

PINE GROVE FARMS

IBLA 90-240

Decided June 3, 1993

Appeal from a decision of the Paradise-Denio, Nevada, Resource Area Office, Bureau of Land Management, assessing damages for trespass. NV 020-4-593.

Affirmed in part, set aside in part, and remanded.

1. Trespass: Generally

The unauthorized removal of material (topsoil) from public lands under the jurisdiction of the Department of the Interior is an act of trespass.

2. Administrative Procedure: Burden of Proof--Trespass: Generally

BLM's determination of the volume of material removed in trespass is properly affirmed where it is amply supported by the record, where BLM has supported its conclusions with a thorough exposition of its methodology, and where the appellant fails to establish error in the methodology BLM used to collect data and its interpretation of that data to determine the amount of material removed from the site. Appellant's anecdotal evidence concerning observations of conditions at the site is insufficient to overcome BLM's documented survey of those conditions.

3. Trespass: Generally--Trespass: Measure of Damages

Anyone properly determined by BLM to be in trespass is liable to the United States under 43 CFR 2801.3(b), among other things, for either rehabilitating the lands harmed by the trespass or for the costs incurred by the United States in so doing.

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

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

5. Trespass: Generally--Trespass: Measure of Damages

Absent controlling State law, damages for an unintentional trespass involving removal of topsoil are the market value of the severed material less the expenses of severing it. Where the record does not contain a clear application of that rule, in that BLM did not take into account the expenses of severing the topsoil, BLM's decision is properly set aside and the case remanded to do so.

APPEARANCES: William F. Schroeder, Esq., Vale, Oregon, for appellant; Scott Billing, Area Manager, Paradise-Denio, Nevada, Resource Area Manager, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Pine Grove Farms has appealed from the February 1, 1990, decision of the Paradise-Denio, Nevada, Resource Area Office, Bureau of Land Management (BLM), assessing trespass damages for the unauthorized removal of topsoil from Federal lands.

According to an initial report of unauthorized use that is in the record, on October 26, 1989, a BLM Range Technician, while checking fences around the Quinn River allotment, observed one self-loading piece of equipment parked on private land and a second picking up material (topsoil) on public lands. The lands were identified as the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 10, T. 43 N., R. 37 E., Mount Diablo Meridian, Humboldt County, Nevada.

A memorandum in the file indicates that, on October 30, 1989, a BLM Realty Specialist visited the site and found "the two earth scrapers[-] haulers working on private land adjacent to the BLM land where the top soil had been removed," but that they did not come onto Federal lands while he was there. There was a barbed-wire fence between the private and Federal lands that had been breached. The Specialist advised the operators of one of the machines that "the operation outside the fence was a violation of Federal regulations and that there would be trespass proceedings brought against" Ken Earp, Pine Grove Farms. The Specialist estimated the amount of topsoil that had been removed from Federal lands.

In November 1989, BLM prepared a Materials Unauthorized Use Investigation Report documenting that a trespass had occurred. An appraisal of the value of the removed material was included. The appraiser calculated the disturbed area at approximately 495,000 square feet (11.4 acres), using two separate methods:

The area was calculated by two methods. First, the scale drawing of the area was divided into standard geometric shapes labelled A through D. The area of each of these was calculated using standard trigonometric formulas with the on the ground measurements and scaled measurements taken from the drawing. * * * The results of this computation are * * * 494,805 [square feet]. * * * Secondly, I traced the boundary of the scale drawing five times with the Numonics planimeter. The average of the results was 495,080 [square feet].

BLM's appraiser used an average stripping depth of 12 inches over the entire site, based on his professional judgment that evidence existed to support that figure:

The thickness of the material removed is somewhat more subjective. In several places there was evidence that 12 inches or more of material had been removed * * *. [1/] A few locations within the disturbed area had vegetation present, and a few other locations showed evidence that 18 inches or more material had been removed. In addition there were three or four locations observed where a gravel horizon was exposed by the stripping. The soil survey of this area puts that gravel horizon at approximately 20 inches.

Multiplying the disturbed area by the thickness of the material removed yielded a figure of 18,333 cubic yards of material removed.

BLM prepared a Short Form Mineral Appraisal valuing the material at \$1 per cubic yard. The report stated that the purpose of the appraisal was to determine the value of topsoil removed in trespass, and that the "rights appraised" were the "purchase and removal of topsoil." Valuation was based on brief comparisons to four sales of topsoil in Nevada, two at \$0.75 per cubic yard, one at \$1.92 per cubic yard, and one at \$1.50 per cubic yard. The quality of the subject soil was found to be high, based on BLM's District Soil Scientist's finding that it was "some of the best in the district for agricultural purposes." Thus, BLM determined that the soil was "comparable [in quality] with all the reference sales." BLM found that the "subject site required minimal development to provide access," making it comparable to two of the four sales and inferior to the other two. Recognizing that "distance to market or site of use" is an important factor

1/ BLM referred to photographs in the record showing the depth of the removal.

in determining the price charged for topsoil, BLM noted that three of the comparables were "within close proximity to their point of use," but that the fourth "requires substantial transport to reach the market area." As

the subject site is directly to the point of use, BLM considered the subject site superior to all of the comparables. Finally, noting that an "irregular or seasonal market requires a lower in-place value to remain economical," and that subject market and three of the comparables are irregular, BLM found the subject to be similar to those three sales, but inferior to the last comparable, where the market is "steadier." Balancing these factors in relation to the comparables, BLM determined that the "subject site is roughly comparable to all the sites evaluated." Although the average value from the sales of the four sites was \$1.23 per cubic yard, BLM adopted a value of \$1 per cubic yard.

Applying that value to the amount determined to have been removed, BLM set the value of the removed material at \$18,333.

On November 17, 1989, BLM sent a Trespass Notice to Ken Earp (NV 020-4-593), asserting that he had removed "18,333 cubic yards of topsoil, without authorization, with the associated destruction of 11.36 acres of surface vegetation," in violation of 30 U.S.C. § 601 et seq. (1988), 43 U.S.C. § 1732 (1988), and 43 CFR 3600. A letter accompanying the trespass notice noted that the value of mineral removed is \$18,333 and invited Earp to appear at BLM's office to effect a settlement for trespass damages.

According to a BLM conversation record in the casefile, on December 4, 1989, Bob Schweigert, whom Pine Grove Farms (through Earp) had authorized to represent it, visited BLM. He indicated that Pine Grove Farms should be listed as the trespasser, not Earp. He did not deny that the trespass had occurred. He questioned the accuracy of the calculation of the depth of material removed. He offered a settlement of \$0.10 per cubic yard.

On December 14, 1989, Schweigert filed a letter detailing his objections to the calculation of the depth of the material removed. He described his own efforts to sample the cuts, yielding his estimate of 3.3 inches of soil removal. He also disputed BLM's conclusion that soil had been removed from all of the acreage indicated by the appraisal, suggesting that some of the area had been "run over by equipment" without removing soil. Even presuming the accuracy of BLM's determination of the area, he noted, the volume of soil removed would be no more than 4,582 cubic yards using his estimate of the thickness. He also asserted that "the logistics of the situation do not support a belief on your part that 18,000 cubic yards of soil could be moved in a period of 5 days."

Schweigert, arguing that "surface soil * * * is relatively abundantly located through the district," and thus must be valued at less than gravel, which BLM routinely values at 15 to 20 cents per cubic yard in the area of the subject soil removal. The value of topsoil, he argues, is further diminished by the lack of commercial market and cost of transportation to

the nearest commercial market area. He proposed a value of \$0.10 per cubic yard as a value for the soil removed and offered in settlement a payment of \$458.20.

Schweigert also challenged BLM's decision to require rehabilitation of the site, noting that BLM had not "seen fit to 'rehabilitate' * * * numerous past disturbances." Specifically, he noted that no rehabilitation of the site has ever been made in response to wildfire damage, construction of irrigation diversion ditches and a large dike, or floods and gravel deposition events. Further, he noted, other pits in the area have never been rehabilitated.

On January 4, 1990, BLM notified Schweigert that it did not accept his settlement offer.

On December 21, 1989, BLM surveyed the area involved in the trespass. That survey, using a Leitz Total Station, resulted in a higher area of land disturbed, viz. 574,556.4 square feet (13.19 acres). The survey is fully documented in the casefile.

On January 25, 1990, BLM revisited the trespass site to conduct a survey of the material removed. In order to determine the depth of the soil removed, 65 data points were surveyed. BLM's methodology has been thoroughly documented in a report in the casefile and in BLM's answer.

The most conservative estimate of the average depth of soil removed was 0.4222 foot, which BLM described as "well established." That figure represented the depth of all 65 samples. However, BLM also asserted that it had "cause to believe that a depth of .488 foot is more accurate and almost equally [defensible]." That higher figure represents the depth of 28 sample points where the depth of the cut could be determined by comparison to the original ground. That was considered to be a more reliable figure than any using sample points where depth was measured by comparing cuts to previous cuts, because at the latter "there was an unknown amount of material that would have existed above both cuts."

On February 1, 1990, the Area Manager, BLM, issued the decision under appeal to Pine Grove Farms, calculating the amount of material removed based on an area of 574,556.4 square feet (13.19 acres) and an average depth of 0.488 foot, yielding 10,384.57 cubic yards. BLM, answering Schweigert's assertion to the contrary, noted that its calculations indicated that machines similar to those used to move the material could move 15,000 to 20,000 cubic yards of material in a 5-day period.

BLM rejected the use of the value of gravel in assessing damages, noting that the principle of comparable sales appraisal required the use of price and attributes from other sales of the same commodity as the one being appraised, where such values are available. BLM adhered to its previous valuation of the material at \$1 per cubic yard and demanded payment of \$10,384.57. BLM also demanded that Pine Grove Farms stabilize the disturbed site by recontouring the area to BLM's satisfaction and seed the site with specified grass. Pine Grove Farms (appellant) appealed.

[1] Under 43 CFR 9239.0-7, the unauthorized removal of materials from public lands under the jurisdiction of the Department of the Interior is an act of trespass. Further, under 43 CFR 2800.0-5(u) and 2801.3(a), any use of public lands that requires a right-of-way, temporary use permit, or other authorization and that has not been so authorized constitutes a trespass. There is no dispute that materials were removed without authority. Therefore, BLM properly held that there was an act of trespass here.

[2] Although the record demonstrates initial uncertainty on this question by BLM, the determination of the volume of the material removed used in the decision under appeal is amply supported by the record. 2/ BLM has supported its ultimate conclusions with a thorough exposition of its methodology, both in the casefile and in its answer.

The burden is on appellant to establish error in the methodology BLM used to collect data and its interpretation of that data to determine the amount of material removed from the site. See Animal Protection Institute of America, 118 IBLA 63, 76 (1991). Appellant, apart from Schweigert's anecdotal evidence concerning his observations at the site, has presented no evidence in support of a contrary conclusion concerning the amount of material removed. Although appellant indicates that it has "evidence concerning these issues * * * in the form of photographic and video recordings," that evidence has not been submitted.

Appellant asserts on appeal that BLM has failed to prove that 18,000 cubic yards of material were removed in 5 days. It faults BLM for not examining the site to determine the actual facts of the operation. BLM was not obliged to make such showing, however. Schweigert argued that BLM's determination of volume must be in error, because it was logistically impossible to move 18,000 cubic yards of soil in 5 days. BLM adequately demonstrated that it was in fact possible to move between 15,000 and 20,000 cubic yards of soil in 5 days. BLM need not present detailed evidence establishing that the material was in fact removed in 5 days. BLM has adequately rebutted appellant's assertion that it was impossible to do so.

[3] Appellant also disputes BLM's requirement that it rehabilitate the site by regrading and reseeded. Anyone properly determined by BLM to be in trespass is liable to the United States, among other things, for either rehabilitating the lands harmed by the trespass or for the costs incurred

2/ The fact that BLM's ultimate conclusions are at variance with its earlier findings does not indicate, as suggested by appellant (Reply at 5), that BLM does not have a valid claim. Further, the measurements ultimately used by BLM are presented as conservative numbers, even though BLM notes that other facts (such as the fact that appellant's soil removal had leveled a drainage ditch that was more than 1 foot in depth) supported a conclusion more in line with BLM's earlier determination.

by the United States in so doing. 43 CFR 2801.3(b). BLM properly directed appellant to rehabilitate the lands.

[4] Appellant has requested a fact-finding hearing. ^{3/} Although authorized under 43 CFR 4.415, a hearing is required only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Lazy VD Land & Livestock Co., 108 IBLA 224 (1989); Lawyers Title Insurance Co., 92 IBLA 162 (1986). As noted above, appellant asserts that it possesses evidence not submitted to the Board showing error in BLM's calculation of volume. As that evidence has not been submitted, we are plainly unable to conclude that it and BLM's evidence are irreconcilable. However, we note that, in view of the empirical nature of the question of fact, it is unlikely that we could not have resolved that question if all evidence had been submitted to us. Appellant's request for hearing is properly denied.

[5] Under 43 CFR 9239.0-7, trespassers are liable in damages to the United States. Under 43 CFR 9239.0-8, the rule of damages to be applied in the cases of timber, coal, oil, and other trespass is 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. BLM did not consider, and the parties did not brief, the issue as to what measure of damages Nevada law prescribes. This is a frequent error. See, e.g., John Aloe, 117 IBLA 298, 299 (1991); Harney Rock & Paving Co., 91 IBLA 278, 290, 93 I.D. 179, 186 (1986).

Our review of Nevada law fails to reveal a Nevada rule establishing the measure of damages for topsoil trespass. ^{4/} Absent controlling State law, we have held that damages for an unintentional trespass involving removal of rock are either (1) the royalty value of the material or (2) the market value of the severed material less the expenses of severing it, whichever is greater. See Harney Rock & Paving Co., 91 IBLA at 289, 93 I.D. at 186. ^{5/}

^{3/} That request was taken under advisement pending review of the evidence.

^{4/} We have recognized that Nevada courts have distinguished between "willful trespassers" and those who "convert [minerals] under a bona fide, but mistaken, belief that they had a right to appropriate them." Patchen v. Keeley, 14 P. 347, 353 (Nev. 1887); see CM Concepts of Nevada, 126 IBLA 134, 136. 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. BLM has not asserted that the trespass was willful here.

^{5/} Patents issued under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § 291 (1970) (repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787) contain a reservation of "minerals in the lands" that has been held to include gravel (Watt v. Western Nuclear, Inc., 462 U.S. 37 (1983)), scoria (Pacific Power & Light Co., 45 IBLA 127 (1980), aff'd, Pacific Power & Light Co. v. Watt, No. C 80-073K (D. Wyo. June 17, 1983)), and aggregate (Harney Rock & Paving, supra).

Turning to the instant case, we note that topsoil has no royalty value, and also that it is doubtful that topsoil can be regarded as a "mineral." See Watt v. Western Nuclear, Inc., *supra* at 53-55; but see United States v. Toole, 224 F. Supp. 440, 455 (D. Mont. 1963) (describing agricultural soil as "mineral soil"). Nevertheless, it is comparable to minerals such as rock in that it is both capable of being removed and has value. Further, like rock, the costs of removal of topsoil are identifiable. We deem it appropriate to set damages as the market value of the severed topsoil less the expenses of severing it.

The record does not contain a clear application of the above rule for establishing damages. Specifically, BLM did not take into account the expenses of severing the topsoil, which must be deducted from the value of the topsoil. For this reason, we set aside BLM's decision and remand the matter for reappraisal and issuance of a new decision subject to appeal. 6/

We would note that, contrary to appellant's suggestion, there was a market for the topsoil, to wit, appellant's demand for it. If appellant had not misappropriated the topsoil from the Federal lands, it would have had to purchase it elsewhere. Appellant cannot be heard to complain that other less expensive material, such as sand or gravel, could have been used. Having elected to use the Government's topsoil, it is obligated to pay for it, as valued under the rule set out above.

fn. 5 (continued)

Removal of those Federally owned mineral materials by the patentee has been adjudged trespass.

Harney Rock & Paving, *supra*, concerned removal of aggregate rock removed from lands patented under SRHA. In addition to expenses of severing the aggregate rock from the ground, the costs of crushing it were also held to be properly deducted from the market value in determining trespass damages.

In the present case, the lands have never been patented, so that the material removed by appellant, whether considered mineral or not, was clearly owned by the United States. As the material was topsoil, not stone, it required no crushing.

6/ Pine Grove's reply denies that BLM conducted an appraisal of comparable sales as claimed, citing several instances where BLM's appraisal fails to comport with the Handbook. That Handbook, like the BLM Manual, is not a regulation. Accordingly, it does not have the force and effect of law, and is not binding on this Board. Beard Oil Co., 111 IBLA 191 (1989); Mesa Petroleum Co., 107 IBLA 184 (1989); Cities Service Oil & Gas Corp., 109 IBLA 322 (1989); The Joyce Foundation, 102 IBLA 342 (1988). However, BLM is reminded that its new appraisal may be judged inadequate if the accompanying report provides insufficient data on materials compared and insufficient analysis of the differences and similarities between the comparable material and the subject material to support the appraisal.

See Amax Magnesium, *supra* at 284. BLM should ensure on remand that its appraisal is adequately supported on the record.

Thus, we specifically reject appellant's suggestion that values of sand and gravel should be used. BLM states in its decision that it used the appraisal procedure outlined in BLM's Minerals Materials Appraisals Handbook 9H-3630-1 (1986) (Handbook), and that the appraisal principle relied on was that of comparable sales, which establishes value by comparison to prices from comparable sales of the same commodity as the one being appraised. The comparable value method of appraisal is the preferred method where there is sufficient comparable data available and appropriate adjustments are made for differences between the subject material and other material sold. See Amax Magnesium, 119 IBLA 281, 284 (1991), and cases cited. BLM correctly held that a use of sand or gravel prices would not be appropriate to set a value for topsoil where, as here, values for comparable sales of topsoil are available.

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.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge