DONALD HALL

IBLA 96-357 Decided August 26, 1998

Appeal from a decision of the Cottonwood Resource Area Manager, Idaho, Bureau of Land Management, assessing trespass liability for the unauthorized cutting and removal of forest products from public lands. IDI 31520.

Affirmed.

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

It is no defense to a charge of unintentional or inadvertent trespass on the public lands that the trespasser acted on the basis of a mistaken belief that he had a permit to cut trees. At best, this evidence establishes that the trespass was inadvertent, which BLM conceded by assessing damages for a nonwillful trespass.

2. Trespass: Measure of Damages

BLM's assessment of damages as a result of a timber trespass is governed by 43 C.F.R. § 9239.1-3(a), which provides for the recovery of administrative costs incurred by the United States as a consequence of the trespass and minimum damages of twice the fair market value of the timber at the time of the trespass, unless State law provides stricter penalties. State law in Idaho provides for the assessment of actual damages for unintentional or nonwillful trespass, i.e., single stumpage value.

3. Trespass: Generally

It is irrelevant whether or not an easement was reserved from appellant's grant, where BLM has established that the trees were cut on land immediately west of private property, on public land. Even assuming that an easement across public land has been granted for a power line, an easement generally does not convey title to the land subject thereto so as to defeat a trespass charge.

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APPEARANCES: Donald Hall, Elk City, Idaho, pro se; Greg M. Yuncevich, Cottonwood Resource Area Manager, U.S. Department of the Interior, Cottonwood, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Donald Hall has appealed from an April 25, 1996, Decision of the Area Manager, Cottonwood Resource Area, Idaho, Bureau of Land Management (BLM), assessing trespass liability for the unauthorized cutting and removal of forest products from public lands pursuant to 43 C.F.R. § 9239.0-7.

On October 18, 1995, BLM employees Mark Craig and Christopher Tambe went to public land adjacent to Hall's residence to investigate a possible timber trespass. They found the stumps of four lodgepole pine trees. Hall admitted he had cut the trees and offered his reasons for doing so, which included the assertions that he had cut the trees under a firewood permit and that he had not trespassed because the trees were on his land. In particular, Hall contended that the survey caps from which the line between public and private land was established were set in error, and he intended to retain a surveyor to prove it. Craig and Tambe prepared Conversation Records memorializing the discussion they had with Hall during the site investigation.

On March 5, 1996, BLM issued an "Initial Report of Unauthorized Use" (Initial Report) stating that four green trees were cut in trespass on BLM land in the SW¼SW¼ of sec. 12, T. 29 N., R. 8 E., Boise Meridian, Idaho County, Idaho, and processed into firewood. Also on March 5, 1996, the Area Manager issued a Trespass Notice to Hall alleging that he had removed timber without authorization from BLM-administered land in the E½SW¼SE¼ of sec. 2, T. 29 N., R. 8 E., B.M., in violation of 18 U.S.C. § 1852 (1994) and 43 C.F.R. § 9239.0-7. Hall was afforded 14 days from receipt of the Trespass Notice in which to present evidence to disprove the allegation. Hall received the notice on March 14, 1996. The record reflects that Hall telephoned BLM to advise that he was in Arizona and scheduled a meeting for April 5, 1996, but did not respond to the trespass charges in writing at that time. (Grant Conversation Record dated Mar. 4, 1996.) In fact, the meeting occurred on April 10, 1996. (Decision at 1.)

On April 25, 1996, BLM issued the Decision under appeal. That Decision stated that BLM had determined Hall's trespass liability as of the date thereof, and enclosed a summary and bill: Total trespass liability was $893.02, which was itemized as $720 for the timber trespass computed as 1.2 MBF (double stumpage), and $173.02 for administrative costs. The administrative record includes Craig's handwritten notes showing how the trespass liability was calculated. Craig determined the net volume of wood cut was 1.2 MBF, valued at $420. Costs were subtracted from this value, for a net value of $360 at single stumpage, thus $720 double stumpage. Craig also calculated employee time and vehicle mileage, arriving at an administrative cost of $173.02.

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In his Notice of Appeal, Hall admits that he cut down the four trees and cut them into firewood. He has not challenged the calculation of the value of the timber or the amount of timber cut. He asserts, however, that the four trees were "danger trees" in that three of them were leaning into power lines and the fourth toward private property where vehicles were parked, and that many neighbors agreed that the trees should be removed. He claims that he had previously spoken to Pam Brown, a BLM Realty Specialist, about removing the trees, but that she never contacted him in response thereto, so he cut them. 1/ Hall also states that he had a permit from the Forest Service to cut firewood. Finally, Hall contends that he was not trespassing and encloses a hand-drawn diagram and photographs offered to illustrate a power line right-of-way, property line, road way and driveway relative to his land and to establish that the subject trees were not on public land. From his further submission to this Board, it appears that Hall now contends that the trees were situated within a power line easement within his property, discussed more fully infra.

Under 43 C.F.R. § 9239.0-7, the unauthorized extraction, severance, injury, or removal of timber from public lands under the jurisdiction of the Department of the Interior is an act of trespass for which damages are properly assessed. Thus, when BLM discovers that timber has been severed or removed from lands under its management, without permission, it may properly deem such action to be a trespass. See, e.g., John Williams, 139 IBLA 186 (1997); Fred Wolske, 137 IBLA 211 (1996).

[1] Hall contends that he had a permit from the Forest Service to cut firewood, suggesting that this pe
rmit authorized his actions. While there is no copy of any such permit in the file, and Hall has not submitted one to this Board, there seems little question that Hall did have a firewood permit. In their October 18, 1995, Conversation Records, Craig and Tambe state that Craig asked Hall whether the trees were dead when cut and Hall replied that they had some green in the tops. Both Conversation Records contain the notation that "[t]he stumps were heavily covered with pitch in the cambial area of the stump. This indicates the trees were alive when cut." Craig states he then told Hall that his permit was only for dead trees and that cutting trees with green limbs was illegal. Photographs of the tree stumps are contained in the case file, including a picture that shows that at least one of the trees was alive when cut. It is no defense to a charge of unintentional or inadvertent trespass on the public lands that the trespasser acted on the basis of a mistaken belief that he had

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1/ Implicit in this argument is the contention that when BLM fails to act in a timely fashion, an affected land owner can invoke a right of self help to do that which BLM has failed to do. We are not aware of any such general right in public land law, and Hall has not cited any rule or authority in support of this assertion. Even assuming arguendo the existence of a right of self help in the circumstances here presented, however, Hall has not shown the imminence of the danger allegedly posed by the four trees necessary to establish the factual predicate for self help.

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a permit to cut the trees. At best, this evidence establishes that the trespass was inadvertent, a fact which BLM conceded by assessing damages for a nonwillful trespass.

[2] BLM's assessment of damages as a result of the timber trespass is governed by 43 C.F.R. § 9239.1-3(a), which provides for the recovery of administrative costs incurred by the United States as a consequence of the trespass and minimum damages of "[t]wice the fair market value of the [timber] at the time of the trespass," unless State law provides stricter penalties. State law in Idaho provides for the assessment of actual damages for unintentional or nonwillful trespass, i.e., single stumpage value. Earl v. Fordice, 374 P.2d 713, 714 (Idaho 1962); United States v. Chamberlain, 51 F. Supp. 54, 56 (N.D. Idaho 1943); Menasha Woodenware Co. v. Spokane International Ry. Co., 115 P. 22, 25 (Idaho 1911). Thus, under 43 C.F.R. § 9239.1-3(a), BLM properly assessed damages for nonwillful trespass at twice the fair market value of the timber.

To constitute a trespass, the timber must have been removed from public lands under the jurisdiction of the Department of the Interior. As noted, Hall argues that he did not believe he was trespassing, because the trees were not on public land and has offered a diagram and photographs to illustrate the basis of his contention. His argument is contradicted by the Conversation Records in the file which state that Craig established the property line from a cadastral survey brass cap that was tied to a private surveyor cap. The Trespass Notice contains notations that the public land was marked by "Blue/White flagging located from an earlier occupancy trespass" and that "BLM re-established the line for an earlier occupancy trespass (Case IDI-30787). Ribbon from that survey still hangs near the unauthorized removal. The property line had been established by a PE [professional engineer] to subdivide the adjacent private land." (Trespass Notice at 2, 3.)

In initially reviewing the case file, however, we could not be certain precisely where the trespass site is located. There are six documents in the file noting land descriptions of where BLM asserts the trespass occurred. All of these land descriptions agree that the land is in T. 29 N., R. 8 E. However, the Conversation Records and the Trespass Notice describe the land as being in sec. 2, whereas the Case Abstract, the Materials Unauthorized Use Investigation Report (Materials Report), and the Initial Report describe the land as being in sec. 12. We were unable to dismiss these variations as mere typographical errors, because the descriptions within the sections are different. The Trespass Notice describes the trespass as taking place in the E½SW¼SE¼ of sec. 2, whereas the Materials Report and the Initial Report describe the land involved as being in the SW¼SW¼ of sec. 12.

On May 13, 1998, we issued an Order directing BLM to clarify the description of the land where the alleged trespass occurred, to provide evidence that the land involved is public land, and to show the relationship of the public land to Hall's land. Appellant was given an

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opportunity to submit a response to the evidence. On May 29, 1998, we received a submission from BLM, and on June 1, 1998, we received Hall's response. According to BLM, the correct legal description is "Section 2: E½SW¼SW¼." We were informed that the Trespass Notice and Materials Report were to be corrected as indicated. A detail from a map showing topographical features and an excerpt from the notes of the Dependent Resurvey of a Portion of the Subdivisional Lines, T. 29 N., R. 8 E., Boise Meridian, were submitted.

With a second copy of his sketch, Appellant provided the following excerpt from an unidentified and unauthenticated document that may be relevant to the land in question:

> Lot Six - L (6-L), part of SE¼SW¼ of Section Two (2), Township 29 North, Range 8, East Boise Meridian, Idaho County, Idaho, and more particularly described as follows:
>
> > The North One Hundred Sixty Five (165') feet of the South Four Hundred Ninety Five (495') feet of the SE¼SW¼ of Section 2, Township 29 North, Range 8, East Boise Meridian, Idaho County, Idaho, consisting of five (5) acres;
> >
> > SUBJECT TO: Grantor reserves an easement on the West 100 feet of said lot for utility easement and for purposes of constructing and maintaining a road for ingress and egress purposes which road is for the use and benefit of lot owners of adjoining lands; * * *.

This excerpt bears the following hand-written notation and Hall's signature: "This is the land description you requested. The map on [the] other page shows where trees were removed from is w[e]ll with[in] the 100 ft easement for utility according to this document."

[3] Regardless of whether or not an easement was reserved from Hall's grant, BLM has established that the trees were cut on land immediately west of Hall's property, in the E½SW¼SW¼ of sec. 2, placing the trees on public land. Assuming arguendo that an easement across public land has been granted for a power line, as depicted in Hall's sketch, an easement generally does not convey title to the land subject thereto so as to defeat a trespass charge. Appellant has provided no evidence to the contrary, and accordingly, the charge must be sustained. As Hall admits that he cut four trees and has not denied that they were live trees, the Decision is affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the

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Decision appealed from is affirmed. BLM shall conform the Trespass Notice and supporting documentation to the legal description submitted to the Board herein.

T. Britt Price
Administrative Judge

I concur:

James L. Burski
Administrative Judge

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