

effect for one year. (Ex. R2 at 1-7.) The Restraining Order was not renewed at the end of the one year period. (Test. of Reeser.)

6. In 2015, Mr. Reeser filed for a divorce from Ms. Stark. (Ex. R1 at 1.) On May 23, 2016, a General Judgment of Dissolution of Marriage (Dissolution) was signed in Linn County Circuit Court. (Ex. R1 at 1, 9.) The Dissolution awarded Ms. Stark the Property “subject to its current indebtedness, holding Husband harmless therefrom and free and clear of any interest of the Husband.” (*Id.* at 4.)

7. On June 16, 2016, the Department mailed a letter to Mr. Reeser and Ms. Stark at the Property’s address, asking to schedule a meeting with them to discuss the lack of reforestation on the Property. (Ex. A10 at 1.)

8. On June 27, 2016, the Department visually inspected the Property from the adjacent highway and driveway. The Department’s forester was unable to access the Property because the gate was shut. There was no sign of any tree plantings in the logged areas visible from the highway and driveway. (Ex. A9 at 1-8; test. of Arbow.)

9. On August 30, 2016, the Department issued a Notice of Violation/Citation to Mr. Reeser and Ms. Stark, which was mailed to the Property’s address, alleging the failure to complete a reforestation within 24 months of the logging operation and ordering Mr. Reeser and Ms. Stark to cease any further violation of the reforestation requirement. The notice included an order for Mr. Reeser and Ms. Stark to repair or correct the unsatisfactory condition by completing site preparation and tree planting or by submitting an alternate plan for a land use change no later than May 1, 2017. (Ex. A2 at 1-2.) Ms. Stark received this notice. (*Id.* at 8.)

10. During 2016, the Department also made several phone calls to the number listed for the Property. No one ever answered the phone or returned the calls. No one responded to the Department’s June 2016 letter or August 2016 notice. (Test. of Arbow.)

11. In early 2017, the Property went through a foreclosure and a third party now owns the Property. (Exs. A18 at 1; A19 at 1.) Mr. Reeser and Ms. Stark were the listed owners of the Property on the Linn County property tax rolls from July 1, 2011 through June 30, 2017. Beginning July 1, 2017, a new entity was listed as the owner of the Property on the Linn County property tax rolls. (Ex. A11 at 1-8.)

12. On May 19, 2017, the Department performed a site visit at the Property. During this visit, the gate was open but the house appeared vacant. There was a “For Sale” sign in front of the Property. There were still no signs of any tree plantings. (Test. of Hopkins.)

13. On September 19, 2017, the Department issued the First Notice to Mr. Reeser and Ms. Stark by mail to the Property’s address. The First Notice was returned to the Department as Mr. Reeser and Ms. Stark no longer resided at the Property and had left no forwarding address. (Exs. A14 at 1-2; A15 at 2.) On October 10, 2017, the Department mailed the First Notice to Mr. Reeser at a new address that the Department had discovered for him. Mr. Reeser received the First Notice on October 13, 2017. (Ex. A17 at 1, 13.) On October 18, 2017, Mr. Reeser called

the Department to discuss the First Notice and his objection to the assessment of the civil penalty. (Ex. A18 at 1.)

14. Mr. Reeser had never received any of the Department's prior communication attempts, and Ms. Stark had never informed him of the Department's prior attempts to contact him. (Exs. A18 at 1; A19 at 1.)

15. On February 13, 2018, the Department issued a Final Order by Default against Ms. Stark, assessing her a civil penalty of \$3,250 for failure to complete the reforestation of the Property after the logging operation. (Ex. A23 at 1-4.)

16. Mr. Reeser has no record of prior forestry violations. (Test. of Wagenblast.)

17. The Department does not consider the size of a three acre logging operation to be major damage. The Department expects the Property to self-restore naturally within five years, at least to the extent that there will be erosion cover that will prevent any further damage. (Test. of Wagenblast.)

CONCLUSIONS OF LAW

1. Reforestation was not completed on the Property within 24 months of the completion of a logging operation.

2. The Department may assess a civil penalty against Brad Reeser.

OPINION

The Department bears the burden of establishing by a preponderance of the evidence that the violation alleged in the Second Notice occurred and that the proposed penalty is warranted. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Dixon v. Board of Nursing*, 291 Or App 207 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Completion of Reforestation

ORS 527.710 grants the Department the authority to promulgate administrative rules for forest practices to ensure the continuous growing and harvesting of forest tree species.

OAR 629-610-0040 provides, in part:

Time Allowed for Reforestation

- (1) The time period for compliance with the reforestation rules begins at the completion of the operation or 12 months after tree stocking has been reduced, whichever comes first.
- (2) The landowner shall begin reforestation, including any necessary site preparation, within 12 months when reforestation is required.
- (3) The landowner shall complete planting or seeding within 24 months unless a plan for an alternate practice for natural reforestation has been approved by the State Forester[.]

The uncontroverted evidence presented during the hearing established that the necessary planting and seeding that would restore the Property to the required tree stocking levels was not completed on three acres of the Property within 24 months of the completion of the logging operation. Therefore, the Department established that the reforestation requirements of OAR 629-610-0040(3) were violated on January 1, 2016,⁵ and the Property has remained in violation of this reforestation requirement since that date.

OAR 629-610-0040(3) provides that the landowner is the responsible party for planting and seeding within 24 months of the completion of a logging operation. ORS 527.620(11) and OAR 629-600-0100(43) provides the same definition of a “landowner” that is applicable to OAR 629-610-0040(3). They provide:

“Landowner” means any individual, combination of individuals, partnership, corporation or association of whatever nature that holds an ownership interest in forestland, including the state and any political subdivision thereof.

Mr. Reeser and Ms. Stark first co-owned the Property in 2011. Pursuant to OAR 629-600-0100(43), they were the Property’s landowner. They continued to co-own the Property until the Dissolution was signed on May 23, 2016, at which time, Ms. Stark became the sole owner of the Property. Although the Restraining Order, issued on January 15, 2015, denied him access to the Property for one year, he retained his ownership interest in the Property until the Dissolution was signed. Pursuant to the terms of the Dissolution, Mr. Reeser no longer held any ownership interest in the Property as of May 23, 2016, so he ceased being the Property’s landowner on that date.

The logging operation was conducted in 2013 when Mr. Reeser was a landowner, jointly with Ms. Stark, because they held ownership interests in the Property at that time. The logging operation concluded by December 31, 2013. Pursuant to OAR 629-610-0040(3), the landowner was required to reforest the Property no later than December 31, 2015. During this period of December 31, 2013 through December 31, 2015, Mr. Reeser jointly with Ms. Stark, as the

⁵ In the Department’s first communication to Ms. Stark and Mr. Reeser (the June 2014 letter), the Department advised the couple to complete the tree planting by April 30, 2016. However, the evidence established that the logging operation was concluded by December 31, 2013, which would result in the 24-month period for reforestation to conclude on December 31, 2015.

landowner of the Property, had the responsibility to reforest the Property. As joint owners of the Property at the time of the logging operation and during the period when reforestation was required, Mr. Reeser was liable, and remains liable, for the failure to complete the planting and seeding of the Property within 24 months of the completion of the logging operation.

Mr. Reeser argued that ATR should have reforested the Property. However, ATR held no ownership interest in the Property and was not the Property's landowner. Pursuant to OAR 629-610-0040(3), it is the landowner that has the legal responsibility to reforest under the Oregon Forest Practices Act. Even if ATR was contractually liable to perform reforestation, it was Mr. Reeser and Ms. Stark's ultimate responsibility to comply with the Oregon Forest Practices Act by ensuring that the reforestation occurred in a timely manner. Mr. Reeser also argued that he moved from the Property on January 3, 2015 and was unable to legally access the Property from January 15, 2015 through January 14, 2016 because of the terms of the Restraining Order. However, even though he did not have the ability to legally access the Property, he retained his ownership interest, and thus his responsibilities as a landowner, until May 23, 2016, when the Dissolution was signed.

Finally, Mr. Reeser sought to use the Dissolution to shield himself from liability for the failure to reforest the Property. His argument is based upon the legal theory of issue preclusion in which he asserted that the Dissolution relieved him of liability for any debts associated with the Property and the Department was bound by that holding in the Dissolution.

Issue preclusion is designed to promote economy of resources in the adjudicatory process and prevent unnecessary re-litigation of issues. *See Clackamas School District v. White*, 305 Or 48, 50-51 (1988); *State v. Ratliff*, 304 Or 254, (1987). Issue preclusion may apply to findings of fact as well as conclusions of law, and may be applied in administrative proceedings. *Drews v. EBI Companies*, 310 Or 134, 140, 142 (1990); *Kaib's Roving R.Ph. Agency Inc. v. Employment Dept.*, 161 Or App 290, (2002).

The Oregon Supreme Court has held that, if the following five requirements are met, one tribunal's determination on an issue may preclude re-litigation of the issue in another proceeding:

1. The issue in the two proceedings is identical. * * *
2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding. * * *
3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue. * * *
4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding. * * *
5. The prior proceeding was the type of proceeding to which a court will give preclusive effect. * * *

Nelson v. Emerald People's Utility District, 318 Or 99, 104 (1993). The Department was not a party and was not in privity with a party to the Dissolution's proceeding. Additionally, the Department did not have a full and fair opportunity to be heard in that proceeding on the issues regarding Mr. Reeser's liability for debts associated with the Property, including any potential debt from the failure to reforest the Property. Therefore, the Dissolution does not preclude the Department from establishing Mr. Reeser's liability and assessing civil penalties against him for the failure to reforest the Property.

As shown above, following the 2013 logging operation, Mr. Reeser, as the landowner, was required to reforest the Property within 24 months. Because the reforestation did not occur, Mr. Reeser violated OAR 629-610-0040(3).

Assessment of Civil Penalty

In its Second Notice, the Department seeks to assess a civil penalty against Mr. Reeser for the violation of the reforestation requirement required by OAR 629-610-0040(3).

ORS 527.680 provides, in part:

(1) * * * Whenever the State Forester determines that the landowner has failed to comply with the reforestation rules under ORS 527.710, the State Forester may issue and serve a citation upon the landowner or authorized representative. Each citation issued under this section shall specify the nature of the violation charged and any damage or unsatisfactory condition that has occurred as the result of such violation.

ORS 527.992(1) provides, in part:

In addition to any other penalty provided by law, any person who fails to comply with any of the following may incur a civil penalty in the amount adopted under ORS 527.685:

* * * * *

(c) Any rule or standard of the State Board of Forestry adopted or issued pursuant to ORS 527.710[.]

Pursuant to the authority granted by ORS 527.710, the Department promulgated administrative rules regarding the procedure for the assessment of the civil penalties authorized by ORS 527.992(1). OAR 629-670-0130(1) provides:

When the State Forester determines a violation exists, enforcement action may be initiated by issuing and serving a citation to the responsible persons or corporations in accordance with ORS 527.680.

OAR 629-670-0200 provides, in part:

- (1) In addition to any other remedy, the State Forester may assess a civil penalty for any violation described in ORS 527.992(1).
- (2) The purpose of this rule is to establish civil penalties that will be uniformly assessed by a civil penalty administrator who is appointed by the State Forester.
- (3) After a citation is issued, the citation and any accompanying information shall be reviewed by a civil penalty administrator. The civil penalty administrator shall review the circumstances of the violation and determine the amount of penalty to be assessed.
- (4) The State Forester shall give written notice of a civil penalty by certified and first class mail to the person incurring the penalty[.]

Because Mr. Reeser violated OAR 629-610-0040(3), the Department may assess him a civil penalty. OAR 629-670-0210 sets forth a formula for determining civil penalties and provides, in part:

- (1) The amount of civil penalty per violation shall be the lesser of \$5000 or the amount determined by the formula $\$B(C \times P) + (\$B \times D \times R)$ where:
 - (a) \$B is a base fine established by type of violation in section (2) of this rule;
 - (b) C is cooperation;
 - (c) P is prior knowledge or prior violations;
 - (d) D is damage to protected resources; and
 - (e) R is the extent of damage that cannot be corrected, or prevented in the future, even though repairs are made.
- (2) The base penalty value (\$B) shall be established as follows:

* * * * *

- (b) A base penalty of \$250 shall be applied to:
 - (A) Violations of any rule or statute which requires or sets standards for accomplishing reforestation.

* * * * *

(3) The cooperation value (C) shall be determined by the State Forester after reviewing whether the operator is taking all feasible steps or procedures necessary or appropriate to correct the violation for which the penalty is being assessed. The value shall be assigned as follows:

(a) A value of 0.5 shall be assigned when, in the judgment of the State Forester, the operator takes substantial initiative to correct the damage or problem that led to the violation. Substantial initiative may include, but is not limited to, reporting the violation before it is discovered, initiating effective repairs without having to be directed, or making substantive changes in operating procedures designed to identify and avoid potential recurrences.

(b) A value of 1 shall be assigned when the operator cooperates in following the direction of the State Forester by immediately ceasing further violation and taking prompt action to repair damage or correct any unsatisfactory condition where deemed feasible by the State Forester.

(c) A value of 2 shall be assigned when the State Forester determines that the operator does not immediately cease further violation, is evasive upon attempts to make necessary communications, or neglects to take necessary and timely action to repair damage or correct any unsatisfactory condition.

(4) The prior knowledge value (P) shall be determined by the State Forester after reviewing department records of citations, operation notification or operation inspections. A value from 0.5 through 10 shall be assigned as follows:

(a) A value of 0.5 is appropriate when the operator has little or no prior knowledge of the Oregon Forest Practices Act but has cooperated in ceasing violation and correcting unsatisfactory conditions.

(b) A value of 1 is appropriate when the operator has general knowledge of the Oregon Forest Practices Act and rules, but has not had significant past experience with the practice in question, or has significant past experience with the practice, but the violation is determined by the State Forester to be inadvertent or accidental.

(c) A value of 2 is appropriate when the operator has had significant past experience with a practice or condition, or has had specific correspondence or conversation with department personnel about the

required practices or actions involved in the violation, before the violation.

(d) A value of 4 is appropriate when the State Forester has issued a written statement of unsatisfactory condition to the operator for the violation and timely corrective action was not taken.

(e) A value from 3 through 5 is appropriate when the operator has received citations for any other forest practice rule or statute within the past three years.

(f) A value from 5 to 10 shall be assigned when the operator has been cited within the past three years for a violation of the same forest practice rule, statute, or condition; or in a case of failure to comply with an order to cease further violation, or order to repair damage, or order to correct an unsatisfactory condition (ORS 527.680(2)).

(5) The damage value (D) shall be determined by the State Forester as a measure of extent or relative adverse effect of damage. The specific value applied shall be based on the pre-operation condition of the site, if known, the severity and extent of damage associated with the violation, and any potential economic gain to any involved operators. The damage value should be consistent with the policy of deterring future violations. A value from 0 through 20 shall be assigned. The following shall guide the State Forester's determination:

* * * * *

(c) A value from 2 to 5 shall be assigned when the damage from the violations left uncorrected is more serious than described in subsection (b) of this section, but the affected resources will self-restore naturally within five years.

* * * * *

(6) The repair value (R) shall be assigned by the State Forester as a measure of the relative extent of the damage that is corrected or prevented through timely corrective action. The value shall be set by the State Forester between 0 and 1, inclusive and expressed as a decimal. The decimal indicates the degree of damage that already occurred and future damage that cannot be prevented, even after the repairs are completed as directed in the repair order[.]

Pursuant to OAR 629-670-0210(2)(b)(A), the base penalty value (B) for the violation of the reforestation requirement is \$250.

Mr. Reeser could not conduct repairs during the period January 15, 2015 through January 14, 2016, because of the terms of the Restraining Order that prohibited his access to the Property and any contact with Ms. Stark. However, prior to the issuance of the Restraining Order, Mr. Reeser had an entire year to accomplish the reforestation but took no steps other than some unsuccessful talks with ATR in an attempt to convince them to return to the Property and perform the reforestation. Additionally, after the expiration of the Restraining Order, Mr. Reeser made no attempts at reforestation of the Property. As he testified during the hearing, Mr. Reeser elected to “just walk away from it.” Test. of Reeser. Because Mr. Reeser neglected to take any action to correct his failure to reforest the Property, the Department correctly assessed the cooperation value (C) as 2, pursuant to OAR 629-670-0210(3)(c).

The Department assessed the prior knowledge value (P) at 5 because “Brad Reeser failed to comply with an order to repair damage or correct an unsatisfactory condition.” Ex. A28 at 3. On August 30, 2016, the Department issued a Notice of Violation/Citation, which was mailed to the Property’s address and was received by Ms. Stark. However, Mr. Reeser persuasively testified that he never received this notice because he no longer resided at the Property, had no communications with Ms. Stark, and was now divorced from her. Because Mr. Reeser had no knowledge of the Department’s order to repair or correct the unsatisfactory condition, he could not fail to comply with the order. Based upon this record, the prior knowledge value (P) is 1 because Mr. Reeser had general knowledge of the reforestation requirement but no significant past experience with the practice in question, pursuant to OAR 629-670-0210(4)(b).

The Department has determined that the reforestation of three acres of forestland will self-restore naturally within five years. Pursuant to OAR 629-670-0210(5)(c), the Department may assess the damage value (D) from 2 to 5. In this matter, the Department assessed a damage value (D) of 3, an appropriate value that is within the allowable range.

Mr. Reeser no longer owns the Property. Therefore, repairs, in this case the reforestation of the Property, are not feasible. The repair value (R) for the violation of the reforestation requirement is 1, pursuant to OAR 629-670-0210(6).

Pursuant to OAR 629-670-0210(1), Mr. Reeser must pay a civil penalty of \$1,250 $((\$250(2 \times 1)) + (\$250 \times 3 \times 1))$. Pursuant to the First Notice and confirmed by the Department at hearing, the Department only sought a total of \$3,250 jointly from Mr. Reeser and Ms. Stark. Because of the Department’s difficulties in locating Ms. Stark and the time deadlines in its rule, the Department issued the Second Notice just to Mr. Reeser. The Department still sought only the one penalty with Mr. Reeser having joint liability for the civil penalty with Ms. Stark. Mr. Reeser is liable for a civil penalty of \$1,250, which will be paid jointly and severally with the penalty assessed by the Department against Ms. Stark.⁶

⁶ The Department can recover a maximum of \$1,250 from Mr. Reeser and a maximum of \$3,250 from Ms. Stark (as assessed in the final order against her) but can only recover a maximum amount of \$3,250 jointly from both parties.

ORDER

I propose the Oregon Department of Forestry and the Board of Forestry issue the following order:

Brad Reeser is ordered to pay a civil penalty in the amount of \$1,250, jointly and severally with the amount owed by Sarah Stark, for violation of the Oregon Forest Practices Act by failing to complete a reforestation within 24 months of a forest operation.

Samantha A. Fair

Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

If this proposed order is adverse to you or to the agency, you or the agency may file exceptions within seven days after the date of the filing of the proposed order with the board if no other time is specified. Exceptions must be filed with the board.

Please send any exceptions to:

Greg Wagenblast, Civil Penalties Administrator
Department of Forestry, Private Forests Division
2600 State Street, Building D
Salem, OR 97310

The exceptions shall be confined to factual and legal issues that are essential to the ultimate and just determination of the proceeding, and shall be based only on grounds that:

1. A necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence on the record;
2. A necessary legal conclusion is omitted or is contrary to law or the board's policy; or
3. Prejudicial procedural error occurred.

The exceptions shall be numbered and shall specify the disputed finding, opinions or conclusions. The nature of the suggested error shall be specified and the alternative or corrective language provided.

After the board has received and reviewed the proposed order and the exceptions, if any, the board may:

1. Entertain written and/or oral argument if the board determines it is necessary or appropriate to assist the board in the proper disposition of the case. If allowed, oral argument

will be limited to matters raised in written exceptions and shall be presented under time limits determined by the board chair;

2. Remand the matter to the ALJ for further proceedings on any issues the board specifies, and to prepare a revised proposed order as appropriate, under OAR 137-003-0655(2);

3. Enter a final order adopting the recommendations of the ALJ; or

4. Enter an amended proposed order or final order that modifies or rejects the recommendations of the ALJ. If the board decides to modify or reject the proposed order, the board must comply with OAR 137-003-0655 and 137-003-0665.

RECONSIDERATION AND REHEARING

Under the provisions of OAR 137-003-0675, you may file a petition for reconsideration or rehearing of the final order with the board within 60 calendar days after this order is served. Any such petition shall set forth the specific grounds for reconsideration or rehearing and the remedy sought. The petition may be supported by a written argument. Under OAR 629-001-0050, you must file a petition for reconsideration as a condition for further appeal.

APPEAL

You may appeal by filing a petition for judicial review with the Oregon Court of Appeals within 60 days following the date the final order on reconsideration or rehearing is issued, or within 60 days following denial of the request for reconsideration or rehearing. *See Oregon Revised Statutes 183.480 et seq.*

CERTIFICATE OF MAILING

On August 22, 2018 I mailed the foregoing Proposed Order issued on this date in OAH Case No. 2018-ABC-01648.

By: First Class Mail

Bradley Reeser
262 Goldfish Farm Road SE
Albany OR 97322

By: Electronic Mail

Greg Wagenblast, Agency Representative
Department of Forestry, Private Forests
2600 State St Bldg D
Salem OR 97310

Lucy M Garcia
Hearing Coordinator