INTERIOR BOARD OF LAND APPEALS

Kenneth Snow and Richard Halliburton

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KENNETH SNOW
RICHARD HALLIBURTON

IBLA 99-115, 99-183 Decided October 5, 2000

Appeals from decisions of the Phoenix Field Office, Bureau of Land Management, charging nonwillful trespass for removing mineral material from public lands. AZA 30414.

IBLA 99-115 reversed; IBLA 99-183 affirmed in part, set aside and remanded in part.

1. Materials Act--Trespass: Generally

BLM must support a charge of nonwillful trespass for removing mineral material from public lands with evidence that the charged party actually com-mitted a trespass by removing mineral materials from public lands, or by directing or acquiescing in such removal without authority. A lessor is not liable for the trespass of his lessee when the trespass is committed on lands other than those leased and where there is no evidence that the lessor extracted and/or removed or directed the extraction and/or removal of materials in trespass.

2. Materials Act: Trespass: Generally

Under 43 C.F.R. § 9239.0-7, the unauthorized extraction and/or removal of mineral materials from public lands is an act of trespass. When a party extracts and removes mineral materials from public lands without prior authorization from BLM, a finding of trespass is properly affirmed. However, when the record shows that one or more parties, in addition to the party charged, operated on the site and may have contributed to the trespass, the case will be remanded for BLM to determine whether trespass damages should be properly apportioned among several parties.

APPEARANCES: Bruce E. Rosenberg, Esq., Prescott, Arizona, for Kenneth Snow; Richard Halliburton, Dewey, Arizona, pro se; 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 DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Kenneth Snow has appealed from a decision dated October 26, 1998, issued by the Phoenix Field Office, Bureau of Land Management (BLM), charging him with nonwillful trespass for removing mineral material from public lands in the SW1/4 sec. 31, T. 14 N., R. 2 E., Gila & Salt River Meridian, Yavapai County, Arizona. The Board docketed Snow's appeal as IBLA 99-115. By a decision of the same date, the Phoenix Field Office, BLM, notified Richard Halliburton of his liability for the same trespass. Halliburton also filed an appeal, which was docketed by the Board as IBLA 99-183. In each decision, BLM directed the recipient to submit $9,197.47 in trespass damages and administrative costs. BLM did not provide the dates of the alleged trespass.

According to the record, Snow and his brother are co-owners of private lands in sec. 31, T. 14 N., R. 2 E., adjacent to the public lands from which the mineral material was removed. In 1994, Snow and his brother leased that private land to Richard and Gayle Halliburton d/b/a Mingus Materials (the Halliburtons) under a "Mining Material Agreement" (Agreement) providing that the Halliburtons were to pay the Snows a certain amount per ton for materials removed from those private lands, with certain exceptions. (Statement of Reasons (SOR), Ex. 1.) 1/ The Agreement identified the land from which material was to be removed as "the land noted as 12.96 acres and 55.17 acres owned by the Snows', located in Dewey, Arizona." The Halliburtons agreed to "indemnify the Snows' [sic] of any breach or liability caused by or from their mining activities * * *."

By letter dated January 27, 1997, Snow notified the Halliburtons that he and his brother were canceling the Agreement "effective immediately" because of "numerous breaches" by the Halliburtons. (SOR, Ex. 2.) On appeal, Snow states that during 1996 the Halliburtons repeatedly defaulted on payments required by the Agreement and that at the time of cancellation the Halliburtons also owed him and his brother monies loaned to the Halliburtons to pursue their mining on the subject property. 2/ Following cancellation of the Agreement, Snow alleges that he had the private property surveyed and determined that mineral extraction had occurred on adjacent public lands and that he notified BLM of that fact. Thereafter, BLM issued duplicate decisions charging both Snow and Richard Halliburton with trespass.

1/ There is some question regarding the royalty provided for in the Agreement. Certain copies of the Agreement in the case record show a royalty of $0.75 per ton, while other copies of the Agreement provide for a royalty of $0.50 per ton. However, our adjudication of these appeals is not dependent on resolution of that question.

2/ Snow states that as a result of the Halliburtons' indebtedness he and his brother sued the Halliburtons in state court in July 1997. (SOR at 3, Exs. 3 and 4.) However, according to Snow, the Halliburtons thereafter filed for bankruptcy and the Snows voluntarily dismissed their suit against the Halliburtons. (SOR at 3, Ex. 5.)

Snow's representations concerning the survey and notification of BLM are confirmed by a memorandum to the file dated September 15, 1997. Therein, Phoenix Field Office official Jeff Garrett reported that Snow had contacted the Phoenix Field Office; that Snow owned certain private lands in sec. 31, T. 14 N., R. 2 E., Gila & Salt River Meridian; that on his visit to the site on September 11, 1997, those lands were being mined by MDI Landscaping Supplies (MDI); that the property previously had been mined by the Halliburtons; and that "Mr. Snow informed us that the operations may have inadvertently trespassed on BLM administered lands." Garrett stated that, during his visit, he noted that "someone had recently surveyed the private lands and the corners were marked." He stated further:

> It was apparent that the operations had encroached on BLM administered lands and that materials had been removed. I spoke to the operator [identified by Garrett as Mike Denny with MDI] and pointed out those lands I felt to be BLM, based upon the location of the surveyed corners and admonished him not to remove any additional materials from BLM lands.

In an October 1, 1997, letter to Garrett, Snow stated that "[w]e had warned Mr. Halliburton in the middle of 1996 that we felt he was close to the property lines in some areas." According to Snow, Halliburton's response was that he was "well aware" of the property lines, and that it was "none of our business." Snow also reported that he and his brother had "hired a new mining company who is fully aware of the boundaries."

On January 13, 1998, BLM personnel visited the land to complete a survey of the suspected trespass site to determine the amount of material removed. BLM determined that mineral material had been removed from BLM-administered lands adjacent to the Snows' land. Based on engineering calculations of the pit utilizing topographic map contours, BLM determined that 10,075 cubic yards of material had been removed. It adopted a royalty rate of $0.50 per ton for specialty stone (schist), and calculated that 10,075 cubic yards of schist or 23,071 tons (based on 2.29 tons of schist per cubic yard) at $0.50 per ton would be $11,535.00 in royalty.

By letter dated February 23, 1998, BLM notified Richard Halliburton that it was BLM's opinion that Halliburton or his representatives had removed and sold material from the public land without a contract. It invited him, within 30 days of receipt of the notice, to provide evidence that he was not in trespass. Halliburton received the letter on February 26, 1998. BLM scheduled a field meeting with Halliburton for March 5, 1998; however, Halliburton did not show up for that meeting. Later, BLM met with him at the site on April 9, 1998, and BLM reported that at that time Halliburton admitted removing material from BLM lands, but pointed out areas on those lands that he thought had been mined after he left, stating that he felt the quarry on BLM land "was bigger than he

remembered." (BLM Inspection Report, dated April 9, 1998.) 3/ According to BLM, Halliburton promised that he would submit the map during his operations and that he would attempt to locate photographs of the quarry, which had been taken at the time he quit his operations. BLM also stated that Halliburton asserted that he paid Snow royalties for material removed.

A "Conversation Record" in the file, dated "5/98," stated that Halliburton had not provided any documentation in support of his contention that removal of material in trespass continued after he quit his operations. However, it indicated that BLM was contemplating citing both Halliburton and Snow for trespass because "Mr. Snow had benifited [sic] from the trespass via royalties."

On June 1, 1998, Garrett received a letter from Halliburton in which Halliburton stated that another company, Materials Delivery Inc., started operations on the site in question shortly after the Agreement was canceled. 4/ He continued:

> While it may be true that I did mine in the area specified by you at our meeting on the property, it was only because these were the boundaries laid out by the property owner, Ken Snow. I do know, however, that at our recent meeting on the property, the amount of material taken from the area in question was considerably larger than at the time when I stopped operations. The material was not taken off of BLM land intentionally and I feel I am innocent of any wrong doing because I was only going by property boundaries set forth by the property owner. Survey map enclosed. [5/] The property owner was paid for any material taken from the property.

On October 26, 1998, BLM issued identical decisions to Snow and Halliburton requiring a payment of $9,197.47 for unintentional trespass. BLM's decisions charged both Snow and Halliburton with violation of Revised Statute 2478 and 43 U.S.C. § 1201 (1994) and the trespass regulation at 43 C.F.R. § 9239.0-7. The decisions included BLM's calculation that 16,149.70 tons of material had been removed in trespass. At $0.50

3/ The quarry was identified in the report as the "Lavender" Quarry. At the bottom of the report, BLM noted "+/- 30 reject on production[.] Reduce survey calculations accordingly."

4/ In his notice of appeal, Halliburton identifies the operator who took over following cancellation of the Agreement as "MDI." Apparently, MDI Landscape Supplies and Materials Delivery Inc. are one and the same.

5/ The "Record of Survey" map provided by Halliburton, which he allegedly used during his operations, states that it was prepared at the request of First Phoenix Holdings Corporation for the purpose of locating the center-line of "Easement for Ingress and Egress." The map bears the date "APR 20," but no year. There is no indication that the map was intended to establish the boundaries of the lands included in the Agreement.

per ton of pit run material, plus labor and administrative costs, BLM determined that a total of $9,197.47 was owed the Government. 6/

Snow argues that he should not be liable in trespass because he never extracted or removed materials from public lands, nor did he authorize any other person to do so. He contends that by virtue of the lease with the Halliburtons he did not control the extraction of mineral materials from his own land, let alone any encroaching extraction on adjacent public lands. Snow also asserts that he never benefitted "in any way from any trespass on public lands, since [Halliburton] defaulted on royalty payments to Mr. Snow." (SOR at 4.)

Halliburton alleges that Snow advised him as to the property boundaries, and that another company commenced operations on the Snows' property 1 week after cancellation of the Agreement. Halliburton questions whether the amount of mineral material he took from public lands could be accurately ascertained in light of subsequent mining operations in the area.

BLM contends that Snow and Halliburton are jointly and severally liable in trespass.

[1] The applicable regulation, 43 C.F.R. § 9239.0-7, 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.

We turn first to the Snow appeal. In a February 6, 1999, order, we requested BLM to "expressly state the basis for its conclusion that Snow is a trespasser within the meaning of 43 C.F.R. § 9239.0-7." In response, BLM cites Curtis Sand & Gravel, 95 IBLA 144, 152, 94 I.D. 1, 5 (1987), for the proposition that in a mineral materials trespass, BLM may proceed against both a lessee and lessor on a theory of joint and several liability.

In Curtis, the estate of Clare Schweitzer held title to certain lands in Los Angeles County, California, which had been patented by the United States to the estate's predecessor-in-interest on March 14, 1934, pursuant to section 1 of the Stock-Raising Homestead Act (SRHA), as amended, 43 U.S.C. § 291 (1970) (repealed effective October 21, 1976, by section 702

6/ BLM calculated the amount owed by determining that the amount of material removed was 23,071 tons; that 30 percent of that amount was fines, thereby reducing the tonnage to 16,149.70 tons (see note 3, supra); that at $0.50 per ton the trespass damages were $8,074.85; that administrative costs were $1,122.62; and that the total due was $9,197.47.

of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787). The patent was made subject to a reservation of "all the coal and other minerals" to the United States, in accordance with section 1 of SRHA. In November 1983, William P. Willman, the executor of the estate, entered into a lease with Curtis whereby Curtis was granted the right for a period of 15 years to remove rock, sand, and gravel from the leased lands. However, on June 6, 1983, the Supreme Court had determined in Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), that "sand and gravel" were reserved minerals under a SRHA patent, and, on December 21, 1983, BLM issued Instruction Memorandum No. 84-183, announcing that trespass damages were deemed actionable from and after July 21, 1983, 45 days after the issuance of the Supreme Court's decision, for sand and gravel removed from lands patented under the SRHA.

In March 1985, BLM issued "Notices of Demand" to Curtis and Willman seeking settlement of trespass damages for unauthorized removal of sand and gravel from July 22, 1983, to October 9, 1984. Regarding joint and several liability, the Board stated at page 152, 94 I.D. at 5-6:

> The District Manager intimated that appellants are jointly and severally liable for the trespass. We agree. The trespass consisted of the unauthorized "extraction, severance, injury, or removal of * * * mineral materials from public lands" (43 CFR 9239.0-7) by Curtis, pursuant to a lease issued by Willman. See 54 Am. Jur. 2d Mines and Minerals § 220 (1971); 75 Am. Jur. 2d Trespass §§ 30-32 (1974). In view of this joint and several liability, BLM may properly proceed against both parties for the collection of trespass damages.

The present case is distinguishable from Curtis. In Curtis, Willman, as the representative of the lessor, authorized the removal of mineral material from SRHA lands under a lease with Curtis. Regardless of whether Willman was aware at the time that the mineral materials were Federally owned, his authorization to remove those minerals resulted in the lessor being liable for trespass damages. In the present case, however, the Snows entered into their Agreement allowing the Halliburtons to remove privately-owned mineral material from the Snows' lands. The Halliburtons agreed to abide by "any and all state, city and federal mining regulations" and to indemnify the Snows for any breach or liability caused by the Halliburtons' mining activities. The record shows that Halliburton admitted removing mineral materials from the public lands. However, there is no evidence that Kenneth Snow ever approved the unlawful removal of mineral materials from public lands.

Despite the argument by BLM on appeal regarding the Curtis case, the case record shows that BLM's original rationale for pursuing Snow for the trespass was its conclusion, apparently based on representations made by Halliburton, that Snow benefitted from the trespass because he received royalties for mineral material removed from public land. ("5/98" Conversation Record.) Although the case record indicates that Halliburton told

BLM that he had paid Snow royalties under the Agreement, there is no evidence that he specifically paid Snow royalties for the mineral material removed from public lands. The Snows and Halliburtons entered into the Agreement in 1994. Snow asserts on appeal that it was "[d]uring 1996" that the Halliburtons "repeatedly defaulted on the payments required by the 1994 Agreement." (SOR at 3.) 7/ In a January 1997 letter to the Halliburtons, Snow canceled the Agreement because of "numerous breaches." It seems unlikely that Kenneth Snow would have canceled the Agreement if, in fact, the Snows were receiving proper royalties under the Agreement. In addition, Snow has provided evidence that he intended to sue the Halliburtons to recover unpaid royalties. (SOR, Ex. 4.) Finally, if Snow were benefitting from the trespass, it is questionable whether he would have reported it to BLM in the first instance, as the record shows he did.

Courts have held that an act of trespass committed by a lessee will not subject the lessor to liability where the trespass is committed on land other than that included in the lease. Brownlee v. Landers, 166 S.W. 2d 734, 737 (1942), and cases cited therein. In Curtis, the lease included the lands from which the minerals were removed. In this case, the parties' Agreement included only private lands.

We conclude that there is no basis on which to find Snow liable for the trespass on public lands. Accordingly, we reverse BLM's decision finding that Snow committed an act of nonwillful trespass and directing him to pay trespass damages.

[2] We turn now to Halliburton's appeal. We conclude that his defenses to the act of trespass are to no avail. Uncertainty as to boundaries would not excuse an operator from assuring himself of their location in order to prevent unauthorized incursions onto neighboring lands. It is no defense to a charge of unintentional trespass that the trespasser acted in the mistaken belief that he was on authorized land. Donald Hall, 145 IBLA 258, 260-61 (1998). However, though the record establishes that Halliburton removed materials in trespass, it is unclear whether he is responsible for the removal of the amount of material calculated by BLM.

The Forrest affidavit describes the survey and calculations performed to determine the volume of material removed in trespass. Forrest asserts that the trespass commenced "on or around August to December 1996"; that BLM personnel visited the site on January 13, 1998, to perform a survey; and that, as a result of the survey, determined that mineral material

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7/ In its answer at page 5, BLM states that "BLM's record shows that on or around August to December of 1996, material mining operations located on Appellant Snow's patented lands strayed onto public lands * * *." The same statement appears at page 3 of a Mar. 5, 1999, affidavit of BLM geologist Camille E. Forrest describing the survey and calculations performed to determine the volume of material removed in trespass. (Answer, Ex. K.) BLM does not expressly state what documents it relied on in reaching that conclusion.

had been removed from public lands. (Forrest Affidavit at 3.) Forrest calculated the amount of material removed by the "use of topographic map contours compared to present day contours (determined by survey and field engineering techniques). The difference between the two was used to compute the amount of material [10,075 cu. yds.] removed." Id. at 3-4.

There is no evidence that Halliburton conducted any mining operations on the private lands described in the Agreement or on the public lands in question after receipt of notice of cancellation of the Agreement. The case record does show, however, that at least one mining operator, MDI, commenced operations on the Snows' private lands after the Halliburtons ceased operations. It is not clear whether MDI commenced operations before or after Snow had the boundaries of his private lands surveyed. Although the boundaries were surveyed when Garrett visited the site on September 11, 1997, Garrett reported that he spoke to a representative of MDI at that time and "admonished him not to remove any additional material from BLM lands." (Memorandum to File, dated September 15, 1997.)

In BLM's opinion, the trespass commenced "on or around August to December of 1996." There is no indication of when BLM believed the trespass was no longer occurring. In view of evidence that at least one other operator removed mineral material from the Snows' adjacent private lands after that time and that the survey calculations to determine the amount of material removed from public lands in trespass were performed on or after January 13, 1998, utilizing "present day contours," we find the present record insufficient to conclude that the Halliburtons alone are responsible for the total amount of mineral material calculated by BLM to have been removed in trespass from the public lands in question. Accordingly, we set aside that part of BLM's decision finding Halliburton responsible for removal of 16,149.70 tons of material from the public lands in trespass and remand the case in order for BLM to make a determination of whether other operators may have removed mineral materials in trespass during the period in question. Should it conclude that Halliburton alone is responsible then it should include in the case record evidence to support its determination.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision in IBLA 99-115 is reversed. The decision in IBLA 99-183 is affirmed to the extent of finding that Halliburton committed a trespass and set aside as to the amount for which Halliburton is responsible and remanded for further action consistent herewith.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge