

JAMES C. MACKEY

IBLA 87-207

Decided April 10, 1987

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, permanently suspending appellant from employment connected with cultural resources permits on Federal lands.

Motion to strike denied; motion to dismiss denied; decision set aside; hearing ordered.

1. Administrative Procedure: Generally -- Appeals: Generally -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Statement of Reasons -- Rules of Practice: Appeals: Timely Filing

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

2. Administrative Authority: Generally -- Board of Land Appeals -- Bureau of Land Management -- Delegation of Authority -- Federal Employees and Officers: Generally

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

3. Administrative Procedure: Generally -- Appeals: Generally -- Rules of Practice: Appeals: Notice of Appeal

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

4. Administrative Authority: Generally-Administrative Procedure: Generally -- Appeals: Jurisdiction -- Board of Land Appeals -- Bureau of Land Management -- Rules of Practice: Appeals: Effect of

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

5. Administrative Procedure: Hearings -- Federal Land Policy and Management Act of 1976: Hearings -- Federal Land Policy and Management Act of 1976: Permits -- Rules of Practice: Hearings

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

APPEARANCES: Roger McDaniel, Esq., Cheyenne, Wyoming, for appellant;

Glenn F. Tiedt, Esq., Office of Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On July 17, 1986, the Wyoming State Office, Bureau of Land Management (BLM), issued a letter decision permanently excluding James C. Mackey "from being involved in any capacity with cultural resource permitted activities on lands administered by BLM in Wyoming." This action was prompted by Mackey's continuing failure to comply with extended deadlines for submitting reports and obtaining curatorial custody of materials pursuant to permit 83-WY-169. Since July of 1985, appellant had been under suspension from permits 031-WY-C084 and 032-WY-AR84 for this reason. By letter dated August 11, 1986, Mackey appealed the July 17 decision. BLM acknowledged receipt of Mackey's appeal, but treated it as a request for a meeting between the parties which was scheduled for September. The record contains no document describing what occurred at this meeting, although it apparently took place as planned.

By letter dated November 13, 1986, counsel for appellant reported work required under permit 83-WY-169 had been completed except for the curation of certain items, and that the project was complete to the extent that a bond filed by appellant should be refunded. The letter also expressed the hope "that full permits could be issued to my clients [the several firms with which Mackey had been affiliated], particularly without a limitation that Jim Mackey not be allowed to research." By letter dated December 2, 1986, the State Office refunded appellant's bond, but adhered to its July 17 decision to permanently exclude appellant from work in any capacity with cultural resource permitted activities on lands administered by BLM in Wyoming. A notice of appeal from the December 2 decision, filed on December 23, 1986, contended that BLM's action was taken without "statutory or other lawful

authority under the provisions of the Archaeological Resources Protection Act of 1979, [16 U.S.C. § 470aa (1982)] or otherwise." Appellant also requested a hearing pursuant to 43 CFR 4.415.

[1] BLM has moved to dismiss the appeal from the December 2 decision as untimely because the July 17 decision was the dispositive action in this matter. However, BLM now concedes that a timely notice of appeal from the July 17 decision was filed, but moves for dismissal because Mackey's statement of reasons was not filed within 30 days after the notice of that appeal. See 43 CFR 4.412. Appellant in turn has moved to strike BLM's motion as untimely. Both motions are denied. Since the notice of appeal from the July 17 decision was timely filed on August 15, the Board has jurisdiction over this matter. Unlike the failure to file a timely notice of appeal, failure to file and serve a timely statement of reasons or answer does not deprive this Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the time required only makes an appeal "subject to summary dismissal." (Emphasis added.) The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party. Indeed, in the absence of such a showing, dismissal of an appeal might be deemed an abuse of discretion. See United States v. Rice, No. CIV. 72-467, PHX WEC (D. Ariz. Feb. 1, 1974), reversing United States v. Rice, 2 IBLA 124 (1971).

Moreover, we regard BLM's motion with disfavor because BLM, not appellant, has failed to follow the Department's regulations or adhere to established practices for processing appeals. The confusion begins with the final paragraph of the State Director's July 17 letter:

Should you wish to dispute the decision made herein, steps for doing so are available in BLM procedures for cultural resource use permits (enclosure 5). Through these procedures, you may submit a letter setting out reasons why you believe our decision should be reconsidered. Alternatively, you may request a conference, to discuss our decision and its basis. Should you be dissatisfied with the outcome of either a review or conference you may request that our decision be reviewed at the next organizational level (i.e., the BLM Director in Washington, D.C.). The State Director's decision shall stand during the course of any higher level review. At any time, formal appeal may be filed with the Interior Board of Land Appeals by following the procedures in 43 CFR, Part 4, Subpart E (enclosure 6).

What was appellant supposed to do after reading this paragraph and the referenced enclosures? Contrary to the State Director's statement that an appeal to IBLA may be filed "[a]t any time," the rules included in enclosure 6 require an appeal to be transmitted "in time to be filed * * * within 30 days after the date of service" of the decision. 43 CFR 4.411(a). Furthermore, enclosure 5, referred to in the Director's letter, sets forth an internal BLM disputes and appeals procedure which must be exhausted before an appeal to the Board may be taken. Appellant's response to BLM's motion suggests that the August appeal was intended to initiate the described disputes process rather than initiate an appeal to this Board. If the disputes and appeals provisions of enclosure 5 were valid, we would dismiss both the August and December appeals because the described procedures have not yet been exhausted.

[2] BLM, however, has not moved to dismiss the December appeal as premature; on the contrary, the attachment to the State Director's transmittal memorandum and BLM's motion to dismiss both attack the appeal because it

comes too late. 1/ One must necessarily conclude that BLM's motion to dismiss implicitly concedes the invalidity of the enclosure 5 disputes procedures. We need not rely on such a concession, however, to rule those procedures invalid. Those procedures are not established by regulation, and thus lack the force and effect of law. See Shell Offshore, Inc., 96 IBLA 149, 94 I.D. (1987). They can neither affect the substantive rights of the appellant nor bind this Board. See Schweiker v. Hansen, 450 U.S. 785, 789 (1981); United States v. Kaycee Bentonite Corp., 64 IBLA 183, 214, 89 I.D. 262, 279 (1982). The procedures are invalid because they purport to give BLM officials continuing authority over matters which lie exclusively within this Board's jurisdiction under Departmental regulations and by delegation from the Secretary. 43 CFR 4.1, 4.410; 13 DM 111. By virtue of this delegation of authority by the Secretary to the Board, BLM has no authority to establish procedures for the disposition of matters which lie within the jurisdiction of the Board.

[3, 4] Of course, BLM may establish procedures under which it issues an interlocutory decision notifying a party of a proposed action which will be taken unless the party submits further information for BLM's consideration. Such a decision would not be subject to appeal to this Board under 43 CFR 4.410 because it would not have adversely affected the party at the time it was issued. 2/ But when a BLM official issues a decision which

1/ The attachment to the transmittal memorandum is not merely a report on the status of the case but states "reasons why * * * the appeal should not be sustained," as provided in 43 CFR 4.414. Although this regulation required the State Director to serve a copy of the attachment upon appellant, the State Director failed to do so. This failure did not prejudice appellant, however. The Solicitor's motion to dismiss essentially incorporates the matter of the attachment, and the motion was served upon appellant. 2/ For a discussion of the distinction between interlocutory decisions and appealable ones, see John R. Anderson, 71 IBLA 172 (1983), especially the concurring opinion of Judge Stuebing at 176-77.

adversely affects a party to the case, as it did here in permanently excluding appellant from working in cultural resources activities on public land, the decision except in limited circumstances is subject to appeal to this Board. 43 CFR 4.410. BLM cannot dispute the fact that the July 17 decision adversely affected appellant. ^{3/} Appellant's letter filed on August 15 must be construed as a notice of appeal under 43 CFR 4.411, even though his August 11 letter was clearly intended to initiate the internal BLM disputes process. In Buck Wilson, 89 IBLA 143 (1985), we found that it does not matter whether a document filed with BLM characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the conclusions or facts of an adverse decision, it should be treated as an appeal. There can be no doubt that Mackey's August 11 letter challenged the conclusion and factual basis of the July 17 decision. When this notice of appeal was filed, BLM lost jurisdiction over the case and had no further authority to take any action on the subject matter of the appeal. Sierra Club, 57 IBLA 288 (1981); James T. Brown, 46 IBLA 265 (1980); Alaska v. Patterson, 46 IBLA 56 (1980). ^{4/} BLM should have transmitted the relevant case files to this Board immediately

^{3/} We note that BLM's disputes and appeals procedures attached to the July 17 decision provide: "The authorized officer's decision shall stand during the course of any higher level of review." This statement appears to conflict with the Department's rules of procedure. "Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." 43 CFR 4.21(a).

^{4/} While it is true that BLM lacks authority to modify a decision under appeal until jurisdiction has been restored by an order of this Board, BLM is not precluded from reconsidering the correctness of its original decision to determine whether to ask that the case be remanded. See B. K. Killion, 90 IBLA 378 (1986).

Exploration and Producing Southeast, Inc., 90 IBLA 173, 177 (1986).

Thus, the disputes procedures are invalid because BLM has no authority to issue dispositive decisions which require resort to further review by any official within the Bureau unless otherwise provided by regulation. Under 43 CFR 4.410, any dispositive action by an authorized officer of BLM is subject to review only by this Board, except where a duly promulgated regulation provides otherwise. E.g., 43 CFR 4.470 (providing that appeals from grazing decisions go to an Administrative Law Judge).

[5] BLM has filed no substantive response to appellant's contention that the action taken in the July 17 decision has no basis under the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa (1982), or other applicable law, nor has BLM filed a specific response to appellant's request for a hearing. Because the July 17 decision permanently excluded appellant from permitted activities on BLM lands, the effect of the decision was to revoke all his existing land use authorizations, and to further indicate BLM's intent to deny pending applications to the extent they involve appellant. Such action at least raises a question as to whether appellant was entitled, as a matter of procedural due process, to a hearing prior to BLM's decision, or at least shortly afterward. See Mathews v. Eldridge, 424 U.S. 319 (1976).

We need not revolve this constitutional issue, however, because we hold that appellant had a statutory right to a hearing prior to the issuance

of the July 17 decision under section 302(c) of FLPMA, 43 U.S.C. § 1732(c) (1982), which provides as follows:

The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan: Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: Provided further, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: Provided further, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: Provided further, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

The permits in this appeal were issued by a delegate of the Secretary and expressly authorized activity on public land administered by BLM. Although the permits in this case do not expressly include the provision required by this statute, this omission does not excuse BLM from adhering to the section 302(c) procedural requirements, if applicable. 5/

5/ It should be noted that the notice and hearing requirement is incidental to the main purpose of the provision, which is to ensure that any land use authorization issued by the Department required compliance with laws including air and water quality standards or implementation plans. As one writer observed:

"It is most important to note that §§ 302(c) and 506 of FLPMA give the Interior Department the clear authority to suspend or revoke land use permits for violations of its regulations as well as those of other federal [and] state agencies, thus becoming a potent tool for the enforcement of pollution standards of other federal and state agencies."

Sturgis, Administrative and Judicial Review of Interior Department Decisions, 31 Rocky Mtn. Min. L. Inst. § 3.07[1] at 3-47 (1985).

The requirements of section 1732(c) are not restricted to instruments issued by BLM under section 1732(b). Inclusion of the fourth proviso makes it clear that Congress intended this requirement to extend to all land use authorizations issued by the Department under any law for lands managed by BLM. Congress provided that the requirements of this section can be avoided only if the law under which the authorization was issued or other law contains specific provisions for the suspension, revocation, or cancellation of a land use authorization.

In 16 U.S.C. § 470cc(f) (1982), ARPA provides for the suspension or revocation of permits for certain prohibited acts listed in 16 U.S.C. § 470ee(a), (b), and (c) (1982). However, BLM's action in this appeal was not based on this provision, and ARPA contains no specific provision for suspension and revocation of permits under such circumstances as those cited in BLM's July 17 decision. Although provisions concerning suspension are set forth at 43 CFR 7.10, no specific procedure is provided by the regulation for administrative conduct of permit suspensions or revocations. Nevertheless, contrary to appellant's contention that BLM's action was not specifically authorized by ARPA, this does not mean that BLM is precluded from suspending or revoking a permit if a term or condition is violated. But because ARPA contains no provision for the suspension or revocation of permits under such circumstances as are alleged in this appeal, BLM may take such action only in a manner consistent with the requirements of 43 U.S.C. § 1732(c) (1982), which requires a hearing before permit revocation or suspension. Because no hearing was held prior to the July 17 decision, that decision must be set aside.

The record originally received by this Board on January 5, 1987, consisted only of the case file for Western Research Archaeology's permit 031-WY-C085PR. A file related to permit 83-WY-169 was subsequently furnished the Board. The July 17 decision revokes Mackey's authority under all existing permits, but those case files were not transmitted with the appeal. The December 2 decision makes clear that BLM considered the July 17 decision to be a final disposition of Mackey's interest in pending applications as well. Although the hearing required by section 1732(c) does not pertain to the denial of an application for a new permit, the reasons for the denial are predicated on the revocation of the Mackey's existing permits, an action which could not become effective until after a hearing was held, a decision issued, and any appeal therefrom resolved. See 43 CFR 4.21(a). BLM shall therefore refrain from taking action on pending permit applications involving Mackey until issuance of a final Departmental decision in this matter. 6/

6/ Furthermore, BLM should note the effectiveness of its July 17 decision was automatically stayed by 43 CFR 4.21(a), the pertinent provisions of which are quoted at n.3, supra. BLM may not preclude appellant from continuing work under existing permits issued before the July 17 decision. This regulation does not require BLM to issue new permits to Mackey on pending applications. We recently noted in Prima Exploration, Inc., 96 IBLA 80, 82 (1987):

"The provisions of [43 CFR 4.21(a)] implement 5 U.S.C. § 704 (1982), which provides that a decision constitutes final action for the purposes of judicial review unless the agency requires by rule that an appeal be taken to superior agency authority, and 'provides that the action meanwhile is inoperative.' See United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971). As one authority has noted, however: 'The requirement that agency action be inoperative pending required appeals to the agency or to superior agency authority does not require the agency to take positive action for the benefit of an applicant.' Attorney General's Manual on the Administrative Procedure Act 105 (1947)." Thus, the fact the July 17 decision is suspended by 43 CFR 4.21(a) does not require BLM to issue new permits to appellant on pending applications.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the matter referred to the Hearings Division for assignment to an Administrative Law Judge, whose decision shall be final unless appealed to this Board pursuant to 43 CFR 4.410.

Franklin D. Arness
Administrative Judge

We concur
Administrative Judge

Gail M. Frazier

Kathryn A. Lynn
Administrative Judge

Alternate Member

