



TRAILS PRESERVATION ALLIANCE, *ET AL.*

180 IBLA 177

Decided December 10, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

TRAILS PRESERVATION ALLIANCE, *ET AL.*

IBLA 2011-24

Decided December 10, 2010

Appeal from a decision of the Colorado State Office, Bureau of Land Management, refusing to consider a notice of appeal filed challenging a decision implementing certain travel management actions because the notice of appeal was not timely filed. CO-160-2008-025-EIS.

Reversed.

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

An appeal to the Board is initiated by filing a notice of appeal with the office of the officer who made the decision within 30 days after the date of service. A notice of decision published by BLM in a newspaper does not establish a date of service from which the 30-day appeal period can be calculated. And, absent a date of publication in the Federal Register, evidence of a date of receipt or nondelivery of certified or registered mail, or the date appellants received actual notice by whatever means, BLM has no basis for determining that appellants' notice of appeal was untimely.

James R. Sebastian, 146 IBLA 138 (1998) overruled to the extent inconsistent herewith.

APPEARANCES: Paul A. Turcke, Esq., and Carl J. Withroe, Esq., Boise, Idaho, for appellants; Michael A. Gheleta, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Trails Preservation Alliance, Colorado Off Highway Vehicle Coalition, and Rocky Mountain Enduro Circuit (collectively, appellants) have appealed from an August 30, 2010, decision of the Colorado State Office, Bureau of Land Management

(BLM), entitled “DECISION NOTICE OF APPEAL NOT CONSIDERED” in which BLM refused to consider appellants’ appeal of a BLM decision implementing certain travel management actions because BLM determined that appellants’ notice of appeal was untimely under 43 C.F.R. § 4.411(a). We reverse BLM’s decision.

Background

On June 28, 2010, BLM’s Gunnison Field Office issued a Record of Decision (ROD) announcing certain actions to be taken by BLM under the Gunnison Basin Federal Lands Travel Management planning process.¹ On June 30, 2010, BLM posted the ROD on its website and mailed postcards to interested parties notifying them of the decision and of the availability of the ROD.² Apparently on that same date, BLM also sent emails to various individuals and organizations. BLM asserts that Don Riggle, a member of the Trails Preservation Alliance, was sent an email.³ Decision at 1. Finally, BLM issued press releases about its ROD, and articles appeared on July 1, 2010, in both the Gunnison Country Times and the Crested Butte

¹ This planning process was undertaken jointly by the BLM Gunnison Field Office and the Forest Service, U.S. Department of Agriculture (FS) Gunnison and Paonia Ranger Districts of the Gunnison, Uncompahgre, and Gunnison National Forest, and both agencies issued RODs. This appeal is related only to the BLM ROD.

² The administrative record contains a sample copy of one of the postcards, together with a 38-page list of names, organizational affiliations, and addresses to which the postcards were mailed. The mailing list identifies four individuals with affiliation to the Colorado Off Highway Vehicle Coalition (BLM asserts that Dennis Larrat also is the Treasurer of the Rocky Mountain Enduro Circuit), and one individual with affiliation to the Trails Preservation Alliance. Decision at 1. The sample copy of the postcard includes no appeal information.

³ The administrative record contains a sample copy of one of the emails, together with a 30-page list of email addresses. The sample email included an image of the postcard and links to the BLM and FS RODs. There was no appeal information included in the body of the email. Despite our review of the list of email addresses, we were unable to identify Don Riggle’s email address.

News weekly newspapers.⁴ The administrative record contains no documentation of the dates of receipt, if any, by appellants of the postcard or email notices of the ROD.

Appellants telefaxed their notice of appeal of the ROD to BLM on August 6, 2010, with a hard copy received by BLM on August 10. BLM's decision references 43 C.F.R. § 4.411(a), and states "[a]ccording to this regulation, your notice of appeal should have been received by this office on August 2, 2010 (this is using the latest date of publication, July 1, 2010)."

Analysis

In its Response to Appellants' Statement of Reasons (Answer), BLM states that "Appellants' Notice of Appeal was filed more than 30 days after BLM *served notice* of the ROD on Appellants and otherwise provided public notice of the ROD's issuance, making the appeal untimely." Answer at 4. BLM continues to try and bolster that assertion by stating that it "published the ROD on the BLM website . . . mailed notice of the ROD specifically to [appellants] . . . [and that] Mr. Riggle also received notice via email."⁵ Answer at 4. However, there is no evidence in the record that BLM "served notice" on appellants. BLM clearly misunderstands the concept of "service" of a legal document and, more specifically, the requirements for service in the context of an appeal before this Board.

[1] The essential precursor to an appeal to the Board is that a notice of appeal must be timely filed.

A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.

43 C.F.R. § 4.411(a). Service requires that an individual actually receive personal notice of a decision, and that usually is accomplished by delivering a document to an

⁴ The administrative record includes copies of both articles. The article published in the Gunnison Country Times includes no appeal information, and the article published in the Crested Butte News states that "[t]he public has 45 days to file a written appeal once the plan is released," which apparently is a reference to the FS appeal procedures found in 36 C.F.R. § 215.15.

⁵ We assume that BLM misspoke with respect to this last statement, which suggests that Riggle received the email. There is nothing in the administrative record showing Riggle *received* an email from BLM, let alone evidencing when receipt occurred.

individual. There are acceptable variations of such personal delivery. Under the Department's regulations, service will be considered to have been accomplished "at the time of personal service, of delivery of a registered or certified letter, or of the return by post office of an undelivered registered or certified letter."⁶ 43 C.F.R. § 4.401(c)(3); *Oregon Natural Resources Council*, 161 IBLA 323, 326 (2004). Also, "[i]f a decision is published in the FEDERAL REGISTER, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication." 43 C.F.R. § 4.411(a). Regardless of the form of service, there must be evidence of that service (usually, evidence of receipt by the recipient) to determine whether an appeal is timely. 161 IBLA at 326.

In this case, BLM asserts that "BLM is not required by its regulations to publish in the Federal Register the decision or notice of its issuance." Answer at 5. However, BLM also states that "[t]he ROD indicates that any appeal of it is 'in accordance with the regulations at 43 CFR 4.400.'" *Id.* (citation omitted). In that case, "[a] notice of decision published by BLM in a newspaper providing that an appeal of the decision must be filed 'within 30 days after the publication of this notice,' *does not establish* a date of service from which the 30-day appeal period of 43 CFR 4.411(a) can be calculated." 161 IBLA at 326 (emphasis added). And, absent a date of publication in the Federal Register, a date of receipt or nondelivery of certified or registered mail, or the date appellants received actual notice of BLM's ROD by whatever means, BLM has no basis for determining that appellants' notice of appeal was untimely. BLM's decision must, accordingly, be reversed.⁷

⁶ Actual notice to an individual also may be a substitute for service, and a notice of appeal must be filed within 30 days from the date of actual notice of a decision by an appellant. *Minchumina Homeowners Association*, 93 IBLA 169, 173 (1986). However, the administrative record here is devoid of evidence of actual notice being received by appellants.

⁷ In *James R. Sebastian*, 146 IBLA 138 (1998), the Board, without inquiry or analysis, dismissed 3 of 4 appeals of a decision implementing a BLM travel management plan because the notices of appeal were postmarked more than 30 days after publication of a notice of decision in a local newspaper. See 146 IBLA at 139-40. *Sebastian* is hereby overruled to the extent it is inconsistent with our holding.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision is reversed and the matter remanded to BLM for appropriate action.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge