

INTERIOR BOARD OF LAND APPEALS

Idaho Power Company

156 IBLA 25 (November 9, 2001)

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IDAHO POWER COMPANY

IBLA 2001-340; IBLA 2001-341

Decided November 9, 2001

Appeals from trespass decisions of the Shoshone, Idaho, Field Office, Bureau of Land Management, assessing damages for fire suppression. ID 076-10-517; ID 076-10-521.

Set aside and referred for a hearing; petitions for stay denied as moot.

1. Trespass: Generally

Under 43 CFR 9239.0-7 and 43 CFR 9239.1-3, the unauthorized burning of public lands is an act of trespass for which fire suppression and related administrative costs may properly be assessed as damages against the trespasser. However, in each case of human-caused fire, BLM must establish either intent or negligence as a prerequisite to the assessment and collection of damages. Where the party assessed for trespass damages raises material issues of fact concerning the cause of the fire and its culpability for negligence, BLM's decision will be set aside and the case will be referred for a hearing to resolve those disputed issues.

APPEARANCES: Christopher F. F. Hopper, Esq., Boise, Idaho, for Idaho Power Company.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Idaho Power Company (Idaho Power) has appealed two trespass decisions issued on June 15, 2001, by the Shoshone, Idaho, Field Office, Bureau of Land Management (BLM), finding Idaho Power responsible for the ignition of the King's Crown Fire F372 (IBLA 2001-340) and the Kimama3 Fire F392 (IBLA 2001-341) and liable for fire suppression costs of \$80,128.90 and \$12,745.80, respectively. Idaho Power has requested hearings to present evidence in these cases and has petitioned for stays of BLM's decisions pending appeal. Because we set aside the decisions and refer these cases for a hearing, Idaho Power's stay petitions are denied as moot.

King's Crown Fire F372

On March 27, 2000, BLM issued Idaho Power a Notice of Suspected Trespass, advising the company that an investigation into the June 25, 1999, King's Crown Fire had indicated that it might be responsible for ignition of that fire, which had burned public land without authorization, and granting it 21 days to present evidence showing that it was not in trespass. The referenced investigation, documented in a December 27, 1999, Fire Report, stated that the fire had affected a total of 2,395.4 acres, including 1758.3 acres of BLM-administered public lands, 239.5 acres of which were within the fire perimeter but not burned. The report identified the cause as "Equipment - Power Line," and remarked that

[p]ower lines down in origin area. Pole number 511. Poles appeared to be old. Area extremely windy. Lightning was thought to be original cause, but no strikes in or near origin area. Wooden beam holding two cables had broken off. Bolt was missing off the top support beam. No burn marks on beam. Idaho Power had reported a line down at [23:22] just prior to the report of fire. Phil Villareal, local representative for Idaho Power that had come out to check the line, however, said that he was unaware of any lines down or any power outages.

(Fire Report at 2.)

After seeking and receiving several extensions to enable it to pursue its own fire investigation, Idaho Power responded to the Notice of Suspected Trespass on April 27, 2001, requesting a full evidentiary hearing prior to the issuance of any trespass decision. Idaho Power questioned the Department's jurisdiction over electrical power issues and its statutory and regulatory authority to find trespass in the circumstances of the case, and challenged the adequacy of BLM's causation investigation to support a trespass decision. Idaho Power disputed the inference that because the pole appeared to be old, it was structurally unsound, and pointed out that, even assuming the fire originated from a fallen transmission line, a point it did not concede, the actual cause of the fallen line was unknown. The company speculated that the shattering and splintering visible in the photographs of the broken beam could have been caused by high winds or concussion forces from lightning strikes near the power line at other locations. In essence Idaho Power argued that, absent a showing of negligence on its part, BLM could not hold it responsible for ignition of the fire and the associated fire suppression costs. Idaho Power also noted discrepancies in the assessed damages and objected to charges for aviation and various materials and supplies.

On June 15, 2001, BLM issued its trespass decision finding Idaho Power responsible for the ignition of the King's Crown Fire. Enclosed with the decision was a bill for collection, charging Idaho Power \$80,128.90 in fire suppression costs. Idaho Power appealed that decision to the Board.

Kimama3 Fire F392

On March 29, 2000, BLM issued Idaho Power a Notice of Suspected Trespass, informing the company that an investigation into the July 15, 1999, Kimama3 Fire had indicated that it might be responsible for ignition of that fire "in violation of the Idaho Forestry Act Fire Hazard Reduction Law, Section 38-107" and granting it 21 days to present evidence showing that it was not in trespass. The case file contains three documents memorializing BLM's investigation: a July 18, 1999, Initial Report of Unauthorized Use which found that the "fire was a result of a downed power line;" an August 22, 1999, Individual Fire Report Form which indicated the fire had burned one acre of grass and sagebrush under a broken power line and had been quickly extinguished; and a December 2, 1999, Fire Investigation Evaluation which, although containing a handwritten "x" by the recommendation "BLM needs to proceed with a fire trespass," also had a typed "x" by the recommendation "BLM does not need to proceed with a trespass. * * * No public land was burned," and a check mark by "No" for evaluation criterion 6 which asked whether "sufficient facts, circumstances, an/or evidence were available to sustain trespass actions."

In its response, Idaho Power requested a full evidentiary hearing prior to the issuance of any trespass decision, questioned the Department's jurisdiction over electrical power issues, and challenged BLM's statutory and regulatory authority to find trespass in the circumstances of this case. Idaho Power complained that BLM's fire investigation was inadequate to support the trespass decision, pointing out that not only had BLM's Fire Investigation Evaluation contained conflicting recommendations about proceeding with a trespass action, but it also had indicated that sufficient data supporting a trespass action did not exist. Idaho Power averred that, assuming the fire had originated from a fallen transmission line, the actual cause of the downed line was unknown. Idaho Power maintained that BLM had failed to prove the requisite conduct on the company's part necessary to establish responsibility, and that, absent a showing of negligence on its part, BLM could not hold it responsible for ignition of the fire and the associated fire suppression costs. Idaho Power also questioned discrepancies in the assessed damages and charges for aviation and various materials and supplies.

BLM issued its trespass decision on June 15, 2001, finding Idaho Power responsible for the ignition of the Kimama3 Fire. Enclosed with the decision was a bill for collection, charging Idaho Power \$12,745.80 in fire suppression costs. Idaho Power appealed that decision to the Board.

Issues on Appeal

In both appeals, Idaho Power argues that BLM exceeded its authority under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1733(g) (1994), and 43 CFR Subpart 9239 because the company did not engage in any activity that could be considered a trespass under the statute or regulations. Idaho Power submits that BLM also misapplied the wildfire prevention regulations found at 43 CFR Subpart 9212 because those

regulations do not apply when a party neither used fire in some way nor interfered with fire suppression efforts. Idaho Power maintains that BLM failed to conduct an adequate investigation into the cause of each fire and that material facts concerning the alleged trespasses are in dispute. Specifically, Idaho Power contends that the evidence of causation is inadequate and inconsistent in both cases and fails to establish liability on the company's part, and that the claimed damages contain obvious errors, unreasonable items, and insufficient documentation. Idaho Power insists that due process requires that it be provided a full evidentiary hearing before issuance of any trespass decision and renews its requests for such a hearing. Idaho Power avers that the applicable legal standard in these cases is negligence, not absolute or strict liability, and asserts that BLM has failed to prove any negligence on the company's part caused the fires. Idaho Power asks that BLM's decisions be reversed, or, alternatively, that hearings be ordered to resolve disputed factual and legal issues.

Discussion

[1] Causing a fire on public lands, other than one permitted in writing by BLM or specifically exempted by the regulations, is one of the prohibited acts enumerated in 43 CFR 9212.1. When such a fire injures vegetative materials on public lands, it constitutes an act of trespass under 43 CFR 9239.0-7. See Gene Goold, 155 IBLA 299, 300 (2001); Darryl Serr, 155 IBLA 21, 22 (2001); Greg Heidemann, 143 IBLA 305, 306 (1998). Pursuant to 43 CFR 9239.1-3(a), damages for trespass include administrative costs and costs "associated with the rehabilitation and stabilization of any resources damaged as a result of the trespass." See Greg Heidemann, 143 IBLA at 306. Thus, to the extent a fire produces an injury to public lands, BLM may properly assess fire suppression and related administrative costs against the trespasser. Gene Goold, 155 IBLA at 300; Darryl Serr, 155 IBLA at 22; Greg Heidemann, 143 IBLA at 306-307.

The Board has held that "[i]n the absence of a rule adopted pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1996), BLM may not administratively adopt procedures which ultimately result in the imposition of strict liability on all members of the public whose actions, regardless of whether they might be deemed nonculpable, result in the ignition of fire on the Federal lands." Pamela Neville, 155 IBLA 303, 309 (2001). Instead, until such a rule is duly promulgated, BLM must establish either intent or negligence as a prerequisite to the assessment and collection of trespass damages. Pamela Neville, 155 IBLA at 309. Accordingly, we expressly held that "in the absence of a showing of either intent or negligence, the mere fact that human actions may have contributed in some way to the initiation of fire on or spread of fire to Federal lands is an insufficient basis on which to predicate liability for fire suppression and restoration costs." Pamela Neville, 155 IBLA at 309-310.

When a fire trespass case involves disputed issues of material facts, the Board will exercise its discretionary authority under 43 CFR 4.415 and refer the case to the Hearings Division, Office of Hearings and

Appeals, for an evidentiary hearing to resolve those conflicts. See Gene Goold, 155 IBLA at 301-302; Darryl Serr, 155 IBLA at 23; Greg Heidemann, 143 IBLA at 307; see also Yates Petroleum Corp., 131 IBLA 230, 235 (1994); Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303, 307 (1991); Norman G. Lavery, 96 IBLA 294, 299 (1987); Woods Petroleum Co., 86 IBLA 46, 55 (1985). In these cases, Idaho Power disputes BLM's factual conclusions as to the origins of the fires and the amount of the damages and expressly denies that any negligence on its part caused the fires. Since the record before us contains inconclusive evidence concerning the ignitions of the fires and suggests that BLM's liability determinations may have been predicated on the strict liability standard recently repudiated in Pamela Neville, we find that a hearing is warranted in these cases. At the hearing, BLM shall have the burden of proving by a preponderance of the evidence that negligence on Idaho Power's part was the cause of the fires and that the damages assessed are justified. 1/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are referred to the Hearings Division for hearing and decision by an administrative law judge.

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge

1/ We note that the recommendation marked with a typed "x" in the Dec. 2, 1999, Fire Investigation Evaluation appears to indicate that no public land was burned by the Kimama3 Fire. Since the wildfire prevention and trespass regulations apply only to public land, this issue should also be addressed at the hearing.