**13.07 TRESPASS – DAMAGES FOR MINERAL CONVERSION**

If you decide in favor of the plaintiff, then you must decide how much money, if any, would fairly compensate the plaintiff for removal of the minerals and damage to plaintiff's real property. The amount that will reasonably compensate the plaintiff for this loss is the following:

[A] The difference in the fair market value of the property immediately before and immediately after the minerals were removed. In a moment I will explain how to measure the fair market value.

[B] The [royalty rate] [market value] of the minerals removed less the costs of extraction.

[C] The cost of restoring the property to its condition immediately before the minerals were removed. However, for the plaintiff to recover this cost, you must find that

(1) the damage to the property is temporary or reparable; and

(2) the cost of restoring the property is not disproportionate to the loss in property value caused by the trespass or, if it is disproportionate, that there is a reason personal to the plaintiff for restoring the property to its original condition.

To determine the loss in property value caused by the trespass, you must calculate the difference in the fair market value of the property immediately before and immediately after the minerals were removed[, excluding the value of the minerals themselves]. In a moment I will explain how to measure the fair market value.

To determine whether there is a reason personal to the plaintiff for restoring the property, you may consider the nature of the property, how it was used, the likelihood that the plaintiff would actually restore it, or any other factors you think are important.

If you find that the damage can be repaired and that the cost of restoring the property is not disproportionate to the loss in value caused by the trespass, or that there is a reason personal to the plaintiff for restoring the property, then you must award the plaintiff the cost of restoring the property.

Otherwise, the plaintiff is only entitled to recover the loss in property value caused by the trespass.

[D] After you have decided the amount that would compensate the plaintiff for removal of the minerals, you must consider the defendant's claim that the plaintiff is not entitled to treble damages. To do this, you must decide whether either of the following things is more likely true than not true:

(1) that the defendant did not intend to enter the property or remove the minerals; or

(2) that the defendant had an honest and reasonable belief that [the property was [his] [her] [its] own property] [[he] [she] [it] was authorized to enter the property and remove the minerals].

If you decide that either of these things is more likely true than not true, then you must award the plaintiff only the amount you decided would reasonably compensate the plaintiff for removal of the minerals.

Otherwise, you must award the plaintiff three times the amount you decided would reasonably compensate the plaintiff for removal of the minerals.

Use Note

In cases involving mineral conversion, this instruction should be used instead of Instruction 13.03.

If the plaintiff seeks to recover the diminution in value of the land as a whole, then part A should be used. If the plaintiff seeks to recover the value of the minerals, then part B should be used instead of part A. If the plaintiff seeks to recover restoration costs as well as the value of the minerals, then both parts B and C should be used, and the bracketed language in part C should be included. (The bracketed language should not be included when part C is used without part B.)

Part D should be used when the plaintiff seeks to recover treble damages under AS 09.45.735, unless the defendant concedes that the trespass was intentional. In such a case, part D should be eliminated and the jury should be instructed to treble the compensatory damage award.

Instruction 20.17A (Fair Market Value Defined) should be given with this instruction.

Comment

In the mineral conversion context, Alaska cases primarily focus on the harsh and mild rules of damages for mineral conversion. See Alyeska v. Anderson, 629 P.2d 512, 526-28 (Alaska 1980); Alaska Placer Co. v. Lee, 553 P.2d 54, 57 (Alaska 1976); Schafer v. Schnabel, 494 P.2d 802 (Alaska 1972). Under both rules, the plaintiff may recover the royalty rate or market value of the minerals removed. E.g., Alyeska v. Anderson, 629 P.2d at 526-28. The difference is that the costs of extraction must be deducted from this amount under the mild rule but not under the harsh rule. Id. The rationale is that the harsh rule is punitive in nature with the goal of deterrence. Id.

The continued viability of the harsh rule is in serious doubt because in 1988 the legislature enacted AS 09.45.735 on trespass related to geotechnical surveys and mining. This statute provides treble damages for trespass for mineral conversion or the gathering of geotechnical data. Because treble damages are punitive in nature, the committee assumes that the statute was intended to supersede the common law harsh rule. Therefore, this instruction does not include the harsh rule. The instruction retains the mild rule as the second compensatory damage option.

The language of AS 09.45.735 is very similar to the language of AS 09.45.730 regarding trespass by cutting or injuring trees or shrubs. Therefore, the committee has relied on case law interpreting AS 09.45.730 in drafting this instruction.

In Andersen v. Edwards, 625 P.2d 282, 289 (Alaska 1981), a tree-cutting case, the Alaska Supreme Court held that diminution in value of the property or the economic value of the timber cut was the appropriate measure of damages. The court indicated, however, that restoration costs could also be awarded if the cost of restoration is not disproportionate to the diminution of value or there is a reason personal to the owner for restoring the original condition. Id. at 288-89 (citing the Restatement (Second) of Torts § 919 (1977)). The court rejected the appellant's contention that "treble damages are appropriate where the damages awarded are based on the lumber or timber value of the trees but are clearly inappropriate where damages are assessed on some other basis." Id. at 289. The court cited with approval a Michigan case, Schankin v. Buskirk, 93 N.W.2d 293, 295-96 (1958), in which the court based a treble damages award on the value of the timber taken plus the cost of restoring the property to a condition of usefulness. Andersen v. Edwards, 625 P.2d at 289.

This instruction reflects the limitations imposed on the restoration measure of damages set forth in Andersen v. Edwards, 625 P.2d 282 (Alaska 1981) and G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379 (Alaska 1974).

In Wernberg v. Matanuska Electric Association, 494 P.2d 790 (Alaska 1972), the court approved an instruction in which the jury was allowed to choose between the diminution in value and the value of the trees cut measure of damages. However, under the Restatement (Second) of Torts § 929 (1979), the plaintiff makes the election:

(2) If a thing attached to the land but severable from it is damaged, he may *at his election* recover the loss in value to the thing instead of the damage to the land as a whole.

(Emphasis added.) The Comment on this section states:

For the destruction of or damage to houses, buildings, crops or mature timber trees that have a market value or a value distinguishable from the value of the land, *the owner can, at his election*, recover for the loss or diminution of the value of the thing injured or destroyed, in substitution for the diminution in value of the land as a whole.

Id. at cmt. f (emphasis added).

The issue before the court in Wernberg was whether a measure of damages other than diminution of value or loss of the value of the trees should have been used. The court did not address whether it was proper to allow the jury to select the measure to be used. Therefore, because the issue was not directly addressed in Wernberg, this instruction follows the Restatement and allows the plaintiff to make the election.

Once the plaintiff has proven trespass and damages, the burden shifts to the defendant to show that the defendant falls within the exceptions to the treble damages provisions. Matanuska Electric Ass'n, Inc. v. Weissler, 723 P.2d 600, 608 (Alaska 1986).