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MEMORANDUM

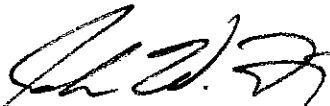
To: Holders of 53 BIAM

From: Deputy Assistant Secretary - Indian Affairs (Operations)

Subject: 53 BIAM Supp. 7, Timber and Fire Trespass

This release provides detailed instructions on Timber and Fire Trespass in the form of a supplement to the basic portion of the new Forestry Program Manual.

Additional instructions in the form of Central Office supplements to the basic manual parts are currently being developed and will be issued at a future date.


Deputy Assistant Secretary -
Indian Affairs (Operations)

Filing Instructions:

- (a) Remove superseded material:
None
- (b) Insert new material transmitted:
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- (c) Pen-and-ink changes:
None

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1. GENERAL

1.1 Policy. It is the policy of the Bureau of Indian Affairs to expend every reasonable effort to prevent fire and timber trespass on Indian trust lands. The mandate for each area director is to:

- A. Proceed in every reasonable manner to detect all acts of trespass.
- B. Assure that acts of trespass are properly investigated, reported, payment demanded and, when appropriate, recommend prosecution to the proper authorities.
- C. Build and maintain adequate records of each case.
- D. Furnish complete, immediate and vigorous support in handling trespass cases at all levels of the Bureau.
- E. Obtain suitable and sufficient training for Bureau staff, particularly but not limited to forestry employees and law enforcement officials, to competently and professionally conduct required investigations and otherwise carry out the mandates of this policy statement.
- F. Issue detailed procedural guidelines for processing trespass cases.

1.2 Objectives. Insofar as it engages in protecting Indian trust resources from fire and timber trespass, the Bureau's objectives include the following:

- A. Prevention of fire and timber trespass.
- B. Obtain maximum recoverable damages when trespass does occur except where such an act would be in conflict with the other objectives presented in this section.
- C. Discourage the purchase of trespass material by sawmills and other forest products processors.
- D. Support efforts to achieve the objectives of the Bureau's forestry program as stated in 25 CFR 163.3.

1.3 Authority. See 62 Stat. 787, 18 U.S.C. 1853; 62 Stat. 788, 18 U.S.C. 1855; 62 Stat. 788, 18 U.S.C. 1856, laws of the state in which the trespass occurred, 25 CFR 163.22, Public Law 280.

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1.4 Definitions.

A. Trespass. The unauthorized interference with the possessory interests of another. In the case of natural resources such as timber, trespass will generally involve damage to, or severance, or unlawful possession of the property of another party.

(1) Timber trespass is the unlawful or wanton injury of destruction of any tree or trees growing, standing, or being upon unallotted lands belonging to, or occupied by, any tribe of Indians under the authority of the United States, or any Indian allotment while the title of the same shall be held in trust by the United States.

(2) Fire trespass is the act of willfully or accidentally and without authority, setting of fire or causing to be kindled, any timber, underbrush, grass or other inflammable material on a landowner's property by another. It includes fires, authorized or unauthorized, with the point of origin on or off the trespass property, which are left unattended or unextinguished and suffered to burn out of control and cause damage to subject property or require expenditure of public or private funds to control or extinguish.

B. Characteristics of Civil Trespass Actions.

(1) Successful prosecution of a civil trespass case requires proof by a preponderance of evidence that the defendant committed the trespass and caused a specific and demonstrable amount of damage to the owners.

(2) The intent of civil prosecution is to recover damages suffered by the injured party.

(3) Damages may be recovered from the trespasser and/or the purchaser of forest products cut in trespass.

(4) Civil action may be filed before, during or after prosecution for criminal acts of trespass.

(5) Civil prosecution is subject to applicable state law.

(6) The solvency of the trespasser is of great concern in the civil case. The government cannot collect from a trespasser who has no assets, regardless of how guilty or liable the latter may be.

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(7) The civil defendant cannot be extradited from outside the state in which the trespass occurred.

C. Characteristics of the Criminal Trespass Actions.

(1) Successful prosecution of the criminal trespass case requires proof beyond a reasonable doubt that the defendant(s) committed the criminal act(s) with which charged.

(2) The intent of criminal prosecution is to punish the wrongdoer (trespasser) and act as a future deterrent for similar offenses. Any money receipts taken in fines or damages go to the U. S. Treasury. In order for the private trespass victim, or in this case the Indian owner(s), to recover damages, civil action must be filed.

(3) Criminal prosecution is subject to applicable federal, and state statutes and ordinances. Public Law 280 (67 Stat. 588) states area directors will issue special instructions to provide for compliance with applicable state laws and regulations.

(4) The criminal defendant can be apprehended in any state in which located and returned to the scene of the crime for prosecution.

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2. TIMBER TRESPASS

2.1 Detection. The first phase of a completed trespass case is detection. Information which comes to the Bureau suggesting that a trespass may have occurred creates an alleged or possible trespass. Sources of this kind of information include, but are not limited to:

- A. Tips, anonymous or otherwise.
- B. Complaints by Indian landowners that allege trespass.
- C. Daily movement of Bureau personnel throughout the reservation, or any other trust property.
- D. Frank and open admission of guilt by a trespasser. Typical is the logger who inadvertently trespasses and voluntarily reports the incident to the Bureau.

2.2 Preliminary Investigation. When the Bureau receives information which creates an alleged or possible trespass, a series of actions are triggered which are designed to confirm or refute the allegation. The following actions are initiated and carried out by forestry personnel:

- A. A trespasser who personally and voluntarily reports the incident will be interviewed by a BIA forester and law enforcement investigator working together. This interview can form the basis of a properly attested affidavit. A written statement, if obtainable should be signed by the trespasser.
- B. Visit the site and evaluate the situation. It may be necessary to give a written notice to cease operations. At this point the investigating official will have begun consulting, through appropriate channels, with the area director and the Office of the Solicitor.
- C. Determine the trespass area. Detection and preliminary investigation often occur after the trespass operations have ceased and the trespasser has moved on. The investigating official must obtain an accurate measure and mapped location of the trespass area. Area determination and legal description of the trespass area is accomplished by one of the following methods:

- (1) Informal survey with hand or staff compass.
- (2) Licensed surveyor.
- (3) Cadastral engineers.

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D. Determine the volume of the trespass material. This will become a part of the formal investigation and may or may not, depending on circumstances, be a part of the initial informal investigation.

E. Determine who cut the forest products in question and make a decision that confirms or refutes the alleged trespass. The investigation should attempt to determine whether the case should be processed as a criminal or civil case or both. This decision will involve the area director and the Office of the Solicitor, as well as the local special officer. It may also include the Federal Bureau of Investigation.

2.3 Follow-up Investigative Action. If the initial investigation confirms that a trespass has occurred, certain decisions and actions are required. If the case appears to be criminal in nature, the superintendent should immediately refer it to the local special officer, sheriff, and/or local FBI agent for investigation as soon as possible. The area director should be immediately advised of the situation. Criminal action, if warranted, should be given precedence over civil action, but not at the expense of neglecting to compile evidence to support an action for civil damages. If the trespass is ongoing and the trespasser refuses to comply with a notice to cease operations, the area director, working through the solicitor's office, is required to obtain a temporary restraining order through the courts to halt operations.

Initial investigation will be conducted by the BIA. Formal investigation of civil damage claims will be undertaken by the BIA, whereas criminal cases will be investigated by the FBI or sheriff. The office which begins the investigation should follow it through the final stages or until it is relieved in writing by the appropriate authority. Very few cases below \$600.00 in damages and costs are acceptable for civil prosecution by the U.S. Attorney.

The following actions typify those required in handling trespass cases:

A. Seizure of Materials. The superintendent may mark and forbid the removal of timber from lands under his or her jurisdiction, or direct its removal to a point of safekeeping when he/she has reason to believe that such timber was unlawfully cut. Seized material should be marked so that it can be positively distinguished from legally cut material.

(1) Posting. Seizure of materials is accomplished by posting "Notice and Posting of Seizure" on the materials with copies delivered to trespasser and purchaser in person or by certified mail.

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(2) Appraisal. Seized material shall be appraised for current market value including any enhanced values resulting from production costs already expended by the trespasser.

(3) Sale. Seized material may be sold by the government to prevent loss and/or offset damages.

B. Formal Investigation. The area director shall request an investigator to conduct a formal investigation to establish:

- (1) What act was committed?
- (2) Who committed the violation?
- (3) When did the act occur?
- (4) What was the extent of the damage?
- (5) Who was damaged?
- (6) Can damages be recovered and from whom?
- (7) What evidence, including witnesses, is available?
- (8) Should the case be conducted as civil, criminal, or both?

C. Essential Elements of the Investigation. Consideration should be given to the following essential elements of the investigation:

(1) The investigation shall be initiated and conducted in a timely fashion. Under the federal statute of limitations, the right of legal recourse to collect damages for timber trespass on real property expires six years and 90 days from the date of accrual. However, state double and treble damage statutes are generally shorter (usually 3 years), than the federal limitation period noted above, and such state created actions are subject to the shorter limitation period which vary from state to state.

(2) The investigation shall be complete and professional. It shall be conducted by trained and competent people. The investigation must meet the quality and standards required to substantiate claims made by the federal government in a court of law.

(3) The investigation shall be detailed so that all pertinent aspects of the case can be recalled clearly and convincingly.

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(4) The material shall be well written so that the facts are clear and understandable.

(5) Evidence shall be preserved either physically, in narrative form, photographically or by obtaining written statements.

(6) The investigation shall be conducted in accordance with instructions issued by the area director.

(7) The financial condition of the trespasser shall be established in the investigation.

(8) The trespass material should be traced and any subsequent purchasers identified.

(9) The boundary of the trespass area shall be established and mapped to a standard required to serve as evidence before a court.

(10) Legal relationship of all entities involved shall be established.

D. The Formal Written Report. A forestry employee will normally be involved in the investigation. This may be the initial investigation, the formal investigation, or some combination thereof as instructed by the area director. A written formal report shall be developed as part of the investigation and shall include as a minimum:

- (1) Timber Trespass Report
- (2) Narrative Statement
- (3) Appraisal

(4) Map, statement of witnesses and other pertinent information. The statement of witnesses shall be provided by the agency special officer, local FBI or as otherwise instructed by the area director.

2.4 Settlement. The ultimate objective is to obtain settlement or payment for the trespass damages. Frequently, settlement will be rendered voluntarily by the trespasser, and if not, civil action in conformance with the laws of the state in which the trespass occurred is required. Part or all of the following common elements may comprise the process of settlement:

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A. Authority to Settle. Each area director is authorized to accept payment of damages in full in settlement of civil trespass cases. "Payment of damages in full" means payment of the maximum amount due under applicable law.

(1) Damage Letter. Follow instructions issued by the area director.

(2) Promissory Notes. Follow instructions issued by the area director.

B. Compromise Settlement. Any case involving compromise settlement or which may be of a criminal or willful nature shall be administered by the Office of the Solicitor.

C. Department of Justice. After a case has been referred to the Department of Justice, no settlement should be made or even attempted under the authority of the area director's office.

D. Records. Each trespass shall be handled separately. An original and two copies of all material shall be made. One copy shall be retained by the agency; the original and one copy shall be sent to the area office.

2.5 Closing the Case. After payment has been received for the trespass, the case shall be closed by sending a letter to the trespasser in accordance with instructions issued by the area director.

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3. FIRE TRESPASS

3.1 Detection. All wildfires occurring on lands under the jurisdiction of the Bureau of Indian Affairs shall be investigated to determine the specific cause of the fire. The intensity of the investigation will be determined by:

- A. The level of damages to trust resources.
- B. The risk to life and property.
- C. The level of cost incurred by the government.

3.2 Investigation. If the cause determination inquiry indicates that the fire was man-caused and without authorization, trespass action shall be dependent on the following considerations:

- A. Was the trespass the result of a criminal act?

(1) Unless the impact of the fire was significant (severe injury, loss of life or major damages), it is unlikely that the case will be accepted by the U.S. attorney's office for criminal prosecution.

(2) If the decision is made to seek filing of a criminal complaint, the superintendent shall refer the case to the appropriate law enforcement officials as soon as possible for any further investigation.

- B. Is there a reasonable chance of recovering damages through a civil claim?

(1) Do total damages and costs exceed an amount likely to be considered for civil prosecution by the U.S. attorney's office? Consultation with the solicitor's office is advised.

(2) Do the owner(s) wish to attempt a civil action (e.g., prosecute a tribal member)?

(3) If the decision is made to attempt a civil recovery of damages, the superintendent shall secure the services of a trained fire investigator as soon as possible for any further investigative work. In instances where such expertise is not available from within the organization or through cooperating agencies, investigation shall be conducted by a person or persons designated by the superintendent concurrent with procedural advice from the solicitor's office and such guidelines and handbooks as may be available to the agency.

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It must be realized, however, that weak or improper investigative procedure can eliminate the chances for successful court action.

C. If the decision is made to proceed with a trespass action, the investigation shall be treated as a potential court case regardless of the probability of an out of court settlement. Refer to section 2.3C of this supplement for the essential elements of the investigation.

3.3 Appraisal. In cases where a fire trespass has resulted in damages to trust resources of and costs to the U.S. Government, the Bureau of Indian Affairs will attempt to recover the maximum allowable civil settlement provided for under appropriate state laws where it has been determined that a reasonable chance exists for successful recovery.

A. Damages. Damages are defined as the net reduction in dollar value of the trust resources existing at the time of the trespass.

B. Costs. Included would be:

(1) Direct fire suppression costs.

(2) Costs resulting from rehabilitation measures needed to restore the affected area to the level of productivity at the time the trespass occurred.

(3) Costs necessary to restore improvements (fences, buildings, bridges, etc.) held in title by the U.S. Government to the same or similar condition existing at the time the trespass occurred.

C. Limitations.

(1) Damages.

(a) Recovery of damages on behalf of the owner(s) is limited to those affected resources managed in trust.

(b) Any damages claimed must take into account values recovered from salvage operations.

(2) Excluded Resources. Timber and other natural resources excluded from commercial use due to regulatory or administrative decision must be appraised as damaged in terms of the application of those resources

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at the time of the trespass. Examples would be wilderness areas, recreational areas, and special use areas. Consult with the appropriate solicitor's office involved in preparing the litigation for advice on such appraisals.

D. Appraisals Based on the Open Market. Appraisal methods used to determine damages should be those normally used by the area to determine the commercial value of the resource for sale on the open market (where such methods exist) except that an allowance for a profit/risk factor will not be included in those appraisal systems where such values are normally used. Where there is more than one method of appraising value in use, that method which is most certain and definite should be used.

E. Other Appraisals. For those resources which are not normally appraised for sale on the open market but which may still incur damage as the result of an act of trespass, or commercial resources in an immature stage of development, areas should review currently available literature, handbooks and guidelines and select the method that can best determine the net reduction in value of the specific resource resulting from such an act. Selection of the most appropriate method shall be contingent upon the following considerations:

(1) Actual costs and current market values are favored by the courts where they can be established and are applicable.

(2) The courts do not favor mechanistic or mathematical formulas or procedures in determining damages unless their usage and applicability can be clearly established.

(3) Any estimate used in an appraisal must be definite and factually supportable.

(4) Expect the appraisal system used to be challenged in court.

3.4 Settlement. The procedures contained in section 2.4 of this supplement apply.

3.5 Closing the Case. The procedures referred to in section 2.5 of this supplement apply.