



## INTERIOR BOARD OF INDIAN APPEALS

Schuyler Van Gorden v. Acting Midwest Regional Director, Bureau of Indian Affairs

41 IBIA 195 (09/12/2005)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

SCHUYLER VAN GORDEN, Appellant,	:	Order Affirming Decision in Part,
	:	Vacating Decision in Part,
	:	and Remanding
v.	:	
	:	
ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	Docket No. IBIA 03-48-A
	:	
	:	September 12, 2005

Dr. Schuyler Van Gorden (Appellant) appeals from a November 27, 2002, decision of the Acting Midwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director found that Appellant was liable for damages for a trespass that occurred on forest land held in trust by the United States for the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (Tribe). For the reasons discussed below, the Board affirms the Regional Director's finding of liability, but vacates and remands the Regional Director's determination of the restoration costs for which Appellant is liable.

## Background

On October 10, 2000, a BIA forester was informed that someone was cutting timber on tribal land near Moonshine Lake, which is part of the Chippewa Flowage in northwest Wisconsin. The tribal land on which the cutting was taking place is located on the Tribe's reservation, on the north and east sides of Moonshine Lake, comprising the S½ of sec. 30, T. 40 N., R. 6 W., in Sawyer County, Wisconsin. The land had been acquired in 1984 from Northern States Power Company (NSP) and taken into trust by the United States for the benefit of the Tribe.

To the west of the tribal land is land managed by the Wisconsin Department of Natural Resources (DNR), which the State purchased from NSP in 1988. Timber was also being cut on the state land. On the south side of Moonshine Lake is land that Appellant purchased in September 2000 from a private individual.

Investigations conducted by BIA and DNR officials found that the timber had been cut as part of road construction or improvement activities to provide an access road through the state and tribal lands to Appellant's property. The construction activities widened and added a gravel base to an existing but primitive road or trail, which led to Appellant's property. The initial investigation determined that the timber cutting and road construction were being conducted by Thompson Sand and Gravel, which had been hired by Stephen Bodenschatz, a real estate agent.

Treating the timber cutting as an apparent trespass under the BIA forestry regulations, 25 C.F.R. § 163.29, BIA seized the cut timber, posted notices of the seizure, and sent specific notices to Bodenschatz and another individual. BIA then sold the timber pursuant to the regulations. BIA also investigated whether any easements or rights-of-way were recorded that might provide a right for constructing, maintaining, or using the access road, and found none.

Subsequent investigations revealed that Bodenschatz had been hired by Appellant in 1999 to handle the real estate transaction for Appellant's purchase of his property, and for related matters associated with development and resale of the property. Appellant told the DNR investigator that he had hired Bodenschatz, understood that the access road was to be improved, and had placed money into escrow for the road improvement. See Miller (DNR) Report of Interview with Appellant, Apr. 24, 2001. Bodenschatz stated that he was the "land agent" for Appellant, and that he had hired Thompson Sand and Gravel to build a road to the land purchased by Appellant. See Miller (DNR) Report of Interview with Bodenschatz, Nov. 30, 2000.

On June 5, 2002, the BIA Superintendent (Superintendent) for the Great Lakes Agency sent a letter ("right-of-way letter") to Appellant concerning his right to use the road. The letter, apparently prepared by the Agency's Realty Branch, informed Appellant that "[a] review of [the] Agency records shows no formal recorded easement for road purposes over this [tribal] parcel of land." The letter further advised him: "[Y]ou will have ten days [from receipt of the letter] to provide documentation of your right to improve and use the existing trail. If use has not been validated by that date, this office will proceed to suspend the use of the road and collect damages for its improvement and use."

Also on June 5, 2002, the Superintendent sent another letter to Appellant, addressing the timber cutting. In this letter ("timber trespass decision"), apparently prepared by the Agency's Forestry Branch, the Superintendent found that the timber had been cut "by [Appellant] or by persons for whose actions [Appellant is] responsible." The letter demanded damages in the amount of \$35,603.72. Of that amount, \$1,172.65 was for stumpage damages (triple stumpage value minus the sale proceeds), \$115.24 was for interest based on payment by June 28, 2002, \$3,342.73 was for investigation costs, and \$30,973.10 was for restoration costs. The Superintendent sent identical trespass decision letters to Bodenschatz, Thomas Thompson

of Thompson Sand and Gravel, and Michael Kelsey, an attorney who had handled Appellant's purchase in 2000 and who also represented Bodenschatz and Thompson.

On June 7, 2002, present counsel for Appellant responded to the Superintendent's right-of-way letter. 1/ The response claimed that the road had been in existence for many years. It also asserted that the affected property owners had rights through adverse use over a period of time before the land was acquired for the Tribe in 1984. By the time Appellant's counsel sent his June 7, 2000, response, however, the Superintendent had already issued his timber trespass decision demanding damages.

On June 20, 2002, Appellant appealed the Superintendent's timber trespass decision. 2/

On September 10, 2002, while his appeal to the Regional Director was pending, Appellant and three other landowners filed suit in Wisconsin Circuit Court against the State (which was pursuing its own enforcement actions), the United States, and the Tribe, seeking to establish a right to use the access road based on adverse possession. The United States and the Tribe removed the action to Federal court.

On November 27, 2002, the Regional Director upheld the Superintendent's timber trespass decision, except to modify it to apply a fixed interest rate to the stumpage damages. The Regional Director rejected Appellant's arguments that the Superintendent's decision was unsupported by facts or law, was based on investigations unrelated to the timber trespass, and was made in bad faith because it assessed damages unrelated to restoration costs. The Regional Director found that the facts supported a finding of timber trespass and liability under the National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101–3120 and 25 C.F.R. § 163.29, and that all components of the Superintendent's damages claim were authorized by 25 C.F.R. Part 163. The Regional Director also found that costs had been prorated for the components of the restoration plan that covered both state and tribal lands, and therefore Appellant had not been assessed damages unrelated to restoring the affected Indian lands.

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1/ It appears that at the time, Appellant's present counsel represented two individuals who had purchased property from Appellant, but did not yet represent Appellant, who was still represented by Kelsey. The letter states, however, that it is in response to the Superintendent's letter to Appellant.

2/ Bodenschatz, Thompson, and Kelsey also appealed from the Superintendent's timber trespass decision, but apparently failed to file any statements of reasons setting forth the grounds for their appeals or arguments. On Sept. 6, 2002, the Acting Regional Director affirmed the Superintendent's decision against these individuals, and none sought to appeal to the Board.

Appellant appealed the Regional Director's decision to the Board. The Board solicited comments on the possible effect of Appellant's judicial action on this appeal, and was informed that the Federal District Court had granted a motion to dismiss the United States and the Tribe, based on sovereign immunity. See Schilling v. Wisconsin Department of Natural Resources, No. 02-C-0573-C (W.D. Wis. Jan. 9, 2003). The Board then scheduled briefing for this appeal, and Appellant and the Regional Director filed briefs.

### Discussion

Appellant bears the burden of proving that the Regional Director's decision was erroneous or not supported by substantial evidence. All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202, 213-14 (1992), and cases cited therein.

Appellant contends that the Regional Director's decision should be reversed because (1) his due process rights were violated because the Superintendent failed to give him a hearing and an opportunity to present evidence before issuing the timber trespass decision, and because the Regional Director relied on information that was not in the Superintendent's administrative record, (2) the evidence in the record is insufficient to support a finding that Appellant is liable for the trespass, (3) the restoration charges evince bad faith because they demand more than is required to restore the area to its pre-trespass condition, which included an existing road, and (4) BIA cannot demand damages in full from Appellant because it is also attempting to collect the full amount of damages for the trespass from the other individuals against which timber trespass decisions were issued.

Appellant cites no statutory or regulatory authority to support his contention that he was entitled to some type of evidentiary hearing or opportunity to present evidence before the Superintendent issued the timber trespass decision. The regulations governing the appeal to the Regional Director allowed Appellant to make whatever arguments and offer whatever evidence he believed the Regional Director should consider in deciding whether to sustain the Superintendent's decision. See 25 C.F.R. § 2.21(a) (reviewing official may consider any information available, whether part of the record or not). <sup>3/</sup> Appellant's due process rights are

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<sup>3/</sup> Appellant did not seek to present rebuttal evidence to the Regional Director. In his reply brief in this appeal, Appellant seeks to excuse this failure by arguing that the Superintendent's decision did not advise him that he could submit affidavits or other evidence with an appeal. The Superintendent's decision, however, advised Appellant that an appeal to the Regional Director was governed by 25 C.F.R. Part 2, which allowed the Regional Director to consider any evidence offered by Appellant. As the Board has previously stated, "[t]hose who deal with the Federal Government are responsible for familiarizing themselves with duly promulgated regulations." Blackhawk v. Billings Area Director, 24 IBIA 275, 280 (1993).

adequately protected by the Department's administrative review process, which includes his rights of appeal to the Regional Director and to the Board. See All Materials of Montana, 21 IBIA at 211 ("The Department's regulations provide an administrative review process which meets the requirements of due process."). The Superintendent was not required to provide Appellant with a hearing or opportunity to present evidence before issuing his decision.

Appellant also argues that BIA failed to comply with the "due process" advice it received in a May 31, 2002, letter from the Solicitor's Office. Opening Brief at 3. In that letter — pre-dating the Superintendent's decision — the Solicitor's Office advised BIA to make contact with the alleged trespassers and invite them to provide BIA with a written statement why they believe they are not in trespass.

The regulations do not require that an alleged trespasser be afforded specific notice and an opportunity to present evidence before the Superintendent issues a notice of trespass. See 25 C.F.R. § 163.29(g). 4/ Nor did the procedural advice provided by the Solicitor's Office purport to state a legal requirement. It appears that the Superintendent's right-of-way letter may have been an attempt to follow the Solicitor's Office advice, but of course the Superintendent did not wait for a response before issuing his timber trespass decision. It certainly would have been advisable for the Superintendent to have waited for a response before issuing the trespass decision, but his failure to do so in this particular case did not violate Appellant's due process rights, and it provides no basis to reverse the Regional Director's decision. 5/

The Board concludes that Appellant has failed to demonstrate that his due process rights were violated by the Superintendent's failure to provide him with a hearing or an opportunity to present evidence before issuing the June 5, 2002, timber trespass decision.

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4/ As discussed supra at 196, BIA did send notices to individuals identified at the time as potentially responsible for the trespass, and also posted notices of the seizure. Appellant does not contend that BIA did not comply with 25 C.F.R. Part 163, which allows a Notice of Seizure to be posted if the identity of involved individuals is unknown. See 25 C.F.R. § 163.29(e).

5/ Although we reject Appellant's argument, we agree that the Superintendent created unnecessary confusion by soliciting potential right-of-way information but not waiting for a response before issuing the timber trespass decision. The Regional Director's attempt in his answer brief to distinguish the timber trespass and right-of-way issues is unconvincing, given the close relationship between the two in this case. For example, if Appellant had been able to document that he held a valid easement, and that his rights under the easement encompassed a right to widen the road, that right presumably would have been relevant to a determination whether or not the timber cutting constituted a trespass.

Appellant also argues that the Regional Director's decision should be reversed because he relied on information that was not part of the Superintendent's administrative record. As noted earlier, the Regional Director was allowed to consider information or evidence outside of the Superintendent's record. 25 C.F.R. § 2.21(a). The Regional Director was, however, required to notify Appellant of any additional information or evidence under consideration, and provide him with an opportunity to comment. *Id.* § 2.21(b). It appears that the Regional Director failed to comply with subsection 2.21(b).

Based on the specific facts of this case, the Board concludes that the Regional Director's failure to comply with subsection 2.21(b) does not constitute reversible error. The additional documents that are included in the Regional Director's administrative record <sup>6/</sup> fall into two categories. The first category includes several title abstracts and other records relating to title and ownership of the lands involved in this matter. With respect to these documents, the Board concludes that the Regional Director's failure to comply with 25 C.F.R. § 2.21(b) does not constitute reversible error because title is not an issue raised in this appeal. <sup>7/</sup> The second category includes various documents and photographs relating to when and where the road was first constructed, when it was extended, and its condition immediately prior to the 2000 trespass. These documents are relevant to an issue raised in this appeal — the restoration damages assessed against Appellant. In the course of this appeal, however, Appellant has been provided an opportunity to review and respond to these additional documents, and the Board has fully considered Appellant's arguments. Furthermore, as discussed below, the Board is remanding the restoration damages issue to the Regional Director. Under these circumstances, the Board need not decide whether the Regional Director's failure to comply with 25 C.F.R. § 2.21(b) with respect to these documents would, by itself, have constituted reversible error.

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<sup>6/</sup> The Regional Director identifies two documents in the record as post-dating the Superintendent's decision, and contends, Answer Brief at 2 n.1, that only one of those arguably was relied upon by the Regional Director, but that his failure to comply with 25 C.F.R. § 2.21(b) was harmless error. The Board's review of the Regional Director's administrative record, however, indicates that there are additional documents in the record that post-date the Superintendent's decision, which arguably were considered by the Regional Director. *See, e.g.*, Oct. 4, 2002, Documentation of Telephone Call from Kimberly Bouchard, BIA Realty Specialist, to Don Robinson, Retired NSP Forester. Therefore, the Board assumes, for purposes of this decision, that the Regional Director considered or relied upon these additional documents that either post-date or were collected after the Superintendent's decision.

<sup>7/</sup> In addition, it appears that most of the title documents do not even directly pertain to the tribal lands at issue in this appeal, but instead are abstracts for affected state lands and for private lands, including those owned by Appellant.

Appellant also contends that the Regional Director erred by failing to provide him with a copy of the Superintendent's answer responding to his initial appeal, and an opportunity to reply. Although it may be appropriate in certain cases for a Regional Director to allow an appellant to reply to an answer filed by a Superintendent, the regulations do not provide for reply briefs as a matter of right in appeals to Regional Directors. Appellant has not shown that the Regional Director committed error in this case by not allowing Appellant an opportunity to reply to the Superintendent's answer.

Appellant argues next that the evidence in the record is insufficient to sustain the Regional Director's finding that Appellant is liable for the trespass, even considering any additional information in the Regional Director's record that may not have been considered by the Superintendent. Appellant argues that the evidence cannot sustain a finding that he "cut timber" or "constructed" the road. Opening Brief at 3-4.

It was not necessary for Appellant to have personally "cut timber" or "constructed" the road to be held legally liable. A person may be liable for trespass committed by his agent. See Restatement (Second) of Torts § 158(a) (one is subject to liability for trespass if he intentionally enters land in possession of another or causes a third person to do so); Restatement (Second) of Agency § 244 (master is subject to liability for a trespass done by a servant within the scope of employment). Appellant does not take issue with the legal principles under which a principal may be held liable for the acts of his agent. Rather, Appellant argues that the evidence in the record is insufficient to find him liable in this case.

The Regional Director found that the timber trespass occurred at the direction of Appellant — i.e., through the acts of Appellant's agents. Appellant admitted to the DNR investigator that he hired Bodenschatz as his agent. See Miller Report of Interview with Appellant, Apr. 24, 2001. Appellant also admitted that he was to pay for the road activities, and had placed money into escrow for that very purpose. Id. There is corroborating evidence to support Appellant's admissions. See, e.g., Miller Report of Interview with Bodenschatz, Nov. 30, 2000; Miller Report of Interview with Thompson, Nov. 30, 2000. Even Appellant's brief to the Board describes the scope of his agency relationship with Bodenschatz as covering the "usual things" associated with developing the property, which Appellant understood to include widening and "improving" the road. See Opening Brief at 5; Miller Report of Interview with Appellant, Apr. 24, 2001. Viewing the record as a whole, the Board concludes that the Regional Director's finding that Appellant is liable for the trespass is supported by substantial evidence. 8/

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8/ In his reply brief, Appellant asserts that the evidence is insufficient to even identify which property is involved, for what purpose he hired Bodenschatz, what "road" Thompson was hired to construct, or where it is located. The Board finds these contentions without merit.

With respect to the Regional Director's assessment of damages, Appellant does not contest the damages for triple stumpage value of the cut timber, interest, or investigation costs. Appellant does argue, however, that the restoration cost damages were assessed in bad faith because they are greater than what is required to restore the area to its pre-trespass condition, which included an existing road. We find no evidence in the record to support Appellant's allegation of bad faith. And we conclude that the Regional Director adequately explained that the costs to implement the restoration plan were prorated between tribal and state lands, so that BIA's demand to Appellant was limited to costs to restore the tribal land.

Nevertheless, we also conclude that the Regional Director's decision does not adequately explain, nor does the administrative record clearly demonstrate, that the restoration damages assessed against Appellant are based on costs necessary to restore the area to its immediate pre-trespass condition in September 2000, and do not include additional costs to restore the area to an earlier condition. The aerial photographs in the record show that some type of road or trail through the tribal property did exist prior to September 2000, 9/ and there are photographs taken in June 2002 of both affected and unaffected areas. The record also indicates that the road was primitive, described by a previous landowner as "not more than a two-rut trail that was passable most times." Miller Report of Interview with Patrick and Adele O'Halloran, Dec. 14, 2001, at 2.

It may very well be that the cost to restore the tribal land to its pre-trespass condition in 2000 is no different than the cost to restore the land to an earlier, natural forest condition. Unfortunately, neither the Regional Director's decision nor the restoration plan clearly identify the 2000 pre-trespass condition as the baseline that was used for developing the restoration plan or for calculating the cost of restoration for which Appellant is liable. And the restoration plan itself can be read as designed to return the area to a more natural or primitive condition than existed in 2000 when the trespass for which Appellant is liable occurred. Because it is possible that there are restoration cost differences associated with the two different baselines, the Board will vacate that portion of the Regional Director's decision and remand this matter for further consideration. Appellant may not be held liable for restoration costs that are greater

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9/ Other evidence in the record indicates that the road originated in the late 1970's, constructed by NSP for logging, although at that time it did not extend to the end of Moonshine Lake. See Oct. 4, 2002, Kimberly Bouchard, BIA Realty Specialist, Documentation of Telephone Call with Don Robinson, retired NSP forester. Subsequently — after the land was tribal land — a private landowner extended the road for access purposes, but with minimal improvements. See Miller Report of Interview with Patrick and Adele O'Halloran, Dec. 14, 2001.

than the cost to restore the affected area to its baseline condition that existed immediately prior to the trespass for which Appellant is liable. 10/

Appellant's final argument — that BIA cannot demand full damages from him because it has also made demands for damages on other parties responsible for the trespass — was not raised during Appellant's appeal to the Regional Director, even though it could have been. The Board has a well-established practice of declining to consider arguments raised for the first time on appeal to the Board. See Aloha Lumber Corp. v. Alaska Regional Director, 41 IBIA 147, 161 (2005), and cases cited therein. The Board sees no reason to depart from that practice here. Furthermore, the Regional Director has assured the Board, through his brief in this appeal, that while BIA considers Appellant jointly and severally liable for the full amount of damages for the trespass, BIA is not seeking to collect multiple full recoveries.

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 Board affirms the Regional Director's November 27, 2002, decision, except for the portion determining the restoration costs for which Appellant is liable. The Board vacates and remands the restoration cost portion of the Regional Director's decision for further consideration, consistent with this decision.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Anita Vogt  
Senior Administrative Judge

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10/ BIA is not, of course, required to recreate the conditions that existed immediately prior to the trespass, and may choose to restore the area to pre-road natural conditions. The issue before the Board is the measure of damages for which Appellant is liable.