

Appeal from the inclusion of certain lands in the Gila Box Wilderness Study Area in Arizona after those lands had previously been excluded from the study area by BLM and restored to it by order of this Board.

Dismissed.

1. Rules of Practice: Appeals: Dismissals

Appeals for which no statements of reasons are submitted will be dismissed in the exercise of the Board's discretion in the absence of any explanation for the failure to file or any indication of appellants' continuing intention to prosecute their appeals.

2. Appeals: Standing--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

Where appellant's statement of reasons for appeal from a decision to include certain lands in a wilderness study area fails to assert any right, claim, title or interest in the subject lands, nor any use of them which will be adversely affected, appellant will be considered to lack standing to appeal, and the appeal will be dismissed.

3. Appeals: Jurisdiction--Board of Land Appeals--Rules of Practice: Appeals: Dismissal

The Board of Land Appeals is the arbiter of its jurisdiction, and neither employees of BLM nor attorneys of the Solicitor's office may create or

deny the right of appeal to the Board. Where a notice published by BLM erroneously includes a provision for appeal to the Board, the Board is not thereby bound, and an appeal filed in response to such notice is subject to dismissal.

4. Administrative Procedure: Administrative Review--Appeals--Board of Land Appeals--Federal Land Policy and Management Act of 1976: Wilderness--Secretary of the Interior

The authority of BLM state directors to designate the boundaries of wilderness study areas derives from the Secretary, and their determinations are appealable to the Board of Land Appeals, which is empowered to decide such appeals as fully and finally as might the Secretary. The Board, therefore, may affirm, reverse or modify such boundary designations on appeal with finality, and BLM's ministerial implementation of such final decisions will not create a new right of appeal.

APPEARANCES: Jerry L. Haggard, Esq. and Steven J. Christiansen, Esq., Phoenix, Ariz., for each of the several appellants; William H. Swan, Esq., Office of the Solicitor, Phoenix, Ariz., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The issues presented by these appeals, involving the same lands, were previously considered and decided by this Board on August 26, 1982, in our decision styled National Public Lands Task Force, 66 IBLA 340 (1982). That appeal was taken from the decision of the Arizona State Director, Bureau of Land Management (BLM), eliminating certain portions of the Gila Box inventory unit from further consideration as a wilderness study area (WSA) because of the intrusive effect of activities associated with the operation of the Morenci mine outside the unit's boundaries, but relatively nearby. After deliberate review of the entire administrative record and the pleadings, the Board affirmed the BLM decision to exclude lands on the outer perimeters of the units which were severely affected by the minerals operations in the vicinity, but remanded the case to BLM with instructions to include in the WSA certain interior lands which were less significantly affected.

In implementing the Board's decision in National Public Lands Task Force, *supra*, BLM reestablished the boundary of the Gila Box WSA in conformity with the Board's holding, and published notification of its action in the Federal Register (48 F.R. 2070, Jan. 17, 1983). That notice included a statement that any person adversely affected might appeal to this Board. In

reaction, Phelps Dodge Corporation, the Upper Gila River Association, the Town of Clifton, and the Boards of Supervisors for Graham County and Greenlee County, respectively, filed notices of appeal, all of them being represented by the same counsel. A single statement of reasons was filed in support of the appeal of Phelps Dodge Corporation, but no statements of reasons were filed by or for the other appellants.

Departmental counsel, on behalf of BLM, has filed a motion for dismissal of the appeal, asserting that the appeal provision which BLM added to the Federal Register notice was included by mistake; that this Board's decision in National Public Lands Task Force, supra, was final for the Department and no further administrative appeal of the issue can be pursued.

[1] We will observe first that the failure of the appellants other than Phelps Dodge to file statements of reasons subjects their appeals to dismissal regardless of other considerations (to be discussed infra). 43 CFR 4.412. Dismissal for this reason is not mandatory, but at the Board's discretion. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). However, this is not a case of a tardy filing by these appellants; there have been no submissions by any of them since the filing of their several notices of appeal; no explanation of their failure to file; and no indication that they still intend to prosecute their respective appeals, despite their representation by the same counsel who have appeared on behalf of Phelps Dodge Corporation. Accordingly, the appeals of the Upper Gila River Association, the Town of Clifton, the Graham County Board of Supervisors, and the Greenlee County Board of Supervisors are hereby dismissed pursuant to 43 CFR 4.412(c).

[2] Aside from the question of whether the action by BLM can be the subject of an appeal in this instance, in any case the right to appeal is limited to those who are parties to a case who are adversely affected by a decision of the Bureau of Land Management or an administrative law judge. 43 CFR 4.410. Although Phelps Dodge has filed an elaborate and extensive statement of reasons, supplemented by 50 pages of exhibits in addition to numerous maps and photographs, there is found therein neither an assertion nor even an inference that Phelps Dodge will be adversely affected by the inclusion of the subject Federal land in the study area. Although Phelps Dodge has a large mining operation in close proximity to the San Francisco Subunit, this Board has affirmed BLM's decision to exclude those Federal lands nearest the mining activity from further study, thus, in effect, leaving a buffer of Federal lands between the Phelps Dodge operation and the lands designated for further study. Phelps Dodge has asserted no right, title, claim or interest in the subject lands, nor any use of them which will be adversely affected by the action complained of. The Board will not indulge in conjecture concerning the reasons for appellant's concern. Having failed to show, or even to allege in its statement of reasons that it has been adversely affected in some cognizable fashion, Phelps Dodge Corporation must be regarded as lacking standing to appeal. Sierra Club v. Morton, 405 U.S. 727 (1972); Hal V. Carslon, Jr., 62 IBLA 305 (1982); State of Alaska, 58 IBLA 118 (1981).

[3,4] Although the holdings recited above constitute an adequate basis for our disposition of this matter, other procedural issues are presented by

this case which should be addressed. Although the appeal of Phelps Dodge is thinly clothed as an appeal from the action of BLM's implementation of this Board's decision in National Public Lands Task Force, supra, appellant makes no effort to disguise the fact that the appeal actually is an attack on the Board's decision, not BLM's decision. Its statement of reasons acknowledges as much at page 5, declaring, "The language of the State Director's decision published in the Federal Register make clear that the sole basis for this decision was the IBLA decision of August 26, 1982, and that decision was not based upon any judgment by the BLM of the qualifications of the subunit for wilderness study." Appellant's pleadings then proceed to attack the Board's decision for what are alleged to be errors. BLM's motion for dismissal contends that the Board's decision constituted final agency action from which no appeal may be taken, citing 43 CFR 4.21(c). In response, Phelps Dodge says that the right of appeal was granted by BLM's State Director, which right cannot be denied; that this is not an appeal of a final decision of the Board but, rather, "an appeal from a new decision of BLM," because this Board had no authority to designate the boundaries of the WSA by its decision in National Public Task Force, supra. Specifically, Phelps Dodge says:

[V]iewed in its proper context, the Task Force decision and the IBLA can do nothing more than review the evidence surrounding the decision of BLM with respect to the Gila Box Wilderness Study Area and direct BLM to carry out its delegated duties to physically designate the boundaries of that Wilderness Study Area in light of the determination by IBLA as to the sufficiency or insufficiency of the evidence and data accumulated by the BLM. Put simply: The authority of the IBLA is limited to reviewing BLM wilderness decisions to determine their propriety or impropriety; IBLA does not have authority to usurp the duty delegated to the BLM to designate and revise the physical boundaries of Wilderness inventory units and Wilderness Study Areas. Therefore, the Task Force decision is not and can not be viewed as a "final decision" as argued by counsel for the BLM. Rather, the subsequent decision by the Acting Arizona State Director is a new decision with respect to the Gila Box Wilderness Area since only BLM (not IBLA) has authority to physically revise the boundaries of Wilderness Study Areas.

In support of this somewhat cleverly contrived argument appellant cites only those portions of the Wilderness Inventory Handbook which declare that BLM's state directors will identify and/or amend WSAs.

First, BLM's incorporation of an appeals provision in the Federal Register publication is not binding on this Board, as BLM itself has noted in the BLM Manual at section 1841-1, and as this Board has previously held in Donald W. Coyer, 36 IBLA 181 (1978); see Donald W. Coyer (On Judicial Remand), 50 IBLA 306 (1980), aff'd, Coyer v. Andrus, Civ. No. 78-104K, etc. (D. Wyo., Mar. 5, 1981) (appeal pending). The Board of Land Appeals is the arbiter of its jurisdiction, and neither employees of BLM nor attorneys of the Solicitor's office may create or deny the right of appeal to the Board. Texas Oil and Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981).

Next, we cannot acquiesce in appellant's endeavor to relegate the role of this Board to that of "an umpire blandly calling balls and strikes" on decisions delivered by BLM. See United States v. Taylor, 11 IBLA 119 (1973), quoting Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2nd Cir. 1965). The Interior Board of Land Appeals is a component of the Office of Hearings and Appeals; an adjunct of the Office of the Secretary. As such, it is invested with the authority of the Secretary to consider and decide, "as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 43 CFR 4.1. (Emphasis added.) Clearly, the several state directors of BLM derive their authority to determine boundaries of WSAs from the delegated power of the Secretary. Equally clear is the jurisdiction of this Board to entertain appeals from decisions of officers of BLM. 43 CFR 4.410. Appellant's concept of the function of this Board could not be valid unless it could establish that the Secretary is powerless to reestablish such boundaries once they were determined by those exercising his authority. But such an argument would be specious, as it is incontrovertible that the Secretary is invested with plenary powers in the supervision of the actions of his subordinates. 43 CFR 4.5. As stated by Professor Kenneth Culp Davis, "The agency heads should have the power to delegate, but they should lack the power to delegate in such a way as to deprive themselves of their residual power." Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong. 2d Sess. 256 (1964).

This Board has received more than 100 appeals concerning the establishment of WSAs, the majority of which involve BLM decisions to include or exclude certain lands from their boundaries. When the Board's decisions in those cases reverse or modify BLM's decisions and require that particular tracts or parcels be omitted or added, the effect is to establish boundaries different from those established by BLM. Such was the effect of the Board's decision in National Public Lands Task Force, supra. A decision by the Board is final for the Department, and no further appeal will lie in the Department from a Board decision, which serves to exhaust the administrative remedy. 43 CFR 4.1(b)(3); 43 CFR 4.21(c).

Our decision in National Public Lands Task Force, supra, was not res judicata as to Phelps Dodge Corporation because the corporation was not a party to that appeal. Nevertheless, we must accord finality to that decision in order to enforce repose. Otherwise, were we to accept appellant's theory of the case and allow ourselves to be persuaded to its view that the subject lands should be eliminated from the WSA, we would only expose the issue to yet another appeal by those harbouring countervailing views who did not participate in the two previous appeals. Should they in turn prevail, the cycle of decision and appeal would be set in motion again, ad infinitum.

The Board has previously considered the identical issue presented here and decided it with finality in National Public Lands Task Force, supra. The BLM publication in the Federal Register was only the ministerial implementation of that decision, and it should not have included a provision for further appeal, but the Board is not thereby bound to set aside its previous decision and review the same matter again.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of all appellants are dismissed.

Edward W. Stuebing

Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge.

