



INTERIOR BOARD OF INDIAN APPEALS

Tubit Enterprises, Inc. v. Pacific Regional Director, Bureau of Indian Affairs

53 IBIA 183 (05/25/2011)



# 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

TUBIT ENTERPRISES, INC.,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	Docket No. IBIA 09-072
	)	
PACIFIC REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	May 25, 2011

The Board of Indian Appeals (Board) affirms the March 9, 2009, decision of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he, in turn, affirmed the decision of the Superintendent of BIA's Northern California Agency to assess damages against Appellant Tubit Enterprises, Inc., in the amount of \$9,862.46 for trespass on an Indian public domain allotment. Appellant does not dispute the facts upon which the trespass determination was made and, at most, Appellant disputes the amount of damages assessed by making a general, unsupported assertion that the timber it removed was "unmerchantable." Appellant's claim that others bear greater blame is no defense to Appellant's own liability, and Appellant's unsupported assertion that the timber was "unmerchantable" does not satisfy Appellant's burden of demonstrating error in BIA's valuation of the wood as suitable for firewood or fuelwood.

## Background

On or before October 10, 2007, Janelle Garcia and her uncle, Ernest Hunt — two of the Indian owners of an Indian public domain allotment known as the Henry Frank Allotment (Allotment)<sup>1</sup> — visited the Allotment and observed that there had been recent

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<sup>1</sup> The Allotment is a public domain allotment located in the N $\frac{1}{2}$  of the SE $\frac{1}{4}$ , the NE $\frac{1}{4}$  of the SW $\frac{1}{4}$ , and the SE $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 11, Township 38 North, Range 5 East, Mount Diablo Meridian, Shasta County, CA. It is identified on the Shasta County Tax Assessor's records as parcel number 016-550-022, and consists of 160 acres.

timber harvesting on the Allotment. On October 9, 2007, Garcia and Hunt reported the trespass to BIA.

BIA investigated the trespass and determined that it had occurred in September 2007 as the result of fire suppression activities promoted by the Lassen County Fire Safe Council, Inc. (LCFSC). The LCFSC received grant funding to implement a “wildfire hazard fuel reduction project” (fire suppression project or project) in forested areas on lands in Shasta County, including an area known as the Day community. *See* AR2,<sup>2</sup> Tab 9. The Allotment is one of the properties in the Day community. According to BIA’s land title records, the United States holds 76.667 percent of the Allotment in trust for several Indian owners; the remaining 23.333 percent apparently passed out of trust into fee. According to Shasta County Assessor’s records, Hayward (Paul) and Joanne Luckey own 3.33 percent of the fee title to the allotment.

Further investigation revealed that LCFSC had contracted with Appellant to carry out the fire suppression project on those properties in the Day community whose owners consented to have fire suppression work done.<sup>3</sup> Under the terms of the Agreement between LCFSC and Appellant, LCFSC was responsible for obtaining landowner consent. For the

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<sup>2</sup> “AR” is used to refer to the Administrative Record, which is a single binder consisting of one set of tabs in the front, numbered 1-10 (AR1), and a second set of tabs in the rear, numbered 1-16 (AR2). AR2 appears to be the record relied upon by the Superintendent.

A table of contents appears at AR2, Tab 11, that apparently was used to transmit the trespass investigation report to the Regional Director prior to the Superintendent’s decision. This table of contents identifies various documents under Tabs “1-8” and “A-H.” Although most of the documents identified in this table of contents are found in various places throughout the administrative record, albeit under different tabs (e.g., the Board did not receive any record with tabs labeled A-H), some are missing. For example, according to this table of contents, there are photographs, presumably of the trespass. But, there are no photographs in the administrative record received by the Board. *BIA is reminded that a complete record should be provided for all appeals to the Board.* Notwithstanding the omission and for purposes of this appeal, we nevertheless determine from Appellant’s concessions as well as from the documents that do appear in the record that the Regional Director’s decision is well supported. And Appellant has not argued that there are documents missing from the record that in any way support its claims of non-liability or for reduced damages.

<sup>3</sup> The contract that appears in the record is dated September 7, 2004. LCFSC states that the contract was renegotiated with Appellant for 2007.

work performed in the Day community, LCFSC agreed to pay Appellant \$550 per acre over and above the value of the cut forest material that “becomes the property of [Appellant].” Agreement Between LCFSC and Appellant, Sept. 7, 2004, at 1-2 (AR2, Tab 6). Pursuant to the Agreement, Appellant was to “work with LCFSC and the individual landowners to remove juniper, decadent brush and generally open up the landscape in order to reduce hazardous fuel loads.” *Id.* at 2.

LCFSC identified landowners through “Parcel Quest” and public, online county records. One of the Shasta County Assessor’s records for the Allotment showed the owners of the allotment to be “Allot Indian,” “Luckey Hayward,” and “Luckey Joanne.” A second Shasta County Assessor record reflected Hayward Luckey as owning 3.33 percent of the parcel; no owner is shown on the line for the remaining 96.67 percent interest. A third record showed ownership in the parcel to be “LUCKEY HAYWARD PAUL JOANNE ET AL.” Nothing in the record suggests that LCFSC inquired with either Shasta County or BIA about the notation of “Allot Indian” or who owned 96.67 percent of the Allotment or who was included in the “et al” shown for the owners of the Allotment. On June 14, 2007, Paul Luckey signed a consent form authorizing LCFSC to access the Allotment “for purposes of treating vegetation in the wildfire hazard fuel reduction project.” AR2, Tab 9. The consent form does not inquire whether the signer is the sole owner of the property nor does it contain a certification from the signer that consent to the fire suppression activities has been obtained from all owners.

On July 30, 2007, and on behalf of the Luckeys, LCFSC filed a Notice of Timber Operations that are Exempt from Timber Harvesting Plan Requirements (Waiver) with the Department of Forestry and Fire Protection for the State of California (CDF). The Waiver permitted the harvesting of dead, dying or diseased trees of any size and fuelwood or split products in amounts less than 10 percent of the average volume per acre. According to the Waiver, an estimated 90 percent of the material that would be removed from the Allotment would be “other, conifer” and the remaining 10 percent would be “Other, hardwood (Juniper).” Waiver at 1 (AR2, Tab 7). Further, over 150 cords of “fuelwood” were expected to be harvested and that 100 of the Allotment’s 160 acres would be included in the timber operation. In September 2007, LCFSC paid Appellant \$37,750.00 for work performed on the Allotment. Letter from LCFSC to BIA, Oct. 19, 2007, at 3 (unnumbered) (AR2, Tab 15). Appellant apparently delivered the harvested trees and juniper to a biomass plant.

When BIA conducted its on-site inspection of the Allotment, BIA determined that the following forest material had been harvested, without BIA approval, from approximately 65 acres in the SE¼ of the NE¼ of the Allotment: 24.78 cords of Ponderosa pine, 36.65 cords of juniper, and 59.05 cords of black oak. BIA documented 2,444 stumps

and noted that “it is possible [that] more trees were cut as some of the stumps were buried.” Timber Trespass Report, Sept. 24, 2008, at 2 (Trespass Report) (AR2, Tab 3). The report estimated the total value of the timber removed as “cordwood” at \$2,102.45.<sup>4</sup> The investigator also recorded additional damage done to the Allotment in the course of the operation, such as water bars in the roads and meadow, crushed and dying brush as a result of skidding, tall slash piles, high stumps, and litter.<sup>5</sup>

On September 26, 2008, the Superintendent issued a decision finding Appellant in trespass on the Allotment and demanding \$9,862.46 to cover treble stumpage damages of \$6,307.35 ( $\$2,102.45 \times 3$ ); interest on the treble damages at the rate of 4 percent calculated from October 1, 2007, through October 25, 2008 (\$270.27); administrative costs of investigation (\$3,245.50); and loss of future revenue (\$39.34).<sup>6</sup>

Appellant appealed the Superintendent’s decision to the Regional Director. It maintained that the Luckeys should be held liable because they authorized Appellant’s work. Appellant also argued, without explanation, that the Superintendent did not accurately describe the work that was done, and Appellant contended that the forest products that it removed were not “merchantable,” implying that Appellant therefore could not be held liable or that the amount of damages was erroneous. The Regional Director rejected Appellant’s arguments and affirmed the Superintendent’s decision. He explained that Appellant had removed and destroyed vegetation without the consent of BIA and the beneficial owners of the Allotment; that the removed and damaged vegetation fell within the meaning of “forest products” because of its value as firewood; and that, for purposes of a trespass action, the applicable regulation requires trespass damages to be “based upon the

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<sup>4</sup> BIA estimated \$371.70 for the Ponderosa pine cordwood, \$549.75 for the juniper cordwood, and \$1,181.00 for the black oak cordwood.

<sup>5</sup> Water bars are ditches usually cut across roads to drain water that would otherwise flow down the roads and cause erosion. See Cornell Cooperative Extension, *Best Management Practices After the Timber Harvest*, “Installing Water Bars” (2004), [www2.dnr.cornell.edu/ext/bmp/contents/postharvest/post\\_waterbar.htm](http://www2.dnr.cornell.edu/ext/bmp/contents/postharvest/post_waterbar.htm). “Skidding” refers to hauling or dragging trees, brush, and other forest growth to a gathering or staging area as part of the logging process. See 70A Am. Jur. 2d Social Security § 281 (2000) (discussing logging industry workers).

<sup>6</sup> On the assumption that Appellant would arrange to clean up the debris and do other remediation work on the Allotment in the wake of its harvesting activities, BIA did not assess rehabilitation costs against Appellant.

highest stumpage value obtainable from the raw materials involved in the trespass.” Decision Document at 4 (unnumbered) (quoting 25 C.F.R. § 163.29(a)(3)(i)) (AR1, Tab 2).<sup>7</sup> The Regional Director noted that the single stumpage value was less than the maximum value (\$3,000.00) that the LCFSC had estimated for the harvest on the Waiver filed with CDF.

This appeal followed. Appellant did not file an opening brief. The Regional Director filed a motion to dismiss, which we construe as an answer brief and to which Appellant submitted a reply.<sup>8</sup>

### Discussion

We affirm the Regional Director’s decision. Appellant does not dispute that it entered onto the Allotment and removed various trees and juniper nor does Appellant dispute the Regional Director’s determination that Appellant did not have the consent of the Indian landowners or authorization from BIA to do so. We reject Appellant’s contention that it should not be held liable for the damages assessed because others were at greater fault or because it removed only “nonmerchantable” timber.

#### I. Statutory and Regulatory Framework

As we explained in *Washinawatok v. Midwest Regional Director*, 48 IBIA 214, 214-15 (2009):

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 lands.<sup>FN</sup> At the direction of NIFRMA,

<sup>FN</sup> “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

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<sup>7</sup> The Regional Director’s decision consists of a single-page cover letter and a five-page “Decision Document.”

<sup>8</sup> To the extent that the Regional Director’s pleading was styled as a motion to dismiss, the Board denied the motion. *See* Order Allowing Response, Sept. 23, 2009.

the production of forest products . . . .”  
25 C.F.R. § 163.1.

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). . . .

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.<sup>[9]</sup> 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).

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<sup>9</sup> See also 25 U.S.C. § 3103(6) (definition of “forest product”).

## 2. Standard of Review

Appellant bears the burden of showing error in the Regional Director's decision. *Strom v. Northwest Regional Director*, 44 IBIA 153, 162 (2007). Simple disagreement with or bare assertions concerning the Regional Director's decision are insufficient to meet this burden. *Gourneau v. Acting Rocky Mountain Regional Director*, 50 IBIA 33, 43 (2009).

We will review *de novo* challenges to the sufficiency of the evidence in support of the decision and to the legal sufficiency of the decision. *Tarbell v. Eastern Regional Director*, 50 IBIA 219, 231 (2009).

## 3. Liability for Trespass

In its Notice of Appeal, Appellant argues that it should not be held liable because (1) others are liable and were at greater fault, and (2) it only removed "unmerchantable" trees and invasive juniper. In connection with the first argument, Appellant contends that the Luckeys are liable for the trespass because they authorized the fire suppression activity without informing LCFSC that they were not the only owners of the Allotment, and that Appellant could not know that there were additional owners because the Luckeys are the only owners shown on the county assessor maps for the Allotment. Appellant maintains that BIA should ensure "that public records clearly show the BIA trust interest and contact information." Notice of Appeal at 2. We find Appellant's arguments unpersuasive as a defense to liability.

It cannot reasonably be disputed that Appellant committed trespass within the meaning of the forestry regulation. First, Appellant does not dispute that an interest in the Allotment — in this case over 75 percent — is held in trust by the United States for Indian landowners, and it does not dispute that it lacked consent from the Indian landowners and from BIA to cut and remove any trees or vegetation from the Allotment.

Second, Appellant concedes that it entered the Allotment and that it removed trees and juniper. Appellant describes the trees as "small" and "unmerchantable," Notice of Appeal at 1, but does not define "unmerchantable" nor does it articulate what legal relevance it intended to attach to the term. For our purposes, what matters is whether the forest material removed fell within one or more of the categories of "forest products" found in the regulatory definition, *see supra* at 188, and Appellant does not deny that the trees and juniper it removed from the Allotment fall within that definition. Even assuming that Appellant intends to equate "unmerchantable" with "unmarketable," we explained in *Washinawatok* that "the drafters of the regulation[s] determined that the listed items

[identified as “forest products”] are marketable.” 48 IBIA at 229. Appellant does not dispute that the trees removed were suitable for “firewood” or “fuelwood,” both of which are expressly included in the definition of “forest product.” *See also* Waiver (AR2, Tab 7) (estimating the operation will result in the removal of over 150 cords of “fuelwood”). In *Washinawatok*, we held that BIA is not required — for purposes of establishing that a trespass occurred — to establish that any damaged or removed vegetation was individually marketable. 48 IBIA at 229. Thus, Appellant’s trespass on the Allotment is established by Appellant’s concession that it removed trees and juniper from the Allotment without BIA’s authorization.<sup>10</sup>

We turn now to Appellant’s arguments that, notwithstanding its commission of a trespass, Appellant should not be held liable because others were at greater fault. There is no statutory or regulatory exemption from liability for trespass based on either the fault or liability of others. All who bear responsibility for the trespass are jointly and severally liable, and here BIA chose to charge the entity that actually entered the Allotment and actually caused damage to the Allotment through its harvesting activities. We cannot find fault with BIA’s decision. As the Regional Director correctly concluded, any claim that Appellant might have against other potentially liable parties for contribution is a separate matter, and not a defense to Appellant’s own liability.

Appellant also argues that BIA has a duty to inform the general public that it holds the Allotment in trust and a duty to ensure that the County accurately reflects this information in its records. Appellant has not shown how this alleged duty is relevant nor has it provided any basis for us to find error in the Regional Director’s decision. Simply put, Appellant failed to secure consent from the owners of the Allotment *and* from BIA prior to conducting harvesting operations on the Allotment. In relying on LCFSC to obtain the appropriate owner consents, Appellant assumed the risk that LCFSC may err and that, as a result, Appellant may commit trespass.<sup>11</sup>

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<sup>10</sup> Trespass is also established by damage done to the Indian forest lands. Appellant does not dispute BIA’s determination that “huge” water bars were dug, “brush was crushed and dying from being skidded over [by Appellant],” and high stumps and litter were evident. Trespass Report at 1 (AR2, Tab 3).

<sup>11</sup> To the extent Appellant argues that the County records showed only that the Luckeys owned the Allotment, we disagree. Each of the three County Assessor’s records bears obvious clues that the Luckeys were not the sole owners of the Allotment. In particular, one of the records showed that the Luckeys owned only 3.33 percent of the Allotment, thus leaving open the question of who owned the remaining 96.67 percent.

In sum, Appellant admits that it entered onto the Allotment and removed trees and vegetation as well as caused additional damage to the Allotment all without the consent of BIA and the Indian owners. None of the arguments raised by Appellant constitutes a defense to Appellant's liability under the applicable forestry statutes or regulations.

#### 4. Damages

As discussed, Appellant argues that it removed no "merchantable" timber from the Allotment. To the extent that Appellant intends by this argument to contend that BIA's damages assessment was in error, we conclude that Appellant's bare assertion fails to demonstrate error in the Regional Director's decision.

BIA found 2,444 stumps on the Allotment following Appellant's harvest. These stumps were of varying size and formed the basis for BIA's determination of the amount of cordwood removed. The Regional Director explained that "[a]lthough . . . Appellant hauled the material to the biomass plant, the Agency appraised the wood as firewood because given the species mix, size, volume, and soundness of the material removed it was the highest value product that could be marketed in the local area." Decision Document at 4 (unnumbered) (AR1, Tab 2). The Regional Director observed that the Waiver, filed by the LCSFC, estimated that over 150 cords of fuelwood would be harvested on the Allotment with a value that would not exceed \$3,000, which was consistent with the Agency's determination that 120.48 cords were removed valued at \$2,102.45. *Id.*; *see also* Waiver (AR2, Tab 7). Appellant does not dispute these specific findings by the Regional Director.

Appellant's assertion that "[n]o merchantable material was removed," and that it "removed no large healthy pines or oaks [and reaffirms that i]nvasive western juniper was removed," Reply at 1, does nothing to refute BIA's determinations of the volume of wood harvested, its characterization as fuelwood or firewood, and its value as such. Wood that is not suitable as construction-grade timber or as sawlogs may still be suitable for firewood, as LCSFC represented in the Waiver, and that it has value accordingly. And Appellant does not dispute or provide any evidence to rebut BIA's appraisal value of the wood (\$15-\$20/cord).

#### Conclusion

We conclude that the Regional Director's decision is well-supported both as to liability and damages, and Appellant has not met its burden of showing error in the Regional Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's March 9, 2009, decision.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge