



## INTERIOR BOARD OF INDIAN APPEALS

Jason Strom, Leon Strom, Theodore Strom, Odessa Strom, and Charles Strom v.  
Northwest Regional Director, Bureau of Indian Affairs

44 IBIA 153 (03/09/2007)



# 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

JASON STROM, LEON STROM,	:	Order Affirming in Part, Vacating in
THEODORE STROM, ODESSA	:	Part, and Remanding
STROM, and CHARLES STROM,	:	
Appellants,	:	
	:	Docket No. IBIA 05-48-A
v.	:	
	:	
NORTHWEST REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	March 9, 2007

Appellants Theodore (Ted) Strom, Jason Strom, Leon Strom, Odessa Strom, and Charles Strom seek review of a January 19, 2005 decision of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), upholding a Notice of Trespass and Seizure of Government Property (trespass notice) issued against each Appellant by the Superintendent of the Taholah Agency (Superintendent; Agency). The trespass notice determined that Appellants had committed a timber trespass on Sampson Johns Public Domain Allotment No. 1755-A (Allotment No. 1755-A), 1/ and notified Appellants that the Superintendent had seized at least 250 logs, primarily sitka spruce, from that parcel. Appellants are the beneficial landowners of Allotment No. 1755-A. 2/ For the reasons stated below, the Interior Board of Indian Appeals (Board) affirms the Regional Director's decision to the extent that it holds Appellants Jason Strom, Ted Strom, and Leon Strom liable for timber trespass on Allotment No. 1755-A. We vacate the Regional Director's determination that Appellants Odessa Strom and Charles Strom are liable for

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1/ Allotment No. 1755-A is located south of the Quinault Indian Reservation and is located in Section 15, Township 18 North, Range 12 West, Willamette Meridian, in Grays Harbor County, State of Washington. According to the Title Status Report, the allotment consists of approximately 81.17 acres, more or less; Appendix 1 to the 1998 Forest Operating Plan for Western Washington Public Domains, which includes this parcel, lists its acreage as 70.5 acres.

2/ Jason and Charles Strom each own a 22/72 interest in Allotment No. 1755-A; Leon and Ted Strom each own an 8/72 interest; and Odessa Strom owns a 12/72 interest.

timber trespass and we remand the matter to the Regional Director to determine whether there is evidence to hold these two appellants independently liable for trespass.

### Regulatory Background

In 1990, Congress passed the National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C. § 3101 *et seq.*, to provide greater protection for Indian forest lands, which Congress described as “among [Indians’] most valuable resources.” 25 U.S.C. § 3101(1) (2001). Section 3118 of NIFRMA required the Secretary of the Interior (Secretary) to promulgate regulations to implement the statute. These regulations, found at 25 C.F.R. Part 163, provide *inter alia* that the removal or harvesting of forest products on Indian forest land that is held in trust must be approved by the Secretary. <sup>3/</sup> That is, a formal timber sale contract must be approved by the Secretary, 25 C.F.R. § 163.20, the harvesting of forest products must be approved by the Secretary, 25 C.F.R. § 163.26, and the Secretary must consent to the cutting of forest products for personal use by the beneficial owner(s), 25 C.F.R. § 163.27.

In addition, section 3106 specifically required the Secretary to issue regulations that “establish civil penalties for the commission of forest trespass,” which section 3103 defines as “the act of illegally removing forest products from, or illegally damaging forest products on, forest lands.” 25 U.S.C. § 3103(8); *see also* 25 C.F.R. § 163.1 (“trespass” defined as “the removal of forest products from, or damaging forest products on, Indian forest land,

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<sup>3/</sup> “Forest products” is broadly defined as

marketable products extracted from Indian forests, such as: Timber; timber products, including lumber, lath, crating, ties, bolts, logs, pulpwood, fuelwood, posts, poles, and split products; bark; Christmas trees, stays, branches, firewood, berries, mosses, pinyon nuts, roots, acorns, syrups, wild rice, mushrooms, and herbs; other marketable material; and gravel which is extracted from, and utilized on, Indian forest land.

25 C.F.R. § 163.1. “Indian forest land” is defined as

Indian lands, including commercial and non-commercial timberland and woodland, 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 [of] whether a formal inspection and land classification action has been taken.

25 U.S.C. § 3103(3); 25 C.F.R. § 163.1 (same, and includes productive and non-productive timberland and woodland within the definition).

except when authorized by law and applicable federal or tribal regulations”). 4/ Subsection 163.11(a) of the regulations requires that a forest management plan be developed for all Indian forest lands, and sets forth certain requirements for forest management plans. Forest management plans must be approved by the Secretary. 25 C.F.R. § 163.11(a).

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.” Penalties and damages may include treble damages, restoration costs, enforcement costs and interest. Id. § 163.29(a)(3). Subsection 163.29(c) provides that, “Indian beneficial owners who trespass, or who are involved in trespass upon their own land, or undivided land in which such owners have a partial interest, shall not receive their beneficial share of any civil penalties and damages collected in consequence of the trespass.” That subsection further provides that any penalties and damages that default pursuant to this provision shall be distributed toward restoration of the land, enforcement costs, and to fund the forest management deduction account of the reservation on which the trespass took place.

### Factual Background

At the outset, we note that Appellants do not dispute that they harvested trees from Allotment No. 1755-A without obtaining a specific timber harvesting permit, either from BIA or from the Quinault Nation (Nation). 5/ However, to provide a backdrop for their defenses to this action, we provide the following factual background.

Sometime prior to 2004, Appellants determined to develop Allotment No. 1755-A as a recreational vehicle campground and an off-road vehicle park that would be named Sampson Johns All Terrain Raceways. There were numerous meetings between January

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4/ The regulations further provide that trespass may 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.

5/ As discussed in greater detail infra, Appellants maintain that they had a Master Land Use Development Permit (Tribal Master Permit) from the Nation that “constituted compliance with federal standards.” Notice of Appeal to Regional Director at 4. The distinction we draw, however, is that the parties do not dispute that Appellants did not have a permit specifically permitting the cutting of timber on Allotment No. 1755-A.

and April 2004 among Appellants, 6/ Appellants' consultants, the Nation, BIA, the U.S. Army Corps of Engineers, and the U.S. Fish and Wildlife Service concerning Appellants' proposed business enterprise. See Mar. 15, 2004 Letter from Backman to Young, Sampson Johns All Terrain Raceways; 7/ Aug. 26, 2004 Statement of Facts by Neil F. Eldridge at 1-2 (Superintendent's Statement of Facts). These meetings were intended to and did advise Appellants of the requirements to be met prior to conducting any development activity on Allotment No. 1755-A. Id. In particular, it is undisputed that several Appellants met with the then-Superintendent of the Agency, Neil Eldridge, and other BIA officials on several occasions in January and February 2004 and

BIA \* \* \* stressed that part of its Trust Responsibility is to insure that all beneficial Indian owners[] are "protected" and that they obtain Fair Market Value for the use of their land and the removal of their timber. Without a lease arra[nge]ment and authorized permit or sale for timber removal, BIA would not be able to guarantee these requirements.

Superintendent's Statement of Facts at 2.

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6/ The Superintendent's Statement of Facts does not identify whether the meetings occurred with all five Appellants or only with Appellants Jason, Leon and/or Ted Strom, who apparently live in the immediate area of Allotment No. 1755-A and appear to be the significant proponents of the development of the allotment. Because the record is unclear as to the involvement of Appellants Charles Strom and Odessa Strom, both of whom apparently live several hundred miles away, we presume that the Superintendent and the Regional Director refer to Jason, Leon and Ted Strom when they refer to "the Stroms" or to "the Appellants."

7/ Young is one of the managers and organizers of Clearwater Development Company, LLC, as are Appellants Ted Strom and Leon Strom. Feb. 5, 2004 Unsigned Articles of Organization for Clearwater Development Company, LLC. Although it is not clear from the record whether Clearwater Development Company is formally in existence — the only reference in the record to this company, apart from two pieces of correspondence, consists of the unexecuted Articles of Organization — it appears that the company may have been formed inter alia for the development of Sampson Johns All Terrain Raceway inasmuch as the letter from Backman was addressed to "Gary Young Sampson Johns All Terrain Raceway" and because Appellants Ted Strom and Leon Strom are both listed on the company's Articles of Organization as managers and organizers of the company. See also Apr. 28, 2004 Letter from Nation to Appellants "Leon & Ted Strom, c/o Clearwater, LLC."

Prior to the timber trespass in this case, Appellants Jason Strom and Leon Strom both informed BIA on separate occasions that there would be no harvesting of trees on Allotment No. 1755-A. Id. First, Appellant Jason Strom met with BIA's Presale Supervisor/Forester, Wayne Moulder, in March 2004 to "discuss[] the possibility of logging the trees." Id. Subsequently, Jason Strom informed Moulder that he "had \* \* \* shelved the timber harvest idea." Id. Second, on May 14, 2004, Leon Strom asked BIA Forester Joe Fitting for the names of contractors for site preparation. Fitting specifically asked whether trees would be cut and Leon Strom replied that no trees would be cut and "they were going to go around them." Id. Nevertheless, Fitting "informed [Leon] Strom that any 'plans' [for clearing the land] should be reviewed by the BIA prior to operations to make sure that appropriate regulations, etc. were being followed [even if Appellants did not plan to cut any trees]." Id.; see also May 27, 2004 Memorandum to the Files by Fitting. No further contact occurred with Fitting prior to discovery of the timber trespass. Superintendent's Statement of Facts at 2.

On April 12, 2004, the Nation issued Tribal Master Permit No. 1347 for Allotment No. 1755-A to Appellants Leon and Ted Strom. The permit was signed by Michael Cardwell, the Nation's Community Development Manager. The permit provided that the property would be used for a "Recreational Park." The permit reflects that a building permit for "Phase I" was approved, subject to a variety of conditions set forth in an "Attachment A." §/ No mention is made of timber cutting in either the Tribal Master Permit or on Attachment A.

By letter dated April 28, 2004, the Nation, through Cardwell, notified Appellants Leon and Ted Strom that they were out of compliance with the "conditional building permit" for their off-road vehicle park proposal. The letter stated that Leon and Ted Strom

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§/ "Attachment A" sets forth the following conditions:

1. Resolution and acceptance of gray water from proposed treatment facilities.
2. Acceptance of proposed Alternating Intermittent Recirculating Reactor (AIRR)-sewer treatment facility.
3. Written Phasing Plan and Construction Schedule.
4. Application & approval of potable water design.
5. Revised concept drawings to reflect access road revisions.
6. WSDOT approval of road design.
7. Approval of pedestrian traffic plan.
8. Completion of final construction documents/specifications must comply with appropriate tribal, state, and local jurisdictions.

were “proceeding with the site preparation, that being the removal of trees for the event parking and phase 1 track.” The letter also stated that there “are still requirements under the permit that are being worked on that need to be finalized,” and advised Ted and Leon Strom that they were not “authorized to proceed until [they] ha[d] in place a Hydraulic Project Application, a Forest Practices Application and a Storm water run-off plan.” <sup>9/</sup> The Nation requested Leon and Ted Strom to contact its Community Development Manager (Cardwell) immediately. Appellants apparently did not respond to the Nation’s letter. See Superintendent’s Statement of Facts at 5.

On May 20, 2004, the Superintendent was driving home from work and noticed clearing activity taking place on Allotment No. 1755-A. The Superintendent stopped to investigate, as he was not aware of any federal approval for a timber harvest for that particular site. Appellants and the Superintendent have different reports as to the ensuing events.

The Superintendent offers the following version of events. When the Superintendent arrived at Allotment No. 1755-A, he encountered Jason Strom, who led him to an area where Ted Strom, Leon Strom, a consultant named Bob Ryan, two timber fallers, and at least two other contractors were working. The Superintendent noted that “[t]he area where we all met had the trees removed and the land cleared of trees and brush. There were timber fallers nearby and they were cutting trees.” Superintendent’s Statement of Facts at 3. The Superintendent asked the Stroms if they had federal approval for the logging and clearing operations. They said that they did not need any federal approval, because they had a Tribal Master Permit. The Superintendent informed the individuals that they did need federal approval and that “they should stop falling trees immediately because each tree that was cut would be charged for at three times the highest value.” Id. Jason Strom then ran over to the fallers and instructed them to stop cutting. Ryan told the Superintendent that he had “no right to shut them down,” and that “they would just start working again after [the Superintendent] left.” Id. Several times, the Superintendent told Ryan and the Stroms that they would be charged treble damages because they had no permit to cut the trees, and he advised them not to continue cutting and harvesting. The Superintendent told them he would look into the issue of the tribal permit and whether a BIA employee might have given approval for the harvesting. The Superintendent said he would let them know what he found out as soon as possible.

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<sup>9/</sup> Nothing in the record or the briefs informs the Board whether a “Forest Practices Application” is a timber harvest permit application or a more general application for conducting non-harvest activities in a forested area.

According to Appellants' version of the events of May 20, 2004, "[a]t no time on May 20th were [the Stroms] directly and/or unequivocally told to cease activities." Appellants' Notice of Appeal to the Regional Director at 2. Appellants explained to the Superintendent that they had a permit from the Nation and had been advised that they did not need federal approval for their activities. Appellants asserted that, after hearing their explanation, the Superintendent told the Stroms "that if they believed they were in the right [about whether they needed federal approval] that they should continue their activities." Id.

After discovering the timber harvest on May 20, 2004, the Superintendent initiated an investigation into Appellants' activities on Allotment No. 1755-A, and learned that no BIA employee had approved the timber harvest on the allotment. On May 24, 2004, the Superintendent met with Cardwell, who told him that he had not met with Appellants for several weeks and that the permit the Nation had given Appellants was a "conditional permit." Superintendent's Statement of Facts at 5. Cardwell said that he had told Appellants that they had not complied with several of the permit's conditions.

Also on May 24, 2004, Tribal Resource Protection Officers LeRoy Black and James Smith went to the location of the timber harvest on Allotment No. 1755-A. They observed workers dumping gravel on the property and saw that a number of trees had been cut. Black contacted the Superintendent, who told him to stop the work. Black verbally ordered the workers to halt operations.

Later that same day, the Superintendent called Ted Strom. The Superintendent notified him of the results of his investigation and informed him that a trespass notice would be issued to the landowners. Also on May 24, 2004, attorney Jack W. Fiander, on behalf of Appellants, called and wrote to the Superintendent to request an explanation for BIA's decision to halt operations on Allotment No. 1755-A. 10/

On May 27, 2004, the Superintendent issued separate trespass notices to each Appellant. 11/ The notices provided, in pertinent part:

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10/ The Superintendent explains that he did not respond to Fiander's letter or to Fiander's May 24 phone call because the Superintendent did not have authorization from the Stroms to discuss the matter with him at that time.

11/ Only copies of the trespass notices to Appellants Ted Strom and Odessa Strom have been included in the record, and they are identical except for the name and address of the addressee. However, the record contains a memo from the Superintendent to the Regional

(continued...)

This is your official Notice of Trespass for an unauthorized harvest of Forest Products and other resource damage committed by you or persons in your employ on [BIA] administered property on [Allotment No. 1755-A]. You, Leon Strom, Jason Strom, Bob Ryan (your hired consultant), two timber fallers, and at least two other contract workers were verbally notified of this trespass, and were instructed to cease and desist, by [the Superintendent], on May 20, 2004, when he found the violation, and you were all on site. You apparently chose to ignore the verbal order and continued activities[,] at least through May 24, 2004. \* \* \* This investigation is in preliminary stages but has established that sitka spruce trees have been felled, and resource damage committed, on Indian-owned lands administered by the United States by you or by persons for whose actions you are responsible. \* \* \* The volume and value of the forest products is currently being evaluated and a demand letter will be sent at a later date.

Trespass notice at 1. The trespass notices also notified Appellants, that, as of May 24, 2004, the Superintendent had seized “[a]t least 250, mainly sitka spruce, logs, of a not yet determined volume, located east of highway 109 and north of Hogan’s corner.” *Id.* at 2. The trespass notices also advised Appellants that treble damages would be imposed based upon the highest stumpage value obtainable from the raw materials involved in the trespass, but did not assess damages. The trespass notices provided appeal rights.

Appellants submitted a joint appeal of the trespass notices to the Regional Director, and submitted a Statement of Reasons. Appellants first argued that Allotment No. 1755-A did not meet the definition of “Indian forest land” set forth in 25 C.F.R § 163.1.

Appellants also argued that 25 C.F.R. § 163.29 requires the Superintendent to “immediately” issue a notice to the alleged trespasser and “promptly” determine whether a trespass occurred, and that the Superintendent failed to do so in this case, therefore increasing the damages. Statement of Reasons to Regional Director at 1. Appellants

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11/(...continued)

Director attached to a copy of the trespass notice to Appellant Ted Strom that states, “[t]his is the trespass letter I sent to all the owners/trespassers of the Sampson Johns Public Domain Allot[ment].” June 4, 2004 Memorandum from Superintendent to Regional Director. Also included in the record are copies of executed certified mail cards that confirm that the trespass notices were received by Appellants Leon, Jason, Theodore, and Charles Strom. The record does not indicate whether Appellant Odessa Strom received her notice of trespass, but she does not claim on appeal that she did not receive it.

asserted that “it is unfair and unjust for a Bureau official to essentially allow timber removal to continue for a whole week” before taking action. Id. at 2.

Appellants also argued that they relied on BIA staff “who had informed them that, if they as landowners undertook their own use of their allotment without a lease and there were no federal dollars involved, there was no ‘federal action’ requiring Secretarial approval or environmental review.” Id.; cf. May 24, 2004 Letter from Fiander to Superintendent (Appellants “were informed by the Portland Regional environmental staff that if action were taken by the landowners themselves \* \* \* , NEPA environmental clearance requirements would not apply as there would be no federal action triggering the requirements”). Appellants asserted that they believed that “compliance with the requirements imposed by the Nation [in the Tribal Master Permit] constituted compliance with federal standards and that no further federal approval was required” because the Nation had contracted BIA’s realty functions under a Pub. L. No. 93-638 contract. Notice of Appeal to Regional Director at 4.

The Agency filed an answer brief; Eldridge submitted a separate Statement of Facts. On January 19, 2005, the Regional Director affirmed the Superintendent’s decision. The Regional Director first rejected Appellants’ argument that Allotment No. 1755-A did not qualify as “Indian forest land” under 25 C.F.R. § 163.1. The Regional Director noted that the property was identified for forest management in BIA’s February 1998 Forest Operating Plan for Western Washington Public Domain Allotments, which was prepared pursuant to NIFRMA. <sup>12/</sup> The Regional Director also relied on the definition of “forest or forest land” provided in 25 C.F.R. 163.1. According to the Regional Director, under that definition, “a timberland classification is applicable to one acre of land or larger with ten percent tree cover or greater.” January 19, 2005 Decision at 4. The Regional Director stated that the trees on the property were not “incidental,” and that, although adjacent parcels had been zoned for commercial and other uses, Allotment No. 1755-A was never zoned for commercial purposes. Id.

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<sup>12/</sup> The Forest Operating Plan governs public domain allotments under the jurisdiction of the Olympic Peninsula Agency at the time the plan was approved in 1998. Sometime thereafter, the Taholah Agency was created, which assumed jurisdiction of some or all of the public domain allotments that previously fell under the jurisdiction of the Olympic Peninsula Agency. Answer of Agency at 1. Allotment No. 1755-A is one such allotment that transferred from the jurisdiction of the Olympic Peninsula Agency to the Taholah Agency. See id.

The Regional Director then stated that the Tribal Master Permit, on which Appellants relied as authority for harvesting the trees, was only a conditional permit, conditioned on compliance with the eight requirements listed in Attachment A to the permit. He determined that, because the permit's conditions had not been met, the Tribal Master Permit was invalid as authorization for Appellants' actions. The Regional Director also noted that when a tribe compacts to perform a Federal program under Pub. L. No. 93-638, as the Nation apparently did with the Forestry program, federal requirements applicable to that program still must be met.

The Regional Director also determined that the Superintendent acted both reasonably and immediately upon discovering the trespass on May 20. In addition, the Regional Director determined that BIA "fully informed the Stoms of all legal requirements necessary for development prior to their site clearing actions" and rejected Appellants' arguments that BIA staff misled them as to what actions were required. Id. 13/

Appellants filed a single notice of appeal of the Regional Director's decision to the Board. Appellants did not file an opening brief, but instead relied on a Statement of Reasons. BIA filed an answer brief. Appellants did not submit a reply brief.

#### Discussion

Appellants bear the burden of proving that the Regional Director's decision was erroneous or not supported by substantial evidence. Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 198 (2005).

The regulations define trespass as "the removal of forest products from, or damaging forest products on, Indian forest land, except when authorized by law and applicable federal or tribal regulations." 25 C.F.R. § 163.1. Appellants do not dispute that Appellants Jason

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13/ The Regional Director also rejected Appellants' proposal that single stumpage payments be deposited into their Individual Indian Money accounts until an overall agreement is reached in consultation with the Nation, BIA, and the landowners. The Regional Director concluded that the use of his discretion to waive the trespass penalties would not be appropriate, given Appellants' numerous violations of federal and tribal law and because beneficial landowners who cause the trespass are barred from receiving any share of civil penalties and damages that may be assessed, 25 C.F.R. § 163.29(c). Accordingly, the Regional Director affirmed the May 27, 2004 trespass notices and directed that any civil penalties be used for restoring Allotment No. 1755-A, covering the costs of the enforcement action, and funding the forest management deductions account.

Strom, Ted Strom and Leon Strom caused forest products to be removed from Allotment No. 1755-A without complying with the requirements of Part 163. Appellants argue, however, that they are not liable for trespass in this case because 1) Allotment No. 1755-A is not properly characterized as “Indian forest land,” 2) they believed the Tribal Master Permit authorized their activities on the land and BIA led them to believe that there were no federal requirements to be met, and 3) BIA failed to comply with its regulations, which require it to promptly and immediately issue the trespass notices. We address each of these arguments in turn. 14/

1. The Characterization of Allotment No. 1755-A as “Indian Forest Land”

On appeal, Appellants continue to question whether Allotment No. 1755-A is “Indian forest land.” Statement of Reasons to Board at 2 (“it is not clear that the Sampson Johns \* \* \* allotment ‘is chiefly valuable for the production of forest products’”). Appellants assert that “[a]lthough [Allotment No. 1755-A] has some species of vegetation on it that have incidental or pulp value, in comparison to the land’s overall value and its location in a commercial district, the property is not ‘chiefly’ valuable for production of forest products within the meaning or intent of 25 CFR Part 163.” Id. Appellants point out that Allotment No. 1755-A is adjacent to a casino and is near a resort community, argue that these nearby properties are chiefly valuable for “recreational use and other purposes,” id., and suggest that Allotment No. 1755-A necessarily must be similar in character.

As the Regional Director notes, Allotment No. 1755-A was identified as “Indian forest land” in 1998 for inclusion in the Forest Operating Plan developed by BIA for the Western Washington Indian Public Domain Allotments. BIA policy, as dictated by the

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14/ Appellants also note that “[t]he Regional office spent several months before issuing a decision which it had previously committed to issuing within 60 days.” Statement of Reasons to Board at 2; see 25 C.F.R. § 2.19(a) (Regional Directors shall decide appeals within 60 days after all time for pleadings has expired). The Regional Director maintains that any delay in issuing his decision resulted from the need for information to arrive from both the Agency and from the Nation.

The Superintendent’s decision does not evaporate nor are Appellants absolved of liability simply because the Regional Director does not decide the appeal within 60 days. Appellants’ remedy, as spelled out in 25 C.F.R. § 2.8, is to bring the delay to the attention of the deciding official and, if Appellants remain dissatisfied with the response or lack thereof, to appeal to this Board. Here, Appellants did not avail themselves of their remedy under Section 2.8, for which reason we do not address this argument further.

Deputy Commissioner in 1991 as well as by forestry regulations, require forest operating or management plans for all Indian trust lands. See Forest Operating Plan for Western Washington Public Domains at 1 (citing to Deputy Commissioner's Nov. 7, 1991 directive); 25 C.F.R. § 163.11. At the time the plan was drafted for the public domain allotments in 1998, the same definition of "Indian forest land," 25 C.F.R. § 163.1 (1997), governed both trespass actions on Indian trust lands, 25 C.F.R. § 163.29, as well as the selection of Indian trust lands for inclusion in a forest management or operating plan, 25 C.F.R. § 163.11. 15/ BIA foresters drafted the forest operating plan and the then-Superintendent approved the plan on February 27, 1998. Thus, under the Forest Operating Plan, Allotment No. 1755-A was determined to be "Indian forest land" within the meaning ascribed to that phrase in 25 C.F.R. § 163.1.

Apart from arguing the proximity of Allotment No. 1755-A to the Nation's casino and other commercial activities, Appellants do not challenge or rebut the Regional Director's specific finding that the trees on the allotment are not incidental 16/ and that, under the definitions of "Indian forest land" and "forest or forest land," Allotment No. 1755-A properly is classified as being "considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover." As the Regional Director determined, the proximity of Allotment No. 1755-A to lands zoned for commercial or some other non-forestry use, without more, is insufficient to rebut the identification of Allotment No. 1755-A as "Indian forest land." Appellants have not met their burden of demonstrating that the Regional Director erred in finding that Allotment No. 1755-A falls within the definition of "Indian forest land" for purposes of 25 C.F.R. Part 163.

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15/ The definition has not changed from 1997 to 2004 when the trespasses occurred or to the present. In the former forestry regulations that appeared at 25 C.F.R. Part 163 prior to the promulgation of the current regulations in 1995, "Indian forest lands" had virtually the same definition as today: "[L]ands held in trust by the United States for Indian tribes [and] individual Indians \* \* \* [that] are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover." 25 C.F.R. § 163.1 (1993). Under the prior regulations, the forest plan could be called a forest operating plan or a forest management plan. See 25 C.F.R. § 163.4 (requiring "management and operating plans").

16/ The Superintendent's seizure of at least 250 logs would appear to belie any argument that the forest vegetation on Allotment No. 1755-A was only "incidental."

## 2. The Significance of the Tribal Master Permit and Alleged Misinformation by BIA

Next, Appellants contend that finding them liable for trespass and damages is “inequitable” under the circumstances of this case because they had reason to believe their harvesting activities were authorized based on 1) the Tribal Master Permit issued by the Nation and 2) statements by “Regional staff who had informed them that, if the landowners undertook their own use of their allotment without a lease and there were no federal dollars involved, there was no ‘federal action’ requiring Secretarial approval or environmental review.” Statement of Reasons to Board at 3.

To the extent that Appellants argue that they did not commit trespass (or that any trespass is mitigated) because their actions were authorized by the Nation and BIA, we agree with the Regional Director that there is no evidence of any such authorization. With limited exceptions not relevant here, the regulations require that removal of forest products be “under forest product harvesting permit forms approved by the Secretary.” See 25 C.F.R. § 163.26. To be valid, permits must be approved by the Secretary. *Id.* The Tribal Master Permit issued by the Nation does not purport to authorize timber harvesting. Even if it could and did, the Tribal Master Permit cannot serve as valid authorization because Appellants had failed to comply with the conditions stated on the permit. Prior to the date of the trespass, the Nation informed Appellants Ted and Leon Strom both verbally and in writing that Appellants were not in noncompliance with the terms of their Tribal Master Permit and Appellants were ordered to cease work. Apr. 28, 2004 Letter from Nation to Appellants Leon Strom and Ted Strom.

With respect to Appellants’ assertions that BIA told them they did not need a permit, Appellants do not identify the BIA official(s) who allegedly made these representations or indicate when or in what context each such statement was made. <sup>17/</sup> If in fact BIA employees gave erroneous advice, that advice does not override applicable laws and regulations. *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006). In particular, the Board repeatedly has held that individuals dealing with the

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<sup>17/</sup> Appellants may be referring to a meeting between Appellants’ environmental consultant, Backman, and BIA’s environmental protection specialist, June Boynton, in which Backman apparently understood that if a lease were not required for the allotment and if no BIA funds were to be used, “there would not be a NEPA trigger.” Mar. 15, 2004 Letter from Backman to Young of Sampson Johns All Terrain Raceways at 2. It is evident that this meeting, between two environmental specialists, focused on environmental requirements and not on forestry or other federal requirements that would need to be met.

government are presumed to have knowledge of duly promulgated regulations. Id. at 212.

In connection with Appellants' assertion that BIA led them to believe that there were no BIA requirements to be met, 18/ we observe that Appellants Jason Strom and Leon Strom on separate occasions misinformed BIA that no trees would be felled. They can hardly now be heard to complain that BIA did not specifically inform them of the need for a timber harvest permit. Even in the face of Appellants' misinformation, it is undisputed that BIA's forester told Appellant Leon Strom that Appellants' plans for clearing the land should be brought to BIA for review. Appellants chose to disregard this suggestion.

We note that Appellants also attempt to confuse environmental requirements applicable to "federal action" (e.g., NEPA) with permit requirements applicable to individuals who harvest timber on Indian trust land. The record, however, shows that Appellants and their counsel knew and understood the distinction: Appellants state that they "were informed by the Portland Regional environmental staff that if action were taken by the landowners themselves \* \* \*, NEPA environmental clearance requirements would not apply as there would be no federal action triggering the requirements." May 24, 2004 Letter from Fiander to Superintendent at 1. Nothing in Appellants' reports of the dialogue between BIA's environmental staff and Appellants and their consultants addresses timber cutting or any subject matter other than environmental requirements and concerns.

Finally and specific to timber harvesting, Appellants' attorney informed them that there were federal timber harvest regulations that could apply to their development: "I \* \* \* advised [Appellants] that although they had been informed that the BIA's environmental concerns had been met, they should take care only to 'clear' or remove brush and debris from their land or the BIA's timber harvesting regulations might apply." Notice of Appeal to Regional Director at 5 (emphasis added); see also May 24, 2004 Letter from Fiander to Superintendent at 1 ("I informed [Appellants] that if they were merely clearing debris, that was permissible [without a permit]. The sale of timber, however, would be considered logging, requiring [BIA] approval and compliance with the CFR").

Based on the foregoing, we reject Appellants' argument that BIA either misled them or misinformed them concerning timber harvest permit requirements. Prior to the timber

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18/ We note Appellants' inconsistent positions, arguing on the one hand that BIA led them to believe that no timber harvest permit was required while also arguing that they made repeated but unanswered inquiries to BIA to discover whether a harvesting permit would be required. Since neither argument is availing, we need not resolve this inconsistency.

harvest, Appellants were well aware that timber cutting could trigger additional “federal action” in the form of BIA approval and compliance with timber harvest regulations.

### 3. Issuance of the Trespass Notice Seven Days After Discovery of the Trespass

We turn now to a discussion of whether the Superintendent delayed impermissibly in notifying Appellants of their trespass. Appellants contend that 25 C.F.R. §§ 163.29(e), (f) and (g) require a federal official who has reason to believe a timber trespass has occurred to “immediately” issue a notice to the landowner or party in possession of the products and “promptly” determine whether a trespass occurred. Statement of Reasons to Board at 3. Appellants maintain that the Superintendent failed to comply with these requirements. Appellants assert that, by failing to immediately issue a trespass notice, the Superintendent “allowed the activity to continue and bears some fault in the matter.” *Id.* Appellants raise a questionable proposition, but one we need not decide in this appeal: Whether a trespasser may escape liability based on an argument that BIA, upon receiving notice of a timber trespass, fails to stop the trespass before further damage occurs.

In the instant appeal, the Regional Director concluded that, under the circumstances, the Superintendent’s actions were reasonable and immediate. The Regional Director noted that the Superintendent used the time between May 20, 2004 and May 27, 2004 to conduct an investigation of Appellants’ claims that their activities had been authorized by BIA and the Nation.

Subsection 163.29(e) of 25 C.F.R., which governs the issuance of notices of seizure, is silent on when the notice of seizure must issue except to note that it must be given “at the time of the seizure” to the possessor or claimant of the Indian forest products. Subsection 163.29(g) requires the Superintendent to “promptly determine if a trespass has occurred. The [Superintendent] will issue an official Notice of Trespass to the alleged trespasser.” Appellants’ reliance on subsection 163.29(f), which requires the Superintendent to “immediately” issue a notice of trespass to the owner of the land or the party in possession of the trespass products, is misplaced in this case. That subsection only applies where the Superintendent has “reason to believe that Indian forest products are involved in trespass and that such products have been removed to land not under [federal] government supervision.” 25 C.F.R. § 163.29(f). In this case, there is no evidence that the products seized had been moved off Allotment No. 1755-A. Accordingly, under the regulations, although the Superintendent was required to “promptly” determine whether a trespass had occurred, there was no requirement that he “immediately” issue a notice to the landowners or the party in possession of the trespass products.

Moreover, there is conflicting evidence in the record as to whether the Superintendent told Appellants to stop work on Thursday, May 20, 2004 — Appellants assert that he told them they could continue if they believed they were in the right, and the Superintendent states that he definitively told them to stop work. However, on Monday, May 24, 2004, Appellants' counsel sent a letter to the Superintendent in which he stated "any operations of the Strom family on the Sampson Johns allotment have been halted by the Bureau," and requested an explanation for the "cease and desist action." May 24, 2004 Letter from Fiander to Superintendent at 1. Tribal Resource Protection Officer Black stated in his investigative report that he "shut down" the activities on Allotment No. 1755-A on May 24, 2004. In addition, the Superintendent asserts that on May 24, 2004 he called Appellant Ted Strom and told him that he was preparing a trespass notice. Superintendent's Statement of Facts at 5. Accordingly, by May 24, 2004, at least verbally, Appellants were told to stop work. The Superintendent's trespass notices were then issued on May 27, 2004.

Even if we were to believe Appellants' version of events as to what the Superintendent said on May 20, 2004, we conclude that it was reasonable for the Superintendent to wait seven days before issuing a written notice of trespass. Appellants advised the Superintendent on May 20, 2004 that their activities had been authorized by the Nation. The record shows that the Superintendent used the seven days between May 20, 2004 and May 27, 2004 to investigate Appellants' assertions, and then, once he had learned that BIA had not approved the timber harvest as was required under the regulations, promptly issued the trespass notices.

For the foregoing reasons, we reject Appellants' argument that BIA allowed the trespass to continue and bears some fault in the matter. We conclude that the Superintendent "promptly" determined whether a trespass had occurred, and that it was reasonable under the circumstances for him to issue the trespass notices seven days after the discovery of the trespass.

Accordingly, because Allotment No. 1755-A properly is identified as Indian forest land and because Appellants' timber harvest activities were not authorized under the applicable regulations, we conclude that the May 2004 timber harvest on Allotment No. 1755-A was illegal. 19/

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19/ Appellants also argue that their conduct is "mitigated" by the fact that they are enrolled members of the Nation. Statement of Reasons to Board at 3. However, the regulations clearly contemplate that Indian owners or co-owners may be subject to trespass actions See

(continued...)

#### 4. Evidence of Each Appellant's Liability for Timber Trespass

We turn now to the Regional Director's finding of liability against each of the five Appellants. At the outset, we note that none of the Appellants argues that s/he did not command, instigate, encourage, advise, countenance, cooperate in, aid, or abet the commission of the timber trespass on Allotment No. 1755-A. See Lummi Nation v. Northwest Regional Director, 44 IBIA 47, 63 (2007) (citing 75 Am. Jur. 2d Trespass § 66 (1991); 87 C.J.S. Trespass § 31 (1954)). Indeed, the evidence amply shows that Appellants Jason Strom, Ted Strom and Leon Strom actively pursued the harvesting of trees on Allotment No. 1755-A. 20/

Nevertheless and for the first time on appeal, Appellants argue that they should not be the only ones held liable. They argue that William Rose, a private individual, "actively controlled[] what was going on," that a logging contractor actually performed the work, and that it was "unfair, unjust and perhaps discriminatory for the BIA to take action solely against the [landowners], while taking no action against the other persons or entities actually performing the alleged trespass activities." Statement of Reasons to Board at 4. Appellants did not raise this argument before the Regional Director.

As a general rule, the Board does not consider arguments raised for the first time on appeal, see Arizona State Land Dep't v. Western Regional Director, 43 IBIA 158, 165 (2006), and we see no reason to depart from that rule here. However, even if we were to

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19/(...continued)

25 C.F.R. § 163.29(c) (Indian owners who are involved in trespass upon their own land "shall not receive their beneficial share of any civil penalties and damages collected in consequence of the trespass").

20/ The Superintendent witnessed the presence of Appellants Jason Strom, Theodore Strom and Leon Strom on Allotment No. 1755-A as timber was cut by others on the allotment. When the Superintendent advised Appellants to halt the timber cutting, Jason "ran over to the fallers and ha[d] them stop cutting." Superintendent's Statement of Facts at 3. The Superintendent also stated that "the Stroms \* \* \* said they would probably start logging and clearing again." Id. at 4. Tribal Resource Protection Officer Black interviewed one of the timber fallers and learned from him that Appellant Ted Strom hired him to cut down the trees on the allotment. These facts, combined with the communications by these three appellants with BIA and others concerning the construction of Sampson Johns All Terrain Raceway on Allotment No. 1755-A are convincing evidence of their knowledge of, acquiescence in, and direct control over the unauthorized timber harvest.

consider Appellants' arguments, we would reject them. Whether Rose and the logging contractor are liable for trespass is irrelevant to the question of whether Appellants themselves committed a trespass. The only issue before the Board is whether the Regional Director's decision to uphold the Superintendent's determination that Appellants had committed a trespass is supported by substantial evidence, not whether Rose and the logging contractors also are liable for trespass. 21/

Finally, we turn to the question of whether the record supports a finding of liability against Appellants Odessa Strom and Charles Strom, and conclude that it does not. The only evidence in the record concerning these two Appellants is a purported Management Services Agreement that all five Appellants apparently signed with W.R. Rose & Associates for the latter to manage the Sampson Johns All Terrain Raceway. First, nothing in this contract relates to timber cutting, site clearing or developing, or any activity that can be construed to be related to timber harvesting. Second, the only signature that appears on the contract submitted to the Board is that of Appellant Jason Strom. Therefore, it cannot be determined if the contract was executed by all parties. Finally, Attachment A to the Agreement, which purports to provide the location where W.R. Rose & Associates will manage the raceway, is not in the record provided to the Board. Consequently, this document is insufficient for us to even determine whether Appellants Charles Strom and Odessa Strom have any involvement with the project being developed on Allotment No. 1755-A.

Ordinarily, the Board's review is "limited to those issues that were \* \* \* before the BIA official on review." 43 C.F.R. § 4.318. However, "the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." *Id.* Given the complete absence of any evidence that might demonstrate the involvement of Appellants Odessa Strom and Charles Strom in the unauthorized timber harvest on Allotment No. 1755-A, we conclude that we must exercise our jurisdiction to correct this error.

Accordingly, we affirm that portion of the Regional Director's decision finding that Appellants Jason Strom, Theodore Strom, and Leon Strom committed timber trespass on

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21/ Appellants also maintain that some of the alleged trespass activities occurred on an adjacent fee parcel. Statement of Reasons to Board at 2; July 28, 2004 Letter from Appellants to BIA. We read the Regional Director's decision as limited to finding Appellants liable for trespass on Allotment No. 1755-A. The legality of additional timber cutting on private fee lands is not within the scope of this appeal and is simply not relevant to Appellants' liability for timber cutting on Allotment No. 1755-A.

