

**Chapter 4****What Kinds of Punitive Damages  
May Be Awarded  
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**§ 4.01. Introduction and Summary.**

There is a good argument that in jurisdictions which allow “gross value” damages for willful trespass to minerals, traditional punitive damages would be duplicative and should not be allowed. In such jurisdictions, the willful trespass damages are already harsh and penalizing, and an award of traditional punitive damages in addition would be redundant. A small handful of jurisdictions have so held. This chapter surveys the scope of willful trespass damage awards in most of the primary mineral-producing states, both generally and then focusing on whether claimants may “double dip” by recovering both the gross sale value of the minerals and punitive damages.

When measuring damages for mineral trespass, courts closely examine the trespasser’s intent. Courts inquire into whether a trespasser has acted

“willfully” or “innocently” in his trespass; willful trespass is found when done recklessly, or with actual knowledge of another’s rights, and innocent trespass is determined when done in good faith, inadvertently, unintentionally, or with the honest belief of the right to do so. In cases of willful trespass, courts typically award the owner the full sale value of the minerals without any allowance for deduction for the expenses incurred in extracting the minerals or for any value added by processing the mineral. This is often referred to as a “harsh” or penalizing rule of damages. On the other hand, in cases of innocent trespass, courts typically award only the value of the mineral *in situ*, measured either by the sales value of the mineral less mining expenses and other value-added costs, or by the reasonable royalty value. This is often referred to as the “mild” rule of damages.

As the harsh rule penalizes the willful trespasser by not allowing deduction of his expenditures, it takes on a punitive nature. That is, it not only forces the trespasser to disgorge profits – which is accomplished by the innocent trespass measure of sales less expenses – but forces the trespasser to pay over the full sales value after having already paid all the costs of getting the mineral to a sale. To the extent that the willful trespass measure is punitive in nature, an additional award of punitive damages on top of the penalizing “compensatory” damages would seem redundant in most cases. The harsh rule not only forces the willful trespasser to essentially pay his mining and production expenses twice, but also represents a windfall to the typical owner who could not have expected to receive more than a royalty value, or if he were in a position to produce the mineral himself, not more than a net profit. Most jurisdictions explicitly recognize the punitive nature of the harsh measure of damages, as addressed in the state-by-state survey below, but at least one jurisdiction (Texas) has refused to treat the harsh rule as punitive.

Issues to consider in response to a willful trespass claim that seeks damages for the full sale value of the mineral and/or punitive damages include (1) when and how to challenge a claim for both full mineral value and traditional punitive damages; and (2) whether and when to challenge a claim for full sales value of the mineral as exceeding the constitutional due process limitations for punitive damage awards. Imposing punitive

damages in addition to the traditional damage measure for willful trespass is arguably duplicative, and therefore assertions that punitive damages should be denied as a matter of law may be affirmative defenses to be raised at the time of the Answer or in motions to dismiss for failure to state a claim. In some jurisdictions, such issues may not be raised until the time of the jury instruction conference. The timing of a constitutional due process defense to the willful trespass measure may also vary from jurisdiction to jurisdiction, and the procedure for same is beyond to scope of this chapter.

**§ 4.02. Scope of Damages for Willful Trespass to Minerals in Primary Mineral-Producing States.**

**[1] — Alaska.**

**[a] — Alaska Follows Typical Damage Measures for Innocent and Willful Trespass to Minerals.**

In a case arising out of tin mining claims, Alaska's Supreme Court confirmed that it follows the traditional rule.<sup>2</sup> The court summarized the distinction between innocent and willful trespass, and the respective damages for each, as follows:

When a trespasser removes minerals from the land of another, there are two generally accepted rules of damages: a 'mild' rule for good faith trespassers and a 'harsh' rule for willful trespassers. [citations omitted] The mild rule provides that a good faith trespasser must pay the owner damages based on either a royalty rate or on the market value of the minerals less the cost of extraction. Thus the nonwillful trespasser may receive credit for the mining expenses involved in the conversion.<sup>3</sup>

The harsh rule for intentional trespassers operates as a form of punitive damages, with the goal of deterrence. The owner may recover the market

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<sup>2</sup> Alaska Placer Co. v. Lee, 553 P.2d 54, 57 (Alaska 1976).

<sup>3</sup> *Id.* at 57.