

LARRY D. OLSON

IBLA 92-445

Decided May 24, 1993

Appeal from a decision of the South Valley Resource Area Manager, Bureau of Land Management, instituting trespass proceedings. OR 48220.

Affirmed in part, set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Permits--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way--Rights-of-Way: Generally--Trespass: Generally

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

2. Trespass: Generally--Trespass: Measure of Damages

When the record does not support the calculation of fees for the unauthorized use of a road and of penalties under 43 CFR 2801.3(b)(2) and (c), the calculation of liability will be set aside and remanded.

APPEARANCES: Gregory E. Harris, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On April 24, 1992, the Acting South Valley Resource Area Manager, Bureau of Land Management (BLM), issued a decision instituting trespass proceedings against Larry D. Olson for using 0.66 miles of BLM Road No. 19-4-26 for timber hauling before receiving a permit to do so, in violation of 43 CFR 2812.1-3. BLM's decision stated its "investigation indicates [Olson had] been hauling timber over the subject road since approximately January 20, 1992," and enclosed a bill for \$7,409.84 for knowing and willful trespass "based upon [its] estimate of the volume of timber that has been hauled * * * without authorization to date." BLM estimated that 1,615 MBF had been hauled. The decision stated: "If you have credible proof of a different volume hauled, we are certainly willing to examine that proof and adjust the amount of fees and penalty due if judged appropriate."

On February 18, 1992, BLM had sent Olson two copies of a permit for signature and a letter stating he was required to pay \$7,327 in estimated road use and maintenance fees and to provide a \$1,000 performance bond before BLM approved the permit. The letter stated: "You may begin hauling under the terms of this permit after you receive the approved copy of the permit." Olson remitted the required fees on March 19, 1992.

In response to BLM's April 24 decision, on April 29, 1992, Olson returned the permit that had been sent to him by BLM on February 18, 1992, along with the required \$1,000 bond. Olson stated that he "apologize[d] for this mix up[.] I was under the impression that all you needed was the check for [the fees]," and that the "trespass was not willful, just a misunderstanding of your instructions * * *. A reconsideration of the willful charge would be appreciated."

On May 4, 1992, Olson submitted reports of road use for March and April 1992 showing 645.79 and 359.79 MBF of timber had been hauled, more than 600 MBF less than BLM had estimated in its April 24, 1992, decision. These reports apparently crossed in the mail with BLM's May 5, 1992, response to Olson's April 29 letter that requested Olson to "provide us with chronological evidence and reasons as a basis for a reversal of our decision. Such evidence should include the date of the Oregon State Dept. of Forestry Permit, the date falling began, the date yarding began, and the date hauling began."

In his statement of reasons for appeal, Olson stated that hauling began on February 24, 1992, that no hauling occurred before he received the permit, and therefore that "no wanton, willful, or malicious intent to trespass occurred."

BLM based its statement that the trespass began approximately January 20, 1992, and its estimate of the amount of timber hauled on a March 9, 1992, interview with the logging foreman who stated approximately 45 acres had been logged since logging operations began approximately 7 weeks before. When BLM forwarded the case file to the Board on June 3, 1992, it included a June 2, 1992, memorandum from the Area Engineer to the file stating that, based on the reports of road use, the volumes of timber reported were less than BLM estimated, and that "[f]urther investigation is thus needed before a determination can be made as to the actual volume of timber hauled in trespass and thus whether an adjustment in the road use and maintenance fees and trespass penalty demanded in the trespass decision of April 24, 1992 is warranted."

[1] We have no difficulty affirming BLM's decision that Olson's trespass was willful. 43 CFR 2812.1-3 provides that any use of Oregon and California lands without authorization is a trespass as defined in 43 CFR 2800.0-5. 43 CFR 2800.0-5(v), in turn, defines willful trespass as "voluntary or conscious trespass * * *. The term does not include an act made by mistake or inadvertence. * * * Conduct which is otherwise regarded as being knowing or willful does not become innocent through the

belief that the conduct is reasonable or legal." Olson does not deny that he began to use the road before BLM issued the permit; rather, he states he was under the impression that only the fees were required. BLM's February 18, 1992, letter stated clearly that Olson could "begin hauling under the terms of this permit after you receive the approved copy of the permit," that the performance bond was to be provided prior to BLM approval of the permit, and that Olson was to notify BLM in writing before beginning hauling. Olson cannot be excused for disregarding this letter or the corresponding language of the enclosed permit. That is, Olson's conduct does not become innocent through his erroneous belief that BLM only needed the fees. See High Desert Communications, Inc., 123 IBLA 20 (1992); cf. Western States Contracting, Inc., 119 IBLA 355 (1991).

[2] We cannot, however, affirm the fees and penalties included with the decision. Both the date Olson began hauling and the volume of timber hauled were estimated in BLM's decision, and BLM has acknowledged that further investigation is needed before a determination can be made as to the actual volume hauled in trespass. It is therefore appropriate to set aside the calculation of liability for fees and penalties under 43 CFR 2801.3(b)(2) and (c). See Penasco Valley Telephone Cooperative, Inc., 55 IBLA 360, 369 (1981).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's April 24, 1992, decision is affirmed in part and set aside in part and remanded for recalculation of the appropriate fees and penalties.

Will A. Irwin
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge