



United States Department of the Interior

OFFICE OF THE SOLICITOR

MAR 9 2004

TO: Director,
Bureau of Land Management

FROM: Associate Solicitor,
Division of Land and Water Resources

SUBJECT: Fire Trespass Assessment Collection Standards

I. Introduction

The Solicitor's Office has received several inquiries regarding the circumstances under which the Bureau of Land Management (BLM) may administratively assess fire suppression costs and fire damages to public lands. This issue arises, in part, because neither BLM Manual 9238 (1990), Fire Trespass Handbook H-9238-1 (2000), nor 43 C.F.R. Part 9230 specifically discuss the applicable standards for liability.

According to BLM regulations, a fire that causes injury to or the removal of timber or vegetative resources from public lands creates a trespass. See 43 C.F.R. § 9239.0-7. The regulations, however, provide no standard for imposing trespass liability. The Fire Trespass Manual and Handbook can be interpreted as imposing a strict liability standard by requiring cost recovery even when a fire appears to be an accident. The Manual establishes that BLM policy is to take fire trespass action in all human-caused fires where responsibility can be determined. Manual 9238.06. The Handbook states that "[f]or all human-caused fires where the suspect can be determined, actions must be taken to recover the cost of suppression activities, land rehabilitation, and damages to the resources and improvements." Handbook at i. It further provides that "[a]bsent objection from the Field Solicitor or Department of Justice, within 30 days of the notice, the Field Manager shall bill for all human-caused fires." Handbook at I-1. Yet, the Handbook also mandates that "[a]ll fires must be thoroughly investigated to determine cause and whether negligence and/or criminal intent were factors." Handbook at II-1. Thus, these sources provide no clear standards for imposing fire trespass assessments.

In response to BLM's inquiries, this memorandum explains the assessment standards recently articulated by the Interior Board of Land Appeals (IBLA) and provides suggestions on how BLM might investigate fire trespass in light of these decisions. In short, the IBLA has clearly rejected a strict liability standard and held that BLM may not recover for fire trespass unless the party causing the fire did so negligently or intentionally. When negligence or intent is contested by the party, IBLA has referred the matter for a hearing where BLM must demonstrate this negligence or intent.

II. General Authority to Collect for Fire Trespass

The United States, like any other private landholder, is entitled to protect its property against trespass. United States v. Gardner, 903 F.Supp. 1394, 1402 (D. Nev. 1995); see Camfield v. United States, 167 U.S. 518, 524 (1897) (stating "the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers . . . no legislation was necessary to vindicate the rights of the Government as a landed proprietor.")

Additionally, BLM has promulgated regulations providing for the recovery of damages for trespass to vegetation. See 43 C.F.R. § 9239.0-7. The IBLA has held that these regulations authorize BLM to collect fire trespass damages administratively and has summarized the regulations as follows:

"Causing" a fire, other than one specifically excepted by regulation, on public lands is a "prohibited act." 43 C.F.R. § 9212.1. Under 43 C.F.R. § 9239.0-7, any injury to resources on the public lands is an act of trespass for which the trespasser will be liable for damages to the United States. Damages are measured pursuant to 43 C.F.R. § 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.

Gene Goold, 155 IBLA 299, 300 (2001). The Fire Trespass Handbook, at IV-3, details the costs and damages that BLM administratively assesses. They include: (1) fire suppression costs; (2) resource damages (defined generally as the cost of reestablishing the resource including any net value of resources burned); (3) rehabilitation costs; (4) costs of repairing or replacing physical improvements; (5) costs of repairing, replacing, or rehabilitating offsite values (e.g. loss of a water structure); and, (6) direct (administrative) costs.

III. Negligence or Intent as the Applicable Fire Trespass Assessment Standards

On two occasions, the IBLA has thoughtfully considered the issue and held that a finding of either negligence or intent is necessary for BLM to impose fire suppression costs and fire damages on responsible parties. See Pamela Neville, 155 IBLA 303 (2001); Idaho Power Company, 156 IBLA 25 (2001).

In Pamela Neville, the appellant was traveling in her motorhome when she noticed the smell of propane and stopped to check the propane tank, which was located on the outside of the motorhome. 155 IBLA 303 (2001). As she was turning off the propane, she heard an explosion from inside the motorhome. A fire started in the rear of the vehicle and flames ultimately spread to roadside vegetation. Appellant attempted to stop the flames from spreading, but was unsuccessful. The wildfire eventually engulfed over 600 acres of public and private land. BLM subsequently billed Ms. Neville for \$36,510. Id. at 306-07.

On appeal to the IBLA, Ms. Neville argued that she was not responsible for the ignition of the fire because it was an accident and the cause of the propane leak remained unclear. *Id.* at 307. In response, BLM agreed that the fire appeared to have been accidental, but asserted that the Nevilles were responsible since they were operating their recreational vehicle that day, the vehicle caught on fire, and the vehicle fire spread to the wildland fuels in the area. *Id.* The IBLA observed that BLM viewed the Manual as imposing "strict liability" on any individual who might be deemed to have "caused" a fire, however inadvertent or non-culpable that individual's actions might have been. *Id.* at 309. The IBLA held that the Manual could not impose strict liability absent a regulation imposing such a standard. The IBLA stated:

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 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.

Id. The IBLA specifically noted, however, that fire costs can be recovered for negligent or intentional conduct:

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.

Id. Additionally, the IBLA stated that, in those cases where negligence or intent cannot be found, BLM should terminate collection efforts. *Id.*

In Idaho Power Company, BLM issued two trespass decisions against Idaho Power. 156 IBLA 25 (2001). BLM found that Idaho Power was responsible for starting the King's Crown Fire and the Kimama 3 Fire and issued citations for \$80,128.90 and \$12,745.80 respectively. Idaho Power then challenged these assessments, arguing that the causes of these fires were uncertain, BLM's investigations were insufficient, and that BLM could not hold Idaho Power responsible for fire damage or fire suppression costs absent a showing of negligence. *Id.* at 26-27.

The IBLA's reasoning in Idaho Power Company reinforced its holding in Pamela Neville. The IBLA began by acknowledging BLM's authority to assess fire suppression and related administrative costs against fire trespassers. *Id.* at 28. However, the IBLA added that it would not impose a strict liability standard for fire trespass until appropriate administrative procedures

creating this standard are adopted. *Id.* Until regulations creating strict liability exist, the IBLA held that “BLM must establish either intent or negligence as a prerequisite to the assessment and collection of trespass damages.” *Id.* Accordingly, in situations where the facts surrounding the cause of a fire are disputed, a hearing is appropriate at which BLM has the burden to demonstrate negligence by a preponderance of the evidence to justify an assessment. *Id.* at 28-29.

Clearly, the IBLA has mandated that BLM support fire trespass assessments by making at least a showing of negligence. Although these decisions may contradict an interpretation of the BLM Manual or Handbook that allows assessments based on strict liability, the IBLA decisions are controlling on this matter. The IBLA is a representative of the Secretary and has the authority to determine appeals as fully and finally as does the Secretary. 43 C.F.R. § 4.1. Consequently, unless these IBLA decisions are modified in the future, that body has spoken for the Secretary in finding that BLM does not have legal authority to impose strict liability through its Manual or Fire Handbook. Thus, BLM may assess fire suppression costs and fire damages against parties only where the evidence supports a finding of negligence or intent.¹

IV. Investigating Negligence and Issuing Assessments

The determination of negligence is a fact specific inquiry, meaning that there is no bright line rule governing the issue. However, an understanding of the basics of negligence, especially as it applies to fire, may improve the focus and efficiency of fire trespass investigations. In general, negligence consists of “acting other than as a reasonable person would do in the circumstances” or “the failure to use that degree of care for the protection of another that the ordinarily reasonably careful and prudent [person] would use under like circumstances.” 57A Am.Jur. 2d, Negligence § 7 (2d. ed. 1989); Restatement (Second) of Torts § 283. What constitutes ordinary care depends on the specific circumstances surrounding the fire. The care must be proportionate to the known risks posed by a situation, or those risks that should be recognized by a reasonable person. 35A Am.Jur. 2d, Fires § 23; Restatement (Second) of Torts § 289, comment (b). Additionally, courts may adopt a statute or regulation as the reasonable standard of conduct,

¹The IBLA has not yet considered the argument that strict liability may stem from regulations allowing BLM to assess fire trespass under state penalties more strict than the BLM trespass rules. See 43 C.F.R. § 9239.1-3. Strict liability generally arises only where an abnormally dangerous activity results in an injury to a person or property. Restatement (Second) of Torts § 519. In determining whether an activity is abnormally dangerous, the following factors must be considered: (1) the degree of the risk; (2) the likelihood that great harm will result; (3) the inability to limit the risk through reasonable care; (4) the extent to which the activity is uncommon; (5) the inappropriateness of the activity to its location; and (6) the extent to which the danger from the activity outweighs its value to the community. *Id.* at § 520. Because this issue has not been before the IBLA, BLM should assume that either negligence or intent must be shown in all fire trespass cases. If BLM believes a particular case warrants looking closely at a strict liability standard for resource damages to public lands, BLM should discuss the particular case with the relevant field or regional Solicitor’s office.

making an unexcused violation negligence in itself. Restatement (Second) of Torts § 288B. More specifically, liability may be based on negligence in starting or using a fire, allowing or causing a fire to spread, or failing to provide sufficient effort to prevent or extinguish the fire. Even where a fire is properly set for lawful purposes, liability may be imposed for damages resulting from the fire's spread where subsequent negligence is found. 35A Am.Jur. 2d, Fires § 32. This occurs where a party unreasonably keeps property in a condition that increases the risk of a fire spreading, such as improperly storing combustible material. *Id.* at § 36. Additionally, a failure to use proper equipment, to train employees in the proper use of equipment, and improper use of the equipment itself can all be the basis for a finding of negligence.

Because negligence is a fact specific inquiry, BLM should carefully investigate and document the causes of a fire and the facts relevant to whether suspected fire trespassers acted with reasonable care. Specifically, BLM should document the circumstances under which a person started a fire and any action taken to suppress it. The investigation should include information such as actual weather (temperature, humidity, wind, presence of lightning), forecasted weather, fire precaution levels, fire restrictions that were in effect, and a summary of the reasonable precautions a person would normally take to avoid the ignition or spread of fire under the circumstances. Several examples may help illustrate facts important to the negligence determination.

If a party is operating equipment when a fire ignites, for example, the possibility that the equipment may have caused sparks is relevant. Especially important would be information about whether, given the particular fire risk and weather in an area, the party was operating the equipment at a prudent time (e.g., time of day and time of year) place (e.g., a fire prone area with substantial flammable material), and in a prudent manner. Additionally, there may be federal or state standards governing use of a particular piece of equipment to protect against fire. A violation of an applicable safety standard may constitute, or contribute to, a finding of negligence.

If a motorist starts a fire, any information concerning the improper maintenance, operation, or monitoring of the vehicle is relevant. For example, if a vehicle is pulling a trailer which starts to emit sparks from a flat tire, the parties might be negligent for failing to keep a proper lookout over the towed vehicle or for improperly maintaining the vehicle. Evidence which BLM could collect to show negligence here includes scraps of burned rubber and pictures of scraped pavement along the highway, indicating inattentiveness to problems with the vehicle. Other information, such as whether the party was driving over fire-prone vegetation or was on notice of dangerous fire conditions, would also be relevant to the negligence inquiry.

Since negligence is partially a legal question, the field and regional Solicitor's offices are available to assist BLM in determining whether the legal standard for negligence is met in a particular case. BLM's initial investigation need not reach a legal conclusion concerning negligence, but it should sufficiently document the available evidence so that BLM and the Solicitor's Office can determine whether a particular case meets the threshold for negligence.

V. Conclusion

The IBLA has plainly held that, absent a regulation imposing strict liability, BLM may not recover for fire trespass unless the party causing a fire did so through negligent or intentional conduct. The holding of the IBLA is, to this point, the controlling authority on this matter and overrules any contrary suggestions in the BLM Manual and Fire Trespass Handbook.

The requirement that BLM show negligent behavior to support a fire trespass assessment highlights the importance of conducting accurate and detailed fire investigations. Negligence is a fact sensitive analysis that may not be summed up using any bright line rule. Instead, BLM must collect information on the causes of a fire, the circumstances surrounding the fire, and the actions of individuals suspected of fire trespass in order to shed light on the reasonableness of their behavior. As determining negligence includes legal analysis, cooperation between BLM and the Solicitor's Office in the manner described above could increase the efficiency and effectiveness of fire trespass enforcement.

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