

INTERIOR BOARD OF LAND APPEALS

Brad Bower

163 IBLA 342 (November 4, 2004)

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BRAD BOWER

IBLA 2003-77

Decided November 4, 2004

Appeal from a decision of the Vale District Office, Bureau of Land Management, issuing a Bill for Collection in fire trespass case no. OR-030-01-686 (Dry Creek Fire).

Affirmed; petition for stay denied as moot.

1. Trespass: Generally

Under 43 CFR 9239.0-7 and 9239.1-3(a), 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.

2. Trespass: Generally

In each case of human-caused fire constituting trespass on public lands, the record must establish either intent or negligence as a prerequisite to the assessment and collection of damages. A hearing to resolve the trespasser's culpability for causing the fire or his liability for costs is unnecessary where the issues can be resolved through the record.

APPEARANCES: John J. Lerma, Esq., Boise, Idaho, for Brad Bower; Bradley Grenham, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Brad Bower has appealed from a November 20, 2002, decision of the Malheur (Oregon) Field Manager, Bureau of Land Management (BLM), issuing a Bill for Collection emanating from a fire trespass in Case No. OR-03-01-686, the Dry Creek

Fire of June 10, 2001.^{1/} According to the decision, Bower was responsible for the ignition of this fire. The Bill for Collection seeks recovery of \$20,841.39 for fire suppression costs. An itemized list of expenses was attached. Bower does not debate the origin of the fire in his statement of reasons (SOR) for appeal, but states that

[t]his Appeal is made for, but not limited to, the reason that BLM personnel did not arrive to participate in suppression activities until after the fire had been completely extinguished. As such the alleged damages and/or costs incurred should not reasonably be awarded against [him].

(SOR at 2.) Bower further requests an evidentiary hearing “concerning the appropriateness of the trespass order[,] which fails to identify sufficient evidence of responsibility and attempts to apply a strict liability standard” and the amount of the damages, asserting that an evidentiary hearing is “implicated in light of the [Board’s] decisions” in Pamela Neville, 155 IBLA 303 (2001), and Gene Goad, 155 IBLA 299 (2001). (SOR at 2-3.)

We begin with Incident/Investigation Report #0145300093, BLM’s examination of a “human-caused fire” that burned in sec. 19, T. 23 S., R. 44 E., Willamette Meridian, Malheur County, Oregon, on Sunday, June 10, 2001. It was reported therein: “Bower was burning trash and debris at his cabin in the Dry Creek area of Lake Owyhee. The fire escaped and caused a wildfire to which BLM fire crews responded for suppression action.” As a result of the investigation, a Notice of Suspected Trespass was issued to Bower on May 20, 2002, which also conveyed the following request for evidence.

On 06-10-01 the Dry Creek Fire occurred in the Nyssa Oregon area and burned public land without authorization. An investigation indicates that you may be responsible for ignition of the fire. This action may be in violation of the Code of Federal Regulations (43 CFR 9212.1).

If you have evidence of information which tends to show that you are not responsible for starting the fire, you are allowed 21 days

^{1/} Bower also petitioned for a stay of the decision. In its response to the petition, BLM voluntarily stayed the effect of its decision with the understanding that interest from the date the amount of damages was to be tendered would be assessed if BLM prevailed on appeal. (Response to Petition at 1.) That petition is now denied as moot.

from receipt of this notice to present such evidence or information * * *.

Bower responded by letter filed June 5, 2002, stating in part:

[A]s you know from the investigation and our discussion, the fire was started at my cabin on June 10, 2001. In review, I was burning a piece of trash in an established burn area surrounded by rocks and dirt. A gust of wind grabbed a piece and blew it into some cheat grass that ignited. It had not been windy prior. This fire was started by myself but there definitely was not negligence involved. * * *

Also, it was at least 4-5 hours before the BLM was at the fire, after being radioed by the sheriff. We had fought the fire this whole time and kept it at bay at each cabin down the subdivision, with no one from the BLM there. The fire had burned up over the hill and into some rocks where it had pretty well burned itself out by the time the BLM arrived.

After reviewing this response, the appealed decision was issued.

[1] Under Departmental regulation 43 CFR 9212.1, “causing” a fire, other than one specifically excepted by regulation, on public lands is a “prohibited act.” Any injury to resources on the public lands is an act of trespass under 43 CFR 9239.0-7, for which the trespasser will be liable for damages to the United States. Damages are measured pursuant to 43 CFR 9239.1-3(a). To the extent an “injury” to public lands is occasioned by fire, fire suppression and related administrative costs may properly be assessed as damages against the trespasser.^{2/} Idaho Power Company, 155 IBLA 25, 28 (2001); Gene Goold, 155 IBLA 299, 300 (2001); Darryl Serr, 155 IBLA 21, 22 (2001); Greg Heidemann, 143 IBLA 305, 306-07 (1998).

As noted by appellant, fire trespass cases often involve a question of whether to refer the matter to the Hearings Division, Office of Hearings and Appeals, for further examination of complex factual issues. Of the five fire trespass decisions so far reported by the Board, all but one were set aside and referred for hearing.

^{2/} The concept of “fire trespass” is a relatively recent regulatory construct. See discussion in Pamela Neville, 155 IBLA 303, 308-309 (2001) (A.J. Burski). In the initial Departmental communication regarding this matter, BLM Manual Release 9-170 (April 1, 1980), “fire trespass” was defined as “any unauthorized transgression of ignition of fire upon the lands of the United States under the jurisdiction of the Bureau of Land Management.” BLM Manual 9238.05A (1980).

In the first such case, Greg Heidemann, *supra*, the matter was referred for a hearing. The appellant asserted that BLM personnel did not arrive until after the fire was contained and argued that their services were unnecessary. When BLM did not respond to the allegations of fact that conflicted with its incident report, the Board ordered a hearing to resolve those factual issues. 143 IBLA at 308. In the next fire trespass case, Darryl Serr, *supra*, the Board concluded that the appellant's liability was established by his own admission that he was responsible for the fire trespass. 155 IBLA at 23 (fire set on private lands blown out of control onto public lands). Concluding that no complex factual issue or defense was presented, the Board affirmed. Then in Gene Goold, *supra*, the appellant argued that, while he had intentionally set a fire on private lands, he was not responsible for its spreading to public lands. Noting that Serr did not establish strict liability for fire damage on public lands, the Board referred the case for a hearing because the appellant had asserted that his action was not the proximate cause of the fire on public lands and BLM's record did not establish otherwise. 155 IBLA at 300-301 (noting that while the salient facts were similar to Serr -- a fire set on private lands spreading to public lands by an errant wind -- other factors distinguished the two cases).

In Pamela Neville, *supra*, the Board concluded that BLM was applying an improper standard in determining "responsibility" for igniting trespass fires. Upon reviewing BLM's procedures and practice in processing fire trespass cases, the Board held that "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 non-culpable, result in the ignition of fire on the Federal lands." 155 IBLA at 309. The Board 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." 155 IBLA at 309-310. The Board ordered a hearing because the record developed in that case was inadequate to support the trespass action. In the final decision to date, Idaho Power Company, *supra*, the Board, quoting Neville above, determined a hearing was warranted because the appellant expressly denied any negligence on its part and the record contained inconclusive evidence concerning the cause of the offending fires. 156 IBLA at 29.

[2] As these cases have shown, in each individual case of human-caused fire, the record must establish either intent or negligence as a prerequisite to the assessment and collection of damages. In this instance, appellant has declared to BLM that there was no negligence on his part. Moreover, he contends that the costs assessed were unnecessary expenditures on BLM's part. However, in this case we find sufficient evidence to support BLM's determination of liability and its assessment of costs.

The record amply reveals that a “brush fire” needing attention was first reported at 12:28 p.m., on June 10, including a copy of the Malheur County Sheriff Office Incident Report. According to that report, BLM was notified by the Sheriff's Office at 12:30 p.m. The following is taken from BLM's “VAD [Vale Administrative District] Initial Incident Report,” which includes the contemporaneously hand-written notes of the Dispatch Center (hereafter Dispatch Log), documenting the incident as follows:

<u>Date</u>	<u>Time</u>	<u>Unit</u>	<u>Incident Log and Activities</u>
6/10	1237	626	Sent 626 to fire
*	*	*	* * * *
	1255	626	sending 626 to other fire
	1257	623	+ T. Martinez → to Dry Creek
	1413	Marcom	→ Dry Cr.
	1442	432	→ Dry Ck. Carpenter + Gruber, Spellman
	1442	427	→ Dry Ck. Crouch + Gorrigal + Jacobs
*	*	*	* * * *
	1524	Marcom	* * * Arrived at Dry Crk. fire. 150 - 200 acres burning up + away from cabins. Several structures scorched, out buildings burned.
*	*	*	* * * *
	1532	Dent. [623]	Arrived on scene. Deputies on scene.
	1535	Dent.	A building on fire. - outbuildings on fire.
*	*	*	* * * *
6/10	1552	60P	On Scen. w/helio744 - looks like 200 acres involved [unreadable] behind cabins. [unreadable] through grass + sage. 70% active per S+E side, Backing up west side.
*	*	*	* * * *
	1600	427	
	1600	432	> on scene
*	*	*	* * * *
	1624	Bitting	* * * both ships [helicopters] working w/ W/SW side. Bad engine access -- will go as far as they can. -- Handcrew the rest of it.
*	*	*	* * * *
	[1715]	Bitting	* * * 350 acres this time. * * * Winds 8-11 W/NW a few hot spots online. Handcrews working on the line. * * *
*	*	*	* * * *

	1740	Dentinger	Weather - 1730, Dry 83° wet 56° rh 16° w 5-7mph. Lower 1/3 of slop. NW aspect. No cover.
*	*	*	* * *
6/10	1819	Crouch	* * *No active flames, no active perimeter. Mop-up situation at this time.
*	*	*	* * *
	1913	744	Heli off fire, another incident * * *.
*	*	*	* * *
	2048	60P	Off Dry Creek.
*	*	*	* * *
	2217	Crouch	Update, very well. Mop up continuing. Working until 0030 - 0100; Bedding down out there.
*	*	*	* * *
[6/11]	1554	Yeager	getting good rain - calling it contained/controlled @ 1600.

This account, supported by photographs and other evidence of record, refutes appellant's portrayal of the events. Under appellant's scenario, the fire was burned out by around 4:30 or 5:30 p.m. and BLM did not arrive until "thirty or forty-five minutes later," or somewhere around 5:00 to 6:15 p.m. However, the Dispatch Log shows that a BLM unit arrived at around 3:30 p.m. At that time, several structures were on fire and 150 to 200 acres of grass land were burning.^{3/} Helicopters were on the scene just before 4:00 p.m. and reported that the grass fire was 70-percent active. The other two fire engines arrived around 4:00 p.m. Other smaller crews arrived at various times. At around 4:30 p.m., both helicopters were still working on the west/southwest side of the grass fire. The Dispatch Log notes "bad engine access," and that the fire engines would go as far as they could and "handcrew the rest of it." (Dispatch Log at 2 of 8.) At around 5:15 p.m., it was reported that the fire then encompassed 350 acres with a few "hot spots on line," showing that the fire had grown in size since BLM's arrival. *Id.* at 3. Handcrews continued to work the line. By around 6:20 p.m., it was reported that there were no active flames and BLM's crews had moved into a "mop-up" mode, *i.e.*, working to extinguish burning material which could cause the fire to re-ignite or spread beyond the control lines. *Id.* at 4.) By around 9:00 p.m., both helicopters had left the scene, but the ground crews remained, working until around midnight and "bedding down" at the site. *Id.* at 5.

^{3/} Contrary to appellant's assertion, the facts that structures were still burning and the fire was "not contained" are apparent from photographs of the fire taken by BLM personnel for the file. Those pictures show BLM fire-fighting equipment in the vicinity of a burning cabin.

At around 6:30 a.m. on June 11, the three engines began the return trip to their home base in Vale. Three smaller fire crews (pickup truck-based units) remained at the scene throughout June 11 to perform “mop-up” work. One helicopter returned during the day to map (“GPS”) the fire (at 437 acres of public lands). With the presence of sufficient rain, the fire was declared “contained” as of 4:00 p.m. on Monday, June 11. *Id.* at 6. The remaining three crews arrived at their home base just before 6:00 p.m. *Id.* at 7.

It is clear from the record that BLM fire suppression crews appeared at the fire scene because public lands were involved, undertook suppression efforts on a growing wildfire threatening further injury to public lands, and remained there until the danger was completely abated. The cause of the wildfire was appellant, who was burning trash and debris at his cabin site (on private land), as confirmed by appellant’s own admissions and BLM’s investigation. Specifically, a “styrofoam cooler” being burned as debris was blown from the trash fire and ignited nearby vegetation, the wildfire spreading to grasses on the adjacent public lands. (See Fire Cause Determination Report (admission/statement of responsibility taken from Bower); Bower’s hand-written note of June 10.) The reports concluded that the trash fire was unattended at the time the wildfire ignited and the trash burn area was insufficiently buffered to prevent it from spreading to surrounding fuels. It is obvious from the photographs that Bower’s burn area was not a contained area or structure. The evidence and the incident and investigation reports were and are available to appellant.

Despite the evidence, appellant now asserts that he was not negligent in this matter. This uncorroborated assertion, however, is insufficient to warrant a hearing, notwithstanding his arguments regarding the Neville and Goold decisions. These circumstances are certainly unlike those found in Neville, where there was no evidence to determine fault in the propane explosion which ignited the wildfire. 155 IBLA at 309. And they are unlike those in Goold, where the facts agreed upon by the appellant and BLM did not demonstrate any negligence on the part of the appellant, who appeared to have expended a reasonable level of caution. We find the instant situation to be more like the circumstances found in Serr, where we held that the evidence showing responsibility was so overwhelming that liability was not an issue. 155 IBLA at 23. The Board further clarified the distinction between Goold and Serr by noting that the appellant in Serr “deliberately set a fire adjacent to federal lands at a time when his permit had expired and, more crucial, at a time during a ban on open burning.” 155 IBLA at 301.

In its Answer, BLM rebuts appellant’s declaration that he was not negligent by showing that appellant’s trash fire violated local permitting criteria, and has submitted a copy of a blank Malheur County Area Burning Permit as Ex. 3 to its Answer. There is no indication that appellant held a burning permit, contrary to a

State of Oregon statute requiring a county permit for open burning of, *inter alia*, domestic waste in non-municipal areas such as the locale of appellant's cabin, and Bower does not state or suggest that he held a burning permit. *See* Or Rev. Stat. § 476.380(1) (2001). The required Malheur County Burning Permit plainly states that "PERMIT MUST BE SECURED BEFORE ANY BURNING IS STARTED." It further stipulates: "Open burning should not be attempted when one or more of the following conditions exist[s]: [A] Temperature above 100°; [B] Wind velocity above 20 m.p.h.; [C] Humidity below 20%." The permit also proscribed the burning of certain materials "anywhere, anytime," including several categories which would cover styrofoam. Thus, appellant's actions certainly constituted negligence in that he burned styrofoam in an open, uncontained fire at a time when the relative humidity was only 16%. These facts are in the record and have not been refuted by appellant.

An Oregon statute regarding fire prevention also provides that "[i]f such burning results in the escape of fire and injury or damage to the property of another, such escape and damage or injury constitutes prima facie evidence that the burning was not safe." Or. Rev. Stat. § 476.380(3)(b) (2001). BLM avers that appellant "cannot rebut this prima facie evidence as the record shows that [he] did not take reasonable care in starting or supervising the fire." Despite the obviously dry conditions, Bower did not adequately remove fuels from around his burn area; he did not burn in a containment structure; and he left the fire unattended despite the fact that he was burning styrofoam, a light material readily transported by wind. The need for an evidentiary hearing to determine liability is unwarranted in light of these circumstances. A prima facie case of negligence under the Oregon statutes exists and appellant has presented nothing but his uncorroborated statement to rebut it. There is thus no basis for Bower's claim that BLM is attempting to impose strict liability in this case.

Turning to Bower's request for a hearing in the matter of costs incurred by BLM, we note that this issue was also the focus in Heidemann. That case was referred for a hearing when BLM did not respond to the appellant's allegations disputing the necessity of BLM's deployment of fire suppression efforts. 143 IBLA at 307. In this case, however, BLM has carefully documented events and the itemized costs associated with the Dry Creek brush fire in the record. Those documents include the reports of personnel costs, vehicle costs, equipment costs, aviation costs, supply costs, and resource damage assessment. They are itemized and may be easily correlated to the Dispatch Log and other activity and investigation reports.

Generally the Board will order a hearing only when an appellant presents a material issue of fact requiring resolution through the introduction of testimony and other evidence. If an appeal can be resolved relying on documentary submissions, a request for a hearing is properly denied. *See Obsidian Services, Inc.*, 155 IBLA 239,

247-48 (2001); cf. Yates Petroleum Corp., 131 IBLA 230, 235 (1994) (hearing granted). We find that BLM has reasonably supported its assessment of costs under 43 CFR 9239.1-3(a). Bower has not shown error in those costs or established reason to question those costs in light of the record before us. He certainly has not presented an issue of fact that cannot be resolved by this record. Accordingly, the request for a hearing is denied.

As for the merits of the case itself, it is quite clear that Bower did not exercise diligence in this matter, that he acted in a manner that did not comply with State law, and, as a result, that public lands were damaged because of his failure to do so. The records credibly establish the costs for suppressing the fire Bower initiated. Appellant has failed to discharge his burden to show error in the decision appealed by a preponderance of the evidence.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, and the petition for stay is denied as moot.

T. Britt Price
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge