



## INTERIOR BOARD OF INDIAN APPEALS

Lummi Nation v. Northwest Regional Director, Bureau of Indian Affairs

44 IBIA 47 (01/11/2007)



## 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

LUMMI NATION,	:	Order Dismissing Docket No. IBIA
Appellant,	:	04-161-A and Order Affirming
	:	Docket No. IBIA 05-12-A in Part,
	:	Vacating in Part, and Remanding
v.	:	for Further Proceedings
	:	
	:	Docket Nos. IBIA 04-161-A
NORTHWEST REGIONAL DIRECTOR,	:	05-12-A
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	January 11, 2007

The Lummi Nation (Nation) has filed two appeals from a determination by the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA) that the Nation is liable for timber trespass and damages therefor on several parcels located on the Ben Mainstagin Allotment, No. 59 (Allotment No. 59), located on the Nation's Reservation in the State of Washington. Initially, the Regional Director issued a notice of trespass and an estimate of damages on August 3, 2004, which the Nation appealed. Docket No. IBIA 04-161-A. One month later, on September 9, 2004, the Acting Northwest Regional Director 1/ reiterated the August 3 finding of trespass and finalized BIA's demand for damages, interest and costs in the amount of \$289,874.73. The Nation's second appeal is from this latter decision. Docket No. IBIA 05-12-A. The trespass determination was based on the issuance of invalid timber cutting permits by a tribal employee purporting to authorize logging on certain parcels on Allotment No. 59 without BIA approval.

For the reasons stated below, the Interior Board of Indian Appeals (Board) dismisses the appeal from the Regional Director's August 3, 2004 decision as moot. As to the

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1/ In this decision, we will refer to the Regional Director and the Acting Regional Director as "Regional Director."

September 9, 2004 decision, it is affirmed in part, vacated in part, and remanded for further proceedings consistent with this decision. 2/

### Factual Background

#### A. Summary

In 2003, timber harvesting occurred on 10 or 11 individually-owned parcels all located on Allotment No. 59 within the exterior boundaries of the Lummi Reservation (Reservation). 3/ Because each of these parcels is trust property, federal regulations require that BIA approve any timber harvests prior to the removal of any timber therefrom. See 25 C.F.R. § 163.26. It is undisputed that the logging operation on these parcels occurred without the knowledge or consent of BIA.

BIA maintains that through the actions of the Nation's employees, particularly its Forest Manager, the Nation is liable for the timber trespass pursuant to 25 U.S.C. § 3106. The Nation maintains that, as a sovereign Indian nation, it cannot be held liable under section 3106. Additionally, even if tribes can be held liable, the Nation argues that it is not liable for the acts of its Forest Manager, who acted on his own and contrary to the instructions of his supervisors.

We conclude that tribes are not exempt from liability for timber trespass under section 3106. However, we are unable to conclude, based on the record before us and BIA's conclusory findings, that the Nation is liable for the timber trespasses on Allotment No. 59. We remand this matter to the Regional Director for further consideration. If on remand, the Regional Director again concludes that the Nation is liable, he should clearly explain the specific legal theory of liability and the evidentiary support for finding liability.

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2/ The Nation does not appeal the amount of damages, interest or costs calculated by BIA for the timber trespass. The only issue before this Board is whether the Nation is liable for the timber trespass.

3/ According to BIA's initial timber trespass report, timber was illegally logged on 10 parcels on Allotment No. 59. See July 14, 2004 Timber Trespass Report (Report) at 1. Sometime thereafter — the record is silent as to the circumstances — the parties began referring to an 11th parcel, parcel 59-AT, as also subject to damages for timber trespass.

## B. Brief History

In 1990, the Nation entered into a self-governance compact with the Secretary of the Interior pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, 25 U.S.C. § 450 *et seq.* Under the compact and relevant to this appeal, the Nation provides forestry programs and services for tribally- and individually-owned trust lands on the Reservation. <sup>4/</sup> The record does not contain a description of those programs and services.

In the years preceding the timber harvest at issue in this appeal, the record reflects that there were some difficulties with the Nation's administration of its forestry program, including an unauthorized timber harvest that occurred on the General Harrison allotment. <sup>5/</sup> In April 2001, the Lummi Natural Resources Department (LNRD), an agency of the Nation, hired Allen Tweedie as its Forest Manager. In this position, Tweedie was responsible for preparing and issuing timber harvest permits for trust lands located on the Reservation. Tweedie also drafted the 2002-2012 Lummi Forestry Management Plan (Plan), which was approved by the Lummi Indian Business Council (LIBC) and BIA. The Plan was drafted specifically to redress one of the deficiencies in the Nation's forestry program identified by BIA in 2000 at the time of the timber trespass on the General Harrison allotment. June 1, 2000 Letter from Regional Director to Nation. The Plan provides that timber harvest permit applications must go through "an internal review process to determine whether the permit will be approved, approved with conditions, or denied. Once the timber harvest is approved internally, BIA in Portland has to make the final approval." Plan at 62. <sup>6/</sup>

## C. Facts Relating to the Timber Trespasses on Allotment No. 59

At approximately the same time in May 2004, both the Nation and BIA became aware of a timber harvest occurring on a number of parcels on Allotment No. 59 when a

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<sup>4/</sup> The Nation represents that it has been managing the forestry program on its reservation since 1988 "when [it] was a part of the first group of Tribes participating in the self-governance pilot project with the Department of [the] Interior." Sept. 17, 2004 Letter from Nation to BIA at 1.

<sup>5/</sup> This trespass was the subject of investigation by the Regional Director. June 1, 2000 Letter from Regional Director to Nation.

<sup>6/</sup> Page 62 was the only page of the Plan submitted to the Board.

slashburn that apparently was part of the harvest grew into a wildfire. The Nation maintains that Tweedie started the slashburn. June 28, 2004 Letter from Nation to BIA at 2. Prior to the discovery of the wildfire, BIA and the Nation — except for Tweedie, as will be explained — had no knowledge of the timber harvests and it is undisputed that BIA had not approved the harvests. Both the Nation and BIA issued stop work/cease and desist orders to halt the timber cutting and both commenced investigations.

The Lummi Police Department initiated an investigation to determine whether Tweedie had engaged in criminal activity. <sup>7/</sup> BIA initiated a timber trespass investigation headed by Nick Johnson, a forester for the Puget Sound Agency, BIA (Agency), and Joe LaVerdure, a BIA Regional Forester. Over the course of BIA's investigation, Johnson and LaVerdure met with various Nation officials; investigated and calculated the value of the timber cut and damaged by the fire; interviewed some of the holders of interests on Allotment No. 59 whose parcels were affected by the timber harvest; and gathered various documents related to the affected parcels and the timber harvests. <sup>8/</sup> Because damages for timber trespass on a number of the parcels have been settled by the parties <sup>9/</sup>, this decision addresses the results of BIA's investigation and conclusions only with respect to those parcels for which damages remain outstanding: 59-F, 59-I, 59-L, 59-M, 59-R and 59-AT. Below, we summarize the evidence in the record pertaining to each of these six parcels and the timber trespass thereon.

#### Parcel 59-F

On August 19, 2002, the owner of parcel 59-F completed an application for a land use permit, which is part of the record, to clear timber on her parcel. <sup>10/</sup> The land use permit application lists Ray Beck as the contractor who would be harvesting the timber on

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<sup>7/</sup> The parties have not informed the Board whether any criminal charges were brought against Tweedie and, if so, their outcome.

<sup>8/</sup> Two trespass reports were submitted, the Report dated July 14, 2004 and a February 25, 2005 Revised Report (Revised Report).

<sup>9/</sup> The Nation has settled the damages with the owners of parcels 59-G, 59-H, 59-J, 59-K and 59-N as well as with some of the owners of parcel 59-L.

<sup>10/</sup> Apparently, tribal law requires landowners to obtain both a timber harvest permit and a land use permit prior to conducting any timber harvest operations on lands within the Reservation.

parcel 59-F. The land use permit application was approved by the Lummi Planning Department and a conditional land use permit, also in the record, was issued in September 2002. <sup>11/</sup> The permit describes the work on parcel 59-F as “[c]learing & installation of manufactured home.”

On May 8, 2003, the landowner obtained a timber harvest permit from the Nation. The permit is a two-page document. The first page has the Nation’s letterhead with the following caption displayed,

**Lummi Indian Business Council  
LNR, Forestry Timber Cutting Permit**

The permit begins by informing the landowner that “[p]ermission is hereby granted \* \* \* to cut and remove timber in accordance with the provisions on the reverse side of this permit.” (Emphasis added.) The permit describes the land where the timber harvest will occur, describes the timber to be cut (“mainly firewood material and pulp grade and sawlogs”), and sets out various conditions that must be met. One of the conditions requires “[t]he permittee [to] comply with all other laws and regulation[s] governing the Lummi Reservation within which the permit area is located.” The permit is signed by both the landowner, who agrees to comply with the conditions of the permit, and by Tweedie. Tweedie is identified on the permit as the “Lummi Forestry Officer” and his signature appears on a line after the word “APPROVED.” This permit, and the ones described hereafter, do not contain any specific notice to the permittee that informs the landowner that timber cutting cannot commence in the absence of BIA approval.

When interviewed by the Nation’s investigating officer on May 28, 2004, the owner of parcel 59-F stated that she saw loggers harvesting timber on land near her parcel and approached them about logging her parcel. The loggers told her to contact Tweedie to get a timber harvest permit. She said she then called Tweedie, who told her she did not need to find a contractor for cutting her wood because the “tribe had one.” Summary of Tribal Police Interviews at 1. The owner said that she received \$1000 for her timber in the fall of 2003.

According to BIA’s investigator, the owner of parcel 59-F told a different story to tribal and Department of the Interior officials on February 17, 2005: That she had

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<sup>11/</sup> The land use permits approve the use of the land for the purposes described in the permit provided that the landowner complies with any “conditions” listed in the permit. Hence, the land use permits are entitled “conditional land use permits.”

arranged to have Ray Beck harvest her timber, but that Tweedie “chased him off” her property and “had other loggers clear the entire forested 2+ acres west of the barn.” Revised Report at 2. The interview summary does not explain how the landowner determined that Tweedie caused other loggers to clear her land. 12/

Finally, the record contains a couple of documents from Wisteria Corporation. 13/ There is a typed note dated November 10, 2003 by Chris Hatch of Wisteria Corporation to Tweedie that is titled, “2003 Lummi Harvests” and refers to the timber harvests. The note states that the “estimated harvest range was 100-110 MBF [thousand board feet] +/-.” Underneath this statement appears a handwritten note that states, “[t]his was for 6 Lummi clients over a period of the calendar year 2003,” and lists the owner of parcel 59-F as a “client.” Additionally, there are copies of two canceled checks dated in June 2003 and made payable to the owner of parcel 59-F by Wisteria Corporation.

#### Parcel 59-I

The only information provided to the Board concerning Parcel 59-I confirms the ownership of this parcel and sets out the calculated stumpage value of the timber cut or damaged thereon. No interview notes or summaries appear in the record and no permits or applications for parcel 59-I are included.

#### Parcel 59-L

The record contains a land use permit application, dated April 21, 2003. The application identifies Wisteria Corporation and Raven Forest Products as the contractors who would be harvesting the timber. Also in the record is the conditional land use permit issued by the Nation in April 2003 that describes the work to be done as “Timber harvest.” The land use permit also contains “conditions” to be met by the landowner as part of the land use permit. One of the conditions is: “A Timber Harvest Permit is required prior to

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12/ That is, the record does not inform us whether the landowner actually heard Tweedie instruct the loggers to clear her property or whether the landowner assumed that Tweedie caused the loggers to clear her property because they appeared after Tweedie “chased off” Ray Beck.

13/ Apparently, most if not all of the impermissible timber harvests on Allotment No. 59 were done by Wisteria Corporation. Another company, Raven Forest Products, also may have played some role in the timber harvests. BIA attempts to draw some connection between Tweedie and these two companies. Answer Brief at 4, 7.

any harvest or harvest-related activity (e.g., road building) taking place. Contact Allen Tweedie, [LNRD] Forester \* \* \* for a permit application and additional information.” No further mention is made in the land use permit regarding the timber harvest permit and no mention is made of BIA or its role in the timber harvest process.

When interviewed by BIA’s investigator, one of the owners of parcel 59-L stated that Tweedie approached her and other owners of the parcel to encourage them to cut the timber on their parcel; this same owner also told the Lummi investigator that she and her brother went to Tweedie to obtain a timber harvest permit after talking with the owner of parcel 59-M. Although there is no timber cutting permit in the record, the owner reported that one was issued by Tweedie.

### Parcel 59-M

Copies of three conditional land use permits are found in the file for parcel 59-M issued in February 2000, January 2001 and March 2003. 14/ The 2003 permit contains the following language:

A timber harvest permit is required prior to the cutting of any trees, of more than \$2,500.00 in value and may be obtained from the Forester, Allen Tweedie of the [LNRD] \* \* \* .

#### **The timber harvest permit may include:**

- Flagging of boundaries (it is the applicant’s responsibility to delineate the property boundaries)
- A timber cruise or a comparable estimate of timber volumes.
- An Environmental Assessment (EA)
- An Appraisal with logging costs & the identification of sawmill where logs shipped.
- Advertisement for an operator.
- Approval by the Director of Lummi Natural Resources.
- Approval by the Bureau of Indian Affairs.
- A reforestation plan and/**or confirmation if the applicant desires to change the land status.**
- A road plan that would contain, 1) road layout, 2) culvert locations, 3) use and/or maintenance after the logging is completed. The location of roads and

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14/ By their terms, the land use permits are valid only for one year, which explains the multiple permits for parcel 59-M.

drainage features needs to be flagged in the field prior to the start of operations.

**The Bureau of Indian Affairs may issue Timber Harvest Permits within the boundaries of the Lummi Indian Reservation in the absence of a[n] Environmental Assessment Plan. This issue is being addressed and is expected to be resolved in the near future.**

(Emphasis in original.) The earlier two permits for parcel 59-M contained nearly the same conditions except they do not contain the last paragraph concerning BIA. <sup>15/</sup> The record contains a copy of the Nation-issued timber harvest permit, like the one described for parcel 59-L, that was signed by both Tweedie and the landowner. The record also contains an authorization signed by the owner of parcel 59-M permitting Tweedie access to files for parcel 59-M in the Nation's Realty & Planning Department. It is not entirely clear why Tweedie would need access to these records, but it appears to be in connection with the construction of "an access road and to harvest trees for the Tribal firewood program." See Jan. 20, 2003 Memorandum from owner of parcel 59-M to Realty & Planning. <sup>16/</sup>

The owner of parcel 59-M reported to BIA's investigator that his parcel was logged in early spring of 2003 and that he received an advance payment of \$5500.00 for the timber from Wisteria Corporation (a copy of the check is in the record). There is also a memorandum in the record from Hatch to Tweedie stating that his "original revenue estimate on the [59-M] cutting block was \$5250. My reviewed estimate is \$5840. After deducting the \$5500 stumpage payments to [the owner of parcel 59-M] that leaves \$340 for expenses. Any suggestions?" There is no evidence in the record of a response by Tweedie. Parcel 59-M is identified as one of the six "clients" from which 100-110 MBF timber was harvested by Wisteria Corporation on the Reservation in 2003. See Nov. 10, 2003 Letter from Hatch to Tweedie.

#### Parcel 59-R

According to BIA's investigator, one of the owners of parcel 59-R told him that Tweedie

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<sup>15/</sup> None of the other conditional land use permits issued by the Nation for affected parcels on Allotment No. 59 contained this detail.

<sup>16/</sup> The parties did not inform the Board whether the Nation benefitted from any of the timber harvests on Allotment No. 59 for the Tribal firewood program.

approached her about cutting [timber from] 59-R and had her sign a \* \* \* Timber Cutting Permit. Tweed[ie] advised her that he had a good logger lined up who would do a good job. She also states that she alone received a total of \$3,748.00 for all the wood cut from 59-R from Chris Hatch of Wisteria Corporation.

July 14, 2004 Report at 3. The owner signed a timber harvest permit, as did Tweedie, a copy of which is in the record. Also in the record is a copy of the completed application for a land use permit, which designates Wisteria Corporation and Raven Forest Products as the timber harvest contractors. A copy of the resulting conditional land use permit issued by the Nation is in the record. The two permits and the application for the land use permit are virtually identical in form to those described for parcel 59-F, except that the stated purpose for the land use permit for parcel 59-R is “[t]imber harvest.” BIA’s trespass report states that a portion (5.7 acres) of parcel 59-R was clearcut while a smaller portion (0.04 acre) was damaged by fire. Report at 1. Finally, Hatch reported to Tweedie that parcel 59-R was one of the six “clients” for whom logging was conducted on the Reservation in 2003, see Nov. 10, 2003 Letter from Hatch to Tweedie, and copies of four checks from Wisteria Corporation to the owner of parcel 59-R are part of the record.

#### Parcel 59-AT

As with parcel 59-I, there is no information or documents in the record concerning parcel 59-AT other than ownership records and stumpage value of timber cut.

#### D. Trespass Determination

On July 14, 2004, Johnson completed the Report for Allotment No. 59, and the Regional Director approved the Report on July 26, 2004. The Report found that timber had been illegally cut without a valid permit in the spring and summer of 2003 on 10 parcels on Allotment No. 59 — parcels 59-F, 59-G, 59-H, 59-I, 59-J, 59-K, 59-L, 59-M, 59-N, and 59-R. The Report appraised the stumpage value 17/ at \$83,503.64 for the timber that had been cut and damaged by fire on the allotment.

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17/ “Stumpage value” is “the value of a forest product prior to extraction from Indian forest land.” 25 C.F.R. § 163.1.

The Report identified Tweedie, Merle Jefferson 18/, and Hatch as the persons suspected of being involved in the trespass, and concluded that “the main cause of this timber trespass is the indifference of tribal officials toward the Federal regulations contained in 25 CFR 163 and even the provisions of their own 2002 Lummi Forest Management Plan mandating such things as \* \* \* Federal approval of all timber cutting permits.” Id. at 5. The Report noted that Tweedie was “the only Tribal representative signing [the timber cutting permits],” id., and that Tweedie’s supervisor should have noticed the clearcut of the parcels and investigated why he had not seen a timber cutting permit for the timber harvest. The Report concluded: “[t]he cause of this trespass is, partially the lack of oversight, and partially misdirection of the Forest Manager by the tribal employees in charge of the Natural Resources and Planning Programs.” Id. at 6. 19/

On August 3, 2004 and based on the Report, the Regional Director issued the Notice of Trespass to the Chairman of the LIBC. The Notice stated that

[A] determination has been made that a trespass has occurred on Indian forest land located on [Allotment No. 59], based on the following evidence: Copies of the Timber Cutting Permits (#s LUA-03-034, LUA 02-060, LUA-03-052, and LUA-03-047) improperly authorized by a Lummi tribal official, scale, and payment records from the purchaser and Timber Trespass investigation performed by BIA.

(Emphasis in original.) The Regional Director estimated damages, penalties, and costs at \$249,992.59, prior to interest charges. The Regional Director provided appeal rights and, on September 1, 2004, the Nation filed a protective notice of appeal, which is the subject of Docket No. IBIA 04-161-A. 20/

Two days after his August 3 decision, the Regional Director issued a second letter, revisiting the earlier charges and assessing treble damages, costs and penalties for the alleged timber trespass on Allotment No. 59 in the aggregate amount of \$278,539.36. The

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18/ Merle Jefferson was the head of the LNRD and Tweedie’s supervisor. See Declaration of Merle Jefferson.

19/ In addition to BIA’s lack of approval of the timber cutting permits, the Report identified several other defects in the permits. Id.

20/ The Nation observed that the August 3 decision was not, in fact, a final and appealable decision in light of the Regional Director’s subsequent August 5 letter.

Regional Director invited rebuttal evidence from the Nation, but also incorporated by reference the appeal rights contained in his August 3 letter. The Nation did not appeal from this letter.

On September 9, 2004, the Regional Director issued a third and final letter. In it, the Regional Director refined his earlier calculations of damages and assessed treble damages, costs, and penalties for the trespass in the amount of \$289,874.73. This amount reflected an increase in enforcement costs and in interest charges since the August 5, 2004 letter. The Regional Director stated that “[a] recent investigation established that timber was cut by persons acting under authority granted by employees of the [Nation]. This timber trespass occurred on Trust lands administered by the United States.” Sept. 9, 2004 Decision at 1. The Regional Director stated that BIA was required to collect damages resulting from timber trespasses committed on trust lands and that the damages were assessed pursuant to 25 C.F.R. § 163.29, which provides for treble damages with interest on the stumpage value and enforcement costs. The Regional Director’s letter itemized the species of trees that had been cut, the net volume of the trees, and the recommended rate for the timber, but did not identify the damages by parcel. The letter contained appeal rights. The Nation appealed this decision, which is the subject of Docket No. IBIA 05-12-A. 21/

At the same time that BIA was investigating the timber trespass, the Interior Department’s Office of the Special Trustee for American Indians (OST) conducted a trust evaluation of the Nation’s forestry program. Specifically, OST stated that the evaluation occurred

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21/ On September 17, 2004, the Chairman of the LIBC wrote to the Assistant Secretary - Indian Affairs to request assistance in resolving the trespass notice. The Chairman acknowledged that timber harvesting had occurred on Allotment No. 59 without BIA approval, and stated with respect to Tweedie’s actions that

[o]ur investigations to date indicate that our former employee may have formed his own opinions about whether the harvests in question required BIA approval. He has stated to the Lummi Police investigator that harvests of less than \$15,000 did not require BIA approval; more recently he told the investigator that the land was not zoned forestry and that was why no BIA permits were needed.

Sept. 17, 2004 Letter from Chairman to Assistant Secretary - Indian Affairs at 3. We have not been provided with a copy of the Assistant Secretary - Indian Affairs’s response to this letter, if any.

during the period of October 28-30, 2003 at the Lummi Indian Nation (Nation) to monitor the performance of trust functions conducted by the Nation in fiscal years 2002 and 2003. Program interviews, transaction file reviews, and onsite inspections were conducted for the real estate services, probate and forestry programs.

Sept. 15, 2004 Letter from OST to Nation at 1. The deficiencies discovered by OST as a result of its audit were found in the Nation's administration of its timber harvest program, namely the illegal trespasses on Allotment No. 59 (referred to in OST's correspondence as the Cagey Road Trespass) and an unidentified timber trespass unrelated to the Allotment No. 59 trespasses. Id. With respect to the timber trespass on Allotment No. 59, OST found that the "trespasses were again caused by the Nation not following the regulatory and statutory guidelines in the harvest of timber from a number of [parcels]." Id. 22/ OST specifically found that the Nation's

cumulative actions and inactions \* \* \* and non-compliance with applicable regulations have: 1) led to the degradation, damage, and loss of trust assets owed individual Indians, 2) jeopardized income due to these owners, resulting from the lack of action in the collection of the required amount of stumpage, and, 3) placed forest trust assets in imminent jeopardy.

Id. at 2. The deficiencies were sufficiently serious for OST to notify the Nation that, in the absence of an immediate and satisfactory response from the Nation, OST was prepared to recommend to BIA that it reassume responsibility for the forestry program on the Reservation. Id.

The Nation promptly responded on September 24, 2004 to OST's letter and outlined specific, remedial measures it proposed to take. Ultimately, OST and the Nation reached a resolution and OST suspended the reassumption process. Oct. 25, 2004 Letter from OST to Nation. OST advised the Nation that it would conduct a follow-up examination at the end of the 60-day period to ensure that the corrective actions promised by the Nation had been accomplished. Id. The record is silent as to whether any subsequent examination took place.

Meanwhile, the Board consolidated the Nation's two appeals by order dated December 16, 2004. The Board also stayed the appeals at the request of the parties, pending the outcome of settlement efforts. During the stay, BIA prepared the Revised

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22/ The parties do not identify the earlier trespass(es) to which OST referred.

Report for Allotment No. 59. Thereafter, in a joint status report filed on April 29, 2005, the parties notified the Board that 23 of the 41 affected landowners had accepted a settlement offer from the Nation. <sup>23/</sup> The parties then suggested a briefing schedule to resolve the appeals with respect to the remaining landowners and parcels. On May 9, 2005, the Board lifted the stay and adopted the parties' proposed briefing schedule, including a deadline for the Regional Director to supplement the administrative record. On May 31, 2005, the Regional Director filed the Revised Report with additional documents, and the Nation and the Regional Director filed briefs with the Board.

### Discussion

#### A. Docket No. IBIA 04-161-A

As noted above, the Nation appealed the Regional Director's August 3, 2004 notice of timber trespass for Allotment No. 59. That notice of appeal was filed on September 1, 2004. However, as the Nation noted, the August 3 decision was followed by a second letter on August 5. This second letter contained more detail concerning the basis for the finding of liability and concerning the assessments levied against the Nation. In the August 5 letter, the Regional Director invited the Nation to respond to the Regional Director's evidence and conclusions, but also incorporated by reference the appeal rights set out in the August 3 letter. The Board finds that the August 5 letter superseded the August 3 decision. See Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 222 (1994). Thus, the Nation's appeal of the August 3 decision is moot because, at the time the Nation filed its appeal, the August 3 decision was no longer in effect.

The Board does not rule on moot issues except in extraordinary circumstances. Medallion Exploration v. Acting Phoenix Area Director, 28 IBIA 276, 277 (1995). As neither of the parties has directed our attention to any such circumstances and because the merits of the timber trespass will be addressed below in our decision on Docket No. IBIA 05-12-A, we dismiss the appeal of the Regional Director's August 3, 2004 decision as moot.

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<sup>23/</sup> Additional settlements were subsequently reported to the Board on May 31, 2005.

## B. Docket No. IBIA 05-12-A

### 1. Jurisdiction

At the outset, we address the Regional Director's jurisdiction to render his September 9 decision inasmuch as the Nation filed its appeal of the August 3 decision on September 1, 2004, the effect of which would ordinarily deprive the Regional Director of authority to render any further decisions concerning the Allotment No. 59 timber trespasses in the absence of authority from the Board to do so. See Bullcreek v. Western Regional Director, 39 IBIA 100, 101 (2003); Medallion Exploration, 28 IBIA at 276. However, in this case, the Nation specifically appealed a decision that already had been superseded and the Nation expressly acknowledged, but decidedly did not appeal, the second letter. Had the Nation not so specifically confined its appeal to the superseded August 3 decision or had indicated in some fashion that it was appealing the August 5 decision, the Regional Director would have lost jurisdiction to enter any further modifications to the timber trespass decision. Therefore, inasmuch as the August 3 decision was of no effect at the time the Nation appealed, the appeal — as discussed above — was moot ab initio and the Regional Director did not lose jurisdiction.

Even assuming that the Nation's appeal of the August 3 decision did deprive the Regional Director of authority to enter his subsequent September 9 decision, no useful purpose would be served by a remand from this Board solely to cure the defect. See Leon v. Albuquerque Area Director, 23 IBIA 248, 259 (1993). All parties agree that the September 9 decision is the Regional Director's final decision, the merits have been briefed, and the Board thus proceeds with its review.

### 2. Statutory and Regulatory Framework

In 1990, Congress passed the National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C. § 3101 et seq., in part to address the “threat to Indian forest lands arising from trespass and unauthorized harvesting of Indian forest land resources.” 25 U.S.C. § 3101(6) (2001). Section 3118 of NIFRMA required the Secretary to promulgate regulations to implement the statute. These regulations, found at 25 C.F.R. Part 163, provide, among other things, that all permits to harvest forest products must be approved by the Secretary to be valid. 25 C.F.R. § 163.26(a) (2003). 24/ In addition, section 3106 specifically required the Secretary to issue regulations that “establish civil

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24/ “Forest products” are defined as “marketable products extracted from Indian forests, such as: Timber \* \* \* .” 25 C.F.R. § 163.1.

penalties for the commission of forest trespass,” which the statute defines as “the act of illegally removing forest products from, or illegally damaging forest products on, forest lands.” 25 U.S.C. §§ 3106(a)(1), 3103(8); see also 25 C.F.R. § 163.1 (defining “trespass”). The regulations further identify trespass to “include any damage to forest resources on Indian forest land resulting from activities under contracts or permits or from fire.” 25 C.F.R. § 163.1.

Section 163.29 of the regulations provides that “[t]respassers 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.” Under subsection 163.29(a)(3), civil penalties for trespass include treble damages, costs of restoration, costs of enforcement, and interest.

### 3. Can Tribes be Held Liable for Timber Trespass Under 25 U.S.C. § 3106?

Despite the Nation’s many spirited arguments to the contrary, we conclude that tribes can be held liable for timber trespass in the same manner as private individuals and business or governmental entities.

We begin with the statutory definition of timber trespass. NIFRMA defines forest trespass as “the act of illegally removing forest products from, or illegally damaging forest products on, forest lands.” 25 U.S.C. § 3103(8). Nothing in this definition or elsewhere in the statutory scheme exempts or excepts any person or entity, including tribes, from potential liability for timber trespass. The regulations found at 25 C.F.R. Part 163 contain a similar definition of trespass and likewise do not admit of any exemptions from liability. See 25 C.F.R. § 163.1. 25/

The Nation asserts that in enacting NIFRMA, Congress was “concerned about unauthorized losses of tribal forestry resources,” and “thought that the best way to accomplish the goal of protecting tribal resources was to increase tribal involvement in forestry programs under the Self-Determination Act.” Opening Brief at 14-15 (citing S. Rep. No. 101-402 (1990)). Consequently, argues the Nation, Congress cannot have intended the tribes, with whom the United States had partnered for the protection of tribal resources, to be liable for timber trespass. While the Nation is correct that these were

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25/ Notably, the regulations anticipate that Indian beneficial owners may be held liable for timber trespass on their own lands. See 25 C.F.R. § 163.29(c) (excepting the Indian trespasser from receiving any share of the civil penalties and damages assessed for his trespass on his own land).

among the purposes that motivated Congress to pass NIFRMA, see 25 U.S.C. §§ 3101-3102, increasing tribal participation in forest programs and protecting tribal forestry resources were not the sole purposes of NIFRMA. Congress also recognized that “there is a serious threat to Indian forest lands arising from trespass and unauthorized harvesting of Indian forest land resources.” See 25 U.S.C. § 3101(6). “Indian forest land” includes tribally-owned as well as individually-owned forest land. 26/ Thus, Congress made no distinction in NIFRMA between its intent to protect tribal forest lands and individually-owned forest lands, determining that both were entitled to the protections of NIFRMA and, in particular, protection from timber trespass.

Moreover, where a statute is remedial in nature, as is section 3106, it “should be broadly construed to effectuate its purposes.” Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Construing NIFRMA broadly compels us to hold that tribes can be liable in the same manner as individual, governmental or organizational entities for timber trespass. Doing so “effectuates” one of the principal purposes of NIFRMA by addressing the “threat to Indian forest lands arising from trespass and unauthorized harvesting of Indian forest land resources.” 25 U.S.C. § 3101(6).

The Nation also argues that the statutory definition of “trespass” is “unambiguous,” and requires that the trespasser be the person who “illegally remov[ed] \* \* \* or illegally damag[ed] forest products.” Opening Brief at 11. Because there is no evidence that

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26/ “Indian forest land” is defined as “Indian lands \* \* \* that are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover, regardless whether a formal inspection and land classification action has been taken,” 25 U.S.C. § 3103(3), and “Indian land” is defined as land[,] title to which is held by (A) the United States in trust for an Indian, an individual of Indian or Alaska Native ancestry who is not a member of a federally-recognized Indian tribe, or an Indian tribe, or (B) an Indian, an individual of Indian or Alaska Native ancestry who is not a member of a federally recognized tribe, or an Indian tribe subject to a restriction by the United States against alienation.

25 U.S.C. § 3103(10); cf. 25 C.F.R. § 163.1 (“forest or forest land” defined as “an ecosystem at least one acre in size, including timberland and woodland, which: Is characterized by a more or less dense and extensive tree cover; contains, or once contained, at least ten percent tree crown cover, and is not developed or planned for exclusive non-forest resource use”).

In his August 3, 2004 Decision, the Regional Director described Allotment No. 59 as “Indian forest land.” The Nation does not dispute this classification.

Tweedie personally cut or removed any trees, the Nation argues that the actions he did take cannot constitute trespass within the meaning of the statute or BIA's forestry regulations. We disagree.

Liability is not limited solely to those who personally wield the ax that fells the tree or who directly damage the timber. See Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 201 (2005) (a person may be liable for trespass committed by his agent, even if he did not personally cut timber). It is well-established that one who commands, instigates, encourages, advises, countenances, cooperates in, aids, or abets the commission of a trespass is liable as a co-trespasser with the person actually committing the trespass, and is liable as a principal to the same extent and in the same manner as if he had performed the wrongful act himself. See 75 Am. Jur. 2d Trespass § 66 (1991); 87 C.J.S. Trespass § 31b & c (1954); see also Bloedel Timberlands Development, Inc. v. Timber Industries, Inc., 626 P.2d 30, 34 (Wash. App. 1981) ("one who authorizes or directs a trespass is jointly liable with the actual trespassers"). Therefore, we hold that Tweedie's actions, and the actions of other employees of the Nation, can be sufficient to give rise to liability for trespass even though they may not have personally removed or damaged any forest products on Allotment No. 59.

The Nation also argues generally that tort liability cannot be based on the issuance of a permit by a permitting agency. In so arguing, the Nation cites Coeur d'Alene Lake v. Kiebert, 790 F. Supp. 998 (D. Id. 1992) and Faust v. South Carolina, 721 F.2d 934 (4th Cir. 1983), neither of which support the Nation's position. In Faust, the Fourth Circuit applied the discretionary function exception of the Federal Tort Claims Act, see 28 U.S.C. § 2680(a), to hold that the Army Corps of Engineers was not liable in tort for issuing a permit for the installation of steel cable necessary to operate a ferry when passengers on a motorboat that collided with the cable were killed or injured. 721 F.2d at 939. Thus, the Court never reached the question of whether liability would attach in the absence of the statutory defense. 27/

In Coeur d'Alene Lake, the court held that citizens did not have a private cause of action against the Army Corps of Engineers for the issuance of a Clean Water Act (Act) permit because the Act only permits a citizen suit in limited circumstances that did not include plaintiff's challenge. 790 F. Supp. at 1008. Again, the Court did not reach the issue of whether liability would attach if the Act permitted citizen suits.

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27/ Assuming arguendo that the Nation contends that it, too, is entitled to a "discretionary function" defense, we are unaware of any authority for the Nation to assert such a defense against the United States.

The Nation cites no other authority for the proposition that it necessarily is shielded from liability simply because the alleged actions on which the trespass allegations are based include the issuance of a permit. Whether issuance of an individual timber harvest permit by a tribal employee, without more, gives rise to trespass liability is an issue we need not decide because, as we explain below, it is far from clear what facts — and law — BIA relied on in finding the Nation liable. That is, it is not clear that BIA relied solely on the issuance of the permits.

We also reject the Nation's argument that the contract remedies authorized by ISDA are the only remedies available to redress a timber trespass committed by a tribe with an ISDA contract to administer a forestry program. 28/ See Opening Brief at 18 (extending liability under NIFRMA is "inconsistent" with section 450m of ISDA).

The Nation is correct that ISDA provides a remedy against an Indian tribe that fails to fulfill its obligations under a self-governance compact by authorizing BIA to rescind the agreement and resume control of a program in certain circumstances. See 25 U.S.C. § 450m. Part 1000 of 25 C.F.R. vests the Secretary of the Interior with discretion to reassume any Federal program operated by a tribe pursuant to an ISDA contract upon a finding of imminent jeopardy to a physical trust asset, a natural resource, or public health and safety. See 25 C.F.R. § 1000.301. The Nation is also correct that in the present case, by letter dated September 15, 2004, OST notified the Nation of a finding of imminent jeopardy based, in part, on the unauthorized harvest of timber on Allotment No. 59; that the Nation responded by notifying OST of the actions it had taken to address OST's concerns; and that OST subsequently suspended the reassumption process. However, nothing in this process remedies, or is intended to remedy, the damage to the landowners from the timber trespass. That remedial process is established in section 3106, while the reassumption process established in ISDA is a remedy for breaches in the performance of obligations under the ISDA contract. Moreover, nothing in either statute suggests that its remedy is exclusive of any other remedy that may be available. We therefore reject the Nation's argument that ISDA provides the exclusive remedy for any responsibility the Nation may have for the timber trespass on Allotment No. 59.

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28/ Pursuant to ISDA, tribes may contract with BIA and other Federal agencies to administer certain programs, functions, services and activities that the Federal government otherwise administers for and provides to tribes and Indian peoples. See generally Citizen Potawatomi Nation v. Director, Office of Self Governance, Bureau of Indian Affairs, 42 IBIA 160 (2006).

Likewise, we reject the Nation's argument that ISDA "expressly protect[s] Indian tribes from tort liability arising from the carrying out of self-determination contracts" and, therefore, shields the Nation from liability for trespass damages. Opening Brief at 20. The Nation argues that under ISDA, a tribal employee acting pursuant to a self-determination contract is considered to be an employee of the Federal government for purposes of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.* Thus, the Nation argues, "[i]f any governmental entity is liable for treble damages for Tweedie's actions, it is the United States," not the Nation. *Id.* at 23. In support of this argument, the Nation relies on Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60 (Nov. 5, 1990) (codified at 25 U.S.C. § 450f notes) (section 314).

Section 314 provides, in pertinent part:

[w]ith respect to claims resulting from the performance of functions \* \* \* under a contract, grant agreement, or other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act \* \* \* an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior \* \* \* while carrying out any such contract or agreement and its employees are deemed employees of the Bureau \* \* \* while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act[.]

(Emphasis in original.) The Nation's reliance on this provision of ISDA is misplaced. While the Nation is correct that section 314 provides that the Federal government is directly liable under the FTCA for certain tortious acts and omissions of tribes and their employees that occur in the course of performing ISDA contract functions, the Nation is incorrect in arguing that the FTCA applies in this case.

The FTCA provides a remedy against the United States only for state law tort claims. See 28 U.S.C. §§ 1346(b), 2674; see also *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994) (the law of the state where the acts or omissions occurred provides the substantive law in FTCA actions); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1025 (9th Cir. 2001) (same). It is well-established that the FTCA does not provide a means of redress for violations of federal law. *Delta Savings Bank*, 265 F.3d at 1024-25 (liability under federal statute cannot sustain cause of action under FTCA) and cases cited therein; *Klett v. Pim*,

965 F.2d 587, 589 (8th Cir. 1992) (“violation of a federal statute or administrative regulation by an agency of the United States does not \* \* \* create a cause of action under the FTCA”). Thus, assuming arguendo that Washington law recognizes a tort of timber trespass analogous or identical to section 3106, the existence of such a parallel cause of action does not convert a federal timber trespass action — that is, an action under section 3106 — into a claim under the FTCA. See Snyder v. Navajo Nation, 382 F.3d 892, 897 (9th Cir. 2004) and cases cited therein.

In Snyder, law enforcement officers employed by the Navajo Nation pursuant to an ISDA contract sought to hold the United States liable under section 314 for their claims under the Federal Labor Standards Act (FLSA). Plaintiffs argued that because section 314 deems the tribal employees who carry out the provisions of the ISDA contract to be federal employees and because section 314 provides that “any civil action \* \* \* ‘shall be deemed to be an action against the United States,’” they were thereby authorized to proceed against the United States under the FLSA. 382 F.3d at 897. The Ninth Circuit rejected this argument and held that “Congress \* \* \* did not intend section 314 to provide a remedy against the United States in civil actions unrelated to the FTCA.” Id. Thus, the court limited the liability of the United States under section 314 solely to claims cognizable under the FTCA, *i.e.*, state law tort claims.

We, too, reject the Nation’s argument that the United States is liable under section 314 for any damages assessed against the Nation under section 3106 and 25 C.F.R. § 163.29. Congress intended to limit liability under section 314 to state law tort claims. Had it intended to extend the protection of section 314 to federal causes of action, such as section 3106, Congress would clearly have so stated. Based on the foregoing, we conclude that BIA’s trespass notice to the Nation does not fall within the ambit of section 314 and section 314 has no applicability to this appeal. 29/

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29/ The Nation makes several additional arguments related to section 314. First, the Nation argues that tort liability under NIFRMA can only be extended “to a tribe carrying out a self-determination contract \* \* \* if Congress intended to impliedly repeal § 314 of the Self-Determination Act when it enacted § 3106.” Opening Brief at 22. Second, relying in part on section 314, the Nation asserts that BIA’s extension of section 3106 to the Nation “leads to an absurd result, because any judgment arising from torts committed by a tribal employee carrying out a self-determination contract will ultimately be paid by the United States.” Id. at 23-24. Because we hold that damages imposed pursuant to section 3106 do not implicate section 314, we need not address these arguments.

Similarly, we reject the Nation's argument that Congress intended to exempt tribes from punitive damages when Congress enacted 25 U.S.C. § 450f(c). Section 450f(c) requires the Secretary to obtain or provide liability insurance to cover claims that are not addressed by the FTCA. Section 450f(c) (3) (B) permits tribes' sovereign immunity to remain intact as to any claims for prejudgment interest, punitive damages, etc., "imposed by the law of the State in which the alleged injury occurs." (Emphasis added.) Nothing in this section exempts tribes, including the Nation, from treble damages authorized by federal law.

One final argument by the Nation merits mention. The Nation argues that "[i]f Tribes face potential treble damage liability for mistakes in issuing timber-cutting permits, Tribes will have no choice but to give up participation in the forestry programs," which would "defeat Congress'[s] goals" in passing section 3106. Opening Brief at 16. 30/ We are not persuaded by this argument. First, as we have already noted, it is not clear to us that BIA's decision to hold the Nation liable was based solely on the issuance of invalid permits. Second, even if the risk is as great as suggested by the Nation, avoidance of the risk is simple: All tribes need to do is obtain BIA approval of timber harvests or sales prior to issuing the permits, as required by 25 C.F.R. Part 163.

For the reasons set forth above, we hold that tribes are subject to enforcement actions under section 3106 and to any resulting assessment of damages. We turn now to our analysis of the Nation's liability for timber trespass on Allotment No. 59.

#### 4. Is the Nation Liable for Timber Trespass on Allotment No. 59?

After reviewing the record provided in this matter, we are left with a number of unanswered questions. The most significant question goes to BIA's theory of liability. The Regional Director concluded that the Nation is liable for timber trespass under section 3106 but his explanation and justification fall short. Since the Nation acts only through those authorized to act on its behalf, there must first be a theory or theories for holding the Nation liable (conceivably, respondeat superior or actual/apparent authority or a combination thereof). The next question goes to the factual record. That is, once BIA articulates its theory or theories for holding the Nation liable for the actions of its

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30/ We disagree with the Nation's characterization of Tweedie's actions as "mistakes in issuing timber-cutting permits." It is undisputed that Tweedie drafted the Nation's Plan in which the mandatory requirement of BIA approval for timber harvesting is clearly stated. Therefore, Tweedie knew that the timber harvest permits required BIA approval.

employees, the facts in the record must support the elements of its theory(ies) for holding the Nation liable under section 3106.

Instead, BIA seems to argue a different cause of action than trespass, rather than a theory for holding the Nation liable for trespass. In its Report, issued July 14, 2004, BIA concluded as follows:

The main cause of this timber trespass is the indifference of tribal officials toward the Federal regulations contained in 25 CFR 163 and even the provisions of their own 2002 Lummi Forest Management Plan mandating such things as the requirement of Federal approval of all timber cutting permits.

\* \* \* \* \*

\* \* \* The cause of this trespass is, partially the lack of oversight, and partially misdirection of the Forest Manager by the tribal employees in charge of the Natural Resources and Planning Programs. \* \* \* [The Forest Manager's] supervisor \* \* \* would have had to notice the clearcut [of timber] long before it reached 26 acres and wondered why a timber cutting permit approved by the Bureau had not crossed his desk.

Report at 5-6. The above excerpts are suggestive of a negligent supervision theory for holding the Nation liable. However, "negligent supervision" is a cause of action that is separate and distinct from a timber trespass action under section 3106. See 27 Am. Jur. 2d Employment Relationship § 397 (2004) (negligent supervision).

Ordinarily, employer liability is established through the theory of respondeat superior (strict liability) or actual/apparent authority (vicarious liability). See, e.g., 27 Am. Jur. 2d Employment Relationship § 373 et seq. (2004) (respondeat superior); 3 Am. Jur. 2d Agency §§ 70-79 (2002) (actual/apparent authority); see also 27 Am. Jur. 2d Employment Relationship §§ 3, 375 (2004) (actual/apparent authority in employer-employee relationship). BIA does not discuss either of these theories in the Regional Director's decision or in its brief on appeal, much less is any factual analysis applied to the legal framework of one or more of these theories. 31/ Moreover, there is no discussion of the factual evidence supporting trespass by the Nation for each separate parcel.

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31/ For its part, the Nation refers to actual and apparent authority in its reply brief. See Reply Brief at 4.

Instead, the Regional Director's decision and his brief contain a number of conclusory statements with no citation to the record and no analysis of the legal basis for finding the Nation liable under section 3106 for Tweedie's actions. For example, BIA claims that "the tribal Forest Manager had arranged for the timber to be cut," Answer Brief at 2, states that "the tribal Forest Manager directed the timber harvest \* \* \* [and] was clearly in charge of organizing and executing the logging operation, and represented himself as acting on behalf of the Lummi Nation," *id.* at 3, and argues that "[t]here is no question but that the tribal Forest Manager arranged for, encouraged, and directed the removal of the forest products from the various parcels," *id.* at 6. These statements are conclusory and lack any citation to the record or recitation of supporting facts. Moreover, the bare presence of Tweedie at the site of the timber harvests does not, without more, compel the conclusion that he was acting in his capacity of Tribal Forest Manager. <sup>32/</sup> This is not to suggest that there is a complete absence of factual support in the record for holding the Nation liable. Rather, the problem is that the Regional Director's decision fails to articulate clearly the legal and factual basis for finding the Nation liable. As a result, the parties largely confined their arguments in this appeal to whether the Nation could be held liable as a matter of law and not whether or how the material facts in the record support a finding of actual liability, and whether those facts are disputed.

Not only must BIA identify the evidence that supports its theory of liability, but it should also provide evidence to show where the responsibility lies for obtaining BIA approval of timber harvests on trust lands within the exterior boundaries of the Reservation. Presumably, the Nation is required under the terms of its ISDA contract to route timber harvest permits to BIA for approval. However, there is little, if any, evidence in the record that definitively informs us whether the Nation, the landowner, or the timber harvester is responsible for obtaining BIA approval of timber harvest permits on trust lands on the Reservation. <sup>33/</sup> If the landowner or timber harvester is tasked with obtaining BIA

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<sup>32/</sup> BIA produces evidence suggesting that Tweedie may have had a business interest in one or both of the timber harvesting companies, Wisteria Corporation and Raven Forest Products, which at least raises the question whether he was present at the timber harvests on Allotment No. 59 in his tribal Forest Manager capacity or in some unrelated capacity or a combination of both.

<sup>33/</sup> The excerpt provided to us from the Nation's Forest Management Plan is ambiguous at best as to who is directly responsible for obtaining BIA approval of a permit — the Nation, the landowner, or the permittee. See Plan at 62 ("Once the timber harvest is approved internally, BIA in Portland has to make the final approval."). Similarly, the language in the

(continued...)

approval for the timber harvests, BIA should develop the record further to show when and how the Nation learned or reasonably should have learned that BIA had not approved the permits. 34/

Once the Nation is provided with the theory or theories and the specific factual support therefor on which BIA is proceeding with its assessment of liability, the Nation can then respond with whatever facts or arguments it deems appropriate for its defense. Unless it is readily apparent, which it is not here, the Nation need not guess at the basis for BIA's decision or make BIA's argument(s) for it in order to defend against the decision.

Therefore, for the foregoing reasons, this matter is remanded to BIA for further consideration and development of the record in accordance with this decision.

### Conclusion

We dismiss on mootness grounds the Nation's appeal from the Regional Director's August 3, 2004 decision. Docket No. IBIA 04-0161-A. Prior to the Nation filing its appeal, the Regional Director had issued a superseding letter on August 5, 2004. Therefore, the August 3 decision was rendered ineffective by the August 5 letter and the Nation, in essence, appealed an ineffective decision.

With respect to the Nation's appeal from the Regional Director's September 9, 2004 decision, Docket No. IBIA 05-12-A, we hold as a general matter that tribes are not exempt

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33/(...continued)

Nation's timber harvest permits and in the land use permits — if there is *any* reference in the permits to BIA — also is ambiguous. See, e.g., 2003 Land Use Permit for parcel 59-M (“[BIA] may issue Timber Harvest Permits” and “[t]he timber harvest permit may include \* \* \* [a]pproval by the Bureau of Indian Affairs \* \* \*”).

34/ In the Report, Johnson makes two unsupported conclusions relative to the Nation's knowledge of the illegal timber harvest that are independent of whether Tweedie knew or should have known: Tweedie's supervisor (1) “would have had to notice the clearcut [of timber] long before it reached 26 acres” and (2) “[should have] wondered why a timber cutting permit approved by the Bureau had not crossed his desk.” Report at 6. There is no evidence in the record that would enable us to understand why the supervisor should have noticed the clearcut or that requires the supervisor to see or review all timber cutting permits approved by BIA.

from liability for timber trespass under 25 U.S.C. § 3106 and we affirm the Regional Director's decision on this issue.

However, we vacate and remand for further consideration the Regional Director's decision that the Nation is liable for timber trespass on parcels 59-F, 59-I, 59-L, 59-M, 59-R and 59-AT. On remand, if the Regional Director again concludes that the Nation is liable for trespass, he should articulate clearly his theory or theories for holding the Nation liable and the particular facts that support liability for each separate parcel. In addition or alternatively, the parties are encouraged to renew settlement discussions with respect to the remaining parcels.

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 dismisses the Nation's appeal from the August 3, 2004 decision as moot. The Board affirms the Regional Director's September 9, 2004 decision in part, vacates it in part, and remands the matter for further proceedings consistent with this decision.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge