

PAMELA NEVILLE

IBLA 2001-286

Decided August 29, 2001

Appeal from a notice of trespass issued by the Elko Field Office, Bureau of Land Management. NV 010-2001-03.

Set aside and remanded.

1. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Timely Filing

While a postmark on an envelope containing a notice of appeal raises a rebuttable presumption that the document was mailed on the date of the postmark, where the evidence of record establishes a reasonable likelihood that the document was mailed prior to that date, the Board may ignore the postmark and find, consistent with 43 CFR 4.401(a), that the document in question was transmitted or probably transmitted within the period required and, accordingly, waive a delay in the actual filing of the notice of appeal.

2. Trespass: Generally

Under 43 CFR 9239.0-7 and 43 CFR 9239.1-3(a), 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 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 public lands is an insufficient basis on which to predicate liability for fire suppression and restoration costs.

APPEARANCES: Pamela Neville, pro se; Emily Roosevelt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Pamela Neville has appealed from a notice of trespass, dated April 12, 2001, issued by the Elko Field Office, Bureau of Land Management

(BLM), informing her that an investigation conducted by BLM had indicated that she was the party responsible for the ignition of a fire (referred to as the Squaw Valley Fire) on July 20, 2000. After noting that BLM had a policy "to recover the costs of fire suppression activities, actual fire damage, and vegetation restoration on human caused fires," BLM informed her that a bill for \$36,510.12 was enclosed. This bill further informed appellant that if full payment was not made within 30 days of receipt, interest would be assessed at the rate of 5 percent per year. On May 21, 2001, BLM received a notice of appeal from Neville, which contained various arguments in support of her appeal.

Before turning to those arguments, however, it is necessary to first deal with a motion to dismiss the appeal on the grounds that it is untimely. See BLM Motion to Dismiss, dated June 15, 2001. In support of this motion, BLM notes that the return receipt card which accompanied the April 12 decision was signed by one Matt Neville at appellant's residence in Riverton, Utah, and dated April 14, 2001. The notice of appeal which appellant filed, while dated May 12, 2001, was not received by BLM until May 21, 2001. Noting that the applicable regulation, 43 CFR 4.411(a), requires the filing of a notice of appeal within 30 days of service of the decision being appealed, BLM argues that the appeal was clearly untimely. Moreover, BLM asserts that the grace period afforded by 43 CFR 4.401(a) is not applicable since that regulation requires a showing that the document "was transmitted or was probably transmitted" to the proper office before the end of the 30-day appeal period and the postmark on the envelope containing the notice of appeal bore a date of May 17, 2001, three days beyond the deadline for filing an appeal. Thus, BLM contends that dismissal of the appeal is required by the Board's own regulations.

[1] There is no question that the untimely filing of a notice of appeal requires the dismissal of any pending case since the failure of a party to appeal timely deprives this Board of jurisdiction to hear the matter. See, e.g., Friends of the River, 146 IBLA 157 (1998); Red Rock Golf & Recreational Association, Inc., 77 IBLA 87, 89 (1983). And it is equally clear that, inasmuch as the notice of appeal herein was not received by BLM until May 21, 2001, it was not timely "filed" within the meaning of 43 CFR 4.411(a), since a notice of appeal is only "filed" when it is, in fact, received. See generally United States Forest Service, Alaska Region, 124 IBLA 336 (1992). Where we believe questions arise, however, is in determining whether the grace period afforded by 43 CFR 4.401(a) is properly applicable.

BLM essentially argues that, because the envelope containing the notice of appeal was not postmarked until May 17, 2001, i.e., three days after the date the notice was due, the notice of appeal could not be deemed to have been transmitted within the period in which filing of the notice was required. But, while the Board has held that a postmark on an envelope is generally deemed to be the date of mailing (see, e.g., Margaret Lee Pirtle, 54 IBLA 113 (1981); Annie Mae Buckley, 44 IBLA 99 (1979)), it has never accorded the postmark an absolutely conclusive effect. The reason for this is that, while "filing" within the context of 43 CFR 4.411(a) means "received," the verb "transmitted" as used in 43 CFR

4.401(a) means merely "sent." See Kanawha & Hocking Coal & Coke Co., 93 IBLA 179, 181 (1986). Thus, the notice of appeal is "transmitted" not when it is "postmarked," but rather "when the document in question is delivered to the Post Office or deposited in a mail box." United States Forest Service, Alaska Region, supra at 338. While it is expected that, in the normal course of events, the postmark will be affixed soon after the document has been transmitted, the Board has, in practice, recognized that such is not always the case. See, e.g., Barodynamics, Inc., 135 IBLA 352 (1996); Enstar Corp., 102 IBLA 207 (1988); Elliott and Leon Davis, 26 IBLA 91 (1976).

We realize, of course, that while the postmark has been treated as establishing merely a rebuttable presumption ^{1/} of when a document was sent or transmitted (see Max W. Young, 60 IBLA 224, 226 n.1 (1981)), it is still necessary for an appellant to provide something other than a naked assertion of timely mailing to overcome this presumption. See Agnes M. French, 28 IBLA 285 (1976); Minntex Oil Co., 17 IBLA 16 (1974). We believe that particularly instructive on this point is the Board's decision in W. A. Fitzhugh (On Reconsideration), 18 IBLA 323 (1975).

The Fitzhugh appeal involved the question of whether reasonable diligence had been established so as to justify reinstatement of an oil and gas lease which had terminated for failure to pay the annual rental on or before the anniversary date of the lease. In its original consideration of this matter (reported at 18 IBLA 94 (1994)), the Board had denied reinstatement of the terminated lease based on the fact that the payment in question had been postmarked the day before it was due and that, in the absence of credible evidence to the contrary, the postmark was deemed to be the date of mailing. ^{2/} Appellant in Fitzhugh filed a petition for reconsideration together with affidavits of two employees that the rental payment had been posted 6 days prior to the anniversary date of the lease and a copy of a letter, dated June 19, 1974, from the Eastern States Land Office to appellant, which had been received by appellant in Dallas on June 28, 1974, and had been so postmarked. The Board found this evidence sufficient to support a conclusion that the payment had been mailed prior

^{1/} It is important to differentiate between the situation in which an appellant contends that the document in question was transmitted on a date prior to the date shown on the postmark from that where there is some question as to whether or not the document was sent or transmitted after the date shown on a postmark. While the Board has treated the postmark as establishing a rebuttable presumption of mailing in the former situation, it has treated a postmark affixed by the U.S. Postal Service as establishing a conclusive presumption in the latter situation. See United States v. Becker, 33 IBLA 301, 304 (1978).

^{2/} Prior to the adoption of certain regulatory amendments to 43 CFR 3108.2-1(a), effective Aug. 23, 1983, 43 F.R. 33655 (July 22, 1983), an oil and gas lessee whose lease had terminated for late payment of the annual rental pursuant to the provisions of 30 U.S.C. § 188(b) (1994) could establish that the late payment had not been occasioned by a "lack of

to the date of the postmark and to grant reinstatement of the lease. W. A. Fitzhugh (On Reconsideration), *supra* at 324-35.

We believe that the Fitzhugh case is relevant because of the following facts disclosed by the record in the instant appeal. As noted above, the notice of appeal herein was dated on May 12, 2001, and indicates it was sent from appellant's residence in Riverton. It was not postmarked until May 17, 2001, and the postmark was affixed in Salt Lake City. There is thus a 5 day gap between the putative date of mailing and the date of the postmark. This, however, is not the only such gap between mailing dates and postmark dates in the instant record.

We also noted above that the return receipt card was signed on April 14, 2001, by Matt Neville at the family's Riverton address. The return receipt card, however, bears a Salt Lake City postmark of April 20, 2001, and was not received by BLM until April 23, 2001. Since the return receipt card never left the control of the postal authorities, it is difficult to ascertain why it took 6 days to be postmarked or why it was postmarked in Salt Lake City. At a minimum, we must conclude that a gap of 5 days between the date of mailing in Riverton and the date of the postmark in Salt Lake City can obviously occur. Considering the totality of the evidence, we conclude that the notice of appeal was "probably transmitted" on or before the date that it was due and hereby waive the late filing of the notice of appeal pursuant to the provisions of 43 CFR 4.401(a).

Turning to the issues presented by this appeal, we note that, while liability is clearly contested, the general underlying factual construct is not in particular dispute. The record discloses that, on the morning of July 11, 2000, while traveling in her motorhome with her children on their way to Oregon, appellant was given directions which led to the Scrapper Springs Road. While driving down the road, appellant noticed a propane odor and stopped in order to check the propane tank which was located outside the motorhome in the rear of the vehicle. As appellant was in the process of turning off the propane, she heard an explosion from inside the motorhome. A fire simultaneously started in the rear of the vehicle.

While appellant was able to get her children and a pet bird out of the motorhome, it was soon engulfed in flames. These flames ultimately spread to roadside vegetation. With the help of a passing motorist who stopped to render assistance, appellant attempted to extinguish the spread of the flames but was unsuccessful. The motorist reported the fire to the authorities on a cell phone and then drove appellant and her children to

fn. 2 (continued)

reasonable diligence" only by showing that the payment had been mailed "sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal and delivery of the payment." Louis Samuel, 8 IBLA 268, 272 (1972) quoting the text of 43 CFR 3108.2-1(c)(2) (1972). Under Board precedent, mailing a payment the day before it was due was deemed not to be the exercise of reasonable diligence. Id. at 280.

her residence. Appellant's husband picked her and the children up that evening. In the meantime, the wildfire spread, eventually engulfing approximately 600 acres of public and private land. Suppressing the fire took 2 days and numerous resources including an air tanker and involved employees of the United States Forest Service and the Nevada Division of Forestry as well as BLM. As noted above, total costs assessed against appellant aggregated \$36,510.02.

Appellant does not challenge the foregoing factual recitation. ^{3/} What she does attack, however, is the BLM claim that she is both responsible for the fire and liable for the cost of its suppression. Thus, she argues that it is possible that the poor conditions of the Scraper Springs Road caused the propane leak in the first instance and since, she alleges, it was a Government official who first directed her to the road, the Government should bear any ultimate responsibility for the fire. In any event, she argues that she was not responsible for the ignition of the fire since it was clearly an accident and it is uncertain exactly what did cause the propane tank to leak. She noted that the BLM official who interviewed her (Special Agent Robert J. Posey) had told her the he was going to have a fire expert determine what caused the fire to ignite in her motorhome, but this was never done.

In response, ^{4/} BLM argues that there is no evidence that any BLM employee gave appellant directions and, in any event, since appellant was driving the vehicle she could have turned around when the road got too bumpy. (BLM's Response at 1.) BLM agreed that the fire appeared to have been accidental, but continued:

However, we feel that the Neville's are responsible. Mrs. Neville was operating their recreational vehicle that day, it caught on fire, that vehicle fire spread to the wildland fuels in the area starting the Squaw Valley Fire. Numerous fire suppression forces were required to put the fire out. Over 36,000 dollars of public funds were spent to extinguish the fire. The BLM is trying to recover that money through this trespass action.

Id. at 2. Insofar as the failure to ascertain what caused the fire to ignite inside the vehicle is concerned, BLM admitted that it did not know what caused the fire to ignite, but essentially deemed this question irrelevant since appellant had admitted that the fire which started in her

^{3/} Admittedly, appellant does challenge the extent of the area which was burned, claiming that she was told that it was only 100 acres. However, regardless of what appellant may or may not have been told, the record indicates that a helicopter with a Global Positioning System unit was used to map the burned area on July 29, 2001, and that this mapping showed that approximately 600 acres of public and private land were burned.

^{4/} We note that the initial BLM response accompanied the transmittal of the appeal and case file to the Board. There is no indication that this response was served on appellant, even though service on an appellant of such documents generated by BLM after a notice of appeal has been filed is clearly required by the regulations. See 43 CFR 4.414. Normally, the

vehicle had itself ignited the adjacent vegetation, thereby starting the Squaw Valley Fire.

For the reasons set forth below, we believe that BLM applied an improper standard in determining "responsibility" for the ignition of the Squaw Valley Fire and that, as a result, the record developed thus far is inadequate to support the present trespass action.

[2] The concept of "fire trespass" is a relatively recent regulatory construct. In fact, nowhere in the regulations does the term "fire trespass" actually appear and it has surfaced in only a single Board decision to date. See Daryl Serr, 155 IBLA 21 (2001). It finds its origins in a BLM Manual Release 9-170, dated April 1, 1980, entitled "Fire Trespass" which was issued for the purpose of providing "guidance for processing criminal charges and civil claims for the United States resulting from unauthorized use of fire upon land administered by BLM." BLM Manual 9238.01 (1980).

In that release, "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). Under these provisions, District Managers were charged with the responsibility to "investigate each fire to determine if it is man-caused, and on all man-caused fires [to take] action to determine the persons responsible for the ignition, the circumstances surrounding the incident, the degree of negligence or intent, and the amount of damage caused by the incident." BLM Manual 9238.04B (1980) (emphasis supplied). That release differentiated between a criminal offense ("any unlawful ignition act intended to damage the United States Government or its properties, or persons using the public lands") and a civil offense ("any negligent act which causes damage to resources or properties of the United States"), and further defined a "negligent act" as "any unplanned act which lacks sufficient caution to prevent unwilling damage to properties of the United States." BLM Manual 9238.05C, .05D, and .05E (1980).

In 1990, this Manual Release was superceded by Manual Release 9-302, dated April 2, 1990. It is notably deficient in a number of areas. Thus, no definition of fire trespass is provided. More to the point, while the District Managers are still charged with the responsibility of ascertaining, inter alia, "the degree of negligence or intent" of the persons found to be responsible for the ignition of human-caused fires (see BLM Manual 9238.04E (1990)), the definitions which had provided guidance to the

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Board would require that BLM complete proper service before considering the subject appeal. But, inasmuch as the Board has determined that, regardless, the decision should be set aside, we have decided to proceed to consideration of the subject appeal without further delay. BLM is cautioned, however, that similar failures in the future may impel the Board to disregard its pleadings as provided in the regulations. We note that the motion to dismiss filed by the Office of the Field Solicitor on behalf of BLM was served on appellant as required by the regulations.

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determination of what constituted negligence were also removed. It is this lack of any definitional guidance, we believe, which has engendered a misapprehension as to the scope of individual liability in fire trespass situations.

In essence, it is apparent that, insofar as the instant appeal is concerned, BLM viewed the present Manual as establishing some sort of "strict liability" on any individual who might be deemed to have "caused" a fire, however inadvertent or non-culpable the individual's actions might have been. Certainly, such a standard could not be maintained under the 1980 Manual provisions, which specifically required a finding that the causation upon which

liability was predicated be the result of an intentional or a negligent act. Nor do we believe that such a "strict liability" standard can be supported under the 1990 Manual provisions.

Certainly, nothing in the 1990 Manual provisions purported to announce the adoption of a strict liability approach to any fire damage occurring on Federal lands. Nor could they. It must not be forgotten that BLM Manual provisions do not have the force and effect of law nor are they binding on the general public or on this Board. See, e.g., Morton v. Ruiz, 415 U.S. 199, 235 (1974); Shaw Resources, Inc., 79 IBLA 153, 164, 91 I.D. 122, 128 (1984); United States v. Williamson, 54 IBLA 264, 276 (1980). Indeed, the Board has expressly noted that "it seems quite evident that a manual provision which imposes a specific obligation on members of the public must be published." Lane County Audubon Society, 55 IBLA 171, 175 (1981). In 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 non-culpable, result in the ignition of fire on the Federal lands.

This does not, of course, mean that those who act either intentionally or negligently can avoid payment for fire suppression and resource restoration costs. Such individuals remain liable. But, what is necessary in each individual case of human-caused fire is for BLM to ultimately establish either intent or negligence as a prerequisite to the assessment and collection of damages. This was not done in the instant case. BLM made no showing or even allegation that appellant was in any way at fault in the propane explosion which initiated the fire. Absent such a predicate assertion, we do not believe there is an adequate basis to refer this matter to the Hearings Division for the assignment of an administrative law judge at the present time. Rather, we believe the correct procedure is to set aside the decision and remand the case to BLM so that it might reexamine the matter to determine whether a trespass action can be justified under the standards set forth above. If so, a new decision should issue with the right of appeal to this Board. If not, the matter should be terminated.

In any event, we expressly hold 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

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Federal lands is an insufficient basis on which to predicate liability for fire suppression and restoration costs.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss is denied and the decision appealed from is set aside and the case remanded for further action consistent with the foregoing.

James L. Burski
Administrative Judge

I concur:

R. W. Mullen

Administrative Judge

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