

T.J.'S LAND CLEARING
GOLDEN VALLEY ELECTRIC ASSOCIATION, INC.

IBLA 2003-308; 2003-309

Decided December 28, 2004

Appeals from trespass decisions of the Alaska Fire Service, Bureau of Land Management, holding appellants responsible for igniting the Survey Line Fire (B247) and assessing damages for fire suppression. AK 360-10-0013 (Bill for Collection No. A381841).

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: Cory R. Borgeson, Esq., Fairbanks, Alaska, for T.J.'s Land Clearing and Golden Valley Electric Association, Inc.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

T.J.'s Land Clearing (T.J.'s) and Golden Valley Electric Association, Inc. (GVEA), have each appealed from separately-issued but similar decisions of the Manager, Alaska Fire Service (AFS), Bureau of Land Management (BLM), dated June 11, 2003. The decisions held T.J.'s and GVEA responsible for igniting the Survey Line Fire (B247) and liable for suppression costs. Both T.J.'s and GVEA

challenge Bill for Collection No. A381841, in the amount of \$504,353.91 for suppression costs, which accompanied the decisions. In conjunction with their respective appeals, each have petitioned to stay the effect of the decision issued to them. Both appellants have also requested a hearing so that they may present evidence and arguments disputing or repudiating liability for the fire and costs set forth in the bill.

The Survey Line Fire was reported to the Military Zone Dispatch Office, AFS, on June 20, 2001, and eventually burned 112,112 acres of mostly Federal lands approximately 15 miles southwest of Fairbanks, Alaska, in the area of Fort Wainwright, Tanana Flats Training Area.^{1/} Attached to the Bill for Collection is an AFS Cost Summary reporting the subtotal costs as follows: AFS, \$384,736.34; State of Alaska, \$56,859.68; and Forest Service, \$69,320.54, for a total amount of \$510,916.56. Of that total, the amount of \$6,562.65 represents research support costs not directly related to suppression efforts and was therefore subtracted. AFS billed for the amount of \$504,353.91 under responsibility delegated to it pursuant to the Alaska Interagency Fire Management Plan.

The record includes a bound report entitled “Wildfire Investigation Report, Origin & Cause Determination,” prepared by Dave Mobraten, Fire Investigator,^{2/} for the Survey Line Fire. Therein, Mobraten concluded that the fire “was caused by members of T.J.’s Land Clearing crew, while under a contract purchase order agreement from Golden Valley Electric Company, as they were clearing vegetation at the proposed Northern Intertie electric transmission tower site location #415.” (Fire Investigation Narrative at 13.) His conclusion was based upon the following observation derived from his investigation: “Although I did not find any direct evidence of an actual spark ignition, it is a logical conclusion that the chainsaw operations on this day produced the ignition source of this wildfire.” *Id.* Also included in the bound report was the Field Manager’s Fire Trespass Decision Document, with its investigation summary:

Although the fire investigation report does not identify the absolute ignition source, it is reasonable to conclude the ignition of this fire was

^{1/} Of the total amount of land impacted, 112,050 acres are Federal, non-commercial forest lands. Of the remaining lands, 52.3 acres are tribal, non-commercial forest lands, and 9.7 acres are State-owned, commercial forest lands. See BLM Fire Report, *found in* Documentation for Fire B247. The record also includes a statement calculating loss of commercial timber suffered by the State of Alaska at \$3,110.61, which timber was subject to Timber Sale Contract NC-900-F.

^{2/} The specific office or agency to which Mobraten is assigned as a Fire Investigator is not identified in the case file.

most likely due to the activities of the contract crew personnel in the area. One possible scenario is use of a chain saw without a spark arrester. The ignition source (carbon fragment) probably ignited the grasses and upper duff layer which smoldered undetected for approximately one hour and began to spread with active flames shortly thereafter possibly due to a local wind event.

Noting that “[t]he fire investigation report documents the point of ignition and identifies a select group of people in the area,” the Fire Management Officer, AFS, recommended that BLM proceed with the trespass action.

According to BLM investigative reports, the subject wildfire originated on the GVEA Northern Intertie power line route crossing the Fort Wainwright Military Withdrawal. On June 20, 2001, a right-of-way clearing crew was working in the vicinity. The Dispatch Office, AFS, was notified of the fire at 2:33 p.m. by an AFS crew en route to another wildfire along the same power line route. Mobraten supplied the following account:

According to two of the clearing crew members they noticed smoke coming from the tower site clearing about 10 minutes or longer after they had moved northwesterly and as they were clearing the access trail from tower site location #415.

When they ran back to the site it was approximately pick-up bed in size and burning actively. They attempted to put it out with spruce boughs and willow branches. They were not successful and by beating on the flames they only managed to fan the fire and scatter it more. This created an area of what appeared to be multiple ignitions.

(Fire Investigation Narrative at 12.) What is clear from the report is that there is no conclusive evidence of how the fire started. Mobraten fashioned his conclusion from the circumstances of the afternoon: T.J.’s was working in the immediate area of the ignition site with chainsaws, “flush cutting stumps to ground level in very dry duff material which was exposed to direct sunlight.” *Id.* at 12-13. Mobraten ruled out eight other causes of wildfire based on the lack of evidence or presence of those factors in the immediate area.^{3/} He further reported that he visibly examined the

^{3/} Mobraten did attempt to “replicate the ignition of a fire start by using a chainsaw and fine fuels that I had collected from the Fairbanks area” at the State of Alaska, Division of Forestry, maintenance shop. (Aug. 8, 2001, Declaration.) While he was unsuccessful, he cautioned that “[t]he conditions under which I conducted this test could not be replicated under the same weather and fuel environment as were at the
(continued...)

chainsaws that had been used at the site of the fire, noting that “[t]he clearing crew said the saws were operating very hot that day (too hot to touch the bar),” and that “[s]everal times the chainsaws would throw the chain and they would have to re-tighten them.” *Id.* at 3, 11. He said that when he examined the #5 saw, it lacked a spark arrester screen.

In their statements of reasons, T.J.’s and GVEA each argue that the actual source and circumstances of ignition have never been definitely identified and, therefore, BLM was arbitrary and capricious in assigning them liability for the fire. T.J.’s asserts that it was not negligent in conducting its land clearing operations and did not cause the fire. GVEA contends that it should not be held liable for its contractor’s actions. Appellants further argue that T.J.’s chainsaws were regularly maintained by Ron’s Saw Shop and had been serviced just days before the incident occurred. As to Mabraten’s claim that one of the chainsaws lacked a spark arrester screen, T.J.’s avers that “Rod Stephens, an expert in saw sales, repair, and service stated that following the fire he inspected the saw in question and found a spark arrester screen in place.” (T.J.’s Petition for Stay at 7-8.) T.J.’s further observes that saw #5 was professionally serviced just 4 days prior to the incident.

[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. *Idaho Power Company*, 156 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).

This Board has, however, held that it is necessary in each individual case of human-caused fire for BLM to ultimately establish either intent or negligence as a prerequisite to the assessment and collection of damages. The analysis in *Idaho Power Company*, as set forth below, applies to this case:

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.”

^{3/} (...continued)

location of the ignition site of Fire B-247.” *Id.*

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.

156 IBLA at 28-29.

We find that BLM, in its decision, did not present convincing evidence that the wildfire at issue was actually caused by T.J.’s. It could not cite any of T.J.’s activities as directly related to what ignited the fire. Further, BLM did not set forth any legal theory for holding GVEA responsible for igniting the fire. In this instance, BLM issued Notices of Suspected Trespass to both T.J.’s and GVEA asking for evidence or information showing that they were not responsible for starting the fire. By letter filed February 11, 2003, appellants offered comments, citing Gene Goold, supra, and Pamela Neville, supra, and arguing that neither negligence nor intent were involved:

GVEA’s and T.J.’s Land Clearing’s conduct falls into the same category as Pamela Neville’s and Gene Goold’s. GVEA hired an

experienced and professional independent contractor in T.J.'s Land Clearing to remove vegetation from the Intertie route. T.J.'s Land Clearing used the professional service of Ron's Saw Shop to maintain their equipment days before the incident occurred. The Intertie is being constructed under State and Federal permits which required extensive environmental studies to minimize impacts on wildlands before construction was authorized, and the clearing crews received daily safety instructions from BLM officials.

The record does not show that BLM has responded to these claims or the request for a hearing to resolve disputed facts. In the case of Greg Heidemann, 143 IBLA at 308, the Board ordered a hearing to resolve factual issues when BLM did not respond to allegations of fact in conflict with its incident report. We find that the instant case, too, raises material issues of fact regarding appellants' liability for suppression costs which cannot be resolved utilizing the record before us. Again, Mobraten states that he "did not find any direct evidence of an actual spark ignition," but that "it is a logical conclusion that the chainsaw operations on this day produced the ignition source of this wildfire." (Draft at 2, quoting Fire Investigation Narrative at 13.) He proceeds to state that "the fire investigation report does not identify the absolute ignition source," and that "[o]ne possible scenario is use of a chain saw without a spark arrester." Whether T.J.'s crew caused the fire is a matter of speculation, with Mobraten ruling out eight other possible scenarios under which the fire could have started based on lack of evidence, and concluding that T.J.'s was responsible for the fire based upon "[o]ne possible scenario."

On the other hand, T.J.'s contests BLM's determination that T.J.'s crew caused the fire, and GVEA contends that it should not be responsible for its contractor's actions. In Idaho Power Company, the appellant "dispute[d] BLM's factual conclusions as to the origins of the fires and the amount of the damages and expressly denie[d] that any negligence on its part caused the fires." 156 IBLA at 29. T.J.'s and GVEA maintain the same in this case. As in Idaho Power Company, this case "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." Id. T.J.'s argues that the actual source and circumstances of the fire have not been identified, and further denies that it was negligent in conducting its land clearing operations and that it caused the fire. When a case, such as this one, involves a legitimate factual controversy as to the source and circumstances of the fire, and the appellant further denies that it was negligent in conducting its land clearing operations and that it caused the fire, the matter should be referred for a hearing in accordance with Pamela Neville and Idaho Power Company.

The administrative law judge to whom this matter is assigned is directed to conduct a hearing, at which GVEA and T.J.'s will be afforded the opportunity to present evidence to demonstrate that they are not liable for suppression costs in connection with the Survey Line Fire, as set forth in the Bill for Collection dated May 29, 2003. BLM will bear the burden of going forward and proving, by a preponderance of the evidence, liability and the appropriate amount of trespass damages. See Idaho Power Company, 156 IBLA at 29; Greg Heidemann, 143 IBLA at 307. Following the hearing, the judge will render a decision on the question of liability and damages, including any related questions of law. The decision of the administrative law judge will be final for the Department, absent a proper appeal to the Board pursuant to 43 CFR Part 4.^{4/}

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's June 11, 2003, decisions and Bill for Collection No. A381841 are set aside, and the case is referred to the Hearings Division for a hearing. Appellants' petitions to stay the effect of those decisions are denied as moot.

James F. Roberts
Administrative Judge

^{4/} We note that appellants are concerned with indications by BLM that interest and fees of about 10-percent will be imposed if the Bill for Collection is not fully paid within a specified period. (Notice of Actions in Event of Delinquency, *attached to* Decision.) Hence, they have filed petitions for stay of the decisions. By our setting aside the decisions and Bill for Collection, the issue is rendered moot. We therefore deny the petitions for stay.

ADMINISTRATIVE JUDGE PRICE CONCURRING IN THE RESULT:

I concur in the result, albeit reluctantly. That reluctance stems not from any conviction regarding the ultimate outcome of this controversy, but from appellants' failure to identify the material issues of fact, which if proven, would alter the disposition of the appeal. Taylor Energy Co., 148 IBLA 286, 295 (1999) (producing wells determined to be competitive). The Bureau of Land Management (BLM) enumerated at length a number of specific facts, admissions of the crew of T.J.'s Land Clearing (T.J.'s) who were present at the start of the fire and spread it in an attempt to contain it (they had brought no fire suppression equipment with them), statements from Rod and Craig Stephans of Rod's Saw Shop that flatly contradict T.J.'s statements, and other circumstances on which BLM relies for its "logical conclusion that the chainsaw operations * * * produced the ignition source of this wildfire," evidently suggesting a theory of *res ipsa loquitur* to explain the fire. (Fire Investigation Narrative at 3.) On appeal, in perfunctory fashion, appellants raise several legal issues challenging BLM's authority and Golden Valley Electric Association's (GVEA's) liability for the acts of its contractor. These are arguments that do not require a hearing, and the latter is an issue to be resolved by T.J.'s and GVEA.

As to a showing of the material factual issues that would require a hearing, however, the substance of it principally lies in two statements from T.J.'s "Preliminary Statement of Reasons" (PSOR): "There is no concrete evidence that T.J.'s ignited that fire. In fact[,] no source of ignition has ever been definitely identified." (PSOR at 2 of 10.) My colleague cites T.J.'s Petition for Stay (Petition at 7-8 of 10) to frame an issue regarding the servicing of chainsaw #5 and the missing spark arrester, but those further assertions, while consistent with the Fire Investigation Report as far as they go, do not show a factual dispute with regard to other key statements of individuals at Rod's Saw Shop to the contrary (Fire Investigation Report at 7), or Mobraten's statements that, at tower site #415 where the fire started, and at his request, T.J.'s crew removed the muffler on chainsaw #5 and "[t]he bracket that holds the screen was in place[,] but the screen was completely gone" (Fire Investigation Report at 3). Nor do T.J.'s statements purport to deny, as another example, the critical admissions BLM attributed to T.J.'s crew, or state any particular factual issue raised by those admissions. See Fire Investigation Report at 4; see also 8.

In other cases, the Board has required the submission of "sufficient probative evidence indicating that a hearing might be productive." Taylor Energy Co., 148 IBLA at 295. It has noted the absence of "any inaccurate or contradictory statements that raise issues of fact," Wold Trona Co., Inc., 150 IBLA 277, 281 (1999) (rejection of high bid), as well as failure to state what the material issues were, Commission for the Preservation of Wild Horses, 133 IBLA 97, 100 (1995) (adequacy

of an environmental assessment), and on that basis denied the hearing request. We have denied hearings where the moving party made no offer of proof, State of Alaska Department of Transportation and Public Utilities, 131 IBLA 121, 125 (1994) (Native allotment application); Obsidian Services, Inc., 155 IBLA 239, 247-48 (2001) (special use permit); Arjay Oil Co., 43 IBLA 98, 100 (1979) (oil and gas lease offer); “made no offer of further evidence” to support the request, Frank Robbins, 146 IBLA 213, 219 (1998) (grazing trespass); or failed to specify “what evidence would be submitted should [a hearing] occur,” Thomas B. Craig, 134 IBLA 145, 154 (1995) (equitable adjudication). We have gone so far as to issue an order explicitly requiring the appellant to identify “what specific issues of material fact require a hearing, what evidence concerning these issues must be presented by oral testimony, what witnesses need to be examined, and what evidence could be presented in documentary, rather than oral, form.” Western Production Co., 124 IBLA 111, 115 (1992) (oil and gas lease), to determine whether to grant a hearing. Where the issue was a matter of a “conclusion of law to be drawn from an accepted set of facts,” we have refused to order a hearing. Boy Dexter Ogle, 140 IBLA 362, 372 (1997) (Alaska Native allotment application).

In other fire trespass appeals, appellants in those cases have offered considerably more than T.J.’s statements, asserting with particularity the facts and circumstances they believed showed they were not or should not be held responsible for the fire and which cast doubt on the particulars of those urged by BLM. In Greg Heidemann, 143 IBLA 305, 306-07 (1998), appellant admitted starting the fire and that it got out of control. On appeal, he argued that he had successfully contained the fire with the help of a neighbor, and therefore fire suppression efforts on BLM’s part were belated and unnecessary, so that he should not have been billed for such costs. In Gene Goold, 155 IBLA 299, 300 (2001), Goold alleged that he had a valid burn permit, an adequate buffer zone, and water on the burn site when he ignited his fire. According to Goold, allegedly “unpredictable dust devils” arose and spread the fire to public lands. In Pamela Neville, 155 IBLA 303, 306-07 (2001), a propane tank on appellant’s motor home exploded while she was driving the vehicle. On appeal she specifically identified other plausible causes and explanations for the burst tank.

In Daryl Serr, 155 IBLA 21, 22 (2002), Serr admitted he had started the fire during a fire ban when he had no valid burn permit. On appeal, he argued that the wind that blew the fire onto public land constituted an act of God. In Idaho Power Company, 156 IBLA 25, 26-27 (2002), appellant expressly questioned the adequacy of the investigation, specifically regarding the question of what had caused power lines to break and fall. In the last of the Board’s decisions, Brad Bower, 163 IBLA 342 (2004), appellant initially admitted starting the fire. Although Bower attempted to retreat from his admission on appeal and call BLM’s costs into question, we did not order a hearing and instead determined that the case could be decided on the record, because the ultimate question was whether the facts found by BLM constituted

negligence as a matter of law, notwithstanding his disavowal, since Bower had admitted starting the fire with highly combustible material without a permit or adequate firewall on a day when the threat of fire was high and it was windy.

An issue of fact can be implied from appellants' statements on appeal. Since a hearing is discretionary, however, and consistent with Board precedent, it behooved appellants and their counsel to identify the particular factual issues that require oral testimony to be resolved, without which the situation is more analogous to that in Bower. Despite misgivings, I concur in the result.

T. Britt Price
Administrative Judge