Province of
British Columbia

Ministry of
Forests

Chief Forester's Office
595 Pandora Avenue, 4th Floor
Victoria, British Columbia
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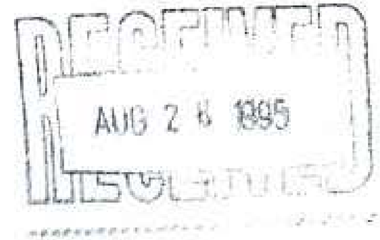
File: 19020-30/CHR-95

August 23, 1995



Dick Byl
Dick Byl Law Corporation
Barristers and Solicitors
Suite 900-550 Victoria St.
Prince George, British Columbia
V2L 2K1

Dear Mr. Byl:

Re: Appeal by Marshall and Ruby Christenson from a decision by the Regional Manager of the Cariboo Forest Region, dated June 14, 1995, in relation to Trespasses 930507 and 951124 on non-arable land within Lease Agriculture 513353 in the Lillooet Land District.

In reaching a decision on the above appeal I have considered the following submissions and materials presented to me at a hearing held in Williams Lake on August 3, 1995:

1. written, oral and graphics submissions presented by Counsel for Marshall and Ruby Christenson (the Appellants); and
2. written, oral and graphic submissions presented by Counsel for the Forest Service.

In addition, I have also received independent legal advice.

Facts

The following points and events are not in dispute.

1. On August 7, 1987, the Ministry of Forests and Lands issued Licence of Occupation #512691 to the Appellants for 129.5 hectares (ha) of land on the west half of Section 30, Township 12 of the Lillooet Land District. Attached to the licence was a map identifying 73.5 ha of arable and 56.0 ha of non-arable land. The licence did not give the Appellants exclusive possession of the lands nor did it provide for the cutting or removal of timber by them.

2. On August 7, 1987, the Williams Lake Forest District issued Licence to Cut #YC994 to the Appellants for 32.5 ha of arable land on the block covered by their licence of occupation. The licence to cut was valid for a period of one year and prohibited harvesting in non-arable portions.

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3. On August 7, 1988, the Ministry of Crown Lands issued Lease Agriculture #513353 to the Appellants for the land (now estimated at 129.1 ha) covered by their licence of occupation. Attached to the lease was a clearing plan map identifying 73.1 ha of arable and 56.0 ha of non-arable land.

4. Harvesting was carried out on the agricultural lease area by the Appellants between 1987 and 1994.

5. In six letters to the Appellants, between 1988 and 1993, the District Manager, Williams Lake Forest District, authorized consecutive one-year extensions to Licence to Cut #YC994. Under the terms of the final extension the licence to cut would expire on December 31, 1993. The final extension also stated that harvesting would still be permitted only in the arable portions identified in the original 1987 map, despite the Appellants' request to B.C. Lands (within the Ministry of Environment, Lands and Parks) to reassess the boundaries of the arable portions.

6. In a letter to the Appellants, dated December 9, 1992, the District Manager advised that timber appeared to have been harvested on non-arable land within the Appellants' agricultural lease area—in contravention of Licence to Cut #YC994—and that a trespass investigation was underway.

7. In a letter to the Appellants, dated January 12, 1993, the District Manager advised that the trespass determination would be held in abeyance until June 15, 1993, pending the results of the arability reassessment.

8. In a letter to the District Manager, dated September 27, 1993, the Land Inspector of B.C. Lands advised that the arable land component of the Appellants' agricultural lease area had been reassessed and increased from 73.1 ha to 100 ha. An amended clearing plan map was attached illustrating the new boundaries of the arable portions.

9. In a letter to the Appellant, dated December 10, 1993, the District Manager stated his determination that timber had been harvested in trespass on the now-reduced area of non-arable land within the agricultural lease area, in contravention of Licence to Cut #YC994 and, consequently, Section 138 of the *Forest Act*. The investigation into this trespass (identified as Trespass #930507) would continue, but further harvesting or removal of timber was prohibited.

10. In a letter to the Appellants, dated January 7, 1994, the District Manager authorized a further one-year extension to Licence to Cut #YC994. Under the terms of the extension the licence would terminate on December 31, 1994, and applied only to those areas of arable land as identified by the Land Inspector in his letter of September 27, 1993, to the District Manager.

11. In a letter to the Appellants, dated December 15, 1994, the District Manager advised that a recent inspection indicated more timber had been harvested in trespass on non-

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arable land within the Appellants' agricultural lease area—in contravention of Licence to Cut #YC994.

12. In a letter to the Appellants, dated March 17, 1995, the District Manager advised that he had determined that 2194.8 m^3 had been harvested in trespass in association with Trespass #930507. Accordingly, he was assessing them a penalty of $18 205.87, calculated at a penalty rate of 0.5 times trespass stumpage.

13. In a letter to the Appellants, dated March 20, 1995, the District Manager advised his determination that 2489.8 m^3 had been harvested in the trespass action described in his letter of December 15, 1994, and now identified as Trespass #951124. Accordingly, he was assessing them a penalty of $91 525.05, calculated at a penalty rate of two times trespass stumpage.

14. In a letter to the Regional Manager, Cariboo Forest Region, dated April 5, 1995, the Appellants appealed the trespass determination of the District Manager regarding Trespass #930507.

15. In a second letter to the Regional Manager, dated April 26, 1995, the Appellants appealed the trespass determination of the District Manager regarding Trespass #951124.

16. In a letter to the Appellants, dated May 29, 1995, the Land Inspector of B.C. Lands advised that a May 23, 1995, request by the Appellants to have their agricultural lease area reclassified was denied.

17. On June 1, 1995, the appeal was heard by the Regional Manager in Williams Lake.

18. In a letter to the Appellants, dated June 14, 1995, the Regional Manager upheld the two trespass determinations.

19. On June 27, 1995, the Cariboo Forest Region issued scale and royalty invoices for $18 205.87 (Trespass #930507) and $91 525.05 (Trespass #951124) to the Appellants . The cumulative total was $109 730.92.

20. In a letter to the Regional Manager, dated July 8, 1995, the Appellants appealed the June 14, 1995, decision.

21. In a letter to the Chief Forester, dated July 11, 1995, Counsel for the Appellants appealed the decision of the Regional Manager.

22. On August 3, 1995, I, as Deputy Chief Forester, heard the appeal in Williams Lake.

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Appellants' Case

The Appellants argued the following.

1. This case belongs under the jurisdiction of B.C. Lands, not the Forest Service. The principal document governing the land in question is the agricultural lease, a contractual agreement between the Appellants and the Ministry of Crown Lands (as B.C. Lands was called at the time). It authorizes the Appellants to clear the land for agricultural purposes, which they were doing. It makes no mention of being subject to penalties or regulations administered by the Forest Service. Moreover, it makes no mention that the Appellants need pay anything other than the annual rent. The payment of stumpage charges is an additional obligation incorrectly imposed upon the Appellants by the Forest Service.

2. Even if one accepts that the Forest Service had some jurisdiction over the land in question, this ended in 1991 when the agricultural lease area was deleted from the provincial forest.

3. The licence to cut restricted harvesting to arable areas, yet far more of the agricultural lease area was arable than was indicated on the amended clearing plan map. The Appellants are experienced ranchers and testified to the presence of considerable topsoil in many areas marked non-arable—areas that would be very suitable for growing forage crops. These areas were improperly classified as non-arable and thus wrongly deemed to have been harvested in trespass. Counsel for the Appellants argued that the arability question was central to the entire appeal, and to settle it he requested a stay of decision until a soil agrologist could test the disputed areas for arability.

4. There is no concrete evidence that a trespass took place nor that the volume of timber the Forest Service says was harvested was, in fact, taken from the land. For a trespass charge to be upheld, the Forest Service must identify precisely where the boundary lines of the arability portions of the agricultural lease lie. It was contended that the map scale was such that it contained insufficient detail to permit the accurate identification of the boundary lines out in the field.

   All of the area and volume measurements represent approximations. If the Forest Service is to levy penalties of the magnitude they did they need to prove a greater degree of precision in their work. Failing that, they are relying on a balance of probabilities in their calculations; and in such cases common law dictates that the benefit of the doubt must rest with the Appellants.

5. The timber that was harvested was predominantly beetle-killed timber, much of it already blown down. In the south-east corner, 2.3 ha that were deemed in trespass had blown down in the early 1980s. The entire forest along the fence line through the

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middle of the property was dying and useful only for salvage timber, yet it was also considered a trespass.

If it is ruled that a trespass did occur, then the amount of the penalty should be reduced to reflect the lower stumpage rates in effect for stands of beetle-killed timber immediately adjacent to the agricultural lease. The District Manager has considerable discretion in setting the penalty rate and should have considered the stumpage rates paid by adjacent operators before levying the penalty on the Appellants.

6. Section 138 of the *Forest Act*, under which the trespass determination was made, is unconstitutional and invades the jurisdiction of the federal government with regard to criminal law. The levying of penalty rates of two and three times trespass stumpage can only be construed as punitive and alien to the *Lands Act* under which the agricultural lease was issued.

Forest Service Case

The Forest Service argued the following.

1. This appeal should not be heard as a hearing *de novo* unless it can be shown that there was a patently unreasonable error in the decision of the Regional Manager or that the record upon which that decision was based was insufficient. *Dupras v. Mason* (Exhibit 8, Tab 1) and *MacMillan Bloedel v. Appeal Board* (Exhibit 8, Tab 3) both confirm that a hearing *de novo* cannot be held by an appellate body unless it is specifically empowered to do so or unless one of the two conditions described above holds.

   The *Forest Act* does not specifically empower this appeal to be heard *de novo.* Consequently, unless the Chair rules that one of the two conditions above exists, she should confine her considerations to the material that was before the Regional Manager.

2. Paragraph 9.12 of the licence to cut stipulates, "The onus is on the licensee to confine his activities to the area approved in the licence of occupation." The arable portions within the agricultural lease area were ribboned off by the Forest Service, based on the clearing plan map in the licence of occupation and, later, the agricultural lease. The Appellants had been notified in writing and have admitted that they were aware that they were to be guided by the clearing plan map. Moreover, their logging plan also indicates a willingness to respect the arable land boundaries marked on the clearing plan map. By extension this must apply to the boundary ribbons that were based on that map. If they wished to dispute the locations of the boundaries they should have done so and settled the issue before beginning harvesting.

3. Through their applications for a licence to cut and for repeated extensions to that licence, through the submission of a logging plan, and through their stated recognition that the licence to cut prohibited harvesting on non-arable land, the Appellants manifestly demonstrated their belief that the Forest Service was the responsible authority for the timber on the land and that the licence to cut was an essential document. *Phoenix v. Traveller's Fire Insurance Company* (Exhibit 8, Tab 4, p. 217) and *Adolph Lumber Company v. Meadow Creek Lumber Company* (Exhibit 8, Tab 5, p. 307) confirm the principle that the conditions of a contractual agreement are to be construed in a way as may be understood from the actions of the parties involved. In this case, both the Appellants and the Forest Service clearly treated the licence to cut as an essential document, and so it should be interpreted as such.

   Chitty on Contracts (para. 795) confirms that unless a right, such as a timber right, is specifically stated in a grant offered by the Crown that right remains a reservation in respect of the Crown. In this case, the licence of occupation and the agricultural lease confer the authority to use the land for agricultural purposes. However, neither document specifically grants the Appellants the right to use the timber on the arable land. Consequently, that timber must be considered as remaining the property of the Crown.

4. The deletion of the agricultural lease area from the provincial forest is irrelevant. The Forest Service still retains jurisdiction over the timber on the land, albeit not the land itself.

5. The issue of arability is not relevant to this appeal. The Forest Service relies upon B.C. Lands to determine for arability determinations; once those have been made the Forest Service is in a position to decide whether timber has been harvested in trespass or not. The agricultural lease land has already been reassessed for arability once, much to the benefit of the Appellants: a further reassessment is unnecessary. It was further argued by the Forest Service that the request by the Appellants to delay the decision pending a further arability reassessment amounts to a request to redraft the agricultural lease and the licence to cut. And that would exceed the purview of the appeal.

6. Contrary to testimony given by the Appellants, the stands alleged to have blown down in the early 1980s were shown to be still standing in a 1986 aerial photograph.

7. The techniques used by the District to determine the volume, species and values of the timber taken in trespass were all appropriate and accurately performed. The margin of error associated with the placement of the boundary lines on the clearing plan map was an acceptable one. The subsequent ribboning of the boundary lines by the Forest Service was performed with a level of accuracy comparable to that used in drawing up the clearing plan map and therefore also within an acceptable margin of error.

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On the basis of the boundary lines on the amended clearing plan map the Forest Service measured the angles using a Douglas protractor and the distances to make a "polygon" map of each trespass area. These angles and distances were then ground-checked using the two legal survey monuments from the 1987 survey as references. They also used air photos and the cruise maps for additional information. In estimating the areas in trespass, Forest Service staff were instructed to be conservative in their mapping and calculations.

Volume calculations utilized different methodologies, depending on whether the area was selectively cut or not. For the majority of the logged areas on the non-arable portions, an average volume per hectare was calculated from the 1987 cruise information and multiplied by the total number of hectares in trespass to yield the total volume in trespass. In the selectively cut areas the remaining trees were counted and multiplied by an average volume per tree, which resulted in a total remaining standing volume. This was then deducted from the total volume predicted by the cruise.

8. The District Manager displayed considerable leniency towards the Appellants. First, he calculated the trespass area on the basis of the amended boundaries for the arable portion, whereas he had the legal right to use the original boundaries, which would have resulted in a considerably larger area being in trespass. Second, he could have included the average bonus bid in the penalty assessments, but declined to do so.

9. The stands harvested in trespass were never classified as "catastrophically-damaged." Since the timber was not "downgraded" the statute obligates the District Manager to use the stumpage rates for the overall tenure itself, which he did.

10. The timber harvested under Trespass #930507 was estimated to have been cut between 1990-92, while the timber taken under Trespass #951124 was likely cut between 1992-94. The actual dates of the trespass cannot be specifically determined, so the stumpage rates charged were based on the rates in effect in 1992 and 1993, when the two trespasses became known to the Forest Service. This is consistent with Section 139(1)(a)(i) of the *Forest Act*.

11. The penalty rates chosen were also fair. The first trespass incurred a penalty rate of only 0.5 times trespass stumpage, whereas a higher rate could well have been justified. The second trespass occurred after clear notice had been given to the Appellants not to harvest outside the arable portions again. That they chose to do so anyway can only be viewed as blatant and willful. For this, the two times penalty rate is appropriate.

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Reasons for Decision

I will begin by addressing the legal issues raised.

1. Does this case fall under the jurisdiction of the Forest Service?
2. Should this hearing be a trial *de novo* or an appeal?
3. Is Section 138 of the *Forest Act* unconstitutional?
4. Determination of the arability/non-arability of the land in question.

1. Does this case fall under the jurisdiction of the Forest Service?

Counsel for the Appellants argued that because the agricultural lease did not reserve timber to the Crown or provide for the payment to the Crown of the value of, or a royalty on, timber, the Appellants were free to cut timber and pay no stumpage at all to the Crown. Counsel augmented this argument by pointing out that the Special Proviso Schedule (incorporated by reference by Article 1.01 of the agricultural lease) expressly authorized the Appellants to cut timber on the arable parts of the land (as marked on the clearing plan, which forms an integral part of the Special Proviso Schedule).

There are two issues here. First, if the agricultural lease did convey to the Appellants a right to cut and harvest timber, was that right limited to the portions marked arable on the clearing plan in the Special Proviso Schedule, so that timber taken outside those areas would be trespass in any event?

It is clear from the Special Proviso Schedule that the Appellants were authorized to cut and remove timber on the parts of the land marked arable, for purposes of preparing that land for cultivation. It is also clear that the Special Proviso Schedule did not authorize the Appellants to cut timber outside the areas identified on the clearing plan as arable. Therefore, whatever cutting rights were given in the Special Proviso Schedule, they only applied to the areas marked arable. And if the evidence shows that the Appellants took timber outside the areas marked arable, they had no protection or authorization for that from the Special Proviso Schedule.

Regarding the second issue, Counsel for the Forest Service argued that the interest in the land conveyed to the Appellants by the agricultural lease did not include any right to harvest timber. There was a right in the Special Proviso Schedule to cut timber, but that was limited to agricultural purposes as opposed to harvesting purposes and was also limited to areas marked arable. Counsel for the Appellants contended that because the agricultural lease did not expressly reserve timber to the Crown, the timber went with the land and the Appellants had no need at all for a licence under the *Forest Act*.

I note that the licence to cut was granted under the *Forest Act* after the licence of occupation was granted under the *Land Act*, but *before* the agricultural lease was granted under the *Land Act*. Section 7.01(h)(i) of the agricultural lease says that it was granted subject to "all subsisting grants to or rights of any person made or acquired under the . . .

Forest Act . . ." It therefore follows that the agricultural lease was granted subject to the licence to cut under the *Forest Act,* including its provisions for payment of stumpage or royalties to the Crown. It also follows that the agricultural lease could not have "disposed" of the Crown's timber rights to the Appellants because that would have been inconsistent with the pre-existing licence to cut, which took precedence over the agricultural lease.

A final point was raised by Counsel for the Appellants that removal of the agricultural lease area from the provincial forest in 1991 effectively ended any Forest Service authority that might have existed over that land. I disagree. "Crown timber" is defined in Section 1(1) of the *Forest Act* to mean "timber on Crown land, or timber reserved to the Crown." In the same section, "Crown land" is defined as having "the same meaning as in the *Land Act,* but does not include land owned by an agent of the Crown." Section 1 of the *Land Act* in turn defines "Crown land" to mean "land, whether or not it is covered by water, or an interest in land, vested in the Crown." When the trespasses happened the Appellants had not exercised their option to purchase in the agricultural lease, so the land remained vested in the Crown. Crown land does not cease to be Crown land when it is deleted from a provincial forest. Thus, despite its removal from the provincial forest, the land in question in this case remained Crown land, and the timber on it remained Crown timber under Section 138 of the *Forest Act.*

2. Should this hearing be heard *de novo* or as an appeal?

The *Forest Act* gives little detailed guidance as to how appeals such as this are to be conducted, except that it is clear from Section 155(2) that the Appellant is required to be given "an opportunity to be heard, if he so requests in the notice of appeal." In this case, the Appellants wished for and were given an oral hearing before me to which the Forest Service was also a party. The distinction between a hearing *de novo* and a true appeal was described by the British Columbia Court of Appeal in *Dupras v. Mason et al:*

> The distinction between a trial *de novo* and a true appeal is that in a trial *de novo* the question before the court is the very question that was before the Chief Gold Commissioner . . . whereas in a true appeal the question before the Court is whether the Chief Gold Commissioner made a reviewable error of fact, of law or of procedure. A trial *de novo* ignores the original decision in all respects, except possibly for the purposes of cross-examination. A true appeal focuses on the original decision and examines it to determine whether it is right or wrong, flawed or unflawed.

Counsel for the Forest Service argued:

> . . . you should not treat this as a hearing *de novo* and therefore get involved in the whole documentation and evidence that was presented to you today. But, rather, restrict, yourself to examining whether or not (the Regional Manager) has in fact made an error which is so patently unreasonable that no one could have come to it. And if you decide that that is not the case, that he was not so grossly in error, then you should uphold his determination. If you find that the record was lacking or that there

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was such an error, then it is appropriate, and only then is it appropriate, to proceed to a determination based on the evidence before you today.

In the hearing before me the Appellants raised legal issues about the authority of the Forest Service to levy a *Forest Act* trespass determination in the face of the Appellant's agricultural lease under the *Land Act*, and about the constitutionality of Section 138 of the *Forest Act*. Those issues are reviewable whether the review is *de novo* or strictly an appeal. Other issues raised by the Appellants concern the imprecision of the cut boundaries with which the Appellants had to work, inaccuracy of the Forest Service's determination of the volume and type of timber taken in trespass and unfairness of the penalty assessment. For these latter issues I have treated this hearing as an appeal by focussing on the decisions of the Regional Manager and the District Manager and reviewing the record of those decisions to determine if they were reached in the absence of evidence or were insupportable or unfair on a reasonable assessment of the evidence and issues in the case.

3. Is Section 138 of the *Forest Act* unconstitutional?

Counsel for the Appellants suggested that Section 138 of the *Forest Act* is unconstitutional because it invades the federal field of criminal law. I will not determine that question because I am not a Section 96 court (under the *Constitution Act*). For the purposes of this appeal I have assumed that Section 138 is valid provincial legislation.

4. Determination of arability/non-arability of the land in question.

The determination of arability is carried out by B.C. Lands under the *Lands Act*, and the Forest Service must be guided by the clearing plan attached to both the licence of occupation and agricultural lease provided by B.C. Lands and subsequently amended in September 1993. My authority is limited to determining trespass based on that amended clearing plan. The Appellants should direct any discussion on soil arability determination to B.C. Lands.

Having addressed these legal issues, I will now turn to the details of the two alleged trespasses. There are four questions to be answered in this case:

1. Did a trespass occur?
2. Were the Appellants responsible for the trespass?
3. Were there mitigating circumstances?
4. Were the penalty assessments appropriate and fair?

1. Did a trespass occur?

In determining a trespass in this case I am particularly guided by sections 138(1)(a) and 138(1)(b) of the *Forest Act.* Authority to harvest was provided by Licence to Cut #YC994, which restricted operations to those portions of arable land approved under the logging plan (para. 9.11). Harvesting was required to be carried out sequentially, with approval for further harvesting dependent upon licensee notification of B.C. Lands, B.C. Lands' written notification of the Forest Service, and a subsequent amendment to the licence to cut.

I find that the air photo history—exhibit 4 (1986), exhibit 5 (1992: original clearing plan boundaries marked), exhibit 6 (1992: amended clearing plan boundaries marked), and exhibit 7 (1994)—and evidence submitted at the hearing clearly indicate that areas outside the arable portions defined on the amended clearing plan from B.C. Lands were cut. In addition, there is no visible evidence in the 1986 photo of the blowdown described by the Appellants. I conclude, therefore, that subsequent harvesting was predominantly, if not entirely, in standing timber.

These harvesting operations in the non-arable portions were contrary to the approved licence to cut. The fact that the Appellants do not agree with the either the current or the former arability assessment has no relevance in determining this trespass. Any dispute surrounding soil arability should be directed to B.C. Lands.

2. Were the Appellants responsible for the trespass?

The Appellants do not deny responsibility for the harvesting operations on the areas I have determined as being in trespass, and no evidence was submitted to suggest otherwise.

3. Were there mitigating circumstances?

I acknowledge that the clearing plan is not as precise as might be desired. However, once the Forest Service ribboned the boundaries, based on the clearing plan map, those lines became the official boundaries which the Appellants were obliged to honour. Licence to Cut #YC994, paragraph 9.12, states, "The onus is on the Licensee to confine his activities to the area approved in the Licence of Occupation."

I find that no compelling arguments were made that would excuse the trespass.

4. Is the penalty appropriate and fair?

(i) Area and volume calculations.

Having reviewed the testimony it appears that Counsel was trying to persuade me that the estimate was wrong because the arability line was wrong. As discussed earlier, however, the arability line is set by B.C. Lands and provides guidance to the Forest Service. The Forest Service gave evidence that they used this best available information to approximate the areas of trespass in their "polygons." I accept that the polygons were conservatively drawn and therefore reflect somewhat less than the actual areas of trespass.

Counsel for the Appellants raised the question of why timber harvested in the fence line area was included in the trespass assessments. It is my understanding that harvesting in the non-arable portions was initially carried out without authority. Only later was an application for a fence submitted and a licence to cut along that line issued. This later approval does not change the fact that the earlier harvesting was in trespass.

Counsel for the Appellants also urged me to reject the volume estimates, arguing that I needed more precision than was demonstrated. In this regard, a stump cruise would have been a preferable means of calculating the trespass volumes. A stump cruise, however, can only be conducted where the stumps are left; because the clearing on this land was for agricultural purposes many of the stumps had been removed. Counsel also contended that weigh slips were not used in volume calculations, but I note that Exhibit 3, Tab 18 summarizes the scale returns by date and volumes. No evidence was presented to suggest they were not representative of the actual weigh slips. Accordingly, I am satisfied that the Forest Service used approved methods and cruise information to provide a reasonable estimate of the volumes taken in trespass within an acceptable standard error.

(ii) Policy. Section 139 of the *Forest Act* affords the District Manager considerable discretion in setting the penalty. To guide him in establishing a particular penalty rate he may consult Section 12.63 of the *Timber Management Manual.* I am also guided by this document.

The penalty rate applied to Trespass #930507 was 0.5 times trespass stumpage. This rate falls below one times trespass stumpage, which is appropriate in cases where "logging has occurred contrary to the approved plan, or prior to final approval of the plan." Zero times trespass stumpage is suggested only in cases where the operator is not at fault due to extenuating circumstances. Given my finding that there are no extenuating circumstances in this case, the penalty rate could conceivably be higher. Nonetheless, I will defer to the decision of the District Manager to choose a lower rate.

A penalty rate of two times trespass stumpage is suggested in the manual in cases where there is "operating outside of the clear and specific direction of the cutting document." This rate was applied by the District Manager to Trespass #951124, apparently because this was a second offence and was preceded by a warning to the Appellants. Despite this clear direction from the Forest Service not to harvest further in the non-arable portions,

evidence submitted indicates that the Appellants continued their operations in these areas. This leads me to conclude that the penalty rate of two times trespass stumpage was appropriately applied.

(iii) Stumpage rate used.

Did the District Manager follow the appropriate policy in determining the trespass stumpage? Section 139(1)(a)(i) of the *Forest Act* states that the Regional or District Manager may require a person who contravenes Section 138(1) to pay to the Crown:

> royalty or stumpage under Part 7 at the rates of royalty or stumpage payable at the time of cutting, removal, damage or destruction contrary to section 138(1) or, if that time is not known to the ministry, at the time when the cutting, removal, damage or destruction becomes known to the ministry.

Since the time of actual harvesting in the trespass areas appears not to have been known to the District Manager, he was obliged to use the stumpage rates in effect at the times the trespass harvesting first became known to him. Evidence submitted indicates that the trespasses first became known to him in 1992 and 1993; accordingly, he chose the stumpage rates for those years in his assessments. This is in accordance with Section 139(1)(a)(i).

Counsel for the Appellants introduced arguments regarding the possibility of catastrophic beetle infestations. Evidence submitted by the Forest Service, including notes from field examinations, indicated that beetle populations were only at endemic levels. Based on the information submitted to me it does not appear that there was a catastrophic infestation. Therefore, I feel that the decision to use stumpage rates based on appraisals from areas without intense bark beetle attack was acceptable.

Policy further guides the District Manager to use stumpage rates applicable to adjacent authorized cutting authorities, if available. In this case, the District Manager used the nearest adjacent active cutting authority with applicable stumpage rates, Licence to Cut #YC994 held by the Appellants. There was no information submitted to me to indicate that there was another adjacent cutting authority with applicable stumpage rates.

(iv) Were the penalty assessments appropriate and fair?

Counsel for the Appellants argued that the application by the District Manager of Sections 138 and 139 of the *Forest Act* was unnecessarily punitive. In reviewing the decision, however, I note several aspects in which the Appellants benefited from a relatively lenient penalty calculation process.

(a) Neither penalty assessment included a bonus bid component; normally, bonus bids form part of trespass penalties;
(b) Trespass #930507 was calculated on the amended clearing plan whereas it could legitimately have been based on the original clearing plan;

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(c) The penalty rate for Trespass #930507 was only 0.5 times trespass stumpage whereas it could have been as high as one times trespass stumpage;
(d) District staff were conservative in their calculations of the areas in trespass, leading to a lower calculation of the volumes in trespass; and
(e) Trespass #951124 was only assessed two times trespass stumpage, whereas the willful disregard for instructions issued suggest a higher penalty could have been imposed.

With this in mind, I conclude that the penalty assessed was not punitive and could, indeed, have been much higher.

In summary, I find that:

1. The trespass does fall under the jurisdiction of the Forest Service;
2. It is not necessary for me to make a ruling on the constitutionality of Section 138 of the *Forest Act;*
3. The determination of arability is not central to the appeal;
4. A trespass did occur for which the Appellants were responsible;
5. There were no mitigating circumstances; and
6. The penalty assessed was both appropriate and fair.

Decision

I uphold the decision of the Regional Manager and dismiss the appeal.

Yours truly,

Bronwen Beedle
Deputy Chief Forester

cc: Jan Hill, Solicitor
Ministry of Attorney General

Janna Kumi, Assistant Deputy Minister
Operations Division

Mike Carlson, Regional Manager
Cariboo Forest Region

Brian McNaughton, District Manager
Williams Lake Forest District

Marilyn Seifert, Administrative Review and Appeals Officer
Enforcement Branch