

MESA PETROLEUM CO.

IBLA 79-232

Decided November 30, 1979

Appeal from the decision of the Director, U.S. Geological Survey, dismissing an appeal from the action of the Acting Assistant Area Mining Supervisor denying appellant's application for the establishment of a drilling island in a potash enclave within a designated potash area.

Affirmed.

1. Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

An appeal to the Director, U.S. Geological Survey, is properly dismissed where the appellant failed to file a timely notice of appeal in the proper office within 30 days from service of the decision appealed from in order to comply with the requirements of the applicable regulations in 30 CFR 290.

APPEARANCES: Clarence E. Hinkle, Esq., Roswell, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Mesa Petroleum Company has appealed from a decision of the Acting Director, U.S. Geological Survey, dated January 24, 1979, which dismissed its appeal as not being timely filed.

The record shows that on July 13, 1978, the Acting Assistant Area Mining Supervisor, Carlsbad, New Mexico, U.S. Geological Survey issued a letter decision denying appellant's application for the establishment of a drilling island in the Nash Unit Area. The proposed drilling island was to be located in a potash enclave situated in the NW 1/4 NW 1/4, sec. 7, T. 23 S., R. 30 E., New Mexico principal meridian, Eddy County, New Mexico. The application was rejected for the reason that the proposed drilling island would be within 1 mile of an approved mining plan in violation of Part E, section 1(b), of a Secretarial Order published in the Federal Register November 5, 1975.

Appellant was served with the Acting Mining Supervisor's decision by certified mail July 14, 1978. Appellant's appeal of this decision dated August 10, 1978, was received by the U.S. Geological Survey in Albuquerque, New Mexico, August 21, 1978. The appeal was then forwarded to the proper office in Carlsbad, New Mexico, August 25, 1978.

On January 24, 1979, the Acting Director of U.S. Geological Survey, dismissed the appeal for lack of timeliness, and his action is now before us on appeal.

In its statement of reasons appellant states that the appeal of that decision was originally placed in the United States mail on August 10, 1978, at Roswell, New Mexico, certified mail, return receipt requested, addressed to Wallace Sutherland, Area Oil and Gas Supervisor. Appellant further states that:

Roswell is less than 200 miles by airline from Albuquerque and normally the mail addressed to Albuquerque is delivered the morning following the date of its deposit in the mail in Roswell, which would have been Friday, August 11. Undoubtedly, the appeal was received in the Albuquerque post office on August 11 but for some reason unknown to appellant the certified mail was not receipted for until August 21. Certainly, it was through no fault of appellant that the appeal was not timely received.

[1] By his decision of January 24, 1979, the Acting Director, U.S. Geological Survey, found that appellant had failed to file its notice of appeal in the office of the official who issued the order or decision under appeal within the 30-day period prescribed by 30 CFR 290.

The governing regulation 30 CFR 290.3(a) provides the procedures for perfecting appeals to the Director, U.S. Geological Survey, where it states that: "An appeal to the Director * * * may be taken by filing a notice of appeal in the office of the official issuing the order or decision within 30 days from service of the order or decision." (Emphasis added.)

Unlike the procedures governing appeals to this Board (43 CFR 4.401(a)), the U.S. Geological Survey appeal regulations do not allow a grace period of 10 days beyond the mandatory 30-day time period for filing of a notice of appeal. 30 CFR 290.5 authorizes the Director to extend the time for filing any document in connection with an appeal except the notice of appeal. There is no latitude allowed for the filing of this document. The notice of appeal must be received within the 30-day period.

Although appellant's notice of appeal was placed in the mail August 10, 1978, 4 days before the end of the appeal period, it was received by the U.S. Geological Survey, Albuquerque, New Mexico, the wrong office for filing, on August 21, 1978, 7 days after the expiration of the appeal period. It was then received by the proper office, the one issuing the decision appealed from Carlsbad, New Mexico, on August 25, 1978, or 11 days late. While this would suffice under 43 CFR 4.401(a) (governing appeals to this Board) it is clearly insufficient to meet the requirements of 30 CFR 290.3. See Robert B. Ferguson, 23 IBLA 29, 32 (1975).

For whatever reason appellant did not comply with this requirement and the appeal must be dismissed.

Accordingly pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Director, U.S. Geological Survey, is affirmed.

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur, but suggest that in view of the energy crisis, the Department may wish to reevaluate appellant's drilling proposal on the merits. This would also be in accord with the general Departmental policies regarding delay in the mails and acceptance of late filings where no third party rights have intervened and where there would be no interference with the orderly conduct of Departmental business. E.g., 43 CFR 4.401(a) and 1821.2-2(g).

Joseph W. Goss
Administrative Judge.

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

I would not affirm the dismissal of the appeal, but would treat the appeal on its merits.

I readily concede that 30 CFR Part 290, does not in haec verba invoke the rational sense and liberal provisions of 43 CFR 4.401(a), 1/ but I am not aware of any legal preclusion to reading these regulations in pari materia.

The rationale employed in the decision of the Director, U.S. Geological Survey, to the effect that since the Director is authorized under 30 CFR 290.5 to extend the time for filing any document in connection with an appeal other than a notice of appeal, this appeal cannot be considered on its merits, is a non sequitur.

I am not unaware that the Acting Assistant Area Mining Supervisor's decision was served upon appellant on July 14, 1978, requiring that the notice of appeal and statements of reasons be filed in the supervisors's office on or prior to August 14, 1978, August 13 being a Sunday. These documents were apparently not received until August 21, 1978, by the supervisor's office in Albuquerque, having been mailed on August 10, 1979, from Roswell, New Mexico. They should have been sent to Carlsbad, the place containing the office rendering the decision aggrieving appellant.

The Office of Hearings and Appeals has evinced liberally in somewhat similar circumstances.

In William Goodwin Appellant, U.S. Fish and Wildlife Service, Appellee, Docket No. Povt. 76-4, dates March 15, 1977, an ad hoc Board accepted a late filed notice of appeal because appellant was not notified timely of the earlier decision by his attorney. That Board stated in part:

The time limit imposed for the filing of notices of appeal is for the convenience of the Department. There has been no showing that the Department has been disadvantaged

1/ This subsection reads as follows:

"§ 4.401 Documents.

"(a) Grace period for filing. Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal in connection with which the document is required to be filed."

by the slight delay of at most 6 days after the 30-day period following the date of service upon appellant's former attorney. Appellant should not be made to suffer for the failure of his previous attorney to notify him promptly of the rendition of the Judge's decision. No rights of third parties are affected. There are varying circumstances where the strict enforcement of the time limitation would be inappropriate. Hardly anyone would suggest that the rule should be strictly adhered to where the person with filing a document within a 30-day period was incompetent or, where without fault he met with an incapacitating accident en route to make a timely filing and remained unconscious for the 30-day period in issue.

Nothing in the applicable statutes or regulations specifically limits the Department's authority to grant relief from defaults where good cause therefor exists. United States v. Humboldt Placer Mining Co. and DeRosier, 71 I.D. 434 (1964). There are circumstances 1/ which arise where "uncompromising adherence to the precise letter of the regulation must yield to a determination of whether the spirit and purpose of the regulation have been met." Arthur E. Meinhart, 5 IBLA 345, 349 (1972).

1/ Although this Board is not governed by the Rules of Procedure for the United States District Courts, Rule 60 does contain the recognition that final judgments (and presumably regulations) are not necessarily cast in stone * * *.

I submit that only procrustean adherence to the letter of 30 CFR Part 290 could support the result in the majority opinion. See Knife River Coal Mining Co., IBLA 76-660 (November 11, 1976).

Frederick Fishman
Administrative Judge

