

INTERIOR BOARD OF LAND APPEALS

Wayne D. Klump

130 IBLA 98 (August 2, 1994)

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Editor's note: appeal filed Civ.No. 94-578 TUC RMB (D.Ariz. Aug. 23, 1994), dismissed, (May 19, 1995), appeal filed, No. 95-16109 (9th Cir. May 30, 1995), aff'd, (March 17, 1997)

WAYNE D. KLUMP

IBLA 93-28, 93-525

Decided August 2, 1994

Appeals from a decision by the Arizona State Director, Bureau of Land Management, affirming a notice of noncompliance issued by the San Simon Area Manager for failure to give notice of mining-related disturbance, and a decision by the San Simon Area Manager, Safford, Arizona, District Office, assessing trespass costs and setting a performance bond. AZA 26767 and AZA 26621.

State Director's decision affirmed; Area Manager's decision affirmed in part and vacated in part.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--
Mining Claims: Plan of Operations--Trespass: Generally

A written statement admitting that construction work had been performed on a road across Federal land providing access to mining claims was not the prior notice to BLM required by 43 CFR 3809.1-3(a), but instead supported issuance of a notice of noncompliance pursuant to 43 CFR 3809.3-2(a).

2. Federal Land Policy and Management Act of 1976: Rights-of-way--
Trespass: Generally

Reimbursement of administrative costs incurred by BLM to investigate and reclaim a mining access road, water pipeline, and reservoir constructed without authorization on public land was properly required under right-of-way regulation 43 CFR 2801.3.

APPEARANCES: Steven Weatherspoon, Esq., Tucson, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Wayne D. Klump has appealed from a September 14, 1992, decision of the Arizona State Director, Bureau of Land Management (BLM), affirming a notice of noncompliance issued by the San Simon Resource Area Manager; the notice of noncompliance found that Klump had, without prior notice to BLM and contrary to provision of 43 CFR 3809.1-3(a), graded roads for access to mining

claims across Federal lands in sec. 1, T. 14 S., R. 26 E., Gila and Salt River Meridian, Arizona. Klump has also appealed a related decision issued on May 21, 1993, by the San Simon Area Manager, Safford, Arizona, District Office, that required rehabilitation and removal from public land of a road, water pipeline, and reservoir constructed without prior authorization, ordered payment of administrative costs incurred by BLM to correct the trespass, and set a performance bond to insure reclamation as directed by BLM. The 1993 decision followed an earlier trespass decision issued on May 15, 1992, that invited a reply while notifying Klump that he had, within the purview of Departmental right-of-way regulation 43 CFR 2801.3, built an unauthorized road, earthen reservoir, and pipeline on public land in Gold Gulch Canyon in sec. 36, T. 13 S., R. 26 E., and sec. 1, T. 14 S., R. 26 E., Gila and Salt River Meridian, Arizona. Notice of appeal was timely filed from both decisions; both decisions concerned work performed at about the same time and place and are consolidated for decision because they arise generally from the same activity.

The decision by the State Director found, and Klump did not deny, that he had performed road work on Federal lands without providing prior notice to BLM that he would do so. Before the State Director, Klump contended that he "was not aware that I had to file any kind of plan as most of the work was done on repairing pipelines on existing water rights and cleaning out existing roads that gave access to my mining operation." On the record before him, the State Director found that a notice of noncompliance was properly issued under authority of 43 CFR 3809.1-3(a) and 3809.3-2(a) for the work performed by Klump without prior notice to BLM of his mining-related operations on Federal land. This decision is affirmed on appeal.

The notice of appeal from the San Simon Manager's amended trespass decision put the question of cost-reimbursement for the road work and related activity at issue. Appellant explained that:

On or about June 14, 1993, Wayne Klump, with the assistance of and at the direction of Mr. Larry Humphrey of the BLM, accomplished the repair and rehabilitation to the roads and performed the upgrading and the rehabilitation of the reservoir referred to in the Amended [1993] Trespass Decision. Accordingly those aspects and requirements of the Amended Trespass Decision have been met and are thereby moot, as is the requirement of the \$2,000 [performance] bond.

Insofar as reclamation of the road, pipeline, and dam are concerned, BLM agrees that "[t]he work was in fact carried out as counsel for Mr. Klump claims, was supervised by personnel from the Safford District Office, and is considered acceptable" (BLM Answer at 7). It is also agreed that because "the rehabilitation work has now been completed as required" the performance bond requirement is no longer an issue before us. Id. A subsidiary issue concerning procurement of a state water permit has also been resolved by the parties. Id. As a consequence, the question to be decided concerns whether administrative costs in the amount of \$4,565 incurred by BLM in dealing

with trespass AZA 26621 may properly be charged to Klump under provision of 43 CFR 2801.3. We affirm so much of the 1993 decision as ordered reimbursement of administrative costs under 43 CFR 2801.3; because the record on appeal establishes that reclamation of the trespass is complete, we vacate that part of the decision which required reclamation and posting of a performance bond.

Klump contends that because a complete itemization of costs was not provided to him that this case should be remanded to permit him to evaluate the reasonableness of the administrative costs. He also argues, however, that costs charged for travel by helicopter to the trespass site must be deducted from the costs-bill for \$4,565 because he was always willing to allow BLM to travel across his privately-owned land in order to inspect the unauthorized construction and helicopter rental was therefore an unnecessary expense. Further, he takes the position that the right-of-way regulation published at 43 CFR 2801.3 does not provide authority for assessment of costs in this case, because a letter filed by Klump with BLM on May 14, 1992, gave notice, pursuant to mining regulations at 43 CFR Subpart 3809, that he planned to disturb a surface area of less than 5 acres at Gold Gulch Canyon. He concludes that, under provision of 43 CFR 3809.1-3(b), this notice satisfied all legal requirements for permits to cross the public land because he arguably disturbed less than 5 acres of Federal land with his work, and because such notices fulfil all legal permitting requirements for the work that was done in this case. He argues that the written explanation provided on May 14, 1992, satisfies the regulatory requirement for prior notice to BLM and requires that the notice of noncompliance should be withdrawn.

[1] The rule quoted by Klump requires mining operators on public lands to give BLM not less than 15 days notice before beginning operations that will disturb 5 acres or less. See 43 CFR 3809.1-3(a). In cases such as this one, where construction of an access route is involved, prior "consultation with the authorized officer may be required." 43 CFR 3809.1-3(b). The notice filed by Klump on May 14, 1992, however, recited that the work had already been done ("[m]ost of the work was done on existing water right easements"). The record establishes as a fact that BLM discovered the unauthorized construction during a cattle inventory conducted by helicopter on April 9, 1992, well before Klump filed his May 1992 notice. In his statement of reasons (SOR) Klump admits that the construction at issue was done in 1991 (see page 2 of SOR exhibit B, dated April 22, 1993, stating that "[t]his trespass decision concerns work that I did two years ago"). The notice that he filed on May 14, 1992, could not, therefore, be the notice described by 43 CFR 3809.1-3 since, by definition, any such notice must have been given not later than 15 days before mining-related work began. It is therefore concluded that the notice provision of the mining regulations, 43 CFR 3809.1-3(b), was not satisfied by the late acknowledgement by Klump that he had performed work on Federal land without prior notice; consequently, the decision of the State Director, finding that the notice of noncompliance was properly issued is affirmed.

[2] The explanation provided by Klump in May 1992 did not excuse or explain the unauthorized road, dam, and pipeline discovered by BLM in 1992 on public lands adjoining Klump's property, nor could it substitute for a right-of-way application currently required by Federal law for private uses of the public lands. Regardless of his right of access across the public lands to his mining claims and of his prior water rights, use of the public lands must be in compliance with the requirements of the relevant statutes and regulations. It appears from the answer filed on behalf of BLM that the reservoir constructed by Klump has now been authorized by BLM by means of a range improvement permit (BLM Answer at 8). See 43 CFR 4120.3. This does not alter the fact that the improvements were initially constructed in trespass. See 43 CFR 2800.0-5(u), 2801.3, and 4140(b)(2). Further, pipelines for conveyance of water as well as associated development across public lands must generally be authorized under the regulations governing rights-of-way. See 43 CFR 2800.0-7 and Desert Survivors, 96 IBLA 193, 196 (1987), finding that a mining claimant was required to obtain a right-of-way from BLM for conveyance of water from public lands outside his claim onto the claim, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988) (now implemented by Departmental regulations at 43 CFR Part 2800). It must be concluded, therefore, since Klump did not apply for a right-of-way from BLM, but contends instead that none was needed, that the road, dam, and water pipeline construction were unauthorized, and that this aspect of his appeal is governed by Departmental right-of-way regulation 43 CFR 2801.3. The record establishes without question that Klump constructed his water works on public land without first obtaining a right-of-way for that purpose, as was required by FLPMA and implementing regulations at 43 CFR Part 2800. See 43 U.S.C. § 1770 (1988); see also Roger G. Gervais, 128 IBLA 43, 47 (1994). As the Gervais opinion observed,

FLPMA was designed to replace prior acts, providing as it does that "[e]ffective on and after October 21, 1976, no right-of-way for the purposes [listed, including water pipelines] shall be granted, issued, or renewed over, upon, under, or through [public] lands except under and subject to the provisions, limitations, and conditions of this subchapter [V]."

Id. Issuance of a right-of-way for the purposes to which the Gold Gulch Canyon land was used by Klump was, by operation of the quoted legislation, sanctioned by provisions of the Departmental right-of-way regulations implementing FLPMA published at 43 CFR Part 2800.

The right-of-way regulation under which investigation of Klump's project was carried forward, 43 CFR 2801.3, provides that, where there has been unauthorized use, occupancy, or development of public land, the person responsible shall make "[r]eimbursement of all costs incurred by the United States in the investigation and termination of such trespass." 43 CFR 2801.3(b)(1). As is the case with all rights-of-way appeals, the decision of the authorized officer in the case now before us for review

became immediately effective although an appeal was timely taken from the decision. See 43 CFR 2804.1(b). Since there was no application to stay the decision, none was ordered (although Klump suggests otherwise in SOR exhibit B) and the decision has been in effect since the trespass decision issued on May 21, 1993. See, e.g., Texaco Trading & Transportation Inc., 128 IBLA 239, 240 (1994) (petition for stay of Mineral Leasing Act right-of-way appeal was governed by the specific right-of-way rule provided for such cases by 43 CFR 2884.1(b) and not by the general stay regulation appearing at 43 CFR 4.21(b)). That the decision has been in full force and effect does not, however, make this aspect of the case now before us moot. See, e.g., Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365, 368, (1986) (finding that a case becomes moot only when there is no longer any effective relief that can be afforded by the Department).

In Karry K. Klump, 123 IBLA 377, 382 (1992), we found that 43 CFR 2801.3 provided authority for collection of "all costs incurred by the United States in the investigation and termination of trespass" after a mining claimant built an access road across public land without giving adequate prior notice or filing a right-of-way application with BLM. That decision controls our disposition of this appeal, which also arises from construction of a mining access road across public land without prior notice to BLM. Klump contends that BLM was too quick to use helicopters to investigate the initial trespass report filed by BLM staff members in 1992 and reasons that this expense item is unallowable because it was unneeded. Following discovery of the unauthorized road, pipeline, and dam in 1992, BLM sent employees overland to investigate the suspected trespass. When they attempted to travel to the site by ground transportation, however, they found their passage barred by a locked gate. And when they applied to Klump for access to the public lands, he refused to allow them to cross his property (although it provided the only practical access to the area in question) unless they agreed in advance to buy access from him at a stated daily rate of \$1,000 for each BLM employee agreeing to sign a "hold harmless agreement" reciting that "Wayne Klump will not be held liable for any injury to * * * agency's property." See Letter dated Sept. 23, 1992, Klump to BLM (filed Sept. 25, 1992). Such a demand amounted to refusal to allow BLM passage across his land, since it was in conflict with purposes for which access was sought: the investigation and termination, if needed, of a suspected trespass by Klump. While Klump now argues that BLM could have traveled on the ground to the affected Federal lands during January or February 1993 (SOR at 3), this assertion is inconsistent with exhibit B to the SOR (SOR from Klump dated April 22, 1993), that reiterates the previous demand that BLM first "sign a permission agreement." This recitation confirms a communication from Klump dated August 26, 1992 (received by BLM on August 28, 1992), stating that "[t]his is to serve notice on you [BLM] that you shall not trespass on any of my property whatsoever. If you rent a helicopter to harass me under color of law, then you may be paying for the helicopter yourself."

The record establishes as a fact that BLM requests for access across Klump's property were denied, and supports a finding that BLM employees acted reasonably when, in March 1993, after unsuccessfully attempting to obtain access through Klump's property, they chose to use a helicopter to investigate the April 1992 trespass report. It is therefore concluded that helicopter transportation was a reasonable item of expense incurred by BLM investigators under the circumstances of this case.

Expenses comprising administrative costs of investigation and reclamation were itemized in exhibit Y to the BLM answer, which the record shows was delivered to counsel for Klump on August 16, 1993. The exhibit states, by individual employee, the hours worked by BLM staff members investigating this trespass case before April 5, 1993. Also shown is the cost of using motor vehicles, including helicopters, for the same period. This account appears to be directly related to the investigation described by the record before us, and is reasonable on its face. Except for his challenge to helicopter use and the authority of BLM to regulate access to his mining operations (described above), Klump has not questioned the accuracy or actual expenditure of accounts stated in exhibit Y. Since he has not shown error in the dollar amounts found by BLM to comprise the reasonable costs of investigation and trespass termination, we find no error in the account stated and it is approved as correct. See Karry K. Klump, 123 IBLA at 382.

It is therefore concluded that Klump failed to give prior notice of road construction work contrary to 43 CFR 3809.1-3(a) and was therefore properly given notice of noncompliance with Departmental regulation pursuant to 43 CFR 3809.3-2(a). It is also concluded that, within the purview of 43 CFR 2801.3, Klump was properly required to reimburse administrative costs incurred by BLM in the investigation and termination of a trespass on public lands consisting of an unauthorized construction of a road, water pipeline, and dam at Gold Gulch Canyon, Arizona, in 1991. Access across public land at the time was available under FLPMA Title V by application for a right-of-way grant as well as by proper filing of a mining plan of operations; his failure to obtain prior permission to construct the improvements on public lands was therefore a trespass. A later written admission filed with BLM that Klump had completed his unauthorized construction to serve a mining operation could not be accepted as a substitute for a notice of mining operations or a right-of-way application and did not provide justification for the unauthorized uses so as to avoid payment of administrative costs for their investigation and reclamation.

To the extent Klump has raised arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Director is affirmed; the decision of the San Simon Area Manager is

affirmed insofar as it assessed administrative costs to be reimbursed in the amount of \$4,565; the provision of the decision that required reclamation of the trespass and posting of a performance bond is vacated because reclamation of the trespass is complete.

Franklin D. Arness
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge