NOTE: This disposition is nonprecedential.

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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March 28, 2016

IBLA 2016-69, *et al.*	)	COC-75982 & COC-75983
	)	
ROSEANNE M. GUIRE AND	)	Desert Land Entry
JIMMY RAY GUIRE, II	)	
	)	Cases Consolidated *Sua Sponte*;
	)	BLM Decision Affirmed;
	)	Motion to Dismiss Granted; Appeal
	)	Dismissed

ORDER

Roseanne M. Guire and Jimmy (Jim) Ray Guire, II (Appellants), appeal from a February 11, 2016, decision issued by the Uncompahgre (Colorado) Field Office, Bureau of Land Management (BLM). The agency determined that Appellants' January 14, 2016, notice of appeal of an October 2, 2015, BLM decision rejecting Appellants' Desert Land Entry (DLE) applications was untimely. For the reasons explained below, we affirm BLM's February 11, 2016, decision. We also hereby consolidate this case, pursuant to 43 C.F.R. § 4.404, with Appellants' January 14, 2016, appeal of BLM's October 2, 2015, decision, grant BLM's motion to dismiss that appeal, and dismiss the appeal from our docket.

Background

This case involves two DLE applications (COC-75982 and COC-75983) submitted by Appellants to BLM on January 8, 2013. Under the applications, Appellants are seeking authorization to irrigate approximately 50 acres of public lands, in accordance with Section 1 of the Desert Land Act, 43 U.S.C. § 321 (2012), which provides for the entry of up to 320 acres of desert land for the purpose of reclaiming "by conducting water upon the same." BLM's regulations governing DLEs are found at 43 C.F.R. Part 2520, and require, among other things, that the applicant provide evidence satisfactorily showing either the existence of sufficient water rights to irrigate and reclaim the lands, or that the applicant has taken all appropriate steps to acquire such rights. *See* 43 C.F.R. § 2521.2(d).

On October 2, 2015, BLM issued a decision rejecting Appellants' DLE applications based on the agency's determination that Appellants had not provided evidence of sufficient water rights to support the applications, and thus deeming the applications "incomplete."[1] *See* Oct. 2, 2015, Decision at unp. 5. Appellants appealed that decision on January 14, 2016 (docketed as IBLA 2016-69). On February 11, 2016, BLM issued a decision closing the case because Appellants' appeal was not filed within 30 days of the date of service of the October 2, 2015 decision, in accordance with 43 C.F.R. §§ 4.411(a)(2)(i) and 4.411(c).[2] *See* Feb. 11, 2016, Decision at unp. 2. Appellants then appealed BLM's determination that their first appeal was untimely (docketed as IBLA 2016-89).[3] The agency transmitted the administrative record associated with IBLA 2016-89 to the Board on March 14, 2016.

In their second appeal, Appellants allege that their original appeal was, in fact, timely, and seek the Board's reversal of BLM's February 11, 2016, decision. *See* Statement of Reasons (SOR), IBLA 2016-89. Appellants assert that because they did not receive BLM's October 2, 2015, decision until it was provided to them via email by counsel for BLM on January 13, 2016, their appeal, which was filed on January 19, 2016, was well within the 30-day timeframe required under the regulations. *Id.* at 2; Notice of Appeal (NOA), IBLA 2016-69. On March 10, 2016, BLM filed a motion to dismiss the appeal docketed as 2016-69.

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[1] BLM explained that its rejection of Appellants' application "is not prejudicial to [appellants'] right to file complete applications when [they] have evidence of an adequate and sufficient water right." Feb. 11, 2016, Decision at unpaginated (unp.) 2.

[2] The regulation at 43 C.F.R. § 4.411(a)(2)(i) provides that "[a] person served with the decision being appealed must transmit the notice of appeal in time for it to be received in the appropriate office no later than 30 days after the date of service of the decision." Under 43 C.F.R. § 4.411(c), if BLM determines that a notice of appeal is not timely filed, "the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken."

[3] On Mar. 25, 2016, BLM filed a motion for an automatic extension of time to file an answer to Appellants' SOR in IBLA 2016-89. Based on our disposition of that case, we deny BLM's motion as moot.

Analysis

We first consider whether BLM's February 11, 2016, decision finding that Appellants' original appeal was untimely and closing the case was proper. As discussed below, because we conclude that BLM's decision was correct, and that Appellant's appeal was untimely, the Board lacks jurisdiction to hear Appellant's original appeal. We therefore affirm BLM's February 11, 2016, decision (IBLA 2016-89) and grant the agency's motion to dismiss Appellant's original appeal (IBLA 2016-69).

Whether an appeal is timely filed under our regulations in a situation such as exists here – *i.e.*, where an appellant does not receive BLM's decision until after the 30-day appeal has run – is governed by the doctrine of constructive service. The applicable regulation, 43 C.F.R. § 1810.2(b), provides:

> Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities.

It is well established that, pursuant to this regulation, "'when BLM sends a notice or decision, return receipt requested, to a party's last address of record and it is returned by the Postal Service . . . BLM is deemed to have met is obligation to notify the party and may act as if delivery had actually been made.'" *CMCM Investments LLC*, 185 IBLA 398, 401 (2015) (quoting *J-O'B Operating Co.,* 97 IBLA 89, 91 (1987)). This means that "delivery to the last address of record establishes constructive notice to the addressee." *J-O'B Operating Co.,* 97 IBLA at 91.

More specifically, when BLM sends a notice of decision to a party's last address of record and it is returned to BLM by the Postal Service, "marked as 'Unclaimed,' the notice is considered constructively received despite the lack of actual receipt." *CMCM Investments LLC*, 185 IBLA at 401; *see also Robert W. Willingham,* 164 IBLA 64, 66 (2004) ("[T]ransmission of a decision to a party's last address of record by certified mail, return receipt requested, constitutes constructive service even though the delivery was not successful."); *Bruce M. Lewis*, 156 IBLA 287, 290 n.3 (2002) (Letter

returned by Postal Service marked "Unclaimed" considered constructively received, "despite the lack of actual receipt."). When a notice or decision is returned to BLM by the Postal Service, the 30-day appeal period begins to run on the date the decision is returned to the agency. *See Stephen Miller v. BLM*, 165 IBLA 386, 393 (2005).

After examining the record and the documents supplied by Appellants, we conclude that BLM was correct in dismissing Appellants' January 14, 2016, appeal as untimely and closing the case. The facts are undisputed and are as follows.

Between September 21, 2015, and September 25, 2015, Appellants and counsel for BLM, Kristen C. Guerriero, exchanged emails discussing an upcoming status update for the State of Colorado District Court, Water Division 4, concerning Appellants' water rights. Jim Guire explained to Guerriero that he would be out of the State from October 2, 2015, through October 14, 2015. Email from Guire to Guerriero, dated Sept. 24, 2015 (attached to BLM's Feb. 11, 2016, Decision). In response to an inquiry from Guire about the status of Appellant's DLE applications, Guerriero stated she "believe[s] BLM is sending you correspondence very soon. If you do not receive anything within the next week or so, please let me know." Email from Guerriero to Guire, dated Sept. 25, 2015 (attached to BLM's Feb. 11, 2016, Decision).

On October 2, 2015, BLM issued its decision rejecting Appellants' DLE applications. On that same day, BLM mailed its decision, certified mail, to Appellants' address of record, a post office box in Nucla, Colorado. Also on that same day, BLM emailed its decision to Appellants. Email from Teresa Pfifer, BLM, to Jim Guire, dated Oct. 2, 2015 (attached to BLM's Oct. 2, 2015, Decision). The decision arrived at Appellants' address of record and was available for pick-up by Appellants on October 3, 2015. Appellants did not retrieve the decision from their post office box, and on October 26, 2015, the United States Postal Service sent the decision back to BLM, marked as "Unclaimed." The decision arrived at BLM's office on November 2, 2015.[4]

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[4] The United States Postal Service website provides a record showing the date BLM's decision arrived at the post office in Nucla, Colorado and was made available for pick up; the date BLM's letter was deemed "Unclaimed" and mailed back to BLM; and the date the letter arrived back at BLM. *See* https://tools.usps.com/go/TrackConfirmAction.action?tRef=fullpage&tLc=1&text28777=&tLabels=9171999991703582501902.

Between December 23, 2015, and January 13, 2016, more emails were exchanged between Guire and Guerriero concerning the status of Appellants' DLE applications. In an email dated December 23, 2015, Guerriero informed Guire that BLM had mailed and emailed its October 2, 2015, decision to Appellants on October 2, 2015. Email from Guerriero to Guire, dated Dec. 23, 2015. Guire responded that Appellants had not received either the mailed decision or the email containing the decision. Email from Guire to Guerriero, dated Dec. 23, 2015.

Although Guerriero emailed Guire the next day, stating that she was attaching BLM's October 2, 2015, decision, it appears that the decision was not attached to that email. Email from Guerriero to Guire, dated Dec. 24, 2015. On January 13, 2016, Guire told Guerriero Appellants still had not seen BLM's decision. Email from Guire to Guerriero, dated Jan. 13, 2016 ("We have been checking the mail every other day with it being checked again today. There is no letter or notice to call at the window at the post office."). That same day Guerriero emailed, and Appellants received, the October 2, 2015, decision and attachments showing that the decision had been delivered to Appellants' post office box on October 3, 2015, and returned to BLM by the United States Postal Service as "Unclaimed" on November 2, 2015. Email from Guerriero to Guire, dated Jan. 13, 2016.

The record shows that BLM mailed its October 2, 2015, decision, certified mail, to Appellants' address of record, Appellants failed to retrieve the decision, and the United States Postal Service returned the decision to the agency as "Unclaimed." Appellants argue that because they did not actually receive the decision until January 13, 2016, they had until 30 days after that date to file their appeal. They state they filed their appeal on "the first business day following January 13, 2016, the date the complete letter with 'all' attachments was officially received." NOA, IBLA 2016-69. However, as explained above, under BLM's regulations and our case law, when an agency uses the mail to send a notice or decision to someone, that person "will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him." 43 C.F.R. § 1810.2(b).

Appellants do not dispute that the address used by BLM is the correct address of record, and Appellants do not explain why they did not retrieve BLM's decision from their post office box. Appellants simply state that when something is sent certified mail, the "'notice to call at the window' (pink card) . . . does not show who it is from, only a tracking number and who it is to." Supplemental Information to SOR at 2. Yet this does not explain why Appellants did not retrieve from their post office box the pink card for the October 2, 2015, decision. Appellants appear to suggest that because BLM has in the past sent documents to them certified mail, return receipt requested, that the agency was somehow obligated to do so in this case. *See* Supplemental Information to SOR at 2 ("Throughout the years, we have received

'CERTIFIED MAIL – RETURN RECEIPT REQUESTED' from [BLM] in regards to our DLE[]s, and in those letters, she states time frames for Appellants to respond '**from the receipt of this letter**.'"). There is no requirement, however, that BLM use a specific method when it mails documents; 43 C.F.R. § 1810.2(b) states only that when "the authorized officer *uses the mails*," the recipient "will be deemed to have received the communication if it was delivered to his last address of record . . . , regardless of whether it was in fact received by him." (Emphasis added.)

Appellants further imply that because they had informed counsel for BLM that they would be out of town during the first 2 weeks in October, BLM was wrong to send its decision on October 2, 2015. Appellants state: "Knowing the tactics of BLM – Montrose Field Office, we are not surprised that they would then send us a 'Decision' letter [on October 2, 2015,] knowing that we would not be around to sign for the letter." Supplemental Information to SOR at 4-5. The record shows, however, that BLM's letter to Appellants remained in Appellants' post office box until October 26, 2015, well after Appellants were scheduled to return.

In any event, whether Appellants were out of town during some portion of the time BLM's decision was awaiting retrieval from Appellants' post office box "does not obviate the efficacy of the service and does not toll the time period for filing an appeal." *John Oakason*, 13 IBLA 99, 105 (1973). As we stated in *John Oakason*, "Appellant is charged with notice of this Department's regulations and those of the Postal Service . . . which govern his use of the Post Office box and the conditions pertaining to the delivery and nondelivery of mail." *Id.*

Based on the above, we conclude that BLM's October 2, 2015, decision was properly served on Appellants when BLM mailed the decision to Appellants' address of record, and that the time for appeal ran on December 2, 2015, 30 days after BLM received the unclaimed decision from the Postal Service. *See Stephen Miller v. BLM*, 165 IBLA at 393. We therefore find that Appellants' January 14, 2016, notice of appeal was untimely, and BLM's February 11, 2016, decision closing the case was proper. *See* 43 C.F.R. § 4.411(c). Because Appellants did not timely appeal BLM's October 2, 2015, decision, this Board lacks jurisdiction to consider Appellants' appeal of that decision. *See id.* § 4.411(a); *Red Rock Golf and Recreation Association, Inc.*, 77 IBLA 87, 89 (1983) (The requirement to file an appeal within 30 days is "mandatory," it "determine[s] the jurisdiction of the Board to hear an appeal, and [is] not subject to waiver.").

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm BLM's February 11, 2016, decision at issue in IBLA 2016-89, finding Appellants' appeal untimely and closing the case. We also grant BLM's motion to dismiss Appellants' January 14, 2016, appeal of BLM's October 2, 2015, decision and dismiss the appeal docketed as IBLA 2016-69 for lack of jurisdiction.

/s/
Amy B. Sosin
Administrative Judge

I concur:

/s/
James F. Roberts
Deputy Chief Administrative Judge