

No. 38686-1-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY Cn
DEPUTY

REX McCRARY,

Appellant/Plaintiff,

vs.

ROBY E. DOIDGE,

Respondent/Defendants

APPELLANT MCCRARY'S REPLY BRIEF

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I. INTRODUCTION

Appellant Rex McCrary requests that this Court reverse a decision granting summary judgment in favor of Defendant Roby E. Doidge and “Jane Doe” Doidge. McCrary’s case arises from a cedar bough harvesting operation by a harvester named Guillermo Bravo on land owned by Roby Doidge based on Roby Doidge’s instructions and authorization. McCrary’s land was trespassed by Bravo’s timber crew under daily supervision by Robert Doidge, Roby Doidge’s father, who was acting as Roby Doidge’s agent with regard to the harvest on Roby Doidge’s land. (RP 210-212;135-206; 243-258.) When the trespass occurred, the Bravo crew was harvesting timber on multiple parcels, including parcels owned by Roby Doidge and by Robert Doidge. (RP 210-212.) Roby Doidge authorized both his father and Guillermo Bravo to conduct the harvest on his land. (RP 77; 251; 254-255; 275-281.) Despite this evidence of agency and authorization, the Trial Court dismissed McCrary’s claims against Roby Doidge because Roby Doidge was not physically involved in the actual timber cutting. (RP 224-226.) However, to be liable for a trespass by an agent, a principal need not be physically present when the trespass occurs and need not physically trespass himself.

II. RESTATEMENT OF ASSIGNMENTS OF ERROR

Assignments of Error

- A. The Court erred by summarily dismissing claims against Roby Doidge on the grounds that Roby Doidge was not involved in the underlying timber trespass when there was evidence that he directed or controlled, himself or through an agent, the person committing the trespass.
- B. The Trial Court wrongly ruled (in effect) that a principal is not vicariously liable for the trespasses of an agent and a sub-agent directed by the agent.

III. RESTATEMENT OF ESSENTIAL FACTS

A. Defendant Robert Doidge's Testimony and Version of Facts

Defendant Robert Doidge engaged Guillermo Bravo and his crew to remove cedar boughs from his and his son Roby's properties in the Fall of 2001 and 2002. (RP 66-67; 113; 155-159.) The harvesting involved properties owned by both Roby Doidge and Robert Doidge, and Robert Doidge was again acting as an agent of Roby Doidge. The harvest was a single cutting event, and there is no material distinction between what the Respondent calls the "ten-acre parcel" and the "twelve-acre parcel". (RP 214-215; 251; 254-255.) During these harvests, the Bravo crew crossed the boundary line onto the McCrary property and cut and removed cedar bows without permission from the McCrary property. (RP 207-209)

During his deposition, Robert Doidge admitted that he had not properly located either his boundary or his son's boundary to Bravo and the Bravo Crew. (RP 145-146; 147-152)

In 2003, McCrary discovered that more than 300 cedar trees on his property had their boughs removed, all directly adjacent to and in the vicinity of the Doidges' property boundaries. (RP 208) Critically, some of this cutting activity was directly adjacent to Roby Doidge's property and appeared to originate on the Roby Doidge property. (RP 208, ¶ 4.)

On October 19, 2006, Guillermo Bravo gave a Declaration stating:

Mr. [Robert] Doidge directed us where to cut, what to cut and how much to cut. He did not adequately mark boundaries for us. He showed me where boundaries were from several hundred feet away. The first year he ribboned a portion of the boundary but not all of it. The second year, there were no ribbons on any of the boundaries.

RP 210.

Bravo confirmed his timber harvest activities included both Robert Doidge's property *and* Roby Doidge's property and that all the harvesting was supervised and controlled by Robert Doidge. (RP 210-211.)

Roby Doidge admits he authorized his father Robert Doidge to engage the Bravo Crew to cut cedar boughs on the Roby Doidge

property, to mark the boundaries of the harvest area, and to supervise and direct the Bravo Crew's harvesting activities. Further, Roby Doidge himself directly instructed the Bravo crew as to the means and methods of the harvest, directing them to cut the cedar boughs next to the trunks, rather than leaving stubs. (RP 135-206; 243-258.) On these facts alone, Summary Judgment was not proper.

IV. SUMMARY OF ARGUMENT

When there are inferences that can be drawn from the evidence presented at summary judgment which support the case being pursued by the nonmoving party, Summary Judgment dismissing that case is not proper. Here, there are strong inferences, and even some direct testimonial evidence, that Roby Doidge had delegated his father, Robert Doidge, to harvest timber boughs for profit on his property. Further, there is strong inference, and even some direct evidence, that Roby Doidge, both directly and through his father, hired Mr. Bravo to perform this work. On this evidence, Roby Doidge, along with his father Robert Doidge, is vicariously liable for the harm caused to the McCrary property when the Bravo crew trespassed over the property line to harvest cedar.

V. REPLY ARGUMENT

A. The Contradictions in the Testimony of Roby Doidge, and the Implications that Can Be Drawn therefrom, are *Not* Immaterial.

The Court ruled that Robert Doidge could not escape liability for Bravo's timber trespass, and denied Robert Doidge's Motion for Summary Judgment. However, the Court ruled that Roby Doidge, unlike his agent, could escape liability and granted Roby Doidge's Motion for Summary Judgment. In making this ruling, it appears that the Court accepted as true the statements made by Roby Doidge in his declaration, even though those statements contradicted other testimony of Roby Doidge and others in this case. (RP 224-226; 259-261.)

In his Response, Roby Doidge seeks to justify the dismissal of McCrary's claims against him by asserting that the contradictions between his Declaration testimony and the other testimony were immaterial. In making this argument, Roby Doidge asserts that the only material fact concerns whether Roby Doidge personally instructed the Bravo crew with regard to cedar bough harvesting on the "12-acre parcel" as opposed to the "10-acre parcel."

This is a false distinction under the facts of this case. The harvesting operation was not parcel specific.

Roby Doidge acknowledges that “questions” (meaning contrary inferences) are presented in two areas of fact: 1. The timing of Roby Doidge’s direct interaction with and instruction to Guillermo Bravo and 2. Whether Roby Doidge visited the property and observed the harvesting (and possibly the trespass) along the McCrary boundary. However, relying on the distinction between the harvest on the “10-acre” parcel and the “12-acre” parcel, Roby Doidge asserts that these facts are immaterial.

This claim fails to recognize the nature of this harvest, which was a single operation involving properties owned by both Roby Doidge and Robert Doidge, with Robert Doidge was again acting as an agent of Roby Doidge. There is no material distinction between the harvest on the “10-acre parcel” and that on the “12-acre parcel”. (RP 214-215; 251; 254-255.) Therefore, if Roby Doidge was involved in the harvests *at all* (and it is not disputed that he was), then he is liable for the trespass that resulted from it.

B. The Testimony of Bravo, Which Supports Disregarded Material Implications Precluding Summary Judgment, Demonstrates the Error.

The Guillermo Bravo deposition testimony is not important because it is “newly discovered evidence” contrary to that available at summary judgment, which, if presented at the summary judgment, would have led to a different result. Rather, that testimony is important because

it highlights the error by focusing attention on the implications and extent of Roby Doidge's involvement in this harvests, and on the relationship between Roby Doidge and his agents with regard to the harvests. The basis for Roby Doidge's liability can and should be inferred from his own testimony, his father's testimony, and Bravo's original declaration. Bravo's subsequent deposition testimony is more illustrative than new.

Bravo's testimony matters for its logical importance rather than its procedural newness. On summary judgment, fair inferences are to be resolved in favor of the nonmoving party. An inference can be disregarded only when it is so far-fetched as to have no weight. This means that an inference is disregarded only if it is not possible.

As seen above, the inferences concerning Roby Doidge's involvement and control are material. Further, those inferences are fair and proper. In modal logical terms, a statement can have three truth-values: impossible (false); actual (true); and possible (possibly true and possibly false, therefore neither true or false. A party seeking summary judgment on factual grounds (such as Roby Doidge) has the burden of showing that the factual basis of the other party's claims are flat-out false. Failor's Pharmacy v. DSHS, 125 Wn.2d 488 at 493, 886 P.2d 147 (1994); Morris v. McNicol, 83 Wn.2d 491 at 494, 519 P.2d 7 (1974).

In this case, the Trial Court accepted Roby Doidge's assertions (in his self-serving declaration) as true. Based on this, the contrary inferences were disregarded as false. The subsequent deposition testimony of Guillermo Bravo, although not new, are probative because they establish that the inferences supporting McCrary's claim are not only not false, they are true, and therefore they should not have been disregarded as "impossible" by the Trial Court.

C. **Roby Doidge Is Vicariously Liable For the Wrongful Actions Of Robert Doidge And Guillermo Bravo, Both of Whom were Roby Doidge's Agents.**

Roby Doidge's position (wrongly accepted by the Trial Court and again asserted on appeal) is that because Roby Doidge did not, in fact, exercise effective control over his agents with regard to their trespasses, he is not liable for those trespasses. That is, because Roby Doidge did not *prevent* the trespass (as he should have), he claims that he is not liable for that trespass. This is a world-upside-down argument.

The question is not whether there is evidence that Roby E. Doidge actually directed the actions of Robert Doidge or Guillermo Bravo. Rather, it is whether he *could* have directed their actions. If he retained that control, then Robert Doidge and Guillermo Bravo were "servant-agents" rather than independent contractors.

At summary judgment, McCrary presented evidence that Roby E. Doidge retained the right to control the actions of both Robert Doidge and Guillermo Bravo and his crew. In fact, Roby Doidge specifically directed the means and methods of Bravo's operation (instructing them on the detail of how they should cut the boughs, about as fine an operational detail as could arise in this context.) Roby Doidge himself acknowledged authorizing the work with the expectation of personal profit. (RP 72.)

1. *Robert Doidge as Roby Doidge's Agent*

In Response (and in the Trial Court), Roby Doidge boldly asserts (without analysis) that Robert Doidge was not a "servant-agent" of Roby Doidge. Based on this handwaving argument, Roby Doidge concludes that he cannot be liable for the torts committed on his behalf by Robert Doidge. This is an argument without foundation based on a factual misstatement of the principal/agent relationship between Roby and Robert Doidge.

It is undisputed that Robert Doidge was Roby E. Doidge's agent with regard to the cedar bough harvesting on Roby Doidge's land. In fact, he was an overseer of the operation, which was conducted by the Bravo crew on behalf of Roby Doidge. However, Roby Doidge maintained substantial operational control over both Robert Doidge and the Bravo crew. This makes them servant-agents, not independent contractors.

A master-servant relationship under agency principals arises when one engages another to perform a task for the master's benefit. The one who seeks the benefit may, but need not, control the performance. If he *has the right to control* the performance of his agent, then his agent is a "servant-agent." Direct supervision is not a necessary element of control. Baxter v. Morningside, Inc., 10 Wn.App. 893 at 896, 521 P.2d 946 (1974).

Further, "[t]he question of agency is generally a question of fact to be decided by a jury." O'Brien v. Hafer, 122 Wn.App. 279, 281, 93 P.3d 930 (2004). "The question of control or right of control is also one of fact for the jury." O'Brien, 122 Wn.App. at 284.

"A master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of their agency." Cameron v. A.E. Downs, 32 Wn.App. 875, 881, 650 P.2d 260(1982) (*citing to* Restatement (Second) of Agency § 243 (1958)). "An act, although forbidden or done in a forbidden manner, may be within the scope of one's agency." *See Cameron*, 32 Wn.App. at 881 (*citing to* Restatement (Second) of Agency § 230 (1958)). If Robert Doidge's established torts were within the scope of his agency as agent for Roby Doidge, then Roby Doidge is vicariously liable for them. Cameron, 32 Wn.App. at 881 (*citing to* Restatement (Second) of Agency § 229 (1958)).

Roby E. Doidge specifically directed his father Robert Doidge, as his agent, to mark the boundary between his property and Rex McCrary's. RP 255-256. Robert Doidge did not properly mark the boundaries. *See, e.g.*, RP 116-117. This trespass occurred, and Rex McCrary was injured, as a direct result of Roby Doidge's agent, Robert Doidge, failing to properly mark the property boundary.

The liability of Roby Doidge is just like the liability of the landowner in Bloedel Timberlands Development, Inc. v. Timber Industries, Inc., 28 Wn.App. 669, 626 P.2d 30 (1981). In Bloedel, even though a logging agent committed the timber trespass, the landowner was held liable for the trespass. *See Bloedel*, 28 Wn.App. at 675. Roby Doidge asserts that he cannot be so liable because he had no knowledge of any cutting by Bravo's crew on McCrary land and had no knowledge of any shortcomings in Robert Doidge's marking of property line or supervision over the work. That was also true for Timber Industries in the Bloedel case. There was no evidence that Timber Industries knew that its subcontractor had crossed the boundary before the trespass occurred, but Timber Industries, as principal, was still vicariously liable for the timber trespass. *See Bloedel*, 28 Wn.App. at 677.

2. Bravo as Roby Doidge's Agent.

Further, there is evidence that Roby Doidge had the right to control the actions of Guillermo Bravo in harvesting the cedar boughs. That is, there is evidence that Guillermo Bravo and his crew were direct, servant-agents to Roby Doidge. Roby Doidge admitted that he directed the cedar bough cutting by Guillermo Bravo adjacent to a road, when the Bravo crew was working on both the "10-acre" parcel and the "12-acre" parcel as a single, unified harvest area. Further, Roby Doidge instructed the Bravo crew to cut the branches in a certain manner (for aesthetic purposes), and the Bravo crew complied with this direction. Mr. Bravo obviously thought Roby Doidge had authority to direct his cutting of cedar boughs; and Roby Doidge in fact did direct the cutting that resulted in the timber trespass. This fact alone should have defeated summary judgment.

3. Roby' Doidge's Supervisory Duties over His Agents

As seen above, Roby Doidge's arguments that he is not liable because Robert Doidge and Guillermo Bravo were not "servant-agents" fails because both Robert Doidge and Guillermo Bravo were servant-agents over whom Roby Doidge maintained a right of control, albeit a right he failed to properly exercise. However, even if Roby Doidge's agents were not servants, he would nonetheless be liable for this trespass.

A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, if he neither intended nor authorized the result nor the manner of performance, *unless he was under a duty to have the act performed with due care.*

McLean v. St. Regis Paper Company, 6 Wn.App. 727, 729, 496 P.2d 571 (1972)(*citing to* Restatement (Second) of Agency § 250 (1958))[emphasis added].

Roby Doidge had a duty to make sure the harvesting activities took place on his property and did not cross onto adjacent properties. This duty was imposed by the harvesting permit that Bravo and Doidges were obligated to obtain, which states in bold type, “**Be certain of property boundaries before operation begins.**” (CPs 187 and 188.)

This obligation imposes a duty on the landowner to both recognize and respect property boundaries. If a timber harvest crosses a boundary, it violates the terms of its permit (making it an illegal, unpermitted harvest, subject to administrative forest practice penalties). This regulatory duty is in addition to the general Common Law duty not to trespass on another’s property, and it has been enforced by D.N.R. forest practice regulators (see e.g. Henderson v. D.N.R., 1995 WL 879289 (Decision of Washington Forest Practices Board, attached). Roby Doidge had, and failed to honor, this duty to respect his property boundaries when harvesting his property.

Roby Doidge's Response brief ignores this duty, focusing on RCW 64.12 and RCW 4.24.630, and analyzing those statutes as punitive damages statutes. Timber trespass caselaw makes clear that a landowner can be liable for punitive damages by disregarding a property boundary, and that such disregard, even if done mindlessly, nonetheless satisfies the intent requirement of RCW 4.24.630 (under the Garratt v. Dailey, 46 Wn.2d 197, 279 P.2d 1091 (1955) standard of intent) and the "wantonness" requirement of RCW 64.12. . See, e.g., Longview Fibre Company v. Roberts, 2 Wn.App. 480, 470 P.2d 222 (1970); see also, e.g., Henricksen v. Lyons, 33 Wn.App. 123, 126-27, 652 P.2d 18 (1982) (errors in amateur survey can lead to liability and a finding of willfulness); see also, e.g., Blake v. Grant, 65 Wn.2d 410, 412, 397 P.2d 843 (1964); see also, e.g., Smith v. Shiflett, 66 Wn.2d 462, 466, 403 P.2d 364 (1965).

However, the point here is not that Roby Doidge is liable for punitive damages. Rather, the point is the Roby Doidge had a general Common Law duty to respect his neighbor's boundary and to make sure that his agents did so when harvesting timber boughs. Further, this Common Law duty is underscored and separately imposed by the Forest Practice regulations, and the permit issued for this harvest under those regulations. Roby Doidge is liable for breaching this duty.

VI. CONCLUSION

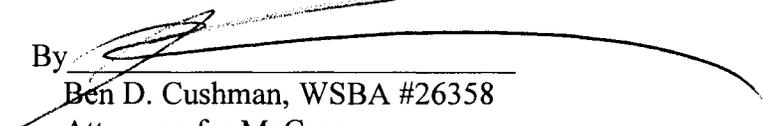
The Trial Court erred in dismissing all claims against Roby Doidge. Roby Doidge personally directed work in the trespass area. Even if Roby Doidge were not personally involved in the trespass, the trespass was committed by his servant-agents. He is liable for such trespasses.

Roby Doidge also had an affirmative duty to respect, and to ensure that his agents respected, his property boundary. He failed to fulfill this duty when he delegated it to Robert Doidge (who failed to properly mark the boundary). Therefore, even if Roby Doidge's agents were not servant-agents, he remains liable for failing to fulfill a duty imposed on him by law. Roby Doidge's negligent supervision of his agents might provide a basis for his direct liability to McCrary, but it cannot provide a defense to his vicarious liability for the misdeeds and trespasses of his agents.

It was error for the Trial Court to summarily dismiss the claims against Roby Doidge. This Court should reverse and remand.

Respectfully Submitted this 28th day of July, 2009

CUSHMAN LAW OFFICES, P.S.

By 

Ben D. Cushman, WSBA #26358
Attorneys for McCrary

CERTIFICATE OF SERVICE

The undersigned declares as follows:

On July 20th, 2009, I caused to be served on the undersigned and/or arranged for service of Appellant Rex McCrary's Reply Brief, to the Court and parties in the manner indicated:

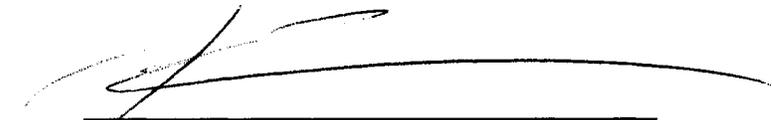
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COURT OF APPEALS
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STATE OF WASHINGTON
BY 
DEPUTY



Ben Cushman, Attorney

Westlaw

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Forest Practices Appeals Board
State of Washington

*1 T. J. HENDERSON, APPELLANT

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, RESPONDENT
FPAB Nos. 95-9, 10 & 11
December 8, 1995

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on before the Honorable William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Norman L. Winn and Dr. Martin R. Kaatz.

The matter is the appeal of civil penalties totaling \$38,200 for allegedly conducting forest practices operations without an approved application and for alleged violation of other forest practice regulations.

Appearances were as follows:

1. L. Eugene Hanson, Attorney at Law, for appellant, Mr. T. J. Henderson.
2. John E. Justice, Assistant Attorney General for respondent State of Washington, Department of Natural Resources.

The hearing was conducted at Lacey, Washington, on October 30 and 31, 1995

Gene Barker & Associates, Olympia, provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

FINDINGS OF FACT

I

This matter arises in Klickitat County in the area of Bickleton.

II

Appellant, T.J. Henderson, is 33 years of age, and makes his living as an independent logger. He began logging with his father at age 14. From 1992 to 1994 he has obtained from 15 to 20 forest practice approvals in his own right from the respondent, the Washington State Department of Natural Resources (DNR).

III

Pertinent to this matter, Mr. Henderson purchased certain small parcels in the Bickleton area which he logged this year. At issue are three separate incidents in which Mr. Henderson allegedly logged his lands; and, while doing so, logged onto the lands of his neighbors. We take these up in turn.

IV

Jensen-Heintz. In March, 1994, Mr. Henderson bought 40 acres. It is customary in the area for owners of property to confer with neighbors before logging, to agree on property lines. Mr. Henderson did not do so. His parcels are adjacent 20 acre rectangles. Moreover, the parcels are an even, 660 feet by 1320 feet, being a regular division of the quarter-section where they are located. In the southwest corner of the quarter section there is a "tag" which marks the location of the section corner. Although the section corner monument has apparently been lost, a tag is normally located no more than 100 feet from the section corner. Mr. Henderson could have, but did not, use this tag as a reference by which to locate his property boundaries by direction and distance. Rather, after obtaining an approved forest practice application for his own land, he proceeded to log both it and from 300 to 660 feet northward into the neighboring lands of Mr. James Jensen and Ms. Becky Heintz.

V

Mr. Jensen and Ms. Heintz also own small parcels which they hold for recreation. Logging is not an objective of either neighbor. Mr. Henderson's logging diminished the value of the neighbor's land for recreation, deprived the neighbors of \$31,045 in merchantable timber, and necessitated reforestation and rehabilitation costs.

Necessary rehabilitation included the regrade of approximately 75-100 feet of badly rutted skid trail on the Heintz property which came about from logging when soil moisture was too high. This regrade was not performed by Mr. Henderson.

VI

*2 This was not a trifling incursion onto the neighbor's lands. It is noteworthy that the magnitude of the logging incursion, 660 feet, matched the width of Mr. Henderson's own property. By order of magnitude, it was a 100% overrun.

VII

Mr. Henderson asserts that Mr. Bob McKinney, from whom he bought the property, orally indicated an incorrect boundary by reference to a green post. Mr. McKinney denies this. However, with the ability in hand of either consulting with his neighbors or using the section tag to locate property boundaries, Mr. Henderson could not reasonably proceed to conduct logging without independently verifying the boundaries.

VIII

The Heintz property was found, after the logging, to contain certain small artifacts which may be cultural resources. These were of interest to the Yakima Indian tribe. The artifacts were not of a size to be readily seen, nor does the evidence show that Mr. Henderson knew of them either before or during the logging.

IX

Kadinger. In May, 1994, Mr. Henderson bought another 20 acres. Again, he did not confer with neighbors to determine property lines before logging. Mr. Henderson's parcel in this instance was also a regular division of a quarter section--a rectangle of 660 feet by 1320 feet. In this instance, the western boundary of the property was a north-south road. Mr. Henderson's property, in other words, lay east of the road. On the west of that road, side roads intersected with the north-south road at locations even with Mr. Henderson's boundaries. This was known to Mr. Henderson's neighbors. Mr. Henderson did not use these side roads as a reference in conducting the logging. After obtaining an approved forest practice application for his own land, he proceeded to log both it and 220 feet northward into the neighboring lands of Mr. Chuck Kadinger.

X

Mr. Kadinger's parcel is also held by him for recreation. Logging is not an objective of Mr. Kadinger. Mr. Henderson's logging diminished the value of Mr. Kadinger's land for recreation, and deprived Mr. Kadinger of \$8,000 in merchantable timber.

XI

The harvest along the common boundary of Henderson-Kadinger was not a straight line. It was an irregular line with only the best timber on the Kadinger side of the boundary being taken.

XII

Mr. Henderson again asserts that Mr. McKinney, from whom he bought the property, orally indicated an incorrect boundary, this time by reference to an east-west road on the Henderson site, distinct from the side roads which accurately indicated boundary locations. With the ability either to consult with neighbors or to use existing side roads to locate property boundaries, Mr. Henderson could not reasonably proceed to conduct logging without independently verifying the boundaries.

XIII

McKinney. In June, 1994, Mr. Henderson bought 25 acres. On this occasion, Mr. Henderson was aware of the correct boundary line between his property and that of his neighbor, Mr. McKinney. Mr. Henderson obtained an approved forest practice application with himself listed as "operator". Mr. Henderson hired Mr. Ralph Barnett as his tree faller for the job. Mr. Henderson undertook to supervise Mr. Barnett's work, but was called away during the operations. Explaining to Mr. Barnett which trees to cut, Mr. Henderson left the site. Later, on returning, Mr. Henderson learned that Mr. Barnett had logged some 485 feet onto the McKinney property, taking all merchantable timber in that area.

XIV

*3 Mr. McKinney did not have logging as an objective. Mr. Barnett's logging diminished the value of Mr. McKinney's land for recreation, and deprived Mr. McKinney of \$5000 in merchantable timber.

XV

Prior Violations. Mr. Henderson has the following violations which occurred prior to this case:

a. Stop Work Order, February 1, 1993: Water flowing down road surface and directly into a type 4 stream. Violation of WAC 222-24-050.

b. Notice to Comply, March 23, 1993: Access road does not have sufficient means of diverting water. Violation of WAC 222-24-050.

c. Notice to Comply, July 22, 1993: Entering a no-entry riparian management zone. Violation of WAC 222-20-060, 222-30-022; 222-30-070; 222-24-040; and 222-20-040.

d. Stop Work Order, January 19, 1994: Construction of roads on slopes exceeding 75% and sidecast material with potential to reach the Klickitat River. Violation of 222-24-020. These involve adverse impacts or potential for adverse impacts such as erosion or water pollution.

XVI

The DNR alleges that Mr. Henderson has violated the following forest practices regulations in this matter and has assessed the following civil penalties:

a. Jensen-Heintz:

1. WAC 222-20-010	
Operating without an approved forest practices application	\$10,000
2. WAC 222-30-070	
Operating when soil moisture content is too high	5,500
3. WAC 222-20-120	
Failure to confer with affected Indian tribe	2,700
b. Kadinger: WAC 222-20-010	
Operating without an approved forest practice application ...	10,000
c. McKinney: WAC 222-20-010	
Operating without an approved forest practice application ...	10,000

	\$38,200

Mr. Henderson now appeals from these civil penalties:

XVII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

This case may be considered both with regard to the violations charged and with regard to the reasonableness of the amount of penalty.

II

*4 Violations. There is a charge, common to each incident, of operating without an approved forest practice application. This arises from WAC 222- 20-010 which states:

No Class II, III or IV forest practice shall be commenced or continued unless the department [DNR] has received a notification for class II forest practices, or approved an application for class III or IV forest practices, pursuant to the act. This is drawn directly from the Forest Practices Act. RCW 76.09.050(2). Moreover, the Act specifies that a forest practices notification or application shall be signed by the landowner. RCW 76.09.060(3)(c). The effect of both these provisions, together, is that logging without permission of the landowner is logging without an approved application. In this case, the DNR properly determined that Mr. Henderson conducted Class II and III forest practices without permission of the landowner and without the prescribed forest practices notification or application. In doing so, Mr. Henderson violated WAC 222- 20-010 in each of the instances at hand.

III

Violation of WAC 222-20-010 occurs when logging is conducted without permission of the landowner. Like a traffic speeding violation or hunting without a license, the violation is in the act itself. There is no mental element of specific intent to break the law or even negligence. To the extent that state of mind is relevant, it is relevant only to the amount of penalty. It is incumbent upon every forest practices operator in the State of Washington to independently verify the ownership boundaries before commencing operations.

IV

The regulation restricting operations in moist soil conditions is WAC 222-30-070 (5) which states:

Tractor and wheeled skidders shall not be used on exposed, erodible soils or saturated soils when soil moisture content is so high that unreasonable soil compaction, soil disturbance, or wetland, stream, lake or pond siltation would result.

The DNR properly determined that Mr. Henderson's operations on the Heintz property were conducted when soil moisture was so high that unreasonable soil disturbance--75 to 100 feet of ruts--resulted. Mr. Henderson violated WAC 222-30-070 (5).

V

The regulation concerning a conference with affected Indian tribes concerning cultural resources is WAC 222-20-120 which provides, in pertinent part:

"(2) Where an application involves cultural resources the land owner shall meet with the affected tribe(s) with the objective of agreeing on a plan for protecting the archaeological or cultural value." Italics added.

It is the hallmark of this case that Mr. Henderson logged on neighboring lands without an application. Without an application, there is nothing to trigger the requirement of WAC 222-20-120 (2) for a conference, as that arises only in response to an application. The citation of WAC 222-20-120 is thus duplicative. Mr. Henderson did not violate that regulation.

VI

*5 The McKinney incident involves logging by Mr. Barnett who was under the supervision of Mr. Henderson at the time in question. Mr. Henderson was the operator set forth on the forest practice application. An operator is liable for the violations of an employee or one whom the operator undertakes to supervise. Mr. Henderson is liable for the penalty resulting from Mr. Barnett's logging on Mr. McKinney's land.

VII

Amount of Penalty. We have carefully reviewed the calculation of civil penalties submitted by DNR. The penalties are properly calculated and should be sustained with respect to the violations sustained above. We would comment in two areas. Neither changes the amount of penalty assessed:

a. Although we have concluded that the Indian cultural resources provision was not violated, we note that the "severity" element of the penalty was marked with the

maximum factor. (See Exhibit R-18) The severity of a forest practice violation is with regard to its effect upon public resources. WAC 222-46-060(3)(b)(v). Public resources include fish, wildlife, water and capital improvements of the state. RCW 76.09.020(13). Pubic resources do not include cultural resources.

b. Finally, the primary defense raised by Mr. Henderson concerns his reliance on what his seller may have told him, orally, concerning property boundaries. This is relevant to the factors considered in determining the penalty amount. See WAC 222-46-060(3)(b)(ii). In this case, Mr. Henderson's complete failure to independently verify the boundaries, either by conferring with his neighbors or using reliable on-the-ground indicators, was conduct showing no precaution to avoid a foreseeable violation. Such conduct justifies an additional penalty. *Id.* Whether this factor is "1" (Exhibits R-18 and 19) or "2" (Exhibit R-20), the resulting penalty of \$10,000 is justified, based on this factor, the grave economic harm to neighboring owners and the other factors set for by DNR.

VIII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

The Violation and civil penalty of \$2,700 concerning a conference with affected Indian tribes is hereby reversed. The other violations and civil penalties of \$35,500 are affirmed.

DONE at Lacey, Washington, this 8th day of December, 1995.

Honorable William A. Harrison

Administrative Appeals Judge

Norman L. Winn

Member

Dr. Martin R. Kaatz

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Member

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