distance from place-of-sale to place-of-use, access to the site, amount of processing required, and reclamation requirements (Exh. R-8 at 4-5, 11). The appraisal concluded that the Bluff site was superior to sale 1 at \$0.35 and sale 3 at \$0.25 and inferior to sale 5 at \$0.75 and sale 6 at \$0.90. Based on her analysis of the sales, Powell determined that "the fair market value of the subject material is 60 cents per cubic yard" (Exh. R-8 at 10).

Sale 5, which Nielson characterized as a "resale" which should be disregarded, was viewed with suspicion by the Judge. Sale 5 was material sold by Dean McClellan to Atchison Construction of Farmington, New Mexico, from the Gray Ridge community pit (Exh. R-8 at 8, 18). The case file contains an appraisal prepared by BLM in 1984 of the subject material in which the value was determined to be \$0.90 per cubic yard. That appraisal, prepared by BLM appraiser Sinclair also utilized the market data approach. It considered two sales to determine value. Sale 1, gravel sold by Malchom Young to Little Bee Mining Company, is discussed in the appraisal report as follows:

With processing, the material can be upgraded to good quality concrete aggregate. Mr. Young has a lease agreement with the

Trust Department of First Security Bank. He then in turn leases the gravel source to the Little Bee Mining Co. While the gravel material is of good quality, the arrangement between Young and Little Bee cannot be considered an arms length transaction. However, due to the lack of other gravel sources in the area, this Sale could be used with the proper adjustments.

Subsequently, appellant submitted information on four lease sales. In response, BLM assigned Powell to prepare a new appraisal. Powell considered all the sales submitted by appellant. They are sales 1-4. She located and included sales 5 and 6.

Powell's sale 5, like Sinclair's sale 1, is not an arm's-length transaction but what Sinclair described as a sale "operating in a wholesale capacity." He did not consider this type of sale appropriate for comparison but concluded he was justified in using it because he could not locate other transactions from other sources in the area. We question Powell's decision to use sale 5 to determine value where she was able to locate additional lease transactions. She offered no explanation for using this type of sale and made no apparent adjustments for the nature of the sale.

As noted by Judge Child, it is unclear what costs were included in the price paid for the material purchased in sale 5. In sale 5, Dean McClellan resold material that he purchased from the Federal Government from a community pit on public land. Powell testified that this sale was most similar to the Bluff site because the material is the same San Juan River terrace gravel and therefore of the same quality, with equal access, and the same reclamation requirements (Exh. R-8 at 8; Tr. 118-19). She stated that the sale was in situ but did not know whether McClellan or Atchison bore the cost of removing it and loading it onto trucks (Tr. 133-34). She also did not know the fair market value price McClellan paid BLM for the material (Tr. 139; see 43 CFR 3604.1).

Sale 6 was gravel sold by the Ute Mountain Tribe from a site in southwestern Colorado to Mountain Gravel & Construction of Dolores, Colorado (Exh. R-8 at 19). Nielson argued that the fact the contract was with an Indian tribe raised questions whether it had been negotiated under open market conditions (Nielson Posthearing Brief at 13-14). Nielson also contended that transportation of the gravel 80 miles for use near Kayenta, Arizona, rather than the 45 miles used as the market area for the Bluff site, added \$2.73 per cubic yard of increased costs ^{3/} to an already high priced gravel and raised questions as to whether the sale should be considered comparable, particularly when the terms of the contract were unknown. *Id.* at 14-15; Exh. R-8 at 4, 9, 19; Tr. 129-31, 184-85. In her appraisal, Powell noted that Indian leases for sand and gravel are more difficult to negotiate. Thus, one would conclude that this difficulty is

^{3/} The transportation costs were based on the rate of \$0.065 per mile, a rate substantiated by Richmond's testimony (Tr. 225). Nielson, however, testified that in 1984 the rate could have been lower (Tr. 184-85).

reflected in the price of the material and that adjustments are warranted for this difference. It is not apparent from the record, however, this recognized difficulty was considered in her comparative analysis of sale 6 to the subject.

Given the disparity of prices in the appraisal for a presumably competitive market, Judge Child reasonably found that the evidence did not show the comparable sales to have been priced on an equivalent basis. ^{4/} Powell estimated the degrees of similarities and differences between the subject material and the comparable sales on the basis of six comparative elements: time, quantity, quality, haul distance, access, processing factor, and reclamation. Neither Powell's appraisal nor her testimony at the hearing are adequate to explain the lack of adjustments for the other factors that should have been considered. Without proper adjustments, we question the usefulness of the sales data and we conclude that sales 5 and 6 should be rejected.

Judge Child did not address the arguments as to highest and best use, and we find them to be of no consequence. While BLM logically maintains that highest and best use as concrete aggregate supports a higher value, and appears to be correct about the quality of the Bluff site gravel (Tr. 251), there is no evidence that either of the higher priced sales were for gravel used as concrete aggregate (Tr. 123, 143).

[2] We agree with BLM that it was inappropriate for Judge Child to discount the appraisal on the basis that Powell was not "disinterested" because she was a BLM employee. Due to the needs of the Department for appraisals of diverse types of interests in land, as well as budget limitations, BLM must train employees to conduct appraisals. As in this case, such interests are not normally appraised by private appraisers. Powell's status as an employee cannot be regarded as affecting her judgment any more than the fact that Richmond received a fee from Nielson should be regarded as affecting his. A claim of bias on the part of an appraiser must be based on personal interest rather than employment. Cf. United States v. Jones, 67 IBLA 225, 230 (1982) (Administrative Law Judge); United States v. Zerwekh, 9 IBLA 172 (1973) (mineral examiner). Whether an appraiser has an interest in a case is, of course, a proper subject for cross-examination.

[3] On the other hand, Judge Child correctly recognized that Powell's minimal training and lack of experience could be considered in determining the weight to be given her testimony (Tr. 113). See United States v. Ramsey, 84 IBLA 66, 68 (1984). The appraisal and Powell's testimony were

^{4/} BLM contends that Judge Child's statement that the evidence was not clear as to whether the prices of the comparables "were for materials in place or stockpiled at the point of sale" and "whether a delivered price may or may not have been reflected" were "baseless and clearly erroneous" (SOR at 8-9). Although the decision's wording was not well chosen, it is clear from the testimony that the Judge was referring to sales 5 and 6.

sufficient to satisfy BLM's burden of presenting a prima facie case as to the fair market value of the sand and gravel. Nielson was free to present both his arguments about the adequacy of the appraisal and his evidence as to the value of the sand and gravel. As he noted, BLM's method of appraisal ultimately relies heavily on the judgment and expertise of the appraiser. While the pluses and minuses assigned the comparable sales reflect the data collected about them, the appraiser renders a judgment as to the fair market value of the material at the appraised site. The appraisal concluded that the Bluff site "is superior to Sale #1 and Sale #3, and it is inferior to Sale #5 and #6" (Exh. R-8 at 10). Thus, Powell considered a range to possible values from \$0.25 to \$0.90. Neither the appraisal nor her testimony provide further analysis to explain why \$0.60 per cubic yard was determined to be the fair market value of the Bluff site gravel. Using a minus to indicate inferior to the subject and a plus to indicate superior to the subject does not distinguish the degrees of similarities and differences sufficient to establish the basis on which she arrived at the \$0.60 value. As we have frequently said, the Administrative Law Judge who presides at a hearing has an opportunity to observe the witnesses and is in the best position to decide the weight to be accorded testimony. United States v. Smith, 54 IBLA 12, 14 (1981), and cases cited therein. Judge Child was free to review the arguments of the parties and the evidence presented, consider the demeanor and credibility of the witnesses, and arrive at his decision. His finding that the value of the Bluff site gravel is \$0.35 per cubic yard is consistent with assigning minimal weight to the appraisal and Powell's testimony and our finding that sales 5 and 6 should be excluded.

The remaining issues to be considered are those of trespass and damages. As noted at the outset, BLM argues that Judge Child exceeded his authority in addressing these issues. BLM contends that the scope of the hearing and the Judge's authority to make findings of fact and conclusions of law was limited under 43 CFR 4.433 to those "prescribed by the Board in referring the case for a hearing" (SOR at 3). Citing portions of pages 197-98 of *Connie Nielson, supra*, BLM states that in referring the case for a hearing the Board did not "challenge" or "question" BLM's findings that the contract expired when the allotted yardage had been removed, that further removal of gravel had been willful, and that subsection 10(b) of the contract requires treble damages (SOR at 3-4). Correspondingly, BLM argues that the hearing was ordered only "to determine the volume and the fair market value of the excess material, and to compute the specific amount to be charged for the trespass" (SOR at 4).

[4] BLM's first argument is based on a misreading of 43 CFR 4.433. After providing Administrative Law Judges authority to conduct hearings, subpoena witnesses, order depositions for taking testimony, administer oaths, call and question witnesses, and make findings of fact, 43 CFR 4.433 also grants authority to "take such other actions in connection with the hearing as may be prescribed by the Board in referring the case for a hearing." The provision addresses the actions an Administrative Law Judge may take in conducting a hearing, not the issues which may be raised. A different regulation, 43 CFR 4.415, authorizes the Board to refer a case for a hearing and identify the issues to be addressed. In referring a case for

a hearing, the Board will normally identify the subject matter and one or more issues. See, e.g., Fallon Ice & Cold Storage Co., 85 IBLA 224, 231-33 (1985). Such instructions, however, do not preclude an Administrative Law Judge from receiving evidence on and considering all relevant matters. Id. at 231. When the Board wishes to limit the scope of a hearing, it so states. See, e.g., Colorado-Ute Electric Association, Inc., 79 IBLA 53, 55 (1984).

BLM also misunderstands the consequences of Nielson's appeal. The fact the Board in Connie Nielson did not comment on or rule upon all aspects of BLM's case did not mean that its allegations and arguments were accepted as correct or made the law of the case. The issues of trespass and damages were not exempted from the hearing. To the contrary, the decision specified: "At the hearing, BLM shall have the burden of going forward to establish a prima facie case in support of its trespass charges. However, Nielson shall have the ultimate burden of showing that the charges are improper." Connie Nielson, supra at 199. Although Judge Child initially understood the scope of the hearing to be limited (Tr. 3, 15), he acted properly in accepting evidence about and ruling upon the questions of whether there had been a trespass and, if so, whether it had been willful.

Judge Child concluded that continued removal of gravel from the Bluff site beyond 7,996 cy was authorized by BLM. He based this conclusion on a number of facts. First, in the spring of 1983 both BLM and Nielson knew that the 7,996 cy allowed under the 1981 contract had been exceeded (Decision at 4). Second, both parties were aware that the 7,996 cy was intended to be "part of a greater amount of gravel expected to be removed." Id. at 5. Third, both parties were aware that gravel removal "was ongoing and continuing." Id. Fourth, from June of 1983 when Powell presented Nielson with the new contract, both parties knew that additional material removed would be at a price "in all likelihood, higher than that expressed in the 1981 contract and probably at the rate of 35 cents per yard." Id. Fifth, Nielson was not advised that he was "no longer authorized to continue to extract gravel from the site" until BLM's letter of March 8, 1984. Id., quoting Exh. R-2. Sixth, upon receipt of the letter, Nielson stopped extracting gravel from the pit.

Judge Child construed the language of the March 8, 1984, letter that Nielson was "no longer authorized to extract gravel" to mean that "prior to that time appellant had be so authorized" and concluded that the excess gravel had been removed "not as a result of trespass, but with the tacit approval, authorization and knowledge of the respondent subject only to an accounting and payment therefor." Id. He rejected BLM's argument that subsection 10(b) of the 1981 contract required a finding of willful trespass and imposition of treble damages. Instead, he concluded that the subsection "refers to removal of the 7,996 yards" and criticized BLM for "placing the words 'when permitted yardage is recovered' where the form obviously called for a date," making it "impossible to impose a time limit for removal of the 7,996 yards." Id. at 6. Concluding that any "trespass was, at worst, innocent and tolerated," he found that, because Nielson had already paid the

fair market value of \$0.35 per cubic yard for the excess material removed, no damages would be assessed. Id.

[5] Our resolution of the trespass issue is controlled by the applicable regulations. Mineral material trespass is prohibited by 43 CFR 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). 5/

Subpart 9239, governing trespass, provides:

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.

43 CFR 9239.0-7. These regulations prohibit the removal of mineral material except when authorized by a sale or permit issued under the Materials Act and Departmental regulations. See Frehner Construction Co., 124 IBLA 310 (1992); Curtis Sand & Gravel Co., 95 IBLA 144, 161, 94 I.D. 1, 10 (1987). Regardless of when Nielson's contract may have expired, it authorized removal of no more than 7,996 cy of gravel and, consequently, the 13,421 additional cubic yards were removed without authorization by permit or sales contract. To the extent the decision concludes that no trespass occurred because BLM authorized Nielson's continued operations, it cannot be allowed to stand. We find Nielson to have removed the excess gravel in trespass and reverse the decision in part.

Although the facts identified by Judge Child do not control the issue of whether there was a trespass, they are relevant to his conclusion that the trespass was innocent and tolerated. His findings were generally correct. As noted in Frehner Construction Co., supra, at 313-14:

[I]n civil cases, evidence of either knowledge that a violation is occurring or a reckless disregard for whether a violation is

5/ The mineral material regulations were revised effective July 11, 1983 (48 FR 27008 (June 10, 1983)), a date occurring during the events at issue in this case. Prior to revision, the regulation was almost identical to 43 CFR 9239.0-7, quoted above. 43 CFR 3602.1 (1982).

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) (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).

As a result of Dalla's volumetric measurements and Powell's phone call to Nielson, both parties knew in May of 1983 that the allotted 7,996 cy had been exceeded. It is also clear that BLM was aware of Nielson's operation at the site. When Powell met with Nielson at the Bluff pit in June of 1983, she did not tell him to cease operations but presented him with a contract to cover the ongoing operations (Tr. 125-26, 180-81). For sometime afterwards, BLM believed that it would be able to execute the contract (Tr. 48). The record does not indicate when BLM concluded that it would be unable to do so, but the termination certificate was prepared on December 20, 1983, and sent to Nielson in March of 1984. From testimony presented by BLM at the hearing, we gather that the delay was due to underfunding of the mineral materials program and the priority given other matters (Tr. 33). Upon receipt of the letter, Nielson halted further excavation (Tr. 181-82).

Judge Child also correctly concluded that, as a consequence of the meeting at the Bluff pit, both parties knew that the additional material removed would be at a price higher than the \$0.25 per cubic yard provided by the 1981 contract, although it is less certain that he correctly found both parties understood that the price would probably be \$0.35. BLM regarded the figure as "arbitrary" and temporary pending an appraisal of the actual fair market value (Tr. 24-25, 54, 57). There was conflicting testimony whether Nielson was told that the price of the gravel would be subject to an appraisal (Tr. 24, 179-80). The parties' understanding of what the price would be, however, is less important to the issue of whether the trespass was willful than their willingness to have the operation continue.

BLM is correct that the evidence did not show that in 1981 BLM agreed to sell Nielson 50,000 cy of gravel (Tr. 191). Judge Child did not find that such an agreement had been made, but found that the contract for 7,996 cy was intended to be "part of a greater amount of gravel expected to be removed" (Decision at 5). The evidence is consistent that a sale of 50,000 cy was discussed at a meeting prior to issuance of the 1981 contract and that the parties understood Nielson wished to purchase that quantity. Id. at 3. Nielson testified about the discussions, stating that he believed an agreement had been reached (Tr. 172-74). His brother and partner Norman Nielson, who was also at the meeting, also testified that an agreement had been reached (Tr. 212-15). Robert Turri, Chief of Realty and Minerals for

the San Juan Resource Area, denied there had been an agreement but confirmed that 50,000 cy had been discussed and explained that the contract had been issued for 7,996 cy because the area office's delegation of contracting authority was limited to \$2,000 (Tr. 22, 256-60). Judge Child's conclusion indicates that he found the latter testimony to be more credible.

The problem posed by the facts of this case is that it is difficult to find willful trespass when BLM knew of the trespass, made no objection, had Nielson execute the contract, indicated that operations could continue, and acted as if the matter would be resolved by the contract executed by Nielson. Of particular concern is that there is no evidence that after Nielson signed the contract Powell presented to him in June of 1983, BLM notified him that it had not been countersigned or that he should cease operations pending its approval. After the meeting the excess material removed increased from approximately 900 cy, plus whatever had been extracted in May of that year, to 13,421 cy.

[6] In Curtis Sand & Gravel Co., *supra*, BLM had issued trespass notices for the unauthorized removal of mineral material from lands patented under section 1 of the Stock-Raising Homestead Act of 1916 (ch. 9, § 1, 39 Stat. 862). The company was conducting operations under a lease issued by the surface owner; however, Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), had held that sand and gravel had been reserved minerals under the Act. BLM issued a trespass notice directing Curtis to cease operations. However, on several subsequent occasions BLM had indicated that operations could continue. *Id.* at 162-63, 94 I.D. at 11-12. The Board concluded that "in the interest of fundamental fairness, BLM is precluded from finding the continuing operations, which remained in trespass in the absence of prior formal authorization, constituted a willful trespass." *Id.* at 163, 94 I.D. at 12.

Although some of the facts in Curtis differ from those in this case, the same pattern is present. Having told Curtis that the company could continue to remove sand and gravel, it would have been incongruous for BLM to later claim there had been willful trespass. The difference between innocent and willful trespass is usually understood to concern the trespasser's knowledge and beliefs about his rights. When BLM has indicated to a trespasser that operations may continue, there is no basis for concluding that the continued operations were conducted with knowledge that a violation was occurring or a reckless disregard of whether a violation was occurring. Frehner Construction Co., *supra* at 313. In the absence of this showing there is no justification for imposing what are essentially punitive damages.

Accordingly, we conclude that Judge Child correctly concluded, based on the record before him, that Nielson did not commit willful trespass. Curtis Sand & Gravel Co., *supra*; Western States Contracting, Inc., 119 IBLA 355 (1991); *see also* Browne-Tankersley Trust, 76 IBLA 48, 50 n.3 (1983); Sunrise Construction Co., 73 IBLA 185 (1983); Lloyd L. Clark, 17 IBLA 201, 214, 81 I.D. 546, 552 (1974).

Also, we reject BLM's argument that a finding of willful trespass is required by subsection 10(b) of the contract which provides:

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. [6/] [Emphasis in original.]

In his posthearing brief, Nielson essentially argued that the provision applies when some portion of the quantity of the material sold under the contract is extracted after the term of the contract has expired or the contract has been suspended or cancelled (Nielson Posthearing Brief at 7-8). BLM argued that the provision applies to the type of material sold under Nielson's contract had expired (BLM Posthearing Brief at 6). As indicated above, Judge Child adopted Nielson's reading of the provision.

On appeal BLM does not raise additional arguments to show that the Judge's ruling was erroneous. Nor, for purpose of reviewing the decision on appeal, do we find any reason to reverse it. The conflicting readings of the provision offered by Nielson and BLM are sufficient to show that its language is ambiguous. It is certainly possible that the provision was drafted to apply to the removal of material after expiration of a contract, as BLM contends, but it does not clearly state that it does apply. It is as plausible that it was drafted to apply only when an operator removes the material sold under the contract after it has expired or has been suspended. In that instance, the removal of excess material, as in this case, would be governed by the Department's trespass regulations.

Resolving the trespass issue, brings us to the matter of damages. The regulations provide that, in accordance with the decision of the Supreme Court in Mason v. United States, 260 U.S. 545 (1923), the rule of damages to be applied "will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized." 43 CFR 9239.0-8. The parties have failed to address the question whether there is applicable state law and, if not, what measure of damages applies. See John Aloe & Liberty Masonry, Inc., 117 IBLA 298, 299 (1991); Harney Rock & Paving Co., 91 IBLA 278, 290, 93 I.D. 179, 186 (1986).

In its posthearing brief BLM asserted that Utah law "authorizes treble damages for the unlawful removal of mineral material," citing Utah Code

6/ Although "triple" and "treble" are sometimes used interchangeably, when used as an adjective "treble usually means 'three times as much or as many' [treble damages] whereas triple means 'having three parts' [a triple bookshelf] [triple bypass surgery]." Garner, A Dictionary of Modern Legal Usage 551 (Oxford U. Press 1987).

Ann. § 40-1-12 and Benton v. State, 709 P.2d 362 (Utah 1985). The case is not helpful, finding simply that the "statute does not delineate who has a cause of action for the wrongful taking of minerals, but rather sets forth the measure of damages to be used in such claims." *Id.* at 366.

[7] In Harney Rock & Paving Co., *supra*, the Board established a rule of damages for sand and gravel trespass. BLM had applied 43 CFR 9239.5-1, which provides that "[f]or ores trespass in a State where there is not State law governing such trespass, the measure of damages will be * * * the same as in the case of coal." The coal regulation provides that "[f]or innocent trespass, payment must be made for the value of the coal in place before severance" and that "[f]or willful trespass, payment must be made for the full value of the coal at the time of conversion without deduction for labor bestowed or expense incurred in removing and marketing the coal." 43 CFR 9239.5-3(a); see BLM Manual § 9235.4 (Rel. 9-120, Aug. 10, 1976). On review the Board determined that BLM had both misapplied 43 CFR 9239.5-3(a) and overlooked an applicable Oregon decision holding that the value of rock used to surface a road was "the rock in the quarry severed and crushed, less the expense of severing and crushing it." Holliday v. Dunn & Baker, 125 Or. 144, 265 P. 1096, 1097 (1928). After discussing the "royalty" standard for computing damages, ^{7/} the Board held that, absent clearly controlling State law, "damages for an unintentional trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing and crushing it, whichever is greater." Harney Rock & Paving Co., *supra* at 289, 93 I.D. at 186. ^{8/}

Although it might seem that deducting extraction and processing costs from market value would give the value of material in place, as discussed in Harney, such is not necessarily the case. See also United States v. Marin Rock & Asphalt Co., 296 F. Supp. 1213, 1218-19 (1969). If the sales price includes a profit, the value in place will be less than the market value after deducting expenses. See Harney Rock & Paving Co., *supra* at 285-86, 93 I.D. at 183-85. In addition, some decisions have disallowed various expenses. See American Law of Mining, § 203.01[2][b] at 203-07 (2d ed.

^{7/} Although the payment made for sand and gravel is frequently referred to as a "royalty," it is a flat-rate purchase price paid for material extracted and not a percentage of the sales price or other value of the material. See 43 CFR 3610.1-2, 3610.1-3.

^{8/} Harney also indicated in dictum that 43 CFR 9239.5-1 "applies only when there is no state law defining the measure of damages." *Id.* at 285, 93 I.D. at 183. It is unclear whether a regulation governing "ores" should be applied to sand and gravel. Had Harney determined that 43 CFR 9239.5-1 applies to sand and gravel, damages would be measured in accord with 43 CFR 9239.5-3(a) which provides that damages for innocent trespass will be "the value of the coal in place before severance" and it would not have been possible to set forth a rule allowing an alternative measure of damages.

1984). Even if all expenses may be deducted, as a practical matter a trespasser may be unable to establish the validity of all of his costs because his financial records may be insufficient to show the proper proportion of indirect expenses attributable to the trespass operation. The operation also may have incurred a loss. Due to fluctuations in market value or unusually large extraction and processing costs, the value in place may have been greater than the amount received for the material less expenses. See Harney Rock & Paving Co., supra at 288, 93 I.D. at 185. Consequently, in Harney the Board noted that case law indicates "BLM should make damage determinations for Federal mineral trespass by the method most favorable to the trespass victim, unless it can be said 'with certainty' that state law requires a different method." Id. at 287, 93 I.D. at 186.

Our review of Utah law has disclosed nothing clearly applicable in this case. ^{9/} Consequently, we apply the rule set forth in Harney. We have affirmed Judge Child's conclusion that the in place value of the gravel at the Bluff site was \$0.35 per cubic yard. The record shows that in its transactions with appellant, BLM stated its election of damages due for innocent trespass to be the in place value of the material removed. See Exh. A-10. Because Nielson has paid \$4,697.35, the amount due as trespass damages, no further payment is required.

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 and reversed in part.

Gail M. Frazier
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

^{9/} More recently Utah has enacted a statute applicable to mineral and gravel trespass on state lands. Utah Stat. Ann. @ 65A-3-1 (1991 Supp.). An earlier statute prohibited gravel trespass on state land, id. § 65-1-78, but the damages allowed were not based on the value of the gravel extracted but rather "payment of twice the appraised value of the use of the land during the time it is occupied * * * together with twice the amount of damage committed upon such land." Id. § 65-1-79. An additional provision allowed damages at twice the value of salt or minerals extracted from the water or bed of navigable lakes. Id. Compare Utah Code § 40-1-12 (1988).

