

J. W. WEAVER

IBLA 92-243

Decided August 21, 1992

Appeal from a decision of the Area Manager, White River Resource Area, Colorado, Bureau of Land Management, ordering payment of damages for vegetative resource trespass. CO-010-7-264.

Motion to dismiss denied; decision affirmed in part, set aside in part, vacated in part and remanded.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons

To constitute an adequate SOR, an appellant's document must affirmatively point out error in the appealed BLM decision. If the SOR is deemed inadequate, the appeal will be subject to summary dismissal.

2. Trespass: Measure of Damages

When the vegetative material severed from the land in trespass is so far from the area permitted under a vegetative material sale contract that the act is reasonably deemed to be a conscious performance of a prohibited act or indifference to or reckless disregard of the law, BLM may assess damages for a willful trespass, pursuant to 43 CFR 9239.1-3(a).

3. Trespass: Measure of Damages

Under 43 CFR 9239.1-3, when applicable State laws do not impose a higher penalty, the trespasser may be assessed three times the value of the timber or other vegetative material severed or removed. By this imposition of treble damages the trespasser is required to: (1) reimburse the United States for the value of the lost timber or vegetative resource, and (2) pay the penalty assessed under 43 CFR 9239.1-3 in an additional amount equal to two times that value. The value to be used for this determination is the value of the timber or vegetative material at the time of the trespass, i.e., when severed or removed from the public lands.

APPEARANCES: Kevin R. O'Reilly, Esq., Glenwood Springs, Colorado, for appellant; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

In a January 13, 1992, decision, the Area Manager, White River Resource Area, Colorado, Bureau of Land Management (BLM), directed J. W. Weaver (Weaver) to pay \$7,782.29 in trespass damages for the unauthorized cutting of pinyon/juniper trees from public land in the SE $\frac{1}{4}$ sec. 31, T. 1 N., R. 98 W., sixth principal meridian, Rio Blanco County, Colorado. BLM found that Weaver had cut firewood outside the area permitted to him for woodcutting pursuant to a January 7, 1991, "Contract for the Cash Sale of Vegetative Resources" (Form 5450-1 (June 1989)). 1/ The damages assessed by BLM were based on the value of the wood cut (\$6,000) 2/ and administrative costs BLM incurred as a result of the trespass (\$1,782.29). 3/

On February 13, 1992, Weaver filed notice of appeal from the January 1992 decision. However, no other document was filed with either BLM or

1/ Weaver's contract was suspended on Oct. 16, 1991, because of the trespass, his use of vehicles off existing roads and trails and his camping on the public lands in violation of contract stipulations. On appeal, he challenges all of these alleged violations. However, the Area Manager's January 1992 decision did not assess any damages for either off road use or camping, and these violations were not cited by BLM in its Oct. 9, 1991, Trespass Notice, which cited only "[s]everance and removal of pinyon and juniper firewood." The assessment of trespass damages is the sole adverse consequence to Weaver of the January 1992 decision, and we are not concerned with the other alleged violations.

2/ There is no evidence that the trees had a higher value as timber. This amount is three times the sales price of 20 cords of firewood at \$100 per cord (Bill for Collection, dated Jan. 13, 1992). The customarily quoted price for firewood is the price of firewood delivered and off-loaded at the point of sale, usually the home of the purchaser. In this case, the amount used by BLM appears to be the sales price of firewood delivered to a residential purchaser in Meeker, Colorado. This measure for willful trespass was used by the Department for a number of years before it promulgated 43 CFR 9239.1-3. See Instructions, 49 L.D. 484, 485 (1923); Rosser Tibbets, 2 L.D. 839, 839-40 (1884). Damages for willful trespass assessed on this basis include the extra value that the trespasser's efforts have afforded the timber or other vegetative material. See Grays Harbor County v. Bay City Lumber Co., 289 P.2d 975, 978 (Wash. 1955); Annotation, Measure of Damages for Destruction of or Injury to Trees and Shrubbery, 161 A.L.R. 549, 572 (1946).

3/ These costs constituted the total value of the time spent by the BLM employee who discovered the trespass (1.5 hours) and the time spent by 10 BLM employees hauling the wood back to the BLM office in Meeker, Colorado, and stacking it (121.5 man-hours).

the Board during the following 30-day period. On April 20, 1992, BLM moved to dismiss Weaver's appeal for failure to file a statement of reasons (SOR) for his appeal. Weaver filed his opposition to that motion on May 5, 1992.

Under 43 CFR 4.412(a) an appellant must file an SOR within 30 days from the date the notice of appeal was filed with BLM, if the SOR is not a part of the notice of appeal. Therefore, if Weaver's notice of appeal did not include an SOR, he would have been required to file an SOR on or before March 16, 1992. No subsequent SOR was filed by Weaver, and we must look to Weaver's notice of appeal for an SOR. His stated reason for appealing the Area Manager's January 1992 decision that he had cut vegetative material in trespass is:

The Defendant/Respondent, J. W. Weaver, totally denies any violations of his permit [4/] and he denies the analysis of the BLM which has resulted in their demand for payment of \$7,782.29. Mr. Weaver totally denies ever severing any wood out[side] of his permit area or allowing any of his agents to sever wood outside of his permit area.

[1] To constitute an adequate SOR, an appellant's document must affirmatively point out error in the BLM decision from which he appeals. 5/ The failure to file an adequate SOR is treated the same as the failure to file an SOR. See Burton A. & Mary H. McGregor, 119 IBLA 95, 98 (1991). When an SOR is deemed inadequate the appeal will be subject to summary dismissal. See 43 CFR 4.402 and 4.412(c). The Board is not required to dismiss an appeal in such circumstances, but we will not hesitate to do so when there is no basis for review and the appellant offers no explanation for the lapse.

We find that Weaver filed an adequate SOR, but are constrained to acknowledge that it is barely adequate. For the most part, his SOR amounts to little more than "[c]onclusory allegations of error," which will not suffice to affirmatively demonstrate error. United States v. De Fisher,

4/ It is apparent that Weaver incorrectly believes that he was charged because the unauthorized cutting of firewood was a violation of his permit. This is not the case. Under Departmental regulations, cutting the trees was an act of trespass. See 43 CFR 9239.0-7 and 9239.1-1(b). The absence of any contractual authorization renders the cutting an act of trespass, as distinguished from a violation of the contract. Compare 43 CFR 9239.1-1(b) with 43 CFR 9239.1-1(c); see Forest Management, Inc., A-31045 (Feb. 6, 1970), at 17-18, 19. We also note that section 10 of the January 1991 contract warned Weaver that he "[would] be liable for damages under applicable law" if he cut any Government materials, other than the vegetative resources sold under this contract.

5/ The cases supporting that proposition are legion. See, e.g., In re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991); Andre C. Capella, 94 IBLA 181 (1986); United States v. De Fisher, 92 IBLA 226, 227 (1986).

supra at 227. Nevertheless, Weaver offered two alternative reasons for challenging BLM's finding when asserting that neither he nor his agents severed wood "outside of his permit area." He is contending either that the wood was cut within that area or that, even though it was cut outside the permit area, it was not cut by Weaver or his agents. Thus, we deem it appropriate to deny BLM's motion to dismiss.

The first reason for appeal had been initially presented to BLM at an October 10, 1991, meeting when Weaver asserted that his January 1991 contract should have allowed, or perhaps did allow, cutting anywhere in the Piceance Basin. 6/ See Memorandum to the Area Manager from Fowler. This suggested that Weaver's cutting had occurred within a broadly expanded permit area. The Area Manager refuted Weaver's assertion, noting that the permit area was clearly spelled out in the January 1991 contract, i.e., "'Friday the 13 Fire including Darold Nays old sale. Wagonroad Ridge Firewood cutting area (as posted),'" and that the trees were cut "eight miles from the closest area authorized" (Decision at 2). Weaver has presented no evidence indicating that he was in fact authorized to cut firewood in that distant area.

Deviating from the posture taken at the October 1991 meeting, Weaver now contends that the firewood was not cut by him or his agents. See Response to the Summary Dismissal, dated Apr. 30, 1992. The record contains sufficient circumstantial evidence to establish that Weaver or his agents engaged in the unauthorized cutting. On September 27, 1991, Weaver attempted to contact Fowler, a BLM forester. The memorandum of that call states: "Needs to talk with you about a wood permit & building a road? to get into where he needs to." On October 2, 1991, during a routine inspection Fowler discovered a "new road/trail" had been constructed from an existing trail:

[I]t was found that trees had been cut down or limbed to improve/create the road. At the end of the road a trailer home was found. At the trailer an envelope was found which was addressed to J.W. Weaver. * * * During the period of walking back to the truck, 75 piles of wood were counted, each pile being approximately one tree.

(Memorandum to the Board from Area Manager, dated Feb. 24, 1992, at 1).

6/ In responding to BLM's trespass allegations, Weaver is reported to have said "[t]hat he did not feel he was cutting outside of his cutting area as on a previous permit he had been issued a permit which stated the cutting area as Wagonroad Ridge/Piceance Basin. As this permit had authorized cutting in the Piceance Basin the new permit should also allow cutting throughout the basin."

(Memorandum to the Area Manager from Robert J. Fowler (emphasis added)).

[2] The applicable regulation provides that

severance, injury, or removal of timber or other vegetative resources [7/] or mineral material from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable to damages to the United States, and will be subject to prosecution for such unlawful acts.

43 CFR 9239.0-7; see also 43 CFR 9239.1-1(b). Cutting trees constitutes the trespass with which Weaver is charged. The inescapable conclusion is that either Weaver or his agents felled the trees to provide access to his trailer home. 8/ He has tendered no evidence to the contrary, and implicitly admitted to constructing the road, stating that "he had followed an existing trail" (Memorandum to the Area Manager from Fowler). See David Robinson, 36 IBLA 386, 387-89 (1978).

In its October 1991 trespass notice, BLM charged Weaver with "[s]everance and removal of pinion and juniper firewood." The vegetative resource Weaver cut (severed from the public lands) was never removed from the site. However, there is no regulatory distinction for instances when a vegetative resource is severed but not removed. Severance of a vegetative resource justifies imposition of the full amount of trespass damages. See 43 CFR 9239.0-7 and 9239.1-1(b). Severance also deprives the United States of the benefit of the vegetative resource, and the United States may recoup the fair market value of the vegetative resource and assess a penalty in an amount equal to twice that value.

We conclude that the evidence clearly supports BLM's finding that Weaver committed an act of trespass by cutting trees outside his permit area without authorization. See Forest Management, Inc., supra at 18-20, and Ray Cole, A-29526 (Oct. 21, 1963) (timber sale purchaser cut trees without proper authorization). We also conclude that it was proper for the Area Manager to assess trespass damages. See 43 CFR 9239.1-1(b). In this respect, we affirm the Area Manager's January 1992 decision.

The exact nature of Weaver's trespass has direct bearing on the outcome of this case because the Department recognizes two forms of trespass - "nonwillful" and "willful." Both terms are defined in the regulations. The term "willful" is defined at 43 CFR 5400.0-5 as "a knowing act or omission

7/ The difference between timber and other vegetative resources is found in the means of measurement. A vegetative resource is "vegetative material that is not normally measured in board feet, but can be sold or removed from public lands by means of the issuance of a contract or permit." 43 CFR 5400.0-5.

8/ The trailer home was removed a day or two after Weaver was informed of the trespass. See Memorandum to the Board from the Area Manager, dated Feb. 24, 1992, at 2.

that constitutes the voluntary or conscious performance of a prohibited act or indifference to or reckless disregard for the law." In turn, "nonwillful" is defined in the same code section as "an action which is inadvertent, mitigated in character by the belief that the conduct is reasonable or legal."

The record supports the conclusion that the trespass was willful. Weaver had a contract for cutting firewood. This was not his first contract. His actions and statements clearly indicate that he was well aware of the area, the permit procedure, and its terms and conditions. The designated permit area was clearly spelled out in the January 1991 contract, *i.e.*, "'Friday the 13 Fire including Darold Nays old sale. Wagonroad Ridge Firewood cutting area (as posted)'" (Decision at 2). The permit area was posted on the ground and Weaver severed approximately 75 trees at a location "eight miles from the closest area authorized" (Decision at 2). Weaver either intended to cut trees in an area not permitted to him or recklessly disregarded his obligation to identify the proper area. In either case, his trespass is deemed willful. *See* 43 CFR 5400.0-5 and 9239.1-1(a); *Warren Stave Co. v. Hardy*, 198 S.W. 99, 100 (Ark. 1917). Weaver has also presented no evidence to refute that finding. We therefore conclude that the trespass was willful. *See John Aloe*, 117 IBLA 298, 301 (1991). We affirm BLM's finding that Weaver's trespass was willful.

[3] Having found a willful trespass, we will consider the appropriate measure of damages. BLM chose to apply the measure of "minimum" damages embodied in 43 CFR 9239.1-3(a), which provides:

Unless State law provides stricter penalties, in which case the State law shall prevail, the following minimum damages apply to trespass of timber and other vegetative resources:

- (1) Administrative costs incurred by the United States as a consequence of the trespass.
- (2) Costs associated with the rehabilitation and stabilization of any resource damaged as a result of the trespass.
- (3) Twice the fair market value of the resource at the time of the trespass when the violation was nonwillful, and 3 times the fair market value at the time of the trespass when the violation was willful.

We find nothing to cause us to believe that BLM did not properly conclude that an applicable State law prescribing damages for a timber or vegetative resource trespass would result in a higher penalty, and thus conclude that the measure of damages set out in 43 CFR 9239.1-3(a) is applicable. 9/ We

9/ We have found no Colorado State Code provisions or decisions by the courts of that state prescribing a measure of damages for vegetative materials trespass.

will first examine that portion of the damages described in paragraph (3) of that code provision.

In his January 1992 decision, after finding Weaver's trespass to be willful, the Area Manager directed him to pay three times the fair market value of the firewood at the time of trespass. This imposition of treble damages is in line with similar State statutes (see 56 FR 10174 (Mar. 11, 1991)), and the trespasser is required to: (1) reimburse the United States for the value of the lost vegetative resource, and (2) pay the penalty assessed under 43 CFR 9239.1-3 in an additional amount equal to two times that value. Construing a similar State statute, in Bailey v. Hayden, 117 P. 720, 721 (Wash. 1911), the court stated that "all damages above compensatory damages are in their nature punitive." See also Williamson v. Chicago Mill & Lumber Corp., 59 F.2d 918, 922 (8th Cir. 1932) (treble damages constitute "penalty"); Annotation, Measure of Damages for Destruction of or Injury to Trees and Shrubbery, 69 A.L.R.2d 1335, 1363 (1960) ("multiple damages or penalties").

A critical question is at what point in the process of manufacture and use of the firewood cut by Weaver is fair market value set? To illustrate this point we note that BLM concluded that firewood had a fair market value of \$100 per cord. This firewood has an apparent value of \$12 per cord when standing as trees, \$100 per cord as firewood delivered to the user, and would probably have a much lower value as fireplace ash. 10/ The fair market value used by BLM when calculating damages was the enhanced value of the firewood, and not the value of the firewood at the time of the trespass, i.e., when the firewood was severed or cut from the public lands. 11/ That value is the stumpage value. 12/ See David Robinson, supra at 391; John W. Henderson, supra at 109-10.

Under the general application of the common law, an innocent trespasser is charged the fair market value of the vegetative resource, i.e.,

10/ We find the definition of fair market value found at 43 CFR 5400.0-5 of little help. Subpart 5400 of 43 CFR addresses general sales of forest products, and provides for competitive sale of standing timber. Fair market value is defined as "the price forest products will return when offered for competitive sale on the open market. Determination of fair market value will be made in accordance with procedures in BLM Manual 9354."

11/ When this measure of damages is used under state law, the penalty is imposed by assessing the gross value of the finished product. BLM compounded the penalty by using the enhanced value and then tripling that value. The regulation at 43 CFR 9239.1-3(a) is patterned after similar State statutes (see 56 FR 10174 (Mar. 11, 1991)), and is intended to triple the value of the stumpage or its equivalent. See David Robinson, 36 IBLA 386, 391 (1978); Hub Lumber Co., A-29527 (Sept. 17, 1963); John W. Henderson, 43 L.D. 106, 110 (1914).

12/ The contract price for firewood under the vegetative materials contract BLM had issued to Weaver and held by him at the time of the trespass was \$12 per cord.

the stumpage value. See Williamson v. Chicago Mill & Lumber Corp., supra at 921; 69 A.L.R.2d at 1345. Assessment of the value the owner would receive if the vegetative material were sold in place (equivalent to "stumpage") is appropriate even though the innocent trespasser may have enhanced the value of the vegetative material after severing it from the ground. For the innocent trespasser the value in place will be determined either by valuing the standing firewood as if it were offered in a sale or by subtracting the costs of the cutting, hauling, and manufacturing from the value of the finished commodity.

Although the damages assessed to the innocent trespasser are not directly applicable, because Weaver was not an innocent trespasser, the wording of 43 CFR 9239.1-3(a)(3) applicable to nonwillful trespass has direct bearing on the meaning of the phrase "fair market value" when calculating damages for willful trespass, because 43 CFR 9239.1-3(a)(3) does not distinguish between the fair market value to be used when calculating the damages for innocent trespass and the fair market value to be used when calculating the damages for willful trespass. The term "fair market value" is applied to nonwillful and willful trespass in the same sentence, and if damages for nonwillful trespass should be twice the stumpage value, we find no basis for a finding that for willful trespass the damages should be three times the value of the vegetative material in its finished form, even though a number of cases addressing willful trespass set the value of timber removed in trespass as the value of the timber in its finished form. See Williamson v. Chicago Mill & Lumber Corp., supra at 921 (stacked at border of owner's land); 69 A.L.R.2d at 1351.

Thus, under 43 CFR 9239.1-3, if applicable State laws do not impose a higher penalty, the damages for willful trespass imposed by 43 CFR 9239.1-3(a)(3) is three times the stumpage value of the firewood, regardless of what may have happened to it following severance. See Bailey v. Hayden, supra at 721; Ventoza v. Anderson, 545 P.2d 1219, 1227 (Wash. Ct. App. 1976).

Under 43 CFR 9239.1-3(a)(1) damages for a timber and vegetative material trespass are to include "[a]dministrative costs incurred by the United States as a consequence of the trespass." (Emphasis added.) BLM assessed costs incurred as a result of the discovery of the trespass and the cost of removing the cut firewood and stacking it at BLM's Meeker office as administrative costs. We have no quarrel with the Area Manager's decision to charge Weaver for the costs BLM incurred investigating the trespass. That cost was incurred as a direct result of the trespass. See Sharon R. Dayton, 117 IBLA 162, 164-65 (1990). However, we have a significant problem with the additional charges represented by the cost of the time spent by various BLM employees hauling the cut firewood to the BLM office and stacking it.

In his January 1992 decision, the Area Manager states that BLM was "unable to assess damages until we could bring in the wood and determine the amount of wood severed." (Emphasis added.) This suggests that BLM could not measure the volume of wood cut without transporting it to BLM's Meeker, Colorado office. We find no justification for this conclusion.

The volume of firewood could have been determined by measuring the existing piles or, if necessary, stacking the wood at the site and measuring the stacks. It was not necessary for BLM to expend time and effort loading the wood on vehicles, hauling it to the BLM office, and unloading it before staking it for measurement. ^{13/} Thus, we are hard pressed to conclude that the time spent by BLM employees loading, hauling, and unloading that wood was a "consequence of the trespass." 43 CFR 9239.1-3(a)(1).

Therefore, we set aside the Area Manager's January 1992 decision to the extent that he directed Weaver to pay the costs of hauling the firewood to the BLM office. Assuming that it was necessary for BLM to stack the wood to measure the number of cords of wood cut, we would allow an assessment for the costs of stacking the wood in the field and a reasonable per mile charge for transporting the necessary personnel to the site from the Meeker Office. The case is remanded to BLM to permit it to recalculate the administrative costs resulting from the trespass. Appropriate justification for each expense should be made a part of the record, and Weaver will have the right to appeal from the BLM decision regarding administrative expenses.

If we did not find it necessary to remand the decision to BLM to allow it to recalculate reasonable administrative costs, we would deem the value of the standing trees to be cut for firewood at \$12 per cord, the price set by BLM in Weaver's contract, to facilitate a final resolution of this case. However, because we are remanding it for recalculation of administrative costs we will also afford BLM the opportunity to recalculate the damages for willful trespass imposed by 43 CFR 9239.1-3(a)(3). That part of the decision is vacated and BLM is directed to recalculate that cost as a part of its decision on remand.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss Weaver's appeal from the Area Manager's January 1992 decision is denied, the decision is affirmed in part, vacated in part, and set aside in part, and the case is remanded to BLM for further action consistent herewith.

R. W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

^{13/} The labor cost incurred by BLM employees for loading, hauling, unloading, and stacking firewood valued at \$100 per chord was \$87.92 per cord.