



INTERIOR BOARD OF INDIAN APPEALS

Louis Washinawatok v. Midwest Regional Director, Bureau of Indian Affairs

48 IBIA 214 (01/29/2009)



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

LOUIS WASHINAWATOK,)	Order Affirming Decision in Part and
Appellant,)	Reversing in Part
)	
v.)	
)	Docket No. IBIA 07-20-A
MIDWEST REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	January 29, 2009

Louis Washinawatok (Appellant), seeks review of an August 24, 2006, decision (Decision) of the Midwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), affirming a determination of the Deputy Regional Director - Trust Services, Midwest Region (Deputy Regional Director), that Appellant committed timber trespass on lands in the SE¹/₄ SE¹/₄, Section 30, T. 28 N., R. 16 E., located on the Reservation of the Menominee Indian Tribe of Wisconsin (MITW or Tribe; Reservation), and assessing damages, interest, and costs. The Regional Director affirmed the finding of trespass but reduced the total amount of the penalty to \$449.96, including \$45.74 for costs of the investigation. The Board of Indian Appeals (Board) affirms the conclusion that Appellant committed a trespass, but reverses the assessment of damages because the record does not support the conclusion that the highest stumpage value obtainable for the timber at issue was \$97.88.¹

Background

I. NIFRMA and Its Implementing Regulations Governing Trespass

In 1990, Congress enacted the National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C. § 3101 et seq., to enhance protection for Indian forest

¹ “Stumpage value” is defined in Departmental regulations as “the value of a forest product prior to extraction from Indian forest land.” 25 C.F.R. § 163.1 (definitions).

lands.² At the direction of NIFRMA, 25 U.S.C. § 3118, the Secretary of the Interior (Secretary) promulgated implementing regulations at 25 C.F.R. Part 163. These rules require approval of the Secretary for any removal or harvesting of forest products from Indian forest lands. 25 C.F.R. § 163.26(a). The regulations contain authority for “free-use harvesting” of forest products for personal use, subject to the consent of the relevant Indian owners and the Secretary. 25 C.F.R. § 163.27.

NIFRMA expressly addressed the “threat to Indian forest lands arising from trespass and unauthorized harvesting of Indian forest land resources.” 25 U.S.C. § 3101. The statute required the Secretary to “establish civil penalties for the commission of forest trespass.” 25 U.S.C. § 3106. Section 3103 defines “trespass” as “the act of illegally removing forest products from, or illegally damaging forest products on, forest lands.” 25 U.S.C. § 3103(8). The NIFRMA regulations define “trespass” as the removal or damage of forest products “except when [the act is] authorized by law and applicable federal or tribal regulations.” 25 C.F.R. § 163.1. “Forest products” are 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. Section 163.29 of the regulations establishes 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 include, *inter alia*, treble damages “based on the highest stumpage value obtainable from the raw materials involved,” rehabilitation and restoration costs, enforcement costs, and interest. 25 C.F.R. § 163.29(a)(3)(i)-(iv).

NIFRMA authorizes the Secretary to enter into contracts, cooperative agreements, and grants with tribes, pursuant to Pub. L. No. 93-638, the Indian Self-Determination Act, 25 U.S.C. §§ 450f - 450n, for the accomplishment of “forest land management activities on Indian forest land.” 25 U.S.C. § 3104(a). “Forest land management activities” include

² “Indian forest land” is defined as “Indian land, including commercial, non-commercial, productive and non-productive timberland and woodland, that are considered chiefly valuable for the production of forest products” 25 C.F.R. § 163.1.

“assessment of damage caused by forest trespass . . . including field examination and survey, damage appraisal, investigation assistance, and report, demand letter, and testimony preparation” 25 U.S.C. § 3103(4)(F). The statute and regulations authorize tribes to exercise “concurrent civil jurisdiction” to enforce NIFRMA and implementing regulations, in which case the Department shall, “at the request of the tribe, defer to tribal prosecutions of forest trespass cases.” 25 U.S.C. § 3106(c). To obtain concurrent jurisdiction to pursue trespass action, a Tribe must, *inter alia*, adopt and enforce rules promulgated by the Secretary to enforce trespass. *Id.*; 25 C.F.R. § 163.29(j).

II. The MITW Contract For Implementation of NIFRMA.

BIA and the Tribe entered into a Forest Management Contract to, among other things, “set out the responsibilities of the BIA and MITW” to implement management of tribal forest lands. Statement of Work, MITW Forest Management Contract (MITW Contract), at 1.³ The MITW Contract expressly addresses the responsibilities of BIA and the Tribe for trespass. The Secretary’s responsibilities include prevention of trespass, “the writing of trespass reports,” and the “fixing and collection of trespass damages.” *Id.* at 7. The Secretary committed to maintain and supervise a “Trust Forester position at MITW,” whose role includes ensuring that trespass reports are written and submitted timely, and that proper procedures are followed in a trespass case. *Id.* The Tribe committed, among other things, to investigate trespasses “and prepare and submit trespass report[s] to the BIA for collection.” *Id.* at 11. It could submit a resolution for concurrent jurisdiction over trespass cases “when desired,” and proceed in such case either in Tribal court or defer to the BIA for prosecution. *Id.* BIA committed to review trespass reports and make damage collections.

There appears to be no dispute that the Tribe did not seek or receive approval for concurrent jurisdiction over NIFRMA trespass cases. Therefore, its obligation with respect to trespass includes investigation of trespass, preparation of reports, and submission of such reports to BIA. BIA’s obligation includes the same, and also prosecution of trespass cases.

In addition, the MITW Contract addressed “free use” of timber. The Tribe committed to develop a free use permit policy, and issue and administer free use timber cutting permits for tribal lands. MITW Contract at 8. BIA was to review and approve the Tribe’s free use policy. *Id.* at 12. In 1997, the Tribe enacted a Tribal Ordinance governing free use permits issued by the Tribe. Tribal Ordinance 81-08 sections 4 and 5.

³ The version of the MITW Contract submitted by BIA is the one “revised” in 2001 and 2002. We do not have the version in place at the time of the trespass alleged in this appeal.

Section 4.01 specifies that any tribal member is eligible to apply for a permit to remove timber for fuelwood or other purposes, whether for personal or commercial use. Section 5.01 states that the Tribe “*shall* issue a numbered permit to salvage or cut timber in an amount not to exceed 25 cords of fuelwood per year for personal use from dead and down timber.” (Emphasis in original). The record includes copies of tribal free use permits and thus it appears that BIA approved the Tribe’s free use policy and permits. 25 C.F.R. § 163.27.

III. Events Leading to the Trespass Investigation and Decision.

This case involves an alleged trespass on February 8, 2000, by Appellant Louis Washinawatok, also known as Nedge White. On that date, at approximately 3:00 p.m., Menominee Tribal Conservation Warden Donald L. Waukechon discovered nine logs of dead wood that he suspected were illegally cut and removed from the surrounding forest in the area of South Line Road on the Reservation. Menominee Tribal Warden’s Report, Statement of Donald L. Waukechon 1285, Feb. 25, 2000 (2000 Waukechon Report).⁴ He identified the wood as nine harvested white pine logs. *Id.* The South Line Road is near Appellant’s residence. *Id.* Waukechon contacted Menominee Tribal Conservation Warden Walter Cox and Menominee Tribal Enterprises (MTE) Assistant Forester Michael Richter to assist in the investigation.⁵ Waukechon showed Cox and Richter the logs. *Id.* They followed drag marks to where the logs apparently were cut. *Id.* The three officers investigated the area to assess it for damages to the surrounding forest but “Mike [Richter] was satisfied that no damage was done.” *Id.* The three investigators encountered Scott White, Appellant’s son, who stated that the logs might be his father’s. *Id.* Waukechon noted that ribbons marked other trees in the area. *Id.*

On February 25, 2000, Waukechon issued a tribal Uniform Civil Citation citing Appellant with cutting, removing, and transporting timber in violation of Tribal Ordinance 81-08 section 7.01.⁶ This section addresses “violations” of the ordinance and states: “Whoever unlawfully cuts, removes, transports, carries away, conceals, or converts to personal use any timber unlawfully cut, or any dead and fallen timber upon any land subject

⁴ Waukechon’s Report was created 17 days after the incident.

⁵ MTE was created to run mills to process tribal forest products for the profit of the Tribe.

⁶ Tribal Ordinance 81-08 section 7.03 defines trespass as the act of cutting and removing timber without a valid permit, but the citation did not refer to this violation or any violation of NIFRMA or Federal regulations.

to the jurisdiction of the Tribe, which is managed by MTE, shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both.” *Id.*⁷ The citation required Washinawatok to appear in Tribal Court on March 20, 2000, and established a “deposit” of \$250 and court costs of \$20.

Apparently, the Tribal Court set the hearing date in error; for this reason it dismissed the citation without prejudice to refile. On a Case Settlement/Disposition document, a court officer referred to the \$250 “deposit” as a “fine.” On March 28, 2000, Waukechon reissued the citation, again for a violation of Tribal Ordinance 81-08 section 7.01. On April 1, 2000, Cox created a written account of the investigation. According to Cox’s April 1 report of the February 8 events, the logs were dead and most had lost all bark. Menominee Tribal Warden’s Report, Statement of Walter J. Cox, Apr. 1, 2000 (2000 Cox Report). Cox reported that “Louis White had permission in other years to cut dead pine near his residence” but had “not contacted MTE this year.” *Id.*

Washinawatok appeared in Tribal Court on April 18, 2000, and made a plea of “not guilty.” A pre-trial conference was set for May 15, and trial was set for June 15.

On May 1, 2000, Richter wrote a letter to Waukechon regarding the logs, which, according to the letter, remained on “Needge White’s driveway.” Letter from Richter to Waukechon, May 1, 2000 (2000 Richter Letter). Richter commented that the “white pine appeared to be cut in log lengths for manufacturing into lumber rather than cut for firewood.” *Id.* Richter confirmed there was no salvage permit on file for Appellant. *Id.*

Apparently in preparation for the June 15 trial, on June 13, Waukechon returned to the site to photograph a pile of what appears in the photographs to be between nine and twelve logs in verdant, green brush on the side of a road.⁸ The caption on the June 13 photographs states that they were taken on a “road to Needge Washinawatok’s res.” and

⁷ The record indicates that the Tribal Ordinance 81-08 in effect from 1983-97 made it a violation to cut green trees, and to “cut/gather firewood/cedar posts and sell the same to anyone without [approval].” Because this ordinance only prohibited cutting green wood, or selling dead wood without a permit, it was amended in 1997.

⁸ On May 19, a Tribal prosecutor submitted in Tribal Court a witness list for the testimonies at the June 15 hearing of Waukechon, Richter, Cox, and Scott White, Washinawatok’s son, but the prosecutor never served the witness list on Washinawatok. The prosecutor issued and the bailiff served subpoenas for the officers on May 22, but the prosecutor did not issue, or the bailiff serve, the subpoena for Scott White until June 12.

“looking south of old keshena lk.”⁹ According to BIA, the dead logs lying in green leafy bush by the road in June are the same logs discovered mid-winter in February snow. Appellant does not dispute this contention, and thus it appears that at least some of these logs are the same ones identified by Waukechon in February and by Richter in May as on “Needge White’s driveway.” 2000 Richter Letter.

On June 15, Washinawatok’s attorney moved to dismiss with prejudice on grounds that the prosecutor had violated the Tribal Court rules of civil procedure for failing to serve the witness list on Washinawatok. He averred that the citation violated Washinawatok’s rights because the citation failed to indicate that Tribal Ordinance 81-08 was amended in 1997. In oral argument, Washinawatok’s counsel complained that section 11 of the Tribal Ordinance 81-08 was criminal in nature and permitted a civil citation only “where the value of the property is \$200 or less.” The prosecutor claimed harmless error, asserting that the logs *were* less than \$200 in value, despite the \$250 “deposit” or “fine” on the civil citation.

On August 31, 2000, Tribal Court Judge Waukau issued a written decision dismissing the citation with prejudice to refile. Judge Waukau held that the prosecutor should have served Washinawatok with the witness list. Tribal Court Decision at 4. He held that the Tribe’s assertions regarding a \$250 “deposit” or fine, with logs the Tribe claimed were under \$200 in value, either contradicted Tribal Ordinance 81-08 section 11 or suggested that the citation under section 7.01, which “explicitly calls for the possibility of a fine [of up to \$1,000], imprisonment, or both,” necessitated a criminal complaint. Tribal Court Decision at 5. Finally, Judge Waukau held that the prosecutor failed to identify 1997 amendments to the Tribal Ordinance and that “the defendant in this matter has the right to know the nature of the charges against him.” *Id.*

Nothing happened with respect to the matter for over 5 years. No report was forwarded by the Tribe to BIA. No wood was confiscated by the wardens as authorized by Tribal Ordinance 81-08 section 7.06. No evidence in the record suggests that any of the three tribal officers present at the event contacted Appellant to ask about his involvement or the disposition of the wood. No investigator established a volume of or value for the wood. The Tribe’s citation under Tribal Ordinance 81-08 section 7.01 was based upon an apparent belief that Washinawatok had improperly removed the timber “for personal use” without a permit.

⁹ We find only one Map in the record, *see* Administrative Record Document I, but cannot determine from it the reference to “old kashena lk.”

On September 28, 2005, BIA received a letter from David Askenette inquiring into the investigation of Appellant's "timber theft."¹⁰ On October 12, 2005, the Regional Director responded to Askenette that he would look into the matter. By letter dated October 13, 2005, copied to BIA Trust Forester Dave Congos, the Regional Director asked the Tribe to investigate and report its findings to Congos in accordance with the MITW Contract discussed above. This request was conveyed to MTE General Counsel Rebecca Loudbear, who responded to the Tribe by letter dated November 8, 2005. She explained that, at the time of the alleged violation in 2000, MTE did not independently investigate such issues, and therefore had no records regarding the incident. She stated:

Since the white pine logs were dead, it appears the real violation was failure to obtain the permit to harvest dead timber, which Mr. Washinawatok would have been entitled to receive under MITW Ordinance 81-08, as amended. . . .

Washinawatok may have failed to obtain the permit he would have been entitled to; therefore, MITW Conservation issued a citation for the violation. It appears [C]onservation, from a review of some of the court records, valued the nine dead pine logs at less than \$200. It is unclear to me where the value was derived from at that time.

Nov. 8, 2005, letter from Loudbear to MITW (emphasis added).

Richter prepared a December 8, 2005, Timber Trespass Report (2005 Richter Trespass Report). He described the officers' discovery of nine cut, dead, white pine logs without bark but explained that the "exact volume is unknown because it was not assessed at the time the alleged trespass was discovered in February 2000." 2005 Richter Trespass Report at 1. Richter postulated a volume on the basis of MTE figures which average nine sawlogs per 1,000 board feet (MBF) of mill quality timber. Richter thus assumed that the nine logs could amount to an MBF, though the record contains no indication that the logs were measured. *Id.*¹¹ But Richter then stated that dead white pine logs could not be

¹⁰ We do not know the relationship between Askenette and the Tribe or anyone involved in the case. Askenette, of Neopit, Wisconsin, visited the Tribe's offices to review records on July 27, 2005. His letter asserts a concern that another individual was prosecuted for timber theft but the record contains no information about that alleged incident.

¹¹ BIA's Answer asserts that the logs were 16 feet in length citing as support the photographs attached to Loudbear's letter, which appear to be the same photographs
(continued...)

sawlogs, because sawlogs must be green. *Id.* Turning to value, he “estimated the value of the timber is anywhere from \$0 to \$97.88 if Wisconsin Sawtimber Values for 2006, Green Bay, are applied.” *Id.* He stated: “The *dead white pine logs have no value to MTE as sawlogs since the cost of production exceeds any lumber value or pulpwood* as the pulp mills will not accept it. Therefore, arguably, the *dead white pine logs have no stumpage value and at most it is less than \$97.88, which is the DNR’s 2006 Green Bay Sawtimber value for green white pine.*” *Id.* (emphasis added). His assessment of triple stumpage value, 25 C.F.R. § 163.29(a)(3)(i), bore five question marks:

<u>Species</u>	<u>Product</u>	<u>Volume</u>	<u>Price/Unit Vol.</u>	<u>Stumpage</u>	<u>Triple Stumpage</u>
White Pine (dead)	Sawlogs	1000 bd.ft.??	\$0-\$97.88/1000?	0-\$97.88?	0-\$293.64?

2005 Richter Trespass Report at 1. In response to whether the “person suspected of trespassing indicated he/she thought they had a right to take the timber,” he responded “unknown.” *Id.* at 3. He left blank question 21, which was “comments and recommendations.” *Id.*

Richter attached an “appraisal” to his Report. It listed 0 to \$97.88 per MBF as the “appraised price.” His recommendation on the triple stumpage value, however, on page 2 of the appraisal was “*less than \$293.88 as that is appraised price for green white pine. Could be as low as \$0.*” Appraisal at 2 (emphasis added). On this page, Richter added \$45.74 in costs, for 1.5 hours taken to prepare the report at \$30.49/hour. Richter attached to this appraisal several pages documenting sawmill stumpage values for various years. Much of this material relates to price data from 2005-06; some relates to prices of sawtimber “delivered,” much of it to species other than white pine. Richter derived his figure for the value of the nine logs from 2006 data for stumpage rates effective November 1, 2005, for the zone identified as “Green Bay.” *See* Administrative Record Document G, 2005 Richter Trespass Report attachments, “NR 46.30(a) Sawtimber Values - 2006.”

Trust Forester Congos criticized the 2005 Richter Trespass Report for failing “to make an effort to investigate this trespass or *discover any new facts in the case beyond what was already documented.*” Dec. 13, 2005, Congos Memorandum to Jay West, Regional Forester, BIA (2005 Congos Memo) (emphasis added). Congos’s own effort to find facts, however, related only to prices of sawmill lumber. Congos asserted that Richter was wrong

¹¹(...continued)

apparently taken in June 2000 by Waukechon. Answer at 17. We find no evidence in the record, however, that any of the tribal or BIA foresters measured the logs, and cannot verify from the photographs a length of 16 feet.

in suggesting that the logs had no value because they were dead, stating that “dead logs, if sound, may be sawn into merchantable lumber and therefore have standing commercial value.” *Id.* Without communicating with Washinawatok or ascertaining facts regarding the length, size, or condition of the logs in question, Congos asserted “facts” proved from Washinawatok’s failure to supply information about his use of the logs.

The facts indicate Mr. *Washinawatok manufactured* the dead white pine *sawtimber into merchantable log lengths thereby establishing that the logs were*, in fact, sound and *usable as sawlogs*. There is *nothing to indicate* that these *trees were* cut and *manufactured for* a lower value product (pulpwood) or *personal use* (firewood). . . . [Richter’s] appraised value of \$0 - \$97.88 is faulty and should not be used. Rather, the BIA stumpage appraisal for timber cut on Menominee during FY 2000 values white pine sawtimber (and woods run sawlogs) at \$183.85 per MBF (copy attached).

Id. (emphasis added). Congos tripled this figure to obtain treble stumpage value, 25 C.F.R. § 163.29(a)(3)(i), and added Richter’s costs of investigation (\$45.74) to conclude that the total known cost of the trespass was \$597.29. He defined this as a “minimum value” because all investigative costs had not been included in Richter’s Report.

Attached to the 2005 Congos Memo was a “Stumpage Appraisal for FY 2000,” producing a “weighted stumpage value per MBF.” The source of this data is not provided. It is not possible to determine whether the “appraisal steps” attached to the appraisal, describing steps for assessing appraised values of differing species of woods, bear a relationship to the appraisal, because the terms on the two sheets of material do not correspond. The significance of a “weighted” stumpage value is not clear, since stumpage value is defined as “the value of a forest product prior to extraction.” 25 C.F.R. § 163.1.

On February 6, 2006, the Deputy Regional Director issued a Notice of Trespass to Washinawatok; it asserted that Richter “determined that you had been cutting without a contract or permit” and that “BIA has determined that you cut 1,000 board feet of sawtimber.” BIA explained that the letter constituted a “formal Notice of Trespass” pursuant to 25 C.F.R. § 163.29(g).¹²

¹² This rule states that BIA or a “tribal representative . . . will promptly determine if a trespass has occurred. The appropriate representative will issue an official Notice of Trespass,” the purpose of which is to advise the alleged trespasser (1) that a trespass determination has been made; (2) the basis for the determination; (3) an assessment of

(continued...)

The Notice did not provide an assessment of the penalty, *see* subsection 163.29(g)(3), or warn Washinawatok against disposing of or removing the logs, *see* subsection 163.29(g)(5). Rather, the Notice notified Washinawatok of the results of the investigation and asked him if he had “anything to add to these facts or evidence refuting liability” Feb. 6, 2006, Notice of Trespass at 2. This Notice thus constituted Washinawatok’s first opportunity to state his position.

The record contains an undated, handwritten, unsigned report of a telephone call from Washinawatok to BIA. Subsequently, Marty Cassellius, Timber Sales Forester, BIA, submitted a 2007 Declaration asserting that he had received a call from Washinawatok on February 8 or 9, 2006, and prepared the telephone report. Cassellius’s notes represent that Washinawatok stated: “2 dead trees across the Road →later clarified I was across rd 1 in woods) - he cut them up into length into [sic] in order get them used as firewood.” *See* Administrative Record Document L. Cassellius’s note also records a “conversation with Jay West, Letter to Tribe: Chairman,” regarding the “free-use cutting permit system.” This note reads: “*would encourage them to seize and confiscate wood that was cut in violation of free-use cutting ordinance.*” Regarding the “case in question,” Cassellius wrote “- failed to properly account for the amount of wood cut (established scaling procedures[]).” *Id.*

On February 15, 2006, BIA received Washinawatok’s written response, in which he repeated that he had collected the logs as firewood, and denied that the wood had value to others: “I’m 73 years old [and] I’ve been cutting firewood since around 1942 or 43, I know better th[a]n to cut any wood that[’]s green or has any value to it.” Appellant attached a copy of page 1 of the 2005 Richter Trespass Report, and also Tribal Ordinance 81-08 section 11, explaining “this I have already appeared in Tribal Court for.”

On March 1, 2006, the Acting Deputy Regional Director issued a Demand Letter to Appellant for \$790.08 in trespass penalties. The penalties were calculated by tripling the value for white pine suggested by Congos to assess damages of \$551.55, with an additional five percent interest from 2000 of \$192.79, as well as investigation costs of \$45.74. The Acting Regional Director ignored Washinawatok’s claim that the wood was valueless except to himself as firewood.

¹²(...continued)

damages, penalties and costs; (4) facts regarding any applicable seizure; and (5) “[t]hat disposition or removal of Indian forest products taken in the trespass may result in civil and/or criminal action by the United States or the tribe.” 25 C.F.R. § 163.29(g).

By letter to the Acting Deputy Regional Director dated March 10, 2006, Washinawatok denied any wrongdoing. He repeated that he had been cutting wood since 1942-43, when he was 10 or 11 years old. “I was told at that time we could cut anything that was dead or down. And that’s the way its been all my life. These trees I cut were of no value to no one. One was laying across the road, I thought I might as well take it home for wood, so I took that home and there was another laying right next to it, so I took that one too. I am still burning that wood and so are a few others.” Mar. 10, 2006, letter from Washinawatok to BIA.¹³ The Deputy Regional Director sent Washinawatok a response on March 21, 2006, reiterating correct appeal procedures.

On April 12, 2006, Appellant filed his notice of appeal through counsel, raising four arguments. First, he asserted that the trespass had been fully and finally adjudicated by the Tribal Court, and that, pursuant to 25 U.S.C. § 3106(c), BIA must grant full faith and credit to the Tribe’s final judgment. Second, he asserted that an investigation years after the event violated his due process rights, and was arbitrary and capricious. He questioned BIA’s motivations in responding to Askenette’s letter; argued that a timely inquiry before 2005 might have disclosed relevant facts and avoided speculation; and asserted that 25 C.F.R. § 263.29(f) and (g) required “prompt” and “immediate” notice to a suspected violator. Third, he argued that the Notice of Trespass was based on speculation and conjecture regarding the logs, in direct contradiction to Richter’s view that they had no value, and claimed that any trespass violation of 25 C.F.R. §§ 163.29(f) and 163.1 was conditioned on a finding of “marketable” forest products. Fourth, he claimed that BIA was estopped from pursuing charges based on principles of laches, estoppel and waiver, because BIA failed to pursue the matter sooner and because the Tribe had concurrent jurisdiction.

On August 24, 2006, the Regional Director issued his Decision affirming the Acting Deputy Regional Director’s finding of trespass but modifying the damage assessment. The Regional Director rejected Appellant’s contention that there was a full and final adjudication of a trespass in Tribal Court, because the Tribe had never sought concurrent authority to pursue trespass as required in the MITW Contract and 25 C.F.R. § 163.29(j). The Regional Director denied any problem created by a second investigation, asserting that BIA timely initiated its investigation as soon as it was alerted to the problem in 2005. He effectively granted Washinawatok’s challenge to Congos’s value figures, but instead accepted the figures in the 2005 Richter Trespass Report, reducing the penalty to one based on Richter’s reference to 2006 Green Bay sawtimber figures, which the Regional Director described as the “open market” value. Decision at 1-3. Finally, he denied that BIA could

¹³ There is no evidence in the record that BIA attempted to verify Washinawatok’s allegation regarding the two trees, or his continued use of the logs for firewood.

be estopped by laches and denied that BIA had waived its rights to pursue the trespass action. *Id.* at 4. The new treble damages (\$293.64) were calculated based on the \$97.88 value of an MBF of sawtimber. With interest and investigation costs, the total assessment was \$449.96.

IV. The Appeal and the Parties' Arguments.

Appellant filed his Notice of Appeal with the Board on September 15, 2006. Appellant presents argument in five categories. First, he alleges that BIA failed to comply with 25 C.F.R. § 163.29(f) requiring "immediate" notice when BIA had reason to believe a trespass has occurred, and subsection (g) requiring a "prompt" determination of trespass. Appellant contends that as Trust Forester, Congos was required to give notice of the trespass in 2000, or no later than October 12, 2005, which is the latest date BIA had "reason to believe" a trespass may have occurred. Moreover, Appellant argues that the 6 years that passed between the event and the Notice cannot constitute a "prompt" determination, and that it was incumbent upon BIA to establish a timely process for communication among Tribal officers and the Trust Forester, so that the ability to investigate stale matters does not prejudice an alleged trespasser. Appellant asserts that BIA's failure to inform him of the fact that BIA had "reason to believe" in October 2005 that a trespass had occurred deprived him of any knowledge of the ongoing investigation, such that he could either find counsel or provide exculpatory information before the Notice was issued. Appellant asserts that this failure to provide him a timely opportunity to provide information to investigators violated his due process rights.

Second, Appellant asserts that, for a trespass to have occurred, the logs must have been "marketable," citing the definition of "forest products" in 25 C.F.R. § 163.1. Citing the 2005 Richter Trepass Report, which stated that the logs were dead, had no value to MTE, and had no stumpage value, and which responded to the space on the trespass form that the "marketable material" was "N/A," Appellant argues that the Trepass Report "conclusively proves" that the logs were not "marketable" and therefore there was no trespass. Notice of Appeal at 4.

Third, Appellant contends that the record refutes the Regional Director's findings of fact and renders his conclusion arbitrary and capricious. Appellant asserts that the record demonstrates that he collected timber for personal use as firewood, and that the Regional Director adopted Congos's description of events which contradicted the description by Richter, who was one of the front line investigators, and thus the Regional Director rejected exculpatory evidence without basis. Moreover, Appellant claims that BIA's choice to ignore his subsequent explanatory statement undermines the Regional Director's finding that "Washinawatok was salvaging the timber for sale to a local sawmill in order that the

logs would be converted into lumber.” Opening Brief at 22. Appellant claims that the Regional Director’s conclusion that the stumpage value of the logs was \$97.88 is refuted by Richter’s conclusion that they had zero value, but, “*at most . . . less than \$97.88.*” *Id.*, citing 2005 Richter Trespass Report. Appellant argues that the Regional Director’s conclusion that the logs had value to a sawmill on the open market was merely speculation. Opening Brief at 22. Appellant contends that the Regional Director acted improperly in concluding that Washinawatok committed a trespass based upon Washinawatok’s concessions that he cut the trees because these statements were given verbally and in writing after the Notice of Trespass was issued. *Id.* at 23, citing Documents L and N (undated telephone notes and Washinawatok’s Mar. 10, 2006, letter.)

Fourth, Appellant argues that the Regional Director violated 25 C.F.R. § 163.29(i) and section 3.02(E) of the MITW Contract when the second investigation was ordered. The rule allows the Secretary to delegate to the Tribe authority for investigating forest trespass, and the Contract Section 3.02(E) charges the Tribe with establishing a free use permit policy. According to Appellant, because the Tribe established this policy in Tribal Ordinance 81-08, BIA had no authority to undertake a second investigation.

Fifth, Appellant asserts that the Regional Director erred in accepting the stumpage value assessment in the 2005 Richter Trespass Report because it was based on speculation. Appellant argues that BIA was obligated to assess stumpage value on the basis of an inspection of the wood and was not permitted to base an assessment on “stumpage rates in effect at the time of the trespass” that bore no relation to inspected raw materials involved in the trespass. Opening Brief at 23-24.

BIA submitted an Answer. In response to Appellant’s arguments regarding 25 C.F.R. § 166.29(f) and (g), BIA contends that subsection (f) does not even apply to these facts, and that it complied with the intent of subsection (g) in investigating and responding to information received first in October 2005. Answer at 11-12. Arguing that the issue is one of first impression before the Board, BIA contends that the delay is harmless error because Washinawatok suffered no “prejudice or harm” from the passage of time. *Id.* at 13. BIA asserts that Washinawatok conceded the trespass by failing to show that he had a permit and by failing to refute the statement in the 2000 Richter Letter that the “white pine appeared to be cut in log lengths for manufacturing into lumber rather than cut for firewood.” *Id.* BIA asks the Board not to find a time limit in NIFRMA and its implementing regulations that counters BIA’s “actual knowledge,” because such a standard would impair BIA’s ability to implement its trust obligation. BIA avers that a right of appeal to this Board constitutes due process. *Id.* at 14.

BIA contends that Appellant misconstrues the plain meaning of “marketable,” and it denies that the fact that the logs were dead and had lost all bark rendered them “unmarketable.” Answer at 15. BIA rejects the notion that the word “marketable” in the definition of “forest products” at 25 C.F.R. § 163.1 confines “trespass” to situations where there is proof that the actual products taken were marketable. Conceding that Richter stated that the logs had no stumpage value, BIA asserts that “the fact that the mill operated by MTE may not accept the logs . . . does not render them unmarketable.” Answer at 16. Proceeding through the information in the record, BIA argues that the Regional Director had “ample basis to reject Appellant’s claim that he merely found two dead white pine logs along the road and took them for firewood, despite not having a free use permit” and this ample evidence, according to BIA, is found in the 2005 Congos Memo, which concludes that “Washinawatok cut dead white pine sawtimber into merchantable log lengths in preparation for transport to a sawmill.” *Id.* at 18.

BIA denies that the decision was arbitrary or ignored exculpatory evidence regarding the “free use permit policy” because, BIA explains, the Tribe’s policy does not permit taking timber without a permit. Answer at 19. BIA claims that reason exists to conclude Washinawatok committed a trespass, because “Appellant’s own son, Scott White . . . admitted that the logs were his dads.” *Id.*, citing 2000 Waukechon Report. BIA denies that it ignored conflicts in Richter’s report, arguing that accepting the highest possible value in Richter’s report (\$97.88/MBF) is consistent with 25 C.F.R. § 163.29(a)(3)(i), which establishes treble damages at the “highest stumpage value obtainable.” Answer at 20. BIA denies that considering Washinawatok’s statements post-dating a Notice was improper. *Id.*

BIA denies that its second investigation was improper. BIA claims that Appellant misconstrues the regulations and the MITW Contract; because the Tribe never sought concurrent jurisdiction, its actions in 2000 could not estop BIA from investigating a trespass in 2005. Answer at 21-22. Regional Forester West asserts that the Tribe neither submitted a request for concurrent jurisdiction over NIFRMA trespass cases, nor asked BIA to defer to the Tribe’s 2000 prosecution efforts. Declaration of Jay R. West at ¶¶ 3 and 4.

Finally, BIA defends the trespass value assigned to the logs in the Regional Director’s decision. Acknowledging Appellant’s claim that the “wood was not inspected by any investigator,” BIA claims that this assertion “is refuted by BIA herein.” *Id.* at 22. BIA attaches the Declaration of Jay R. West, Regional Forester, BIA, who renders his professional opinion that the “timber at issue in this case has value and is marketable” and states that this assessment is based on “many factors, including species, log length and diameter, and the forest products industry in the vicinity” of the Reservation and remains

true even if the timber is dead and has lost all bark. *Id.* at ¶ 7. West does not claim that he personally inspected the logs. *Id.*

In a Reply Brief, Appellant objects to BIA's submission of the West and Cassellius Declarations. Appellant contends that BIA bears the burden of proving all material facts relevant to an alleged trespass and that the Director has shifted the burden to Washinawatok by requiring him to prove that he "did possess a Menominee 'free use' permit." Reply at 7. Appellant characterizes BIA's approach to the efficiency requirements of 25 C.F.R. § 163.29(f) and (g) as "flippant" and denies that an investigation that took place 6 years after the event, outside his knowledge, and without any inquiry into his position, could be characterized as "harmless" to him. Reply at 8-9. He argues for a "constructive notice" test that imputes knowledge possessed by the Tribe to the BIA Trust Forester.

Discussion

Appellant bears the burden of proving that the Regional Director's decision was erroneous or not supported by substantial evidence. *Schuyler Van Gorden v. Acting Midwest Regional Director*, 41 IBIA 195, 198 (2005). We find that Appellant has not met this burden with respect to BIA's liability finding, but has met this burden in demonstrating that the record does not adequately support BIA's assessment of treble damages based on the stumpage value of the logs.

We agree with BIA that the evidence is sufficient to establish that Washinawatok committed a trespass. The rule at 25 C.F.R. § 163.1 defines trespass as "removal of forest products . . . from Indian forest land, except as authorized by law and applicable federal or tribal regulations." Washinawatok admittedly removed logs cut from two dead trees in 2000. He does not argue that he was authorized to do so by law or regulation. He provides no permit. If Washinawatok wishes to prove that his action was authorized, it is up to him to show it. We reject his suggestion that it is "switching burdens" to require a putative trespasser to show a permit, when a permit is the only avenue for authorized timber removal.

We reject Appellant's argument that, under the MTE Contract and the Tribe's free-use policy, BIA was not permitted to initiate its own investigation, after the Tribe's investigation was completed. The Tribe's attempted prosecution of Appellant was pursued under Tribal law only. As noted above, the Tribe never sought concurrent jurisdiction under that contract or under 25 C.F.R. § 163.29(j), and therefore the requirement that the Department "defer to tribal prosecutions of forest trespass cases" under NIFRMA is not relevant. 25 U.S.C. § 3106(c).

We also reject Appellant’s interpretation of the definition of “forest products” as requiring BIA to establish, on a case-specific basis, that the actual product removed was individually “marketable.” As noted earlier, under the regulations, the term “forest products” is defined to mean “*marketable products* extracted from Indian forests, *such as*” timber, specifically identified timber products (e.g., lumber, logs, fuelwood), bark, firewood, etc., and including “other marketable material.” See 25 C.F.R. § 163.1 (emphasis added). Appellant reads the phrase “marketable products” as imposing a case-specific marketability test for each and every product removed from Indian forest lands, and reads the phrase “such as” to refer only to the word “products.” Under this reading, the itemized list in the definition (timber, logs, pulpwood, firewood) is nothing more than a list of “products,” which only become “forest products” if, in a given case, the actual object extracted can be shown to be a “*marketable* product.”

We disagree. We do not read the regulation as creating a separate test requiring a determination in each case whether the actual timber, logs, bark, firewood, berries, etc., that were extracted were themselves “marketable.” Rather, the drafters of the regulation determined that the listed items are marketable. The phrase “such as” relates to the phrase “marketable products,” and not just to the single word “products,” and therefore the items listed fall within specifically listed categories defined to be marketable products. Indeed, where, as here, a tribe broadly allows tribal members, with a permit, to obtain firewood free for personal use, it would be anomalous to require BIA to prove commercial marketability for that freely-obtainable firewood, in order to establish trespass liability when a tribal member fails to obtain a permit.¹⁴

Our reading of the regulatory definition of “forest products” is consistent with the statutory definition, which plainly defines the items listed (e.g., timber, a timber product, firewood) as “forest products,” without qualification.¹⁵ The fact that the drafters of the

¹⁴ This reading is consistent with the inclusion of the catch-all phrase “other marketable material” within the definition of “forest products.” 25 C.F.R. § 163.1. If each forest product had to be shown to be “marketable” on a case-by-case basis to fall within the definition, then a catch-all category of “other material” would have sufficed.

¹⁵ The statute defines “forest product” to mean —

- (A) timber,
- (B) a timber product, including lumber, lath, crating, ties, bolts, logs, pulpwood, fuelwood, posts, poles and split products,

(continued...)

regulation added the phrase “marketable products . . . such as” in the definition does not, in our view, evince any intent to make the regulatory definition narrower than the statutory one. The rulemaking shows that the opposite is true. *See* General Forestry Regulations, Final Rule, 60 Fed. Reg. 52250 (Oct. 5, 1995) (“the wording of the definition [of ‘forest products’] is taken directly from 25 U.S.C. 3103(6) and the definition is intentionally broad to encompass the many products from Indian forest land”).¹⁶

And we reject Appellant’s proposals for a “constructive notice” test to ascertain the proper timing for a “prompt” or “immediate” notice of trespass as required in 25 C.F.R. § 163.29(f) and (g). While this test would presume that BIA had notice of all matters investigated by tribal foresters under the MITW Contract section 3.04.D(4) (advising that tribal foresters will communicate such information to BIA), BIA correctly points out that such a rule would deprive BIA of its statutory authority and responsibility to implement NIFRMA and its regulations. The proffered test would prohibit BIA from investigating a possible trespass if raised too late or, as here, not at all, by the Tribe.¹⁷ The statutory

¹⁵(...continued)

- (C) bark,
- (D) Christmas trees, stays, branches, firewood, berries, mosses, pinyon nuts, roots, acorns, syrups, wild rice, and herbs,
- (E) other marketable material, and
- (F) gravel which is extracted from, and utilized on, Indian forest lands.

25 U.S.C. § 3103(6).

¹⁶ The regulations do not define the term “marketable,” and neither Appellant nor BIA offers a specific definition. Because we conclude that the regulatory definition was intended to identify certain categories of products as “marketable products” per se, we need not define the word “marketable” in order to conclude that the logs cut by Appellant were “forest products.” Of course, whether the logs were, in fact, of suitable quality to have any actual monetary stumpage value, is relevant to the issue of damages, but is not an element for making the threshold liability determination of trespass, based on removal of or damaging a “forest product.”

¹⁷ We have held that the “immediacy” required by 25 C.F.R. § 163.29(f) “applies where [BIA] has ‘reason to believe that Indian forest products are involved in trespass and that such products have been removed to land not under . . . government supervision.’” *See Strom v. Northwest Regional Director*, 44 IBIA 153, 167 (2007) (BIA issued trespass notice (continued...))

imperative is paramount to any alternative construction based on the MITW Contract. BIA took prompt action when advised of the trespass and the timing of BIA's investigation is not sufficiently egregious to justify reading subsection (g) as a bar to liability, even if it could be so construed on other facts.

We disagree with BIA, however, that the evidence is sufficient to sustain its assessment of damages. Although the logs were plainly "forest products," we cannot determine if they had any stumpage value as sawtimber justifying treble damages even on the open market. As an initial matter, we find no support for BIA's inference that the dead logs had stumpage value as lumber based on its insistence that Washinawatok took the dead logs in order to sell them as sawtimber. The Regional Director's finding that "Washinawatok was salvaging the timber for sale to a local sawmill" was founded only on Congos's declarations that "Washinawatok manufactured the dead white pine sawtimber into merchantable log lengths thereby establishing that the logs were, in fact, sound and usable as sawlogs," and that "nothing . . . indicate[s] that these trees were cut and manufactured for a lower value product (pulpwood) or personal use (firewood)." BIA and the Regional Director accepted these averments about the dead logs as true, and proceeded to assess their value as if they were green sawtimber. But Appellant is correct that these factual findings by the Regional Director and Congos are not supported in the record. Instead, they were at worst, conjecture, and at best, a good starting point for investigation.

We find it deeply troubling that BIA foresters made assertions that Appellant cut timber for the purpose of sending it to a sawmill for lumber without ever interviewing him. Washinawatok's first statement was his verbal assertion during the February 2006 phone call with Cassellius; his second and third were in his February 15 and March 10, 2006, letters to BIA. All of these statements took place after the Notice of Trespass was issued and after he was notified that a new BIA investigation had taken place. Thus, by the time he was given a chance to respond to charges, Trust Forester Congos had already rejected any suggestion that Appellant took the logs for firewood *on grounds that he had not made such a statement*. It was not reasonable for BIA to conclude that Washinawatok must have taken the wood for commercial lumbering because he failed to assert that he took it for firewood, prior to giving him any opportunity to say so.

¹⁷(...continued)

within 7 days). We agree that the obligation in 25 C.F.R. § 163.29(g) to make a "prompt" determination should begin at the time that BIA has actual knowledge of the operative facts regarding a trespass.

When BIA did give Washinawatok an opportunity to take a position, he said, orally once and twice in writing, that he took the wood for personal use as firewood and that it had no value to anyone else. He said that one log was lying across the road and the other beside it. Because Congos had *already* concluded that Washinawatok had failed to refute the notion that he was collecting timber for a lumber mill, Washinawatok's statements were simply not acknowledged as relevant to any conclusion about the alleged value or quality of the logs, and accepted only as admissions in support of trespass liability. His statements that the logs only had value as firewood, and only to him, were never investigated or pursued.

We do not suggest that a trespasser's statements must be presumed to be true. Nor do we hold as a matter of law that the regulations require an alleged trespasser to be afforded specific notice and opportunity to respond before the Notice issues. *Cf. Schuyler Van Gorden*, 41 IBIA at 199. But the problem here is that no Tribal or BIA investigator ever took a statement from the alleged trespasser as part of the investigation, and, when he finally gave one, BIA effectively ignored it. Further, BIA failed to follow up with its own direct investigation to determine that the actual character or quality of the logs provided a proper basis for the appraised value which assumed the logs were manufactured as sawtimber.

Moreover, Congos's conclusions and the Regional Director's later factual findings were refuted by the Tribal foresters during the actual investigation in 2000 and MTE's construction of the evidence in 2005. The Tribal officers queried whether Washinawatok cut the dead wood for fuel and their reports noted that he had received permits to collect firewood in prior years. The June 2000 photographic evidence shows the wood remaining unused 4 months after discovery of the logs' removal. Likewise, the Tribe's attempted prosecution suggested that the issue was Washinawatok's collection of fuelwood without a permit. The citations were premised on Tribal Ordinance 81-08 section 7.01, which referred to unauthorized collections of forest goods for "personal use." In 2005, MTE General Counsel Loudbear remarked, based on her reading of the tribal court materials, that Washinawatok's only violation was failing to obtain a permit for personal use of firewood. Casselius's recorded notes of a conversation with West also imply that they discussed the matter as a violation of the free use ordinance.

This material should have posed significant questions for investigation and resolution. Instead, the Regional Director relied on Congos's "facts" in his decision. When Washinawatok asserted in 2006 that he had taken the wood for fuel *and was still using it*, BIA either failed to realize, or realized and ignored, a plain invitation to check the facts.

For these reasons, we find BIA's conclusion that the dead logs were actually manufactured by Washinawatok as sawtimber to be based on considerable speculation.¹⁸

And the record in this case does not support BIA's valuation of the logs as if they were green wood. While the Regional Director rejected Congos's conjecture about the value of the logs, the Regional Director nonetheless assumed, with no proper foundation, that the "highest stumpage value" for the nine logs was \$97.88/MBF, which is the 2006 value of green white pine mentioned in the 2005 Richter Trespass Report. There are several problems with this conclusion. First, the logs were not green. Second, the 2005 Richter Trespass Report concluded that the value was "at most . . . less than" \$97.88/MBF, not equal to it, and possibly zero. Thus, the "highest stumpage value obtainable" could not be said to be \$97.88 based on that Report. Third, the value chosen was for commercial products in the Green Bay zone. We cannot determine whether dead logs from the Reservation that Richter declared were valueless as sawlogs for MTE mills close by could have been sold on the open market in this zone, considering transportation costs.¹⁹ Richter concluded that absent value as sawtimber, they were worthless. 2005 Richter Trespass Report. BIA's effort to overcome these problems is found in West's Declaration supplementing the record. West offers his opinion that the logs are "marketable" and have "value," but this assertion is not based on any actual evidence of their quality or condition, and West himself never inspected them. West's after-the-fact representations describe several characteristics West observes in the June 2000 photographs but are insufficient to overcome actual on-site observations by the Tribal wardens and Appellant's statements regarding their suitability only as firewood. Thus, the asserted value of the logs as lumber was not supported with sufficient evidence.

¹⁸ Even assuming that the photographs are sufficient to determine that the log lengths were *consistent* with sawtimber lengths, it does not follow that the lengths were *inconsistent* with eventual use as firewood, and the photographic evidence of log length could not be used to rule out suitability of the dead wood as firewood. Were BIA to respond that the passage of time prevented evaluation in 2005 of contemporaneous facts of a 2000 trespass, such logic would only validate Appellant's claim that the delay between the trespass investigation and the event unduly prejudiced his rights to respond to allegations regarding a stale claim.

¹⁹ Though West opined in his Declaration, at ¶ 7, that 8-12 nearby lumber mills would have purchased the dead wood at the price of \$97.88/MBF cited by Richter, this price was not a dead wood price but one for green sawtimber. We cannot square these contradictions and West does not support his opinion with evidence.

We caution BIA for relying, in assessing damages, on a set of figures replete with question marks. Before using such figures to assess a penalty, such questions would have to be answered based on facts related to the raw materials taken. While Congos was not comfortable with the 2005 Richter Trespass Report because Richter had retreated from any suggestion that Washinawatok had collected the logs as a commercial venture, Congos should have explored Richter's reason for such reluctance, rather than overriding it with conjecture. It was incumbent upon him to conduct an investigation into the facts to verify his guesses, rather than assuming facts or inferring truth from the silence of a putative trespasser. And when Appellant offered his defense, BIA should have addressed his contentions with specificity, either accepting them, or giving reasons to reject them. Given these serious factual concerns, we reverse the damages assessment.

Finally, we affirm the assessment of \$45.74 in costs, which represent 1.5 hours of Richter's time. Appellant does not specifically challenge this expenditure of time or the hourly cost charged for it as unreasonable. Liability for trespass includes reasonable costs. *See* 25 C.F.R. § 163.29(a)(3)(iii).

Conclusion

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 decision of the Regional Director is affirmed with respect to the finding that Appellant was liable for the trespass, reversed with respect to damages, and affirmed with respect to Appellant's liability for \$45.74 in costs.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.