



DEAN PALMER

186 IBLA 398

Decided December 28, 2015



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Interior Board of Land Appeals  
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IBLA 2014-58

Decided December 28, 2015

Appeal from a November 12, 2013, decision by the Field Manager, Miles City Field Office, Bureau of Land Management, finding appellant liable in trespass for removing mineral materials from the United States' mineral estate, and assessing damages in the amount of \$6,729.29.

Affirmed.

1. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads--Trespass: Generally

Removal of scoria for commercial purposes from land patented under the Stock-Raising Homestead Act, without authorization, constitutes a trespass because such material was reserved to the United States by the Act. 43 U.S.C. § 299 (2012).

2. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads--Trespass: Generally

BLM properly determines that a trespass has occurred, in accordance with 43 C.F.R. §§ 3601.71(a), 3601.72, and 9230.0-7, when mineral materials owned by the United States are removed without agency authorization.

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

In challenging a BLM trespass decision, an appellant bears the burden of establishing error in the decision.

APPEARANCES: Laura Christoffersen, Esq., Culbertson, Montana, for appellant; Jessica M. Wiles, Esq., Office of the Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE SOSIN

Dean Palmer (appellant) appeals from a November 12, 2013, decision issued by the Field Manager, Miles City (Montana) Field Office, Bureau of Land Management (BLM). In the decision, BLM found appellant liable in trespass for removing mineral materials (scoria, a volcanic rock) from the United States' mineral estate, and assessing damages in the amount of \$6,729.29. Because appellant has not met his burden to show error in BLM's decision, we affirm.

*Background*

An "Opencut Permit" approved by the Montana Department of Environmental Quality in 2008 authorized Richland County, Montana, to conduct scoria mining operations on approximately 95 acres of land, identified as the "Palmer Pit site," and located on Lot 7, SW $\frac{1}{4}$  sec. 6, T. 26 N., R. 56 E. and SE $\frac{1}{4}$  sec. 1, T. 26 N., R. 55 E., Montana Principal Meridian, Richland County, Montana (hereafter Lot 7, Section 6). Administrative Record (AR) 25.<sup>1</sup> The permit was based on a 2006 application submitted by Richland County and identifying appellant as the landowner. *Id.* In 2007, appellant signed a "Landowner Consent" form, agreeing to the County's mining operations. *Id.* The County conducted scoria mining operations between June and September 2006.<sup>2</sup> AR 2. In 2009, the County paid appellant \$12,600 for scoria mined at the site. AR 18.

On April 26, 2011, BLM sent Trespass Notices to the County and appellant, stating that because the agency had not authorized the removal of scoria, the County, and possibly appellant, as surface owner, were in trespass. AR 21, 22. The Trespass Notices explained that the lands at issue were patented under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § 299 (2012), and as such were split estate lands – *i.e.*, the minerals underlying the lands, including scoria, had been reserved to the United States. AR 21, 22 (Trespass Notices at unpaginated (unp.) 1). In its Trespass Notice to appellant, BLM stated that once it verified "the mineral quantities

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<sup>1</sup> The AR submitted by BLM consists of a three-ring binder divided into 30 tabbed sections, which contain one or more documents. We will cite to documents according to their tab number (*e.g.*, AR 15).

<sup>2</sup> Richland County completed its scoria mining operations in advance of receiving its permit. According to the County, it had entered into a verbal agreement with appellant on the nature, extent, and quantity of mineral materials to be mined prior to submitting its permit application. AR 17.

mined, processed, stored, removed or sold from the parcels, we may require payment based on fair market value for the volume of mineral materials extracted and disposed from the lands.” AR 22 at unp. 2. To aid in its determinations, BLM required appellant to “provide copies of all contracts or agreements for lease or sale of the scoria mineral material and copies of all royalty payments received dating back to the very beginning of scoria mining activities by Richland County, or others, on the referenced lands.” *Id.*

In a second letter to appellant dated October 31, 2011, BLM noted that appellant had not responded to the April 26, 2011, Trespass Notice; BLM had received information from Richland County about the amount of scoria removed in 2006; and, based on an appraisal assessing the fair market value of the scoria, BLM determined appellant’s trespass liability was \$6,729.29 (including administrative costs).<sup>3</sup> AR 12 at unp. 1-2. BLM further stated that if a settlement was not reached or full payment made within 30 days, “the formal administrative resolution process will be initiated.” *Id.* at unp. 2.

BLM and appellant had telephone conversations on November 29, 2011, and January 6, 2012, in which appellant stated that he was talking to Richland County about the County assisting in paying appellant’s trespass liability. AR 10, 11. In a January 15, 2012, letter to BLM, appellant stated he would not make payment until his dispute with the County was resolved. AR 9.

In a February 15, 2012, letter to appellant, BLM again requested payment within 30 days and stated that if no payment was made, “our attempts to reach an informal resolution to the trespass will conclude and the procedures for formal resolution of the trespass will start. At that time an official Trespass Decision letter will be sent to you along with a bill for collection.” AR 8. Soon thereafter, in a letter dated March 29, 2012, appellant’s attorney, Laura Christoffersen, Esq., notified BLM that appellant did not, in fact, own the surface estate where the scoria had been mined (Lot 7, Section 6), and that the owner is appellant’s mother, Beverly Kay Palmer.

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<sup>3</sup> The calculation of liability was based on an adjusted fair market royalty value of \$0.718/cubic yard, multiplied by 16,000 cubic yards of production. AR 12, 13. BLM explained that under 43 C.F.R. §§ 3601.71 and 9239.0-7, liability would generally be applied equally to the trespassing parties (here, appellant and Richland County), but because 43 C.F.R. Subpart 3604 allows BLM to provide mineral materials free of charge under a Free Use Permit to any State agency, unit or subdivision, including municipalities, as long as the materials are used for a public project, the amount assessed against appellant, as the surface owner, was one-half of the value of the minerals removed, plus administrative costs and the cost of the appraisal. AR 12.

AR 6. Appellant’s attorney instructed BLM to re-direct its correspondence regarding the trespass to Ms. Palmer. *Id.*

On November 12, 2013, BLM issued the trespass decision now on appeal, finding that appellant had “committed an act of innocent trespass by consenting to the removal of mineral material (scoria) owned by the United States.” AR 2 at unp. 2. In its decision, BLM acknowledged the letter from appellant’s attorney stating that appellant did not own the surface interest for the parcel located in Lot 7, Section 6, but stated that because appellant “received [a] financial benefit for the use of the scoria mined in trespass,” he is an unauthorized user under the regulation at 43 C.F.R. § 3601.72. *Id.* at unp. 1. BLM concluded that appellant was liable in trespass, as described in the letters sent by BLM on April 26 and October 31, 2011, in the amount of \$6,729.29. *Id.* at unp. 1-2.

Appellant timely filed a notice of appeal, petition for stay, and statement of reasons. In an Order dated June 30, 2014, we denied appellant’s petition for stay. On February 11, 2014, BLM filed its answer.

#### *Legal Framework*

[1] The Materials Act of 1947, 30 U.S.C. § 601 (2012), authorizes the Secretary of the Interior to “dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) . . . on public lands of the United States.”<sup>4</sup> BLM’s implementing regulations specify that a person may only “extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior” if authorized by BLM, and that unauthorized users are liable for trespass damages. 43 C.F.R. § 3601.71(a); *see id.* § 3601.72; *see also Lon Thomas v. Bureau of Land Management*, 180 IBLA 182, 185 (2010).

[2] BLM’s trespass regulations identify the extraction, severance, injury, or removal of mineral materials from public lands without authorization as “an act of trespass” for which the trespasser is liable in damages to the United States. 43 C.F.R. § 9230.0-7; *see also El Rancho Pistachio*, 152 IBLA 87, 92 (2000), and cases cited. The trespass regulations further specify that a trespasser can be “any person, partnership,

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<sup>4</sup> Scoria is included in the minerals reserved to the United States under the SRHA. *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 53-54 (1983) (SRHA mineral reservation includes gravel); *Sunrise Valley, LLC v. Kempthorne*, 528 F.3d 1251, 1257 (10th Cir. 2008) (SRHA mineral reservation includes rock, sand, and gravel); *Pacific Power & Light Co.*, 45 IBLA 127 (1980) (SRHA mineral reservation includes scoria).

association, or corporation responsible for the unlawful use of, or injury to, property of the United States.” 43 C.F.R. § 9239.0-9(a). Therefore, BLM properly determines that a trespass has occurred when mineral materials owned by the United States are removed without agency authorization. The agency properly holds liable for trespass the entity responsible for severing the minerals from Federal lands without authority to do so.

[3] In challenging a BLM trespass decision, an appellant bears the burden of establishing error in the decision. See *Alfred Jay Schritter*, 171 IBLA 123, 129 (2007); *MSVR Equipment Rentals LTD*, 160 IBLA 95, 98 (2003). Conclusory allegations of error or differences of opinion, standing alone, do not suffice. *Alfred Jay Schritter*, 171 IBLA at 129, and cases cited.

#### *Discussion*

The issue to resolve in this case is whether appellant is liable for trespass under the Materials Act and BLM regulations. Appellant makes two arguments in support of his position that he is not liable for the unauthorized removal of scoria from Lot 7, Section 6.<sup>5</sup> Appellant does not challenge BLM’s calculation of damages.

Appellant’s first argument is that under its opencut permit, Richland County was only to mine minerals owned by appellant in the SE¼ of sec. 1 (hereafter Section 1), and the landowner consent form reflected appellant’s understanding that inclusion of Section 6 on the permit was only to provide access to the portion of the pit in Section 1. SOR at 1. Therefore, appellant claims that Richland County is responsible for all trespass damages. *Id.* at 2 (“Had the pit been developed as indicated, the mining would have occurred where intended without obligation to BLM and without trespass on either Beverly Kay Palmer or BLM.”).

In support of this argument, appellant points to certain statements in Richland County’s Plan of Operation as demonstrating that only property in Section 1, which was directly to the east of Section 6, was to be mined. In particular, appellant claims the following statements in the Plan of Operation indicate that mining was to occur only on Section 1, and not on Section 6:

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<sup>5</sup> Appellant also includes a third argument in his Statement of Reasons (SOR), stating that because Richland County has stopped mining and has not reclaimed the property, noxious weeds have accumulated “and the pit can no longer be used to mine scoria.” SOR at 3. Appellant claims BLM “should act to protect its mineral interest . . . by requiring Richland County to maintain the property through reclamation and/or weed control.” *Id.* Whether BLM should address the condition of its mineral estate is not at issue in this case, however. Moreover, appellant’s third argument does not allege any error in BLM’s decision; we therefore will not address it further.

“Pit has had some mining activity.”

“New access road to be put in on west end of permit area at bottom of hill.”

“About 16-20 acres of post mined land will be reclaimed and put back to native grass land.”

“Mining will begin along north end of the permit area and continue to the south and west.”

SOR at 2; *see* AR 25.

None of these statements from the Plan of Operation, however, supports appellant’s argument. First, the statement that the pit had been mined previously could be interpreted as indicating that mining *was* to occur on Lot 7, Section 6 – appellant notes in his SOR that these lands were mined 40 to 50 years earlier, but abandoned. SOR at 1; *see* Answer at 19. Appellant provides no explanation as to why this statement indicates otherwise. In addition, appellant does not explain how the statements about the new access road and the lands to be reclaimed indicate that mining was to “stay on the westerly side of the permit area,” *i.e.*, limited to Section 1. SOR at 2; *see* Answer at 19-21. Appellant is similarly conclusory in arguing that the last quoted statement – that “[m]ining will begin along north end of the permit area and continue to the south and west” – indicates that mining would not occur on Lot 7, Section 6. We agree with BLM that this statement actually “show[s] the opposite.” Answer at 23. The description of the lands on the County’s permit and other documents, and the mining area depicted on maps attached to the permit show the mining pit as encompassing lands in both Sections 1 and 6, with the northeast corner of the pit located in Section 6 and the southwest corner of the pit located in Section 1. *See* AR 25. As BLM states: “In beginning mining on the ‘north end’ or ‘north east corner’ of the permit area and continuing south and then west to the southwest corner of the permit area, the operation would undoubtedly pass through Lot 7, Section 6.” Answer at 23.

Appellant also states that the maps attached to the County’s permit identify the “old mining area” as the “Mining Area,” and that the “new pits” were on the north end of property in Section 6 that is not owned by Beverly Kay Palmer and on the Section 1 property owned by appellant. SOR at 2. The maps, however, show the mining site as encompassing lands in both Sections 1 and 6. For example, the map referred to by appellant clearly shows the mining area as hatched polygons in Sections 1 *and* 6, a portion of which includes the land located in Lot 7, Section 6. AR 25; Answer at 21-22.

We are not persuaded that the statements from the Plan of Operation and the maps offered by appellant show any error in BLM’s decision. Moreover, appellant

cannot refute the evidence demonstrating that the mining operation was to occur on lands in Lot 7, Section 6. The County's permit application, the permit itself, the Plan of Operation, and the landowner consent form, zoning compliance form, and weed compliance form all identify the location of the opencut mine as including lands in Lot 7, Section 6, and in Section 1. AR 25. Each of these documents describes the mining operation as occurring on the following lands: SW $\frac{1}{4}$  sec. 6, T. 26 N., R. 56 E.; SE $\frac{1}{4}$  sec. 1, T. 26 N., R. 55 E. Indeed, appellant's signature on the landowner consent form indicates that he "acknowledge[d] or consent[ed]" that that mining was to occur on the lands described in that document, which included both Sections 1 and 6. *Id.* There is nothing in any of these documents that indicates that mining was to occur only on lands in Section 1.<sup>6</sup>

Appellant's second argument is that he was paid only for mineral material mined from his own property in Section 1. SOR at 2. He states that 1,800 cubic yards of scoria were removed from Section 1, and Richland County paid him \$7.00/cubic yard, which amounted to \$12,600. *Id.* He further argues that no royalty was paid to anyone for scoria removed from Lot 7, Section 6 because any scoria taken from those lands was either stockpiled there or used to improve the access road or County Road 146, which runs by and through the property. *Id.* at 2-3.

Appellant correctly states that he received \$12,600 from Richland County for 1,800 cubic yards of scoria mined at the site. Appellant, however, provides no evidence supporting his statement that no fee-bearing scoria was removed from Lot 7, Section 6. Moreover, the record shows that the *only* mining activity conducted by the County at the "Palmer Pit site" occurred in Lot 7, Section 6, where 16,000 tons of scoria were removed, and appellant was paid for 1,800 cubic yards. For example, the record includes an aerial photograph showing disturbance in Lot 7, Section 6, but not in Section 1. AR 30. In addition, a Gravel Lease between Richland County and Dean Palmer (dated June 6, 2006, but unsigned) describes the lands to be mined as "[a] tract of land situate[d] in Lot 7 Section 6, T26N, R56E, Richland County, Montana." AR 19. The record also includes an Annual Progress Report from the Montana Department of Environmental Quality Opencut Mining Program showing that mining on the "Palmer Scoria" site occurred in 2006 and resulted in removal of 16,000

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<sup>6</sup> Appellant now states that his mother, Beverly Kay Palmer, is the owner of the surface estate of Lot 7, Section 6. At the time the lands were mined, however, appellant considered himself the owner, as evidenced by his signature on the landowner consent form. In any case, regardless of the ownership of those lands, BLM properly determined in its decision that because appellant consented to and was paid for the scoria mined from the lands, he was an "unauthorized user" under 43 C.F.R. §§ 3601.71(a) and 3601.72, and therefore liable for the trespass. AR 2.

cubic yards of material, and an invoice from Richland County Public Works to Dean Palmer showing that the County paid appellant \$12,600 in 2009. AR 13, 18.

We find that Appellant has not demonstrated that mining was to occur only on Section 1, or that he was paid only for scoria removed from Section 1. In fact, the record overwhelmingly shows that the mining operation was intended to occur, and did occur, on Lot 7, Section 6, and that appellant consented to the mining and was paid for scoria removed from the site. We therefore conclude that appellant has not met his burden to show error in BLM's trespass decision.

*Conclusion*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
Amy B. Sosin  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge