



INTERIOR BOARD OF INDIAN APPEALS

Fred Koontz v. Northwest Regional Director, Bureau of Indian Affairs

55 IBIA 177 (07/17/2012)



# 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

FRED KOONTZ,	)	Order Affirming Decision
	)	
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 10-109
NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	July 17, 2012

Fred Koontz (Appellant) appeals to the Board of Indian Appeals (Board) from a May 6, 2010, decision of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which the Regional Director affirmed the January 28, 2008, decision of BIA's Taholah Agency Acting Superintendent (Superintendent) that held Appellant liable for timber trespass on Allotment No. 3041 (Allotment) on the Quinault Reservation in Washington.<sup>1</sup> The Regional Director also upheld the Superintendent's assessment of damages against Appellant in the total amount of \$25,217.94, after deducting funds received from Appellant for his purchase of the timber.

We affirm the Regional Director's decision. It is evident from Appellant's own statements and actions that he assisted and even arranged for the unauthorized salvage sale that occurred on the Allotment. Whether he *intended* to commit trespass, which he contends he did not, is irrelevant.<sup>2</sup>

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<sup>1</sup> The Allotment is described as Government Lot 4 and in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 22, Township 21 North, Range 11 West, Willamette Meridian, Grays Harbor County, Washington.

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

## Background

The Allotment consists of approximately 74.70 acres in Grays Harbor County, Washington, on the Quinault Reservation. It apparently once was owned entirely or nearly entirely by Appellant's mother, Anna Elliott Koontz (Anna). According to Anna's will,<sup>3</sup> which she executed in 1984, she acquired 5/6 of the Allotment from Kathleen Guay. *See* Will, § III. At the time Anna executed her will, title to 1/2 of the Allotment was held in trust for her while title to her remaining 1/3 interest was held in fee. *Id.*<sup>4</sup> Anna's will was approved for purposes of the distribution of her trust assets and, under the terms of the will and consequent probate order, Appellant inherited Anna's undivided 1/2 trust interest in the Allotment, subject to life estate interests of 1/3 each for Appellant's sister, Marianne Koontz (Marianne), and brother, Paul Koontz (Paul). *Id.*; *see also Estate of Koontz*, No. IP SA 230N97 (Nov. 3, 1999) (Order Approving Will and Decree of Distribution) (Administrative Record (AR) Tab 3). The remaining 1/2 undivided fee interest in the Allotment is owned by the Quinault Indian Nation (Nation), which owns a 1/6 interest, and by Marianne, who owns a 1/3 interest.

On January 3, 2007, Marianne visited BIA's Taholah Agency. According to a BIA memorandum of the visit, she met with Wayne Moulder (Moulder), BIA's Pre-Sale Forestry Supervisor, and inquired about harvesting western red cedar salvage on the Allotment. AR Tab 68 at 1 (unnumbered).<sup>5</sup> Moulder explained that half of the Allotment

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<sup>3</sup> We take official notice of documents, such as wills, in probate files of the Office of Hearings and Appeals (OHA). 43 C.F.R. § 4.24(b); *Estate of Anthony "Tony" Henry Ross*, 44 IBIA 113, 115 n.3 (2007). A copy of Anna's will, from *Estate of Anna Koontz*, No. IP SA 230N97 (OHA 1999), has been added to the file.

<sup>4</sup> It appears that when Anna acquired her interests in the Allotment, the Allotment had passed entirely out of trust and into fee. Anna conveyed 1/3 of the Allotment to the United States to hold in trust for her, which was accepted by BIA in September 1978. AR Tab 72. In addition, the probate record for Anna's trust estate shows that in April 1978 BIA accepted into trust a conveyance from Anna of a 1/6 interest in the Allotment. This document has also been added to the file. Apparently, Anna chose to retain her remaining 1/3 interest in the Allotment in fee, which apparently is now owned by Marianne.

<sup>5</sup> The document that appears at AR Tab 68 is entitled "DOCUMENTATION," and is a typed memorandum that identifies "Person(s) Visited and Station," "Person(s) Visiting," "Date and Time," and "Purpose." The memorandum then recounts various details of the meeting or interaction. Several such memoranda are included in the record, but none of them identify the author or the date the memoranda were written (the "Date and Time" that is shown on the memoranda appear to refer to the dates and times of the meetings or  
(continued...)

was held in trust, and that Marianne would need a contract or permit to harvest the salvage along with consents from her two brothers, Appellant and Paul. Moulder also explained the process by which Marianne could obtain a Free Use Permit that would authorize her to conduct her harvest. *See* 25 C.F.R. § 163.26(b). Moulder drafted a letter for Appellant and Paul to sign that would authorize her to obtain the permit.

On January 4, 2007, Appellant visited BIA and met with Moulder, the Superintendent, and Joe Fitting. Appellant came with various paperwork that had been given to Marianne the day before by BIA. According to the memorandum of this visit, Appellant “expressed unreserved approval for . . . Marianne . . . to acquire the permit and remove \$5,000.00 worth of salvage.” AR Tab 68 at 1 (unnumbered). BIA explained to Appellant that he owned 1/2 of the Allotment, which was held in trust for him, subject to Marianne’s and Paul’s life estates, and that the remaining half of the Allotment was in fee status and owned by Marianne and the Nation. Moulder explained to Appellant that “someone requesting a Free Use Permit on a multiple-owner allotment [should] acquire the [consent] of 100% of the ownership of that allotment [because BIA] will not be able to ensure funds are distributed according to ownership.” *Id.* Appellant stated that he would get Paul to sign the consent form and that he would also talk with the tribal leaders to get their consent. *Id.* Appellant signed the written consent drafted by Moulder, which states:

Dear BIA:

I understand that Marianne Koontz wishes to acquire a Free Use Permit to harvest \$5,000.00 worth of western redcedar salvage from allotment 3041, Quinault Reservation, in which I own an interest. I understand that the BIA does not collect or disburse funds arising from a free use permit. My signature on this letter is my approval for BIA to issue Marianne . . . this permit.

AR Tab 68 at 2 (unnumbered). The consent is undated. By the next day, January 5, 2007, BIA had received the same consent signed by Paul. AR Tab 67.

Marianne did not obtain a contract or permit from BIA for the salvage operation, nor did anyone else. There is no record of further contacts with BIA by anyone concerning a salvage operation on the Allotment until the harvest was discovered on the morning of

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interactions that the memoranda recount). To avoid misunderstandings concerning when such memoranda are written and by whom, this information should be set forth clearly on the face of each memorandum.

July 25, 2007, by Lillian Johnstone (Johnstone), a forestry employee of the Nation's Department of Natural Resources. On site were Gerald Ellis (Juke), who was conducting the harvest operation, and two truck drivers, each with a load of cedar. Juke was unable to produce an approved forest practice application (FPA) when asked by Johnstone, but did have a Washington State Harvesting Permit (haul permit) that was signed by Marianne, Appellant, and Juke, and approved by the State.<sup>6</sup> AR Tab 66. Johnstone contacted BIA to determine whether BIA had approved the harvest, and was told it had not. Johnstone issued a stop work order and the drivers were directed to dump the loaded cedar on the Allotment. She also called the Nation's Natural Resource Officer, Dan Brown (Brown), who came out to the Allotment to investigate.

When Johnstone returned to her office around noon, Juke and Appellant were waiting. Appellant asked her to get the FPA approved on behalf of Marianne.<sup>7</sup> She explained to him that the matter was now under investigation. Juke and Appellant then met with the Superintendent, where they reviewed the ownership information for the Allotment. According to a memorandum memorializing the meeting, Appellant insisted that he understood that the entire Allotment was owned in fee. AR Tab 63.

Appellant also met twice with Moulder on the afternoon of July 25 and urged Moulder to approve the FPA. Moulder explained that while it might be possible to issue a permit, he "would be taking direction from [the Superintendent] and Greg [Masten]." AR Tab 64. Moulder recorded in his notes that Appellant "stated that he had been warned that the wood *he* had flown to the road was at risk for being stolen and . . . [BIA] had stopped

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<sup>6</sup> The capacity in which Appellant signed the haul permit is unclear (e.g., as an owner of the property, as one authorizing Juke to conduct the salvage operation, or as an operator himself), and the copy that is in the record appears to have a line drawn through his name as if to delete his signature from the permit.

<sup>7</sup> Apparently, Marianne may have signed an FPA but it had not been approved by BIA. *See* AR Tab 63 ("I believe it was [Appellant's] sister's signature on the FPA on the table [in the Superintendent's office]"). *See also* Investigative Report at 5 (AR Tab 18) (Juke produced an FPA "that ha[d] not been filled out fully"). The record does not contain a copy of the FPA, nor do the parties explain how, if at all, an FPA is relevant to this matter. *See Strom v. Northwest Regional Director*, 44 IBIA 153, 158 n.9 (2007) (the Board observed that the parties did not explain the relevance of "FPA"). Although there is no mention of FPAs in BIA's regulations, it may be a locally known term for a BIA permit or contract, which would make facts concerning an FPA relevant to these proceedings.

*him* from removing the wood . . . .” *Id.* (Emphasis added).<sup>8</sup> Appellant continued to express concern to Moulder about the potential theft of the salvage cedar that had been harvested and flown to the road.

On July 28, 2007, Appellant wrote out a request for a free use permit for the Allotment. AR Tab 53. Although the free use permit apparently was not approved, BIA did approve a timber contract on August 10, 2007, with Juke for the salvage cedar that he had cut and gathered on the Allotment. *See* Timber Contract at 4 (AR Tab 38) (Contract is limited to “[a]ll western redcedar blocks and roundwood *previously cut and yarded to the road*. No cutting or yarding of any forest products is authorized under this contract.” Emphasis added.). The purchase price was \$900.00 per cord. To secure the contract, Appellant paid an advance deposit of \$32,000.00 on Juke’s behalf. Appellant explained that the deposit was required by BIA as a condition of the contract, that Juke did not have the funds to advance, and that Juke told Appellant that the funds would be refunded “in approximately 90 days minus a 6 percent administrative handling charge.” *See* “Synopsis of Events Nar[r]ative of Fred Koontz,” ¶ 7 (AR Tab 18). A total of 32.46 cords of wood were removed from the Allotment.

Meanwhile, Brown continued with his investigation of the unauthorized salvage operation.<sup>9</sup> He obtained a written statement from Juke, who stated that he was asked by Appellant and Marianne “to salvage the[ir] Allotment . . . .” AR Tab 59. Marianne provided a written statement that she “had no idea that any of the [A]llotment remained in trust status” and that she had gotten her brothers to “sign over their int[e]rest late fall of 2006 so I could harvest salvage by an Indian (Quinault) operator.” AR Tab 54. She further asserted that she got “all [the] necessary paperwork that [she] knew of or had been informed [w]as necessary by [the] County.” *Id.* Appellant asserted that he understood that the Allotment was entirely held in fee title by Marianne and he had “no idea” any part of the Allotment remained in trust. AR Tab 73. He further stated that he and his brother “signed over our interests (any and all) to Marianne before her having [the Allotment] salvaged.” *Id.* According to both Appellant and Marianne, Marianne received \$5,000 from Juke for the cedar salvage. Investigative Report at 3 (AR Tab 30); letter from Marianne to Dept. of Int., Jan. 30, 2008, at 2 (AR Tab 18).

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<sup>8</sup> Once cut and ready for hauling, the salvage apparently was loaded into “slings” and airlifted from the salvage site in the woods to the road to be loaded onto trucks for the final trip to the mill. According to the trespass investigation report, Olympic Air flew 246 slings out of the Allotment.

<sup>9</sup> The Nation apparently has a contract with BIA pursuant to which the Nation assumed responsibility for investigating timber trespasses on trust lands within the Nation’s reservation. *See* Letter from Appellant to Regional Director, June 20, 2008 (AR Tab 18).

On August 1, 2007, and based on Brown's investigation to date, the Superintendent issued identical notices of trespass and notices of seizure to Appellant,<sup>10</sup> Juke, Marianne, Stanley Ellis,<sup>11</sup> and Tom McBride.<sup>12</sup> The notices informed each person that they were found to have committed timber trespass on the Allotment, and that approximately 25 cords of western red cedar blocks and an undetermined volume of round western red cedar logs had been seized by BIA. The parties were informed that a demand letter would be sent at a later date after the volume and value of the seized forest products had been determined. Appeal rights appeared at the end of the seizure notices.<sup>13</sup> Appellant did not appeal.

In his final investigative report, dated November 28, 2007, Brown concluded that "[Juke] was working with [Appellant] on th[e A]llotment. [Appellant] was the one who took charge of the incident. The two individuals [who] are at fault [for the trespass] would be [Juke] and [Appellant]." AR Tab 30. Brown assessed damages in the total amount of \$54,479.02, including enforcement costs and interest. *Id.*

On January 28, 2008, the Superintendent notified Appellant of the final damages assessment against him, which came to \$54,431.94, including enforcement costs and interest. AR Tab 23.<sup>14</sup> From this amount, the Superintendent subtracted \$29,214.00, which was the final amount realized from the sale of the salvage to Juke,<sup>15</sup> and demanded payment from Appellant in the amount of \$25,217.94.

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<sup>10</sup> The record does not contain the trespass notice or the seizure notice sent to Appellant. The Regional Director attached the trespass notice to his Answer Brief, *see* App. A at 1, but did not attach the seizure notice. However, Appellant concedes that he received the seizure notice. *See* Appeal to Regional Director, July 3, 2009, at 1-2 (AR Tab 16).

<sup>11</sup> Stanley is Juke's son and worked as a cutter at the site.

<sup>12</sup> Tom was the owner of the mill to which the wood was being hauled. He told Brown that he "put in \$15,600 [for the salvage project]." Investigation Report at 3 (AR Tab 18).

<sup>13</sup> The trespass notices did not include separate appeal rights, but advised the recipients to contact one of the Nation's employees if they "ha[d] anything to add to the[] facts" of the trespass investigation. Notice of Trespass to Appellant, Aug. 1, 2007 (BIA's Answer Brief, App. A).

<sup>14</sup> The difference between the damages calculated by Brown and the damages charged against Appellant by the Regional Director resulted from the method of calculating the interest.

<sup>15</sup> In or about December 2007, the difference between the advance deposit of \$32,000.00 and the actual sale of \$29,214.00 was refunded to Appellant. AR Tab 21 at 2 (unnumbered).

Appellant sought reconsideration from the Superintendent, which was forwarded to the Regional Director to be considered as an appeal. He asserted that his role in the trespass was “limited” and that “the fines imposed were [un]fair.” Reconsideration Request, Feb. 4, 2008, at 1 (AR Tab 22). With respect to liability, Appellant argued that he did not realize that the land was partially held in trust, that Juke was to blame for not ensuring that “all permits were in place,” and that BIA was at fault for not adhering to “established policies and procedures . . . to prevent [the trespass from occurring].” *Id.* Appellant also asserted that he was not “an operator” on the salvage operation, that he did not even know where the Allotment was located and had never set foot on it, and that he “only became involved in this incident after it was alleged [that a] timber trespass on [the A]llotment . . . had occurred.” *Id.* at 3. Appellant admits that he wanted Juke to conduct cedar salvage on the Allotment. *Id.* at 5 (“Did my sister *and I* want [Juke] to conduct cedar salvage on *our* land? Yes *we* did.” Emphasis added.) Appellant emphatically denies that he willfully intended to commit or instigate the timber trespass, but he “understand[s] that [he] erred administratively.” *Id.* at 6. Aside from challenging liability for the trespass, Appellant did not state that the amount or calculation of BIA’s payment demand was erroneous, only unfair. *Id.* at 1.<sup>16</sup>

On June 20, 2008, Appellant wrote to the Regional Director to urge favorable action on his appeal. AR Tab 18. He asserted that he and Marianne would have obtained a free use permit, if they had known ahead of time that such a permit was required. He also reiterated the arguments made in his initial appeal.

Sometime after his June 20 letter, Appellant retained counsel who filed a third letter on his behalf with the Regional Director. Appellant argued that “the Superintendent’s decision was . . . not supported by substantial evidence.” Letter from Dennis G. Chappabitty, Esq., to Regional Director, July 3, 2008, at 1, 8-9 (AR Tab 16). In particular, Appellant argues that there is no evidence to support the Superintendent’s determination that Appellant was an “operator” or acted with any “intent” to commit trespass. *Id.* at 8-9. Again, Appellant denied that he was an operator or intended trespass, and reiterated that there was confusion over the status of title to the Allotment.

On May 6, 2010, the Regional Director responded to Appellant’s appeal by affirming the Superintendent’s decision to hold Appellant liable for trespass and to assess

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<sup>16</sup> Appellant also asserted that he should not be barred from appealing the demand letter based on his failure to appeal from the August 1 seizure notice because Brown’s investigation report was not completed until nearly 3 months later.

damages in the amount of \$25,217.94.<sup>17</sup> The Regional Director first accepted Appellant's appeal as timely filed. The Regional Director then rejected Appellant's assertions that he did not know the land was held in trust and, therefore, never intended to violate any Federal laws concerning trust property. The Regional Director explained that Appellant came into BIA's Taholah Agency 6 months before the trespass occurred, and the proposed harvest was discussed. BIA explained to him at that time that because half of the Allotment was held in trust for Appellant, a permit was required from BIA to harvest the salvage cedar, and Appellant signed a document consenting to a free use permit. Therefore, the Regional Director concluded that Appellant knew that he owned an interest in the Allotment and that his interest was held in trust. And even if Appellant were confused about the title, the Regional Director explained that intent was not required for liability for trespass under the regulations.

Next, the Regional Director concluded that the evidence showed that Appellant was "an operator or manager" of the salvage harvest because he paid the advance deposit for the harvest to proceed, he was the one who responded to the trespass issues with BIA, and he assumed financial responsibility for the operation. The Regional Director explained that a haul permit authorizes the transport of forest products but did not and could not authorize timber harvest on the Allotment. Therefore, the Regional Director affirmed the Superintendent's decision to hold Appellant liable for trespass and damages on the Allotment.<sup>18</sup>

This appeal followed. Appellant submitted both an opening and a reply brief; the Regional Director submitted an answer brief. No other briefs were received.

### **Regulatory Scheme**

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). Included in NIFRMA are objectives set by Congress for BIA's management of forest resources, such as plans for the health and growth of Indian forest land, development

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<sup>17</sup> The Regional Director's failure to respond sooner to Appellant's appeal became the subject of a separate appeal to the Board under 25 C.F.R. § 2.8, which is an action-prompting mechanism to compel a BIA official to respond to a request for action. The Board dismissed the appeal when the Regional Director issued his May 6 decision. *Koontz v. Northwest Regional Director*, 51 IBIA 269 (2010).

<sup>18</sup> The Regional Director stated that the Superintendent also delivered a demand letter for damages to Juke.

of forest management plans in conjunction with the tribes, application of sound silvicultural and economic principles to various activities affecting forests, promulgation of regulations to promote healthy forests, and related objectives. *Id.* § 3104. To defray the costs of BIA's management of Indian forest lands, Congress directed the Secretary of the Interior (Secretary) to "withhold a reasonable deduction from the gross proceeds of sales of forest products harvested from Indian forest land." *Id.* § 3105(a). Unless the appropriate tribe consents to the higher amount, the amount to be collected shall be ten percent of gross proceeds from the timber sale or the percentage of gross proceeds collected on the date of enactment of NIFRMA, whichever is less. *Id.* § 3105(b).

Congress also required the promulgation of regulations to "establish civil penalties for the commission of forest trespass." *Id.* § 3106(a)(1). And Congress defined "forest trespass" as "the act of illegally removing forest products from, or illegally damaging forest products on, forest lands." *Id.* § 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, except when authorized by law and applicable federal or tribal regulations").<sup>19</sup> The Secretary promulgated the required regulations, 25 C.F.R. Part 163, including one governing forest trespass, *id.* § 163.29.

In a nutshell, trespass is established by the *unauthorized* taking of forest products from or damage to forest products on trust forest land. *Id.* § 163.1 (definition of "trespass"). A taking that is permissible is one that is "authorized by law and applicable [F]ederal or tribal regulations." *Id.* And where, as here, the wood is sold, the regulations require a contract or permit approved by BIA. *Id.* §§ 163.20, 163.26. Indeed, even where a trust allotment is owned entirely by one individual, that individual must also secure approval from BIA for any harvest on the allotment if the forest products will be sold. *Id.* § 163.26(d).<sup>20</sup> The trespass need not be willful or intentional. *Id.* § 163.29(a)(3)(i) ("Proof of Indian ownership of the premises and commission of the acts by the trespasser are prima facie evidence sufficient to support liability for treble damages, with no requirement to show willfulness or intent.").

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<sup>19</sup> "Trespass" also includes 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.

<sup>20</sup> Where forest products are intended for personal use only, landowners must still obtain approval from BIA for harvesting them, but a permit or contract is not required. 25 C.F.R. § 163.27 (Free-Use Harvesting Without Permits); *cf.* § 163.26(b) (free use harvesting permits for sales under \$5,000.00).

## Discussion

We affirm the Regional Director's decision. We agree that the evidence substantially supports the Regional Director's determination that Appellant did commit forest trespass on the Allotment and, thus, is liable for damages.

### 1. Standard of Review

Appellant bears the burden of showing error in the Regional Director's decision. *Tubit Enterprises, Inc. v. Pacific Regional Director*, 53 IBIA 183, 189 (2011). However, Appellant's burden is not met with bare assertions or simple disagreement with the decision. *Id.* Thus, Appellant's burden on appeal is to show that the Regional Director committed a specific error of law, failed to consider evidence in the record, or otherwise abused his discretion.

We review *de novo* the sufficiency of the evidence and legal conclusions. *Id.* We will uphold the decision if it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Thompson v. Acting Southern Plains Regional Director*, 54 IBIA 125, 130 (2011). Moreover, the Board's role is limited to reviewing "those issues that were before . . . the BIA official on review." 43 C.F.R. § 4.318. Therefore, we ordinarily will not consider arguments raised for the first time on appeal. *Strom*, 44 IBIA at 169-70 (2007).

### 2. The Evidence Supports the Finding of Timber Trespass Against Appellant

We conclude that the Regional Director's decision is amply supported by Appellant's own written statements as well as by those oral statements he made to others that he does not dispute. And it matters not that Appellant's statements were made after the discovery of the timber trespass.

As set forth *supra*, a trespass occurs when forest products, including salvage timber, *see* 25 C.F.R. § 163.1,<sup>21</sup> are removed from trust lands without authority from BIA. And landowners may be held liable even where they have not personally conducted the harvest but have worked with others to conduct the harvest. *See, e.g., Lummi Nation v. Northwest Regional Director*, 44 IBIA 47, 63 (2007); *Gorden v. Acting Midwest Regional Director*, 41 IBIA 195, 201 (2005). As we previously have explained,

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<sup>21</sup> The definition of "forest products" found in § 163.1 includes "marketable products extracted from Indian forests," such as timber.

It is well-established that one who commands, instigates, encourages, advises, countenances, cooperates in, aids, or abets the commission of a trespass is liable as a co-trespasser with the person actually committing the trespass, and is liable as a principal to the same extent and in the same manner as if he had performed the wrongful act himself.

*Lummi Nation*, 44 IBIA at 63 (citations omitted).

Despite Appellant's protestations to the contrary, we agree with the Regional Director that the record shows that Appellant was actively engaged in the salvage harvest on the Allotment, whether for his sister's benefit or for both of their benefits. First, the day after Marianne went to BIA for information in January 2007, Appellant visited BIA where he was told that he owned half of the Allotment subject to one-third life estates in that one-half interest for his sister and his brother (i.e., Marianne and Paul each hold a one-sixth undivided life estate interest in the Allotment as a whole), that Appellant's interest is held in trust for him, and that the other half of the Allotment is owned in fee by Marianne and by the Nation.

BIA also told Appellant that a permit was required for Marianne to harvest the salvage cedar, that his brother's consent and the Nation's consent were required, and Appellant then signed a statement consenting to a free use permit for Marianne.<sup>22</sup> Appellant asserted that he would have his brother also sign the consent and he expressed confidence that he could also obtain the Nation's consent. Thus, Appellant was aware that his sister was interested in arranging a salvage harvest, and he actively assisted that effort by assuming responsibility for obtaining additional consents from third parties.<sup>23</sup>

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<sup>22</sup> Consent to a harvest operation on trust land by a co-owner, without more, certainly does not give rise to liability for timber trespass. Here, the facts show that Appellant's participation in planning and assisting the harvest operation went beyond merely granting consent as a co-owner.

<sup>23</sup> Initially, in his opening brief, Appellant vehemently denied that he ever spoke with BIA in January 2007, and produced his credit card receipt to show that he was out-of-state for most of the month. After BIA produced pages from its sign-in visitor's log bearing Appellant's signature on January 4, 2007, see Answer Brief, App. B at 3, Appellant appears to concede that he did, indeed, visit BIA on that date, *see* Reply Brief at 2 ("The January 4, 2007 meeting occurred between [Appellant] and BIA staff where [Appellant] was there to help his sister acquire the Free Use Permit"). January 4 coincided with the brief time period reflected on Appellant's credit card receipt when he was in the vicinity of the Taholah Agency.

Second, Juke told the investigating official (Brown) that both Appellant and Marianne asked him to harvest the cedar salvage on the Allotment. This statement is admitted by Appellant in his appeal to the Regional Director: “Did my sister *and I* want [Juke] to conduct cedar salvage on *our* land? Yes *we* did.” Reconsideration Request, Feb. 4, 2008, at 5 (AR Tab 22) (Emphasis added). And in Appellant’s reply brief to the Board, he maintains that if BIA had provided him and Marianne with a checklist that identified their responsibilities prior to engaging in the harvest operation, “then there would be no doubt *they* would risk proceeding with the cedar salvage operation [without appropriate permits] . . . .” Reply Brief at 3 (emphasis added). These candid admissions confirm Appellant’s participation in the harvest operation.

Third, Appellant signed the haul permit in or about May 2007. Although the capacity in which he signed the permit is unclear, i.e., whether as a landowner or as one engaged in the harvest, and while it is also unclear whether a line was drawn through his signature on the permit, his signature again shows his participation in the harvest operation.

Fourth, Appellant was the landowner who immediately went to BIA—within a couple of hours of the stop work order—to find out why BIA stopped *him* from removing the wood from the Allotment, wood that *he* had had flown from the harvest site to the road.<sup>24</sup> He appeared at BIA with Juke, and met with several BIA officials and with the Nation’s forestry personnel, where his efforts were directed to getting the harvest restarted. He asked that any necessary permits be approved post facto, and, ultimately, he paid the advance deposit on Juke’s behalf to enable Juke to complete the work he had started.<sup>25</sup> If, as Appellant asserts, Marianne had already received payment for the salvage cedar and if, as Appellant further asserts, Juke was responsible for obtaining all necessary permits for conducting the harvest operation, it is unclear that any purpose would be served by

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<sup>24</sup> Of course, Appellant did not personally intend to remove the wood from the Allotment nor did he personally fly the wood from the harvest site. But according to Moulder, Appellant characterized his participation in the harvest in these terms, and Appellant did not deny these assertions.

<sup>25</sup> Since the harvest had already been started and cedar logs had been moved to the road for hauling to the mill, BIA is authorized by regulations to seek a buyer for the wood rather than let the wood fall to waste. 25 C.F.R. § 163.29(e). The record is unclear in explaining how Juke came to be the buyer, but BIA did enter into a contract with him to complete the harvest. The contract required payment in advance of \$32,000.00, which Appellant paid on Juke’s behalf, subject to adjustment after the wood was scaled. *See id.* § 163.23(a).

Appellant paying the advance deposit on Juke's behalf rather than permit the wood to be auctioned or sold to another buyer who could pay the advance deposit.<sup>26</sup>

We find the above to be ample support for a finding of liability for timber trespass. And we are not dissuaded from our conclusion by Appellant's arguments, to which we now turn.

Appellant disputes the Regional Director's determination that Appellant "took command as an operator or manager of the [harvest] operation." Regional Director's Decision at 3. While we agree with Appellant that the evidence does not show that he was an operator or manager of the operation in the sense of being on the Allotment and directing the cutting and gathering, we do not read these terms so narrowly. An individual who arranges for the harvest operation to be done or otherwise serves as the primary owner-contact for the harvest may be liable for trespass, and in general terms might be described as an "operator" or "manager." And, as demonstrated above, the record is replete with statements made by Appellant himself that amply support BIA's determination that Appellant was significantly and actively involved with arranging for the salvage operation. Therefore, we are not troubled by the label of "operator" or "manager" that the Regional Director used to characterize Appellant's role.

Appellant also protests that he did nothing more than sign documents to authorize a salvage harvest to proceed. We disagree. Appellant personally and repeatedly admitted—in his own written statements—that he was a proponent of and participant in the salvage sale. He admitted that *he* wanted Juke to conduct the harvest, that *he* would have applied for a permit if he had known one was needed, that *he* would not have risked proceeding without a permit if BIA had only given him a checklist, that *he* understands that he has erred administratively in not obtaining a permit, and that *he* played a "limited" role in the harvest operation. Appellant made these statements in support of his appeal, first to the Regional Director, then to the Board. We cannot ignore Appellant's unsolicited admissions of his participation, and the law does not distinguish between "full" and "limited" roles in determining culpability for trespass.

Thus, we conclude that these efforts are not the efforts of a landowner who has merely consented to a harvest that will be arranged by a life estate holder but show, at a minimum, that Appellant actively assisted his sister in getting the salvage harvested and, at

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<sup>26</sup> And there is no suggestion in any of Appellant's several written submissions or in the record that he sought confirmation from BIA concerning Juke's assertion to Appellant that Appellant would receive a refund of the deposit, less BIA's administrative fee, at the end of 90 days.

most, that both of them were jointly engaged in arranging and authorizing the salvage harvest. And it does not matter that Appellant and his siblings consented to the harvest: BIA is charged with managing forest resources on trust lands. Depending on the scope of any proposed harvest, BIA ensures, e.g., that owners of trust land receive fair market rate for the harvest; that consents are obtained from a majority of the beneficial owners; that reforestation and other conservation measures are put in place, as necessary; that the harvester confines his operation to the approved area; that any roads or other means of removing timber from the trust land are properly permitted and arranged with a minimum of environmental damage; and that appropriate post-harvest site cleanup occurs. In addition, the law entitles BIA to be paid a “forest management deduction” out of the sale of forest products from trust lands where the sale is \$5,001.00 or more, and these funds are used to offset BIA’s costs of providing services for Indian forest lands. 25 U.S.C. § 3105; 25 C.F.R. § 163.25. For these reasons, it is not enough that the landowners may consent among themselves to a harvest operation on trust land,<sup>27</sup> doing so without obtaining the proper permit from BIA interferes with BIA’s ability to discharge its responsibilities to trust lands and their owners, and deprives the government of income that is used to defray the costs of the forestry services it provides.<sup>28</sup>

As he did before the Regional Director, Appellant continues to maintain that he believed title was held entirely by his sister in fee. If Appellant continued to believe that was the case despite the information he obtained from BIA, then he proceeded at his own risk. To the extent that Appellant argues that he gave his sister his interest in the Allotment, this argument is raised for the first time on appeal, for which reason we need not consider it. Moreover, even if we were inclined to consider it, there is no document in the record of any conveyance (or attempted conveyance) and, even assuming the truth of Appellant’s assertion, it is simply irrelevant to a charge of trespass on trust land.

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<sup>27</sup> And it is not apparent from the record that all of the landowners consented to the harvest on the Allotment: The Nation owns a 1/6 interest in fee, and the record is silent on whether the Nation gave its consent.

<sup>28</sup> Forest management deductions are not applied “where the total consideration furnished under a contract, permit or other document for the sale of forest products is less than \$5,001.” 25 C.F.R. § 163.25(c). Here, the stumpage value paid was \$17,788.08 (\$548/cord multiplied by 32.46 cords). Even had the lower stumpage rate of \$295 been paid, *see* Investigative Report at 6, the stumpage value would have been \$9,575.70 (\$295/cord multiplied by 32.46 cords). Consequently, the stumpage value of the harvest on the Allotment ultimately exceeded the amount for a free use permit (i.e., a permit for which no forest management deductions would be due), *see* 25 C.F.R. § 163.26(b), and therefore a forest management deduction would have been due to BIA.

Appellant also continues to argue that BIA should have provided a checklist for what was needed for a permissible timber harvest on the Allotment and, therefore BIA is at fault for the trespass. But there is no such requirement on BIA's part. He was told that a permit was necessary, and Appellant could have requested an application, he could have written down the information BIA gave him, he could have requested a copy of his written consent to a permit for Marianne, and he could have reviewed BIA's forestry regulations himself. If Appellant neglected to do any one of these things, he cannot lay that fault at BIA's door.

Finally, Appellant also raises a number of other arguments for the first time on appeal. He argues that the Nation's investigator should have questioned Olympic Air and McBride to discover who retained their services; he argues that Juke was to obtain all necessary permits; he argues that nothing in the record prior to the date the trespass was discovered contains any evidence of his involvement with the harvest operation; and he argues that the post-trespass award of the timber contract to Juke should exonerate Appellant of liability for damages. The time to have raised these arguments was during Appellant's appeal to the Regional Director, and we see no reason to depart from our rule of declining to consider arguments that were not first presented to the Regional Director for his consideration before raising them on appeal before the Board.

Even if we were to accept that Appellant may have intended only to help his sister receive some income from land in which she owned a significant stake, it remained incumbent upon Appellant, when he assumed an active role in assisting Marianne with the salvage harvest, to ensure that all applicable laws were followed. Whether intentionally or not, Appellant disregarded information given to him by BIA and he proceeded to arrange the salvage harvest in violation of Federal law. He is therefore liable for trespass, and we affirm the decision of the Regional Director.

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 May 6, 2010, decision of the Regional Director.

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