INTERIOR BOARD OF INDIAN APPEALS

Jack Ward v. Billings Area Director, Bureau of Indian Affairs

34 IBIA 81 (08/12/1999)

Judicial review of this case:

Reversed and remanded, No. CV 00-38-BLG-RWA (D. Mont. June 1, 2001)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JACK WARD, Appellant	:	Order Affirming Decision in Part, Affirming It as Modified in Part, and Reversing It in Part
v.	:	
	:	Docket No. IBIA 98-81-A
BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	August 12, 1999

Appellant Jack Ward seeks review of a February 19, 1998, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning an alleged timber trespass on Allotments 3767, 3907, and 4029 on the Crow Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part, affirms it as modified in part, and reverses it in part.

In December 1995, BIA was notified of a possible timber trespass on Crow Allotment 3767. Fee land abutting this allotment was owned by Irene Cantrell, Appellant's sister. The Crow Agency Supervisory Forester contacted Appellant about the possible trespass. Appellant acknowledged that he had flagged the property boundaries between Cantrell's land and Allotment 3767 for a timber sale from Cantrell's land, and identified the individual who had done the logging.

In January 1996, while enroute to investigate the trespass on Allotment 3767, BIA employees discovered another possible trespass on Crow Allotments 3907 and 4029. These allotments abut fee land owned by Appellant. Appellant admitted that he had flagged the boundaries between his land and the two allotments for a sale of timber from his land.

BIA met with Appellant concerning the trespasses. Appellant wrote to BIA on June 4, 1996. He stated: "Apparently there is an error on my part in property lines and I will gladly reimburse those parties involved, taking your measurements of stumpage and survey at $125/ thousand, although about approximately one-third went to the pulp mill."

By letter dated October 3, 1996, the Superintendent, Crow Agency, BIA (Superintendent), notified Appellant that he had committed timber trespass on Allotments 3907 and 4029, and that he was responsible for payment of damages for the removal of timber and the construction of a road. The Superintendent stated that the road had disturbed 0.192 acres of Allotment 4029, that 23,893 board feet of timber had been removed from Allotment 3907, and that 48,257 board feet had been removed from Allotment 4029. He assessed damages for road construction at the rate of $100 per acre, for a total of $19.20. He further assessed treble damages for the removal of timber at the rate of $69.91 per thousand board feet. These calculations resulted in an assessment of $5,011.08 for trespass on Allotment 3907, and of $10,140.14 on Allotment 4029, for a total of $15,151.22. The Superintendent enclosed a Bill for Collection, but did not inform Appellant of his appeal rights.

On January 6, 1997, Appellant remitted to BIA $5,050.40, which was one-third of the total bill. In a letter accompanying his payment, Appellant indicated that the remainder of the amount assessed would not be paid soon, if at all. On February 4, 1997, BIA acknowledged receipt of this partial payment, but stated that the "remaining balance is still due immediately because you have not offered an acceptable payment plan toward full settlement."

On March 21, 1997, the Department's Field Solicitor in Billings, Montana, wrote to Appellant concerning the unpaid balance of the assessment. The Field Solicitor stated that, if Appellant did not pay or make arrangements to pay the remaining balance within three months, legal action would be taken. The Field Solicitior indicated that possible legal action would include turning the debt over to the Department of the Treasury for collection or referring the matter to the United States Attorney for litigation.

It does not appear that BIA communicated further with Appellant until November 21, 1997, when the Superintendent wrote to Appellant, reiterating the damage assessment and notifying him of his appeal rights. 1/

Appellant appealed to the Area Director. On February 19, 1998, the Area Director affirmed the Superintendent's determination of trespass, but increased the amount of the assessment for Allotments 3907 and 4029 to $27,442.69 plus interest, by using a stumpage rate of $125 per thousand board feet. The Area Director also assessed Appellant $4,048.81 plus interest for damages to Allotment 3767. The Area Director calculated these figures to make a total assessment of $31,491 plus interest. He stated that treble damages were required both by regulations in 25 C.F.R. Part 163 and by Montana State law in Mont. Code Ann. § 70-16-107.

1/ Appellant states that this letter is not a part of the administrative record. It is part of the record, although a typographical error in the table of contents to the record shows it to be dated Nov. 22, 1997, rather than Nov. 21.

Appellant appealed to the Board. He filed an opening brief before having all of the documents in the administrative record. After receiving the documents which he requested from the record, Appellant filed an authorized supplemental brief.

The Board first addresses two arguments which are jurisdictional in nature. Appellant contends that his appeal "should be deemed established and become final" and that the Area Director's decision should be vacated because that decision was not issued "within the period of sixty (60) days." Initial Opening Brief at 6. Although Appellant does not cite any regulation upon which this argument is based, presumably he is referring to the 60-day period established in 25 C.F.R. § 2.19(a). That subsection provides in pertinent part: "Area Directors * * * shall render written decisions in all cases appealed to them within 60 days after all time for pleadings (including all extensions granted) has expired."

Appellant's Notice of Appeal and Statement of Reasons to the Area Director was dated December 19, 1997. The envelope in which this document was mailed is not included in the administrative record. For purposes of this decision, the Board will give Appellant the benefit of the doubt and assume that the document was mailed on December 19, 1997. Therefore, under 25 C.F.R. § 2.13(a)(2), Appellant's Notice of Appeal and Statement of Reasons was filed as of December 19, 1997. The Area Director's decision was issued on February 19, 1998, or 62 days later.

Appellant's argument overlooks the fact that 25 C.F.R. § 2.19(a) does not require that a decision be rendered within 60 days of the date of filing of a notice of appeal and/or statement of reasons, but rather within 60 days "after all time for pleadings (including all extensions granted) has expired." Under 25 C.F.R. § 2.11, interested parties had 30 days from receipt of Appellant's Statement of Reasons in which to respond to his appeal. Even though no responses were filed, the "time for pleadings" did not expire until approximately January 19, 1998. See, e.g., Bellonger v. Aberdeen Area Director, 34 IBIA 49 (1999). The Area Director's decision was issued within 60 days from January 19, 1998.

In any case, even if the Area Director had failed to issue a decision within the timeframe set out in 25 C.F.R. § 2.19(a), that failure would not render Appellant's appeal "established" or "final." It would, however, give Appellant the right to invoke the remedy set out in 25 C.F.R. § 2.8.

Appellant also argues that "[t]he Department's and BIA's continued pursuit of this matter falls outside of the applicable two year period under §27-2-207 M.C.A., and is barred." Initial Opening Brief at 6. Appellant provides no support whatsoever for the notion that a state statute of limitations is applicable to this trespass proceeding. Nor does he provide a copy of the Montana statute he cites. However, the Board obtained a copy off the internet at http://statedocs.msl.state.mt.us/. Montana Code Ann. § 27-2-207 provides: "Within 2 years

is the period prescribed for the commencement of an action for: (1) injury to or waste or trespass on real or personal property."

Even if Appellant had shown that the Montana statute of limitations is applicable here, he has failed to show that that statute would preclude this trespass action. Montana Code Ann. § 27-2-207 speaks in terms of the "commencement" of an action. This action was commenced within 2 years of both the commission of the trespass and the discovery of the trespass. Appellant has failed to cite any Montana case law which interprets section 27-2-207 to prohibit the continuation of an action which was commenced within the statutory time frame.

The Board rejects both of Appellant's jurisdictional arguments and reaches the merits of this appeal.

Appellant contends that the Area Director improperly assessed trespass damages against him in regard to Allotment 3767. Appellant states that Allotment 3767 was never in issue before the Superintendent and that Cantrell has already paid the full amount of damages assessed for trespass on this allotment.

Maps in the administrative record show that Allotment 3767 abuts Cantrell's fee land. Appellant admitted flagging the boundaries of Allotment 3767, but there is no evidence in the record that he was ever assessed damages for trespass on Allotment 3767. To the contrary, the record shows that on May 20, 1996, BIA received an initial payment of $1,000 from Cantrell for trespass on Allotment 3767; that on October 3, 1996, the Superintendent billed Cantrell for trespass damages on Allotment 3767 in the amount of $3,584.24, minus the $1,000 she had already paid; and that Cantrell made a second payment of $2,584.24 on November 4, 1996. Cantrell did not appeal from the Superintendent's assessment of trespass damages. The Area Director's decision, however, recalculated the damages for Allotment 3767 at $7,582.05, credited Appellant with payment of $3,555.74, 2/ and notified Appellant that he was responsible for payment of an additional $4,048.81 plus interest.

The Superintendent issued a decision as to the amount of trespass damages in regard to Allotment 3767, and as to the person against whom those damages were assessed. That decision was not appealed by the person assessed. Therefore trespass damages as to Allotment 3767 were not before the Area Director in this appeal.

The Board concludes that the Area Director erred in assessing trespass damages against Appellant in regard to Allotment 3767. It reverses that part of the Area Director's decision which assessed Appellant $4,048.81 plus interest as damages to Allotment 3767.

2/ The amount of $3,555.74 is not consistent with the evidence in the record as to the amount Cantrell paid for trespass on Allotment 3767. The discrepancy is not explained in the Area Director's decision.

Appellant's remaining arguments concern Allotments 3907 and 4029.

Appellant contends that his June 4, 1996, letter to the Superintendent was written for settlement purposes only and was therefore used out-of-context to prove that he had agreed to pay damages at the rate of $125 per thousand board feet. The Board agrees and has therefore not considered that letter in reaching its decision in this appeal.

Appellant argues that he is being punished for exercising his right of appeal. The context of this argument shows that Appellant is concerned with the possibility that he might be the subject of a criminal investigation. The possibility of a criminal investigation does not relate to Appellant's exercise of his appeal rights, but has instead always existed under 25 C.F.R. § 163.29(a), which provides: "Trespassers will be liable for civil penalties and damages to the enforcement agency and the beneficial Indian owners, and will be subject to prosecution for acts of trespass." However, with the possible exception of the discussion below of Appellant's argument related to the Area Director's increase of the stumpage rate, the Board finds that Appellant has not attempted to show any way in which he has been punished, or otherwise prejudiced, in this appeal because he chose to exercise his appeal rights.

Appellant contends that the Area Director improperly disregarded the survey conducted for him by Daniel McGee. Both McGee's survey and a survey conducted by BIA were intended to establish the boundary between Appellant's fee lands and Allotments 3907 and 4029. Both surveys were conducted after the trespass. The survey conducted by McGee disagreed with the one conducted by BIA as to a triangular section of approximately 6 acres, mostly in the northeast corner of Appellant's fee land and the southeast corner of Allotment 3907.

The issue here is not the survey conducted after the trespass by McGee, but rather the flagging of the boundary line which Appellant did prior to the commencement of logging operations. As shown in maps in the administrative record and as noted by the Area Director in his decision, there was virtually no timber on the triangular section over which the McGee and BIA surveys disagreed. Rather, the trespass occurred north of the boundary line established by either McGee or BIA and therefore well within Allotments 3907 and 4029.

The Board rejects Appellant's contention that the Area Director erred by disregarding the McGee survey.

Appellant raises several objections to the Area Director's recalculation of the amount of damages owed. He first contends that the Area Director's recalculation of the damages interjected a new issue for the first time on appeal and without notice and "is wholly inappropriate." Initial Opening Brief at 4. He continues: "Minimal due process always affords, or should afford, notice of issues of contention and an opportunity to be heard. No notice or opportunity was afforded [Appellant]." Id. In his Supplemental Opening Brief, Appellant presents this argument slightly differently, arguing that the "charge" against him was "limited in scope" by

the Superintendent's calculation of damages. At page 4 of his Supplemental Opening Brief, he states:

> [Appellant] recognizes the scope of an appeal generally can be broadened. Here, however, the BIA implicitly limited the scope by its change [sic]. Moreover, [Appellant] made his payment of $5,050.49 [sic] in January 1997 in good faith based on his reliance on his negotiations with the BIA, and made a commitment based on the figures supplied by the BIA, apparently to his entire detriment.
>
> The BIA now changes its figures. [Appellant] asserts it is wrong for the BIA to change its figures.

Appellant cites no support for his contention that the Area Director, as the reviewing official, was prohibited from concluding that the Superintendent had erred in his calculation of damages. In fact, Appellant specifically raised the accuracy of the stumpage rate at page 2 of his December 19, 1997, Notice of Appeal to the Area Director: "[Appellant] asserts that the stumpage value claimed by the BIA is incorrect and $69.91/thousand does not accurately reflect fair market value for the stumpage involved in this matter."

One of the ever-present uncertainties of litigation is the possibility that a party will be in a worse situation after an appeal than before. This is a chance that is understood and accepted when a party decides to pursue an appeal. It seems highly unlikely that Appellant would have objected had the Area Director lowered the damage assessment. In any case, Appellant has not shown any legal limitation on the Area Director's authority to increase the damage assessment.

The fact that the Area Director recalculated damages did not deny Appellant due process, because the Area Director's recalculation was subject to appeal to this Board. See, e.g., All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202 (1992) (holding that the right of appeal to the Board satisfied due process requirements). The Board rejects Appellant's contention that the Area Director's recalculation of the trespass damages denied him due process.

Appellant objects to the stumpage rate which the Area Director used in recalculating the amount of damages. Both the Superintendent and the Area Director based their stumpage rates on the Western Wood Products Association's Inland Lumber Price Index for White Woods. Appellant does not contest the use of this Index.

Appellant does, however, contest the Area Director's use of the Index's figures for the first quarter of 1995. The Superintendent's stumpage rate of $69.91 per thousand board feet was based on the Index's figures for the last quarter of 1995. The Area Director, referring to

the Index's figures for the first quarter of 1995, used a stumpage rate of $125 per thousand board feet. 3/

In his Initial Opening Brief, Appellant contends that the Area Director's use of the figures for the first quarter of 1995 was incorrectly based on a holding that the date of log delivery to the sawmill was the date of trespass. He argues: "[A]ny actual trespass * * * would have had to occur before that time. That is, timber 'trespass' by its definition, occurs when timber is taken." Initial Opening Brief at 6. Appellant apparently argues here that any trespass would have predated the first quarter of 1995.

However, at page 5 of his Supplemental Opening Brief, Appellant contends that "[a]ny civil trespass * * * was committed on or after October 1995." In an affidavit filed with his Supplemental Opening Brief, Appellant states that the timber was cut and taken in October 1995. He supports these assertions by referring to a BIA narrative statement in regard to the trespass on Allotment 3907, which stated that needles were still attached to slash in that area onor about January 16, 1996.

This trespass was concluded before BIA became aware of it. The dates when it occurred are uniquely within the knowledge of Appellant and his logging contractor. Appellant could have presented documentary evidence at least as to the general timeframe when logging occurred. His logging contractor could have provided evidence as to when each particular section was logged. Appellant chose not to provide such information.

Appellant bears the burden on appeal of proving that the Area Director's decision was erroneous or not supported by substantial evidence. See, e.g., Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 39 (1999), and cases cited therein; Ewing v. Acting Billings Area Director, 29 IBIA 264, 266 (1996), and cases cited therein. Appellant's unsupported and contradictory arguments do not carry his burden of proof. The Board affirms the Area Director's use of the Index's figures for the first quarter of 1995.

Appellant also objects that a proper reduction was not given for timber sold as pulp. In his affidavit, he contends that 23 percent of the timber was sold for pulp. Under 25 C.F.R. § 163.29(a)(3)(i), damages "shall be based upon the highest stumpage value obtainable from the raw materials involved in the trespass." If Appellant contends that pulp was the highest stumpage value obtainable from 23 percent of the raw materials taken from the allotments, it was his responsibility to provide some support for that contention. He did not do so. The Board rejects this argument.

3/ The administrative record shows that the Area Director also had before him information relating to two other methods for determining the stumpage rate, both of which supported a rate of $125 per thousand board feet.

Appellant contends that he was improperly assessed treble damages. The Area Director stated in his decision that the imposition of treble damages was supported by both the regulations in 25 C.F.R. Part 163 and by Montana State law.

Regulations covering timber trespass on Indian lands are found in 25 C.F.R. § 163.29. Subsection 163.29(a) provides in pertinent part:

> (2) Cases in Federal Court. For trespass actions brought in Federal court pursuant to these regulations, the measure of damages, civil penalties, remedies and procedures will be as set forth in this § 163.29. In the absence of applicable federal law, the measure shall be that prescribed by the law of the tribe in whose reservation or within whose jurisdiction the trespass was committed, or in the absence of tribal law, the law of the state in which it was committed.
>
> (3) Civil penalties for trespass include, but are not limited to:
>
> (i) Treble damages, whenever any person, without lawful authority injures, severs, or carries off from a reservation any forest product as defined in § 163.1 of this part. Proof of Indian ownership of the premises and commission of the acts by the trespasser are prima facie evidence sufficient to support liability for treble damages, with no requirement to show willfulness or intent. Treble damages shall be based upon the highest stumpage value obtainable from the raw materials involved in the trespass.

See also 25 U.S.C. § 3106(a): "[T]he Secretary shall issue regulations that--(1) establish civil penalties for the commission of forest trespass which provide for--(A) collection of the value of the products illegally removed plus a penalty of double their value."

Montana State law addresses damages for timber trespass in Mont. Code Ann. §§ 70-16-107--108:

> § 70-16-107. Trespass for taking timber. (1) Any person who cuts down or carries off any wood or underwood, tree, or timber or girdles or otherwise injures any tree or timber on the land of another person * * * without lawful authority, is liable to the owner of such land * * * for treble the amount of damages which may be assessed therefor in a civil action in any court having jurisdiction. * * *
>
> § 70-16-108. Injury to timber -- exceptions as to treble damages. For wrongful injuries to timber, trees, or underwood upon the land of another or removal thereof, the measure of damage is three times such a sum

> as would compensate for the actual detriment, except where the trespass was casual and involuntary or committed under the belief that the land belonged to the trespasser * * * in which cases the damages are a sum equal to the actual detriment.

Internet at http://statedocs.msl.state.mt.us/.

For purposes of this decision, the Board assumes that the Area Director mentioned Montana State law in his decision out of an abundance of caution. Because there is clearly Federal law applicable to this case, however, there was no need to refer to State law.

Appellant does not address 25 U.S.C. § 3106(a) or 25 C.F.R. § 163.29(a)(3), neither of which requires a showing of willfulness or intent to support treble damages. Instead, his arguments are addressed to Mont. Code Ann. § 70-16-108. He contends that treble damages are inappropriate, asserting that "his trespass was casual and unintended and committed under the belief that the land belonged to the trespasser." Supplemental Opening Brief at 7. He continues:

> There are no fences between the Allotments and [Appellant's] Fee Land. There are missing boundary markers. [Appellant] began at the marker he could find and attempted to follow the contour of the land through rugged and hilly country along the 30% slope, putting flagging where he reasonably believed his boundary to be.

Id.

The administrative record contains a map which shows the boundaries as surveyed by BIA and by McGee, and as flagged by Appellant. Appellant's flagging veers off from the line established by either survey at such an angle that it appears Appellant was heading north/northeast when he should have been continuing almost due east. The boundary as established by Appellant is, at one point, almost one quarter of a mile north of the true boundary, or almost one-third of the distance across the Allotments. The area between the actual boundary and Appellant's flag line encompasses approximately 23 acres of Allotment 3907 and 32 acres of Allotment 4029. Within the area marked by Appellant's flag line, BIA counted 203 stumps on Allotment 3907, and 408 stumps on Allotment 4029.

Appellant was well aware that his land abutted land owned by others. He was further aware that the boundary lines were not marked and that the terrain was rough. However, instead of having the boundary surveyed before logging commenced in order to avoid trespassing on land owned by another, he attempted to flag the boundary himself. He erred in this attempt by as much as one-quarter mile, while flagging the boundary in directions which a simple compass would have told him were incorrect. Even if Mont. Code Ann. § 70-16-108

were relevant here, the Board would decline to hold that the Area Director erred in concluding that Appellant's trespass was not "casual and involuntary" or committed under any reasonable "belief that the land belonged to the trespasser."

The Board affirms the Area Director's imposition of treble damages.

Appellant contends that he was improperly assessed $19.20 for road construction. He argues: "The Area Director concedes that there were no roads built, only logging skid trails, where earth had been 'gouged out and vegetation removed.' These logging skid trails were measured and valued at the same damage rate as the road damage rate. This measurement is impermissible. There is a vast difference between a permanently built road and a temporary logging skid trail." Initial Opening Brief at 5.

As noted above, Appellant bears the burden of proving the error in the Area Director's decision. Appellant cites no authority for his contention that there must be a difference in the assessment for a road and a logging skid trail. His belief that there should be a difference does not carry his burden of proof.

However, the issue of road damages raises a question as to the Area Director's ultimate calculation of damages, because that calculation does not show any assessment for road damages. Upon further examination, the Board discovered two other problems with the Area Director's calculation of damages. Appellant did not raise any of these questions. The Board addresses them under its authority in 43 C.F.R. § 4.318 to correct a manifest error.

The following chart shows the Area Director's calculation of damages:

Allotment 4029	48.257 thousand board feet X$125.00/M X 3 =	$21,715.65
Allotment 3907	23.893 thousand board feet X$125.00/M X 3 =	+ 10,751.85
	Total	32,467.50
	Paid 1/10/97	-5,024.81
	Balance owed Allotments 4029 & 3907	**$27,442.69***
		*** Plus Interest**

Area Director's Decision at 2.

The first problem, as noted above, is that the calculation does not include road damages.

The second problem is in the math. When the Board multiplied out the figures in the Area Director's chart, it obtained an assessment of $18,096.38 for Allotment 4029, and of $8,959.88 for Allotment 3907, for a total of $27,056.26.

Third, the Area Director credited Appellant with a payment of $5,024.81, made on January 10, 1997. The administrative record shows that Appellant's January 1997 payment was in the amount of $5,050.40. In a letter dated February 4, 1997, BIA acknowledged receipt of $5,050.40 from Appellant.

The Board has recalculated the assessment amounts by adding back in the assessment for road construction on Allotment 4029, correcting the math, and crediting Appellant with the amount of the payment acknowledged by BIA. Under its recalculation, Appellant owes damages as to Allotment 3907 in the amount of $8,959.88 plus interest for timber trespass. As to Allotment 4029, Appellant owes damages in the amount of $19.20 for road construction and $18,096.38 for timber trespass, for a total amount of $18,115.58 plus interest. This gives a grand total of $27,075.46 for trespass on the two allotments. When his payment of $5,050.40 is subtracted from the total, Appellant owes $22,025.06 plus interest.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Billings Area Director's February 19, 1998, decision is affirmed in part, affirmed as modified in part, and reversed in part. 4/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

4/ All arguments not specifically addressed were considered and rejected.