

JAMES C. MACKEY

IBLA 88-599

Decided October 4, 1988

Appeal from a decision of the Idaho State Office, Bureau of Land Management, denying three cultural resource use permit applications. I-26319.

Dismissed.

1. Administrative Procedure: Generally -- Board of Land Appeals -- Appeals: Generally -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

Any affected person who desires to challenge the issuance or denial of a cultural resource use permit must follow the procedures embodied in 43 CFR 7.36. Until the review process set forth in this regulation has been exhausted, and BLM has had the opportunity to consider and rule on an appellant's challenge in the first instance, the matter is not ripe for review by this Board.

APPEARANCES: James C. Mackey, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

James C. Mackey has appealed from the July 19, 1988, decision of the Idaho State Office, Bureau of Land Management (BLM), denying three cultural resource use permit applications (I-26319) 1/ because the applicants failed to identify the specific projects they propose to conduct on public land in Idaho, and because the applications were missing information and/or documentation necessary for BLM to review them.

By letter dated July 26, 1988, to the Idaho State Office, Mackey requested, inter alia, a conference to discuss the merits of BLM's July 19, 1988, decision. In this letter, Mackey informed BLM that he had filed an

1/ One cultural resource use permit application was filed by Bridget Hakiel on behalf of "Archaeological Rescue, Inc." The second and third permit applications were filed by Mackey on behalf of "Western Prehistoric Research" and "Western Research Archaeology."

appeal from the July 19 decision with this Board. ^{2/} Mackey's notice of appeal and initial statement of reasons was received by the Board on August 1, 1988. Mackey requested that the Board assign this case to an administrative law judge for a hearing "so that evidence can be presented and the decision of July 19, 1988 quickly reversed."

On August 15, 1988, BLM filed a motion with the Board to dismiss Mackey's appeal, arguing that it is "premature since the appellant has not exhausted the permit reviews and disputes procedures presented in 43 CFR 7.36."

[1] On March 23, 1987, the Department adopted regulations to supplement the uniform regulations in 43 CFR Part 7, implementing the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470ii (1982), and in response to section 10(b) of that Act, 16 U.S.C. § 470ii (1982). 52 FR 9168 (March 23, 1987). Subpart B of these supplemental regulations contains procedures for cultural resource use permit reviews and disputes. *Id.* at 9165.

The relevant provisions of 43 CFR 7.36, which includes procedures for further internal review of the July 19 decision within BLM, are set forth below:

(a) Any affected person disputing the decision of a Federal land manager with respect to the issuance or denial of a permit * * * may request the Federal land manager to review the disputed decision and may request a conference to discuss the decision and its basis.

(b) The disputant, if unsatisfied with the outcome of the review or conference, may request that the decision be reviewed by the head of the bureau involved.

(c) Any disputant unsatisfied with the higher level review, and desiring to appeal the decision, pursuant to § 7.11 of this part, should consult with the appropriate Federal land manager regarding the existence of published bureau appeal procedures. In the absence of published bureau appeal procedures, the review by the head of the bureau involved will constitute the final decision.

The BLM review process available to appellant under this regulation must be pursued prior to the Board's consideration of Mackey's challenge to BLM's July 19, 1988, decision. Were the Board to assume jurisdiction of the appeal at this juncture, it would stand in the position of the initial decision maker. That is not the function of this Board. Until the review process

^{2/} Appellant has complained that BLM has not responded to its request for a conference. We would point out that BLM has not authority to proceed with the conference because the filing of the notice of appeal by appellant removed the matter from the jurisdiction of BLM to act further in the matter. *Sierra Club*, 57 IBLA 288 (1981).

has been exhausted, and BLM has had the opportunity to consider and rule on appellant's challenges in the first instance, this matter is not ripe for review by this Board. It is possible that this matter may be resolved to appellant's satisfaction within BLM, under its two tier review procedure, thus obviating the need for an appeal to this Board. As previously noted, Mackey has requested a conference with BLM to discuss the merits of BLM's decision. Once that conference has taken place, Mackey may request review of its outcome by the head of BLM pursuant to 43 CFR 7.36(b). If the head of BLM renders a decision adverse to Mackey, he may then appeal to the Board in accordance with 43 CFR 7.36(c) and 43 CFR 7.11. However, until BLM issues a decision in this matter at the final level of review, the Board will not entertain an appeal. ^{3/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed and remanded to BLM for further action.

Gail M. Frazier
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

^{3/} Regulation 43 CFR 7.11 provides that "[a]ny affected person may appeal permit issuance, denial of permit issuance, suspension, revocation, and terms and conditions of a permit through existing administrative appeal procedures." We note that with its decision, BLM enclosed materials describing the disputes and appeals process available to Mackey. In Paragraph A of Section XIII of a document entitled "Procedures for Cultural Resource Use Permits," BLM sets forth its procedures for handling disputes involving permit denials. Those procedures mirror closely the provisions of 43 CFR 7.36 quoted above. Additionally, Section XIII provides that "[i]f a disputant remains unsatisfied after exhausting the dispute opportunities listed in paragraph A. of this section, a formal appeal may be filed with the Interior Board of Land Appeals by following the procedures in 43 CFR Part 4, Subpart E."

