

## Not All Trespasses to Timber are Created Equal

— by Lori DeDobbelaere

In many parts of Oregon, there are few claims that evoke as much emotional response as a timber trespass claim. Oregonians love their trees and for many in our state, timber represents their livelihood. Accordingly, beginning back when Deady codified Oregon law, the law of Oregon has provided for a remedy if someone wrongfully damages or severs from the land of another produce, shrubs, trees or timber.<sup>1</sup> In order to deter timber trespasses, Oregon law has long provided for treble or double damages for timber trespass claims. However, not all trespasses will fall under the timber trespass statutes and result in treble or double damages.

ORS 105.810(1) provides:

\* \* \* whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person \* \* \* if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiff's proof of ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant willfully, intentionally and without plaintiff's consent.

ORS 105.815(1) provides:

\* \* \* if, upon the trial of an action included on ORS 105.810, it appears that the trespass was casual or involuntary, or that the defen-

dant had probable cause to believe that the land on which the trespass was committed was the land of the defendant or the land of the person in whose service or by whose direction the act was done, or that the tree or timber was taken from unenclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages.

In *Meyer v. Harvey Aluminum*, 263 Or 487, 501 P.2d 795 (1972), plaintiffs had obtained a judgment for injuries to their fruit crops and trees caused by emissions from defendant's aluminum plant. The trial court had trebled the damages pursuant to ORS 105.810(1). The Supreme Court held that treble damages were not available. In so holding the court stated:

In one of the early fume cases in Oregon seeking damages for the destruction of crops and trees, United States District Judge James Alger Fee, held: 'There is, however, no basis for the allowance of treble damages under the Oregon statute, since the language shows the enactment covers only deliberate trespass such as involved in cutting standing timber.'

One purpose of the treble damage statute is to deter the cutting of another person's timber. The destruction of fruit and fruit trees by fumes might also be deterred by the assessment of treble damages.

Another purpose of the multiple damage statutes is applicable to timber trespass but not to injury of fruit and fruit trees. If a trespasser who cuts another's timber is required only to pay as damages the value of the timber felled, the trespasser, in ef-

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fect, would have forced the timber owner to sell his timber at market value. Such a practice obviously would be advantageous to a trespasser who needed timber and unfair to a timber owner who did not want to sell. To offset this unfairness several states have rules calling for double, treble and even quadruple damages in the event of trespass to timber. \* \* \*

Based upon the litigation history of this treble damage statute and the total scheme of the multiple damage statutes, we conclude that they do not apply to the kind of damages assessed in the instant case.

Similarly, in *Chase v. Henderson*, 265 Or. 431, 509 P.2d 1188 (1973), the court held that plaintiffs could not recover double damages pursuant to ORS 105.815 when chemicals defendant sprayed on his pasture drifted onto plaintiffs' property damaging their pole bean crop.

Accordingly, pollution based trespasses will not result in treble or double damages even if the pollution caused damage to produce, shrubs, trees or timber. (However, punitive damages may then be available.) This does not mean that the owner of the damaged produce, shrubs, trees or timber does not have a claim against the trespasser. It simply means that damage caused by pollution does not fall under the timber trespass statutes. This is important not only because double and treble damages are therefore not available, but because ORS 105.810(2) allows the court, in its discretion, to award attorneys' fees. If ORS 105.810 does not apply and the claim is instead a simple trespass claim then the threat of attorneys' fees does not become an issue in the case. ❖

<sup>1</sup>The term "produce" was not added to the timber trespass statutes until 1925.

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