

NATIONAL WILDLIFE FEDERATION ET AL.

IBLA 2004-252

Decided August 13, 2004

Appeal from a decision of the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management, dismissing a request for State Director Review as untimely. SDR WY-2004-17.

Affirmed.

1. Appeals – Rules of Practice : Appeals: Timely Filing

Proof that a document was faxed (evidenced by sender's transmission log) is not the equivalent of proof of receipt. A request for State Director review is not considered properly filed until received by the office of the appropriate State Director.

APPEARANCES: Michael A. Saul, Esq., and Thomas D. Lustig, Esq., Boulder, Colorado, for appellants; Jack D Palma, II, P.C., Cheyenne, Wyoming, for intervenors, Anadarko E & P Company LP and Warren Resources, Inc. and Natalie Eades, Esq. Houston, Texas, for intervenor, Anadarko E & P Company LP.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The National and Wyoming Wildlife Federations, the Wyoming Outdoor Council, and Biodiversity Conservation Alliance (appellants) have appealed an April 15, 2004, decision of the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM) (SDR WY 2004-17) dismissing their request for State Director review of the February 6, 2004, Rawlins Field Office Decision Record and Finding of No Significant Impact (DR/FONSI) for the Atlantic Rim Natural Gas Project, Doty Mountain Pod Environmental Assessment (Doty Mountain DR/FONSI). Appellants' appeal to the Board has been docketed as

Rim Natural Gas Project, Doty Mountain Pod Environmental Assessment (Doty Mountain DR/FONSI). Appellants' appeal to the Board has been docketed as IBLA 2004-252. <sup>1/</sup>

The Deputy State Director dismissed appellants' request for State Director review because appellants failed to timely file a request as required by 43 CFR 3165.3(b). Not disputed is that appellants received a copy of the Doty Mountain DR/FONSI on March 4, 2004 and that April 1, 2004, represented 20 business days from March 4, 2004. Dismissing appellants' request for State Director review, the Wyoming Deputy State Director stated:

We disagree with [appellants'] assertion that this request for SDR has been timely filed. To have met the regulatory requirements found at 43 CFR 3165.3(b), the BLM, Wyoming State Director, must have received the subject request for an SDR by the close of business on April 1, 2004. The document was date stamped as received at the Wyoming State Office on April 2, 2004.

SDR WY 2004-17 at 2.

Before appealing to this Board, appellants filed a request for reconsideration of the SDR Decision dismissing their appeal. Therein, appellants asserted that the "April 15, 2004 Dismissal was based on a misapprehension that our April 1, 2004 Protest was not received within the time provided for in BLM's regulations." Countering this perceived misapprehension, appellants recounted:

[Appellants] received the DR/FONSI on March 4, 2004. Twenty business days from that was April 1, 2004. [Appellants] submitted their Protest via facsimile to the Wyoming State Office on April 1, 2004, prior to the close of business (approximately 1:54 p.m.) on that day. See the attached Declaration of Michael A. Saul and accompanying exhibits. The original, signed Protest was sent by Federal Express on April 1, 2004 and was physically received by the Wyoming State Office on April 2, 2004. 43 C.F.R. § 1822.13 provides that electronic filing is acceptable when an original signature is not required, and nothing in 43 C.F.R. § 3165.3 (governing requests for State Director review) requires an original signature

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<sup>1/</sup> By order dated July 14, 2004, the Board granted Anadarko E & P Company LP and Warren Resources, Inc's motion to intervene and request for extension of time until August 11, 2004, in which to file a response to appellants' statement of reasons.

on requests for State Director review. Therefore, the April 1, 2004 facsimile transmission satisfied the requirements of 43 C.F.R. § § 1822.13 and 3165.3.

Appellants contend, therefore, that the State Director's dismissal "fail[ed] to acknowledge the April 1, 2004 facsimile transmission of the protest, documented in the accompanying declaration of Michael Saul."<sup>2/</sup>

Saul's Declaration included as exhibits a National Wildlife Federation "FAX Transmittal" sheet filled out in handwriting directing the FAX to "Bob Bennett, State Director, BLM - Wyoming." The sheet stated that "Number of Pages: 63. including cover" were being transmitted. A handwritten message in the "Message" box states "Original has been sent via federal express, with attached exhibits. Please notify me if you desire an electronic copy." The second exhibit is an "Activity Management Report TX" generated by appellants' fax machine indicating that 63 pages were transmitted on 4/01 at "13:54" to "BLM CENTRAL FILE 13077756082."

In denying the request for reconsideration, the State Director in a May 5, 2004, decision stated:

[Appellants'] request for reconsideration included an affidavit and facsimile report indicating that on April 1, 2004, a copy of [appellants'] SDR request was sent to a facsimile machine located at the WSO [Wyoming State Office] central files.

We have checked the WSO central files facsimile machine summary reports and no documents were shown to have been received by that machine on April 1, 2004. Also, we have contacted the Wyoming BLM State Office Director's Office as well as other WSO Division Offices to verify if anyone inadvertently received [appellants'] SDR request. We have not been able to locate the 63-page document sent by

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<sup>2/</sup> Appellants add "if the BLM insists on dismissing our Protest because the supporting documents were not received until April 2<sup>nd</sup>, then pursuant to 43 C. F. R. § 3165[.3](b), [appellants] retroactively request a one-day extension for the submission of the exhibits accompanying the Protest." BLM clearly dismissed the protest because the protest itself, not accompanying exhibits, was untimely. We agree with the State Directors' determination that the request for extension in 43 CFR 3165.3(b) "assumes the request for a SDR was timely filed in the first place." (Request for Reconsideration Denied at 2.)

[appellants]. In addition, to our knowledge, no one at the WSO was contacted by [appellants] to confirm if the SDR request had been received by the WSO.

Although we do not dispute the evidence provided by [appellants] indicating the facsimile was sent to the WSO on April 1, 2004, to the best of our knowledge, the facsimile was never received by the WSO within the timeframe established at 43 CFR 3165.3.

Request for Reconsideration Denied at 1-2. Appellants' SOR reiterates arguments advanced in its Request for Reconsideration (SOR at 7-10), asserting more specifically that National Wildlife Federation's "Activity Management Report TX" or "activity log" "shows that the 63-page Protest was successfully received by the BLM \* \* on April 1, 2004." (SOR at 9.)

[1] The regulation at 43 CFR 3165.3(b) states, inter alia, that "[s]uch request [for SDR], including all supporting documentation, shall be filed in writing with the appropriate State Director within 20 business days of the date such notice of violation or assessment or instruction, order, or decision was received or considered to have been received and shall be filed with the appropriate State Director."

The law is well settled that a request for review by a State Director of BLM is properly dismissed as untimely where it is filed more than 20 business days after the date a decision issued under 43 CFR 3165.3(a) is received. Southern Utah Wilderness Alliance, 148 IBLA 117, 118-19 (1999); Conley P. Smith Oil Producers, 131 IBLA 313, 320 (1994).

The operative word "filed" is key to resolution of this appeal. The document must be received. See Terri L. Duff, 156 IBLA 326, 328 (2002). Proof of mailing or proof that a document was faxed (evidenced by the sender's transmission log) is not the equivalent of proof of receipt. See Gail Schmardebeck, 142 IBLA 160, 163 (1998). We have stated on repeated occasions that the one who chooses the means of delivery of the document must accept the responsibility for, and bear the consequences of, delay or nondelivery. Petro-Hunt Corp., 124 IBLA 318, 320 (1992); Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990) and cases cited therein.

The presumption of regularity that BLM officials have properly discharged their duties and have not lost or misplaced legally significant documents would be rebutted by probative evidence that BLM received the disputed document. Tom Hash, 140 IBLA 244, 245 (1997). The evidence that is offered by appellants in this

case is the transmission log generated by appellants' fax machine and their declaration, and no evidence has been presented that appellants' request actually was received by the State Director on April 1, 2004. Accordingly, appellants have failed to overcome the presumption of regularity.

Appellants in their statement of reasons request that we expedite review of this and in and case on the merits. Because we dismiss the appeal, we deny that request as moot.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Deputy State Director dismissing the protest and denying the request for reconsideration are affirmed and the request for expedited consideration on the merits is denied as moot.

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H. Barry Holt  
Chief Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge