

EUGENE V. SIMONS

v.

BUREAU OF LAND MANAGEMENT

IBLA 91-149

Decided March 29, 1996

Motion to compel compliance by employees of the Bureau of Land Management with the final decision of the Board of Land Appeals finding movant entitled to issuance of sodium preference right leases. Wyoming 9026, 9027.

Motion denied.

1. Administrative Appeals--Administrative Authority: Generally--Administrative Procedure: Decisions--Board of Land Appeals

Pursuant to authority delegated by the Secretary of the Interior, the Board of Land Appeals decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials regarding use and disposition of the public lands and their resources. To the extent actions taken by BLM officials on remand of a case decided by the Board are inconsistent with the decision of the Board, these actions are taken without authority. However, the Board has no supervisory authority over employees of BLM and, hence, once a case is finally decided by the Board, a motion to compel compliance by BLM officials is properly denied for lack of jurisdiction in the absence of a further appeal in the case.

APPEARANCES: Thomas L. Sansonetti, Esq., Cheyenne, Wyoming, for movant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for respondent.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

Counsel for Eugene V. Simons has filed a motion to compel the Bureau of Land Management (BLM) to comply with the final decision of the Board in this case, cited as BLM v. Simons, 128 IBLA 99 (1993). <sup>1/</sup> Specifically, it

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<sup>1/</sup> The BLM petition for reconsideration of this decision was denied by order of the Board dated Jan. 17, 1995. The Board affirmed (as modified) the decision of the Administrative Law Judge reached on the basis of a

is contended with supporting documentation that BLM has indicated an intent not to grant the preference right lease applications (PRLA's) which were the subject of the Board's decision in this case until the U.S. Forest Service (FS), U.S. Department of Agriculture, has given a further statement of consent to lease issuance. Attached to the motion is a copy of an undated letter from Dennis R. Stenger, Chief, Mineral Policy Group, Wyoming State Office, BLM, responding to a May 22, 1995, inquiry by movant (Exh. A to Motion to Compel). In this letter, BLM acknowledged the Board decision holding that Simons is entitled to the leases, but refused to issue the leases in the absence of a further expression of consent to leasing by FS officials. 2/ Simons also presents a copy of a June 30, 1995, letter from William R. Burbridge, Director, Minerals Area Management, Intermountain Region, FS, to BLM in which FS asserts that "it is our position that consent has not yet been given by the FS; nor was there a finding of legal consistency or economic feasibility as stated in the Interior Board of Land Appeals (IBLA) decision" in Wold II. See Exh. C to Motion to Compel. The author of the FS letter recited his disagreement with the Board's decision: "The IBLA conclusion that the Forest Service has given 'consent' is difficult to follow in the various decisions, and in our opinion erroneous." Id. at 2.

Movant points out that the issue of FS consent to lease issuance has been considered and ruled on by this Board in the course of its administrative review in this case. BLM v. Simons, supra at 101; Wold II, 95 IBLA at 73. In view of the Board's delegated authority to decide appeal cases on behalf of the Secretary of the Interior, 43 CFR 4.1, and the Board's finding that FS consented to lease issuance, movant contends that BLM is "refusing to abide by the Secretary of the Interior's directive that said consent has already been established and that the PRLA's are to be issued" (Motion at 3). Accordingly, movant seeks an order directing BLM to issue the leases within 30 days.

Failure of BLM officials to comply with the a final decision on appeal when processing an application on remand in disregard of the delegated authority of the Board to issue the final decision in cases appealed to it is a serious matter. See Curt Farmer Pack Llamas, 133 IBLA 278 (1995).

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fn. 1 (continued)

record compiled during 14 days of hearing generating a transcript of testimony encompassing more than 2,300 pages. The Board affirmed the finding of the Administrative Law Judge that Simons had established on the record his entitlement to issuance of the preference right leases under section 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1994). This case has had a long history of adjudication before the Department of the Interior, including two prior Board decisions, John S. Wold, 95 IBLA 69 (1986) (Wold II), and John S. Wold, 48 IBLA 106 (1980) (Wold I).

2/ The letter indicates that this position was taken following an Apr. 20, 1995, meeting of Regional Solicitor's Office personnel (counsel to BLM), FS officials, and BLM employees to discuss, among other things, the "consent issue." See Exh. A to Motion to Compel.

In consideration of the allegations made in support of the motion, we issued an order allowing the parties to brief this matter prior to any ruling on the motion.

The responsive brief filed by BLM disputes movant's assertion that the Board has previously held that FS had consented to lease issuance. In support of this position, BLM quotes language from the prior Board decisions to the effect that FS had consented to the prospecting permits and "potentially" the preference right leases. Wold II at 73; BLM v. Simons at 101. To support BLM's reading of the Board decisions, it references documents that recite doubts expressed by third parties regarding FS consent to leasing and that purport to limit FS consent to further "consideration" of preference right leases. It is indicated by BLM that FS has now decided that it did not previously consent to lease issuance and that FS is now giving "further consideration" to issuance of preference right leases to movant. BLM argues that it is not authorized to issue the leases until FS completes its analysis and relates its conclusion to BLM. Further, BLM contends that this Board is not the proper forum for review of the FS opinion that FS had not previously given its consent as the Board held, but rather that any appeal lies within the Department of Agriculture.

Movant contends BLM is engaging in a blatant misreading of the Board's decisions in this case to the extent it argues that there has been no FS consent. Quoting from the Board's opinion in Wold II on page 73 movant asserts that the Board has unequivocally ruled that the FS consented to the prospecting permits. See Brief in Support of Motion to Compel at 2-3. Further, Simons notes that when the case was remanded for a hearing, Administrative Law Judge Rampton ruled that the issue of FS consent to issuance of the prospecting permits had been decided by the Board in Wold II and this ruling was affirmed in our decision on appeal from Judge Rampton. BLM v. Simons, *supra* at 101. Movant also asserts that he was required to comply with the conditions and stipulations of FS approval in making a final showing in support of his PRLA's and that FS consent was necessarily conditional at the time it was given because it was contingent upon a showing that the trona deposits in the permits could be "profitably developed in compliance with the mitigating measures" developed in the environmental assessment (Reply to BLM Response to Motion to Compel at 3-5). Simons notes that the fact that consent was conditioned upon certain requirements does not vitiate the consent. Further, it is noted that the language of the FS decision notice confirms that issuance of leases "will be recommended" where the appropriate showing is made. In response to the contention that the Board is not the proper forum for review of a recent decision by the FS that it has not consented to lease issuance, movant asserts the issue is mischaracterized. Rather, the question is whether BLM has complied with the Board's final decision in this matter on remand of the case.

We find the language of our decisions in this case to be unequivocal. Thus, in Wold II we held that:

[I]t must be concluded that the Forest Service has consented to the prospecting permits and, potentially, the preference right

leases, subject to the condition of compliance with the mitigating measures set forth in the decision record and proof the deposits can be profitably developed in compliance with these mitigating measures.

95 IBLA at 73. Consistent with the statutory framework of preference right leasing under the Mineral Leasing Act, consent must be given or withheld at the prospecting permit stage. Consent is obtained at the prospecting permit stage because, under the statutory language, once a showing of a valuable deposit is made by the holder of a prospecting permit, the permittee is entitled to a preference right lease. 30 U.S.C. § 262 (1994). As we noted in Simons, 128 IBLA at 101-02 n.4, similar statutory language regarding entitlement to preference right leases on discovery of valuable deposits on coal prospecting permits was considered by the court in Natural Resources Defense Council v. Berklund, 458 F. Supp. 925, 937-38 (D.D.C. 1978), aff'd, 609 F.2d 553 (D.C. Cir. 1979). The district court rejected the contention that having issued the permits the Government had discretion not to issue the lease if the land is discovered to contain commercial quantities of coal. <sup>3/</sup> While consent to issuance of a preference right lease was of necessity contingent upon a showing of a deposit that could be profitably developed (the statutory prerequisite), the suggestion by BLM that use of the word "potentially" in our decision meant that FS retained the right to refuse to consent to lease issuance is simply an unjustifiable misreading of our opinion. Indeed, on appeal in Simons we expressly affirmed the decision of the Administrative Law Judge that the consent of FS had been established on the record in this case. 128 IBLA at 101.

[1] The Board of Land Appeals operates under a delegation of authority from the Secretary of the Interior to decide appeals to the head of the Department from decisions rendered by Departmental officials relating to use and disposition of the public lands and their resources. 43 CFR 4.1(b)(3). The decision of the Board in this matter is final for the Department of the Interior. Id. <sup>4/</sup> Accordingly, this decision is binding on employees of the Department of the Interior with respect to

<sup>3/</sup> Seizing on and distinguishing the "may" language in the section of the statute authorizing issuance of prospecting permits from the "shall be entitled" language in the preference right lease section, the court found "[t]he language 'shall be entitled' could not be clearer, and on its face it obligates the Secretary of the Interior to issue a coal lease to the permittee." 458 F. Supp. at 934; accord, Harry E. McCarthy, 128 IBLA 36, 40 (1993).

<sup>4/</sup> The Secretary of the Interior and the Director, Office of Hearings and Appeals, retain the supervisory authority to take jurisdiction at any stage of any case pending before the Department and render the final decision in the matter. 43 CFR 4.5. There is nothing in the record before us to indicate that either the Secretary or the Director has chosen to exercise their supervisory jurisdiction in this matter.

adjudication of movant's PRLA's. See Milton D. Feinberg (On Reconsideration), 40 IBLA 222, 227-28, 86 I.D. 234, 237 (1979). Although certain FS employees may now (many years after the fact) seek to reconsider the issue of FS consent to leasing in this case, the Board has expressly considered the matter and concluded on the basis of the record that FS consented to lease issuance. This decision is binding on employees of the Department of the Interior. It follows that to the extent Departmental employees refuse to implement the Board decision, their actions are unauthorized. 5/

Movant seeks to have this Board enter an order compelling compliance by BLM with our decision in this case. While movant has made a compelling case that our decision has not been properly implemented on remand, the motion and briefs have not addressed our authority to issue further orders in this case. As noted above, the jurisdiction of this Board basically extends to deciding appeals to the head of the Department from decisions of Departmental officials relating to use and disposition of the public lands and their resources. 43 CFR 4.1(b)(3). This Board does not have supervisory authority over officials of BLM. See, e.g., Animal Protection Institute of America, 118 IBLA 20, 25 n.3 (1991); Ruth Z. Ainsley, 98 IBLA 306, 308 (1987); State of Alaska, 85 IBLA 170, 172 (1985). In the absence of a further administrative appeal from a decision of BLM on remand, we conclude that the motion to compel must be denied for lack of jurisdiction.

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 compel is denied.

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C. Randall Grant, Jr.  
Administrative Judge

I concur.

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Franklin D. Amess  
Administrative Judge

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5/ We express no opinion as to whether such unauthorized actions are sufficiently outside the scope of the employee's authority, *i.e., ultra vires*, as to subject the employee to personal liability. See Ramon by Ramon v. Soto, 916 F.2d 1377, 1383 (9th Cir. 1990); United States v. Yakima Tribal Court, 806 F.2d 853, 859-60 (9th Cir.), cert. denied, 481 U.S. 1069 (1987).

