

JAMES C. MACKEY

IBLA 89-16, 89-282

Decided May 14, 1990

Separate appeals of a Bureau of Land Management decision denying cultural resource permittee's request for a conference and of a letter notifying permittee of BLM procedures regarding problems with cultural resources reports. W 8100, W 8151.

Appeals dismissed.

1. Appeals: Generally--Board of Land Appeals--Rules of Practice:  
Appeals: Dismissal--Rules of Practice: Appeals Statement of Reasons

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

2. Administrative Procedure: Administrative Review--Appeals:  
Generally--Rules of Practice: Appeals: Standing to Appeal

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision appealed. A cultural resources permittee is not a party to a case with standing to appeal a decision adjudicating a right-of-way holder's compliance with a stipulation to the right-of-way requiring mitigation of impacts to cultural resources.

3. Administrative Procedure: Administrative Review--Appeals:  
Generally--Rules of Practice: Appeals: Standing to Appeal

Specific procedures for review of adjudication of a cultural resource use permit are found in the regulations at 43 CFR Part 7, Subpart B. These provisions give the permittee a right to request a conference

to discuss a disputed decision relating to issuance, denial, modification, suspension, or revocation of a permit or the inclusion of specific terms and conditions in a permit. 43 CFR 7.36(a). Such decisions are properly distinguished from a decision adjudicating a right-of-way holder's compliance with a stipulation requiring mitigation of damage to cultural resources and denial of a conference in the latter context entails no reversible error.

4. Administrative Procedure: Administrative Review--Appeals:  
Jurisdiction--Board of Land Appeals--Rules of Practice: Appeals:  
Standing to Appeal

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a ca

APPEARANCES: James C. Mackey, pro se; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

On September 19, 1988, James C. Mackey filed a notice of appeal of a decision of the District Manager, Bureau of Land Management (BLM), Green River Resource Area, to deny Western Research Archeology (WRA) and James C. Mackey a conference. The conference was requested in response to a letter from BLM to Texasgulf Soda Ash, Inc. (Texasgulf) regarding the adequacy of a cultural resources report prepared in connection with its tailings pond on public lands. This appeal has been docketed as IBLA 89-16.

On February 13, 1989, after receiving a letter from the Rawlins District Office, BLM, dated January 24, 1989, Mackey filed a notice of appeal "of the decision to contact clients regarding archeology." This latter appeal has been docketed as IBLA 89-282.

The essence of appellant's contention in the statement of reasons (SOR) for appeal is that BLM is obligated to address its objections regarding appellant's archeological reports directly to appellant and not to appellant's clients on whose behalf the reports are prepared. In response to the SOR, counsel for BLM has moved to strike appellant's brief on the ground that it was not filed within 30 days after filing of the notice of appeal as provided by 43 CFR 4.412(a). Counsel for BLM has also moved the Board to dismiss the appeal regarding the letter to Texasgulf on the ground appellant is not a party to the case adversely affected by the decision. Further, a motion has been made by BLM to dismiss the appeal of the letter announcing the intention of BLM to contact the proponents of projects with respect to difficulties concerning required archeological reports. In

support of the motion, BLM contends that this was not a decision in a case adversely affecting the appellant.

In consideration of the threshold issues raised by the motions to dismiss filed herein, we have advanced these cases for review on our docket. We have also consolidated the cases for review because of the similarity of the issues raised by the parties.

Cultural Resource Use Permit No. 104-WY-AR86 was issued by the Wyoming State Office to WRA on October 6, 1986. The permit had a term of one year from September 25, 1986, to September 24, 1987, and identified Bridget M. Hakiel as the person responsible for carrying out its terms and conditions. 1/ The permit authorized excavation of sites 48SW3039 and 48SW5314 in secs. 6 and 8, T. 20. N., R. 110 W., Sweetwater County, Wyoming. The study and report on these sites was necessitated by the intended use of the public lands as a tailings pond by Texasgulf pursuant to rights-of-way issued by BLM.

Special stipulation number 9 of WRA's permit required a summary report "within 30 days of the completion of fieldwork" and special stipulation number 10 required a draft final report to be furnished "within six (6) months after the permittee leaves the field." Apparently delays were encountered in completion of the work; the record shows that by letter dated April 3, 1987, an extension to May 15, 1987, was approved for fieldwork at site 48SW5314. The record also indicates that WRA received extensions to January 15 and February 15, 1988, for completion of the final report. 2/

On March 14, 1988, BLM received a "Final Report on the Excavation of Site 48SW3039 Locality B" of "The Two Site Mitigation Project, Part I of III." In a letter from BLM to Texasgulf dated March 22, 1988, BLM acknowledged receipt of "final data recovery mitigation reports

---

1/ The SOR explains the relationship of the parties related to the appeal as follows:

"Plaintiff, James C. Mackey, is the principal owner of Western Research Archeology, Inc., a private consulting firm incorporated within Wyoming and holding federal Antiquities Act archeological permits administered and issued by Defendant. Plaintiff's wife, Bridget Hakiel Mackey, is the sole owner of Archaeological Rescue, Inc. Archaeological Rescue is also incorporated in Wyoming and holds federal permits administered by Defendant. Plaintiff works and has worked and has been listed and is listed on both organization's [sic] permits."

2/ The BLM letter of Jan. 25, 1988, granting WRA an extension until Feb. 15, 1988, for the final report expressed a willingness to accommodate reasonable extensions to produce acceptable reports, but warned that "failure to complete this work may place your client, Texasgulf, Inc., in violation of right-of-way permit stipulations and could result in revocation of pertinent rights-of-way."

on sites 48SW3039 Area B and 48SW5314 produced under ARPA [3/] permit 104-WY-AR86." 4/

By letter dated August 9, 1988, the Area Manager of the Green River Resource Area wrote to Texasgulf in regard to the "final report" which had been received in March. The letter provided BLM's evaluation of the report and explained why BLM found the report insufficient to comply with the stipulations included in Texasgulf's rights-of-way:

For ease of discussion we will use the "table of contents," from the research design to guide our review. We find that the items in Chapter 2.0-2.4.4 of the table are present in the report. Although these items are rather simplistically stated and illustrations (both drawings and photographs) are not well produced we can accept these purely descriptive aspects of the report as adequate.

Chapter 3 concerns "Research Questions," and is essentially non-existent in the report. There is no systematic discussion of cultural chronology, projectile point analysis, lithic sources, paleoenvironmental reconstruction flotation analysis or paleoenvironmental reconstruction. There is some very brief and primarily descriptive discussion of these items interspersed within the descriptive portion of the report.

A data recovery mitigation project should result in a synthetic discussion of the data recovered and how it relates to the state of the art in the study of a given region's prehistory. Any lesser approach is excavation without purpose or direction and is tantamount to vandalism or 'pot-hunting.' Since the data recovery report does not include the synthesis outlined in the data recovery plan we find that the project, as reflected in the report, does not meet the data recovery stipulations of your BLM right-of-way permits. If you wish to present additional data to bring Texasgulf into compliance with these stipulations please feel free to do so. [Emphasis added.]

Appellant asserts that a copy of this letter was not sent to WRA. A copy, however, was obtained from Texasgulf. By letter dated August 22, 1988, Mackey wrote to the Area Manager of the Green River Resource Area and others. The letter referred to a multitude of matters including past administrative decisions of the Board involving appellant's firms; numerous documents in pending and proposed litigation in which appellant is

---

3/ Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa- 470ll (1982).

4/ The documents were apparently the "draft final" reports called for by special stipulation number 10. A cover letter from WRA indicates that final reports for these two parts were given to BLM in July 1988.

involved; and reasons why the report at issue is still incomplete, and, hence, why judgment on it should be withheld. Paragraph 10 requested "a Conference with all interested parties in the offices of the Green River Resource Area of the BLM." Paragraphs 12 and 19 similarly requested a conference concerning WRA's Playa #3 archeology, of which the Two Site Mitigation Project is apparently a part.

By letter dated September 13, 1988, the BLM District Manager sent a copy of Mackey's letter to Texasgulf, noting that Mackey had "requested a conference with BLM regarding his company's performance on the project." The District Manager stated: "I have reviewed his letter, and our August 9, 1988 letter to Texasgulf, with officials of the resource area. It is my conclusion that our letter to you was eminently clear and there is no reason to hold a conference with Mr. Mackey." A copy of this September 13 letter was sent to Mackey.

On September 19, 1988, Mackey filed a notice of appeal with the Wyoming State Director of the BLM decision to deny appellant's request for a conference pursuant to BLM regulations regarding cultural resource permits. Appellant also appealed the practice of issuing allegedly "inaccurate, incompetent, biased, unethical letters" directly to WRA's clients rather than to WRA. Appellant has also requested a hearing.

While this appeal was pending, the District Manager of the Rawlins District Office sent a letter dated January 24, 1989, to parties holding cultural resource use permits within the district. The letter informed the permittees of BLM's procedures concerning problems noticed in reviewing the adequacy of cultural resources reports required as a condition of BLM authorized projects:

When reviewing your completed work, we will resolve minor questions or problems directly with you on an informal basis. However, problems which have the potential to delay a project will be brought to the attention of the project proponent in writing. This will provide project proponents with an opportunity to assist in the resolution of these problems. Copies of letters sent to project proponents will be provided to you as well.

On February 18, 1989, Mackey filed an appeal of this letter objecting to notification of WRA's clients.

[1] We first address BLM's motions to strike appellant's SOR. BLM filed a similar motion in a prior case involving this appellant. The Board stated:

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).

James C. Mackey, 96 IBLA 356, 359, 94 I.D. 132, 134 (1987); see Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Mendas Cha-ag Native Corp., 93 IBLA 250, 252 (1986). In this case BLM contends that the SOR is "inexcusably late" and disputes appellant's contention that he did not receive copies of the supporting documents until March and April of 1989. Regardless, BLM has failed to argue and show that it has been prejudiced by appellant's belated filing. Accordingly, its motions to strike the SOR are denied.

[2] BLM has also filed motions to dismiss each of the appeals. In regard to IBLA 89-16, BLM argues that "[t]he August 9, 1988, letter from the Bureau of Land Management to Texasgulf Soda Ash cannot be construed to be a decision on a case adversely affecting a cultural resource management permittee." By regulation "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management \* \* \* shall have a right to appeal to the Board \* \* \*." 43 CFR 4.410(a).

The appeal of the denial of a conference involves two distinct issues. To the extent appellant is challenging the August 9, 1988, BLM letter to Texasgulf, it is not a party to the case. As the underscored language quoted above confirms, that decision is properly characterized as a ruling on the adequacy of Texasgulf's compliance with the data recovery stipulations attached to its right-of-way permits. The dispute at issue in the letter involves the compliance of the right-of-way holder. It appears that WRA was the agent retained to perform this work for the principal, Texasgulf, and that, in order to fulfill this responsibility, it obtained a cultural resources use permit (104-WY-AR86) from BLM. While the letter critiques the work WRA performed on behalf of Texasgulf, the obligation to mitigate damage to cultural resources is that of the right-of-way holder. WRA, as the agent, is not the holder of the right-of-way at issue and is not a party to the case with standing to appeal the decision. To be a party to a case, one must have actively participated in the decision making process regarding the subject of the appeal. Sharon Long, 83 IBLA 304, 307 (1984). Hence, to the extent appellant is challenging the August 9 letter to Texasgulf, the appeal must be dismissed for lack of standing. The Wilderness Society, 110 IBLA 67, 72 (1989); Mark Altman, 93 IBLA 265 (1986).

[3] However, the BLM motion misperceives, at least in part, the nature of the Mackey appeal. His appeal was not filed in response to BLM's letter of August 9, 1988, but, as stated in the Notice of Appeal, it was an appeal of BLM's letter of September 13, 1988. Although that letter was also sent to Texasgulf (with a copy sent to Mackey), it was clearly a response to Mackey's August 22, 1988, letter requesting a conference. To the extent appellant is challenging the September 13 letter

denying his request for a conference regarding the cultural resources report, he is a party to the case. WRA holds cultural resource use permit No. 104-WY-AR86. If a conference had been held, the parties would have discussed at least those matters stated in BLM's August 9, 1988, letter regarding the quality of WRA's report. If, as appellant alleges, the letter is inaccurate, the lack of an opportunity to address the contents of a letter sent to Texasgulf may have adversely affected WRA as well as Mackey. Thus, appellant has standing to appeal the denial of a conference.

The relevant regulations promulgated pursuant to section 10(b) of the Archeological Resources Protection Act of 1979, 16 U.S.C. § 470ii (1982), are found at 43 CFR Part 7, Subpart B. The provision regarding permit reviews and disputes provides in part:

Any affected person disputing the decision of a Federal land manager with respect to the issuance or denial of a permit, the inclusion of specific terms and conditions in a permit, or the modification, suspension, or revocation 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.

43 CFR 7.36(a); see 43 CFR 7.11. A decision regarding rejection or modification of an application for cultural resource use permit is subject to the regulation at 43 CFR 7.36 regarding permit review which includes a right to request a conference to discuss the basis for the decision. See Jicarilla Archaeological Services, 110 IBLA 57 (1989); James C. Mackey, 104 IBLA 393 (1988). Appellant, however, did not request a conference regarding any of the types of decisions described by the regulation. Thus, it was not a request invoking the review procedures established by BLM in promulgating 43 CFR 7.36. Accordingly, we must conclude that appellant has failed to establish error in the BLM decision denying the request for a conference. Contrary to his allegation, the refusal to hold a conference did not violate the relevant regulations. When an appellant fails to affirmatively point out any ground for error in the decision which is appealed, the appeal is properly dismissed. Add-Ventures, Ltd., 95 IBLA 44, 50 (1986); United States v. Reavely, 53 IBLA 320 (1981). Accordingly, the appeal from the denial of the request for a conference is dismissed. 5/

BLM moves to dismiss IBLA 89-282 because the January 24, 1989, letter is not a decision on a case but "an informational communication" sent to 17 cultural resource use permit holders that includes a statement of policy.

---

5/ We recognize that our ruling precludes appellant from addressing in this appeal the inaccuracies he perceives in the letter. However, when BLM proceeds to adjudicate the permit pursuant to the regulations at 43 CFR Part 7, Subpart B, or denies future permits based on the quality of work performed under permit No. 104-WY-AR86, Departmental review procedures provide an opportunity for WRA to respond to and present evidence as to any factual issues concerning the quality of WRA's work. See Jicarilla Archaeological Services, supra at 59-60.

In support BLM has provided a copy of section 8143 of the Wyoming State Office Supplement to the BLM Manual (Release 8-6, Dec. 15, 1986). The relevant subsection, 8143.31.A.1, states:

1. Inadequate Reports.

a. For any problems associated with a permitted archaeologist's fieldwork or report which have potential to delay a project, the BLM District or Resource Area will document these problems in an original letter to the project proponent contracting with that archaeologist, with a carbon copy of same, to the archaeological permittee who conducted the work.

b. Such letters are to urge the project proponent to work with their archaeologist to rectify identified problems, and to point out that until the problems are corrected to BLM standards, approval will be withheld for the proposed project. Permit stipulation infractions will also be identified in all such letters. In addition, the correspondence will mention that the noted deficiencies, omissions, etc., will be used in the review of the performance of the permitted archaeologist and could affect his receiving a permit or fieldwork authorization in the future. [6/]

[4] BLM characterizes the practice of sending such letters as a BLM policy. While we believe subsection 8143.31.A.1 is more properly described as setting forth an administrative procedure rather than a policy, we agree with BLM that its letter of January 24, 1989, merely informed appellant of the matter and does not constitute a decision on a case which is appealable to this Board. The Board does not have jurisdiction to consider challenges to BLM statements of policy because such appeals do not present a case or controversy. See Headwaters, Inc., 101 IBLA 234, 239 (1988); cf. Tennessee Consolidated Coal Co. v. OSMRE, 99 IBLA 274 (1987); State of Alaska, 85 IBLA 170, 172 (1985). The BLM Manual, like instruction memoranda, establishes procedures to be followed by BLM employees in carrying out their duties, and, hence, is not subject to appeal in the absence of a decision applying the procedure to dispose of a case to which appellant is a party. See State of Alaska, 106 IBLA 160, 165, 95 I.D. 304, 306 (1988).

Appellant has requested a hearing in this matter. An evidentiary hearing is warranted only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. KernCo Drilling Co., 71 IBLA 53, 56 (1983). Based on our analysis of the issues raised by these appeals, we conclude appellant has failed to establish the existence of material issues of fact which merit a hearing. Hence, the request for a hearing is denied.

---

<sup>6/</sup> We note that BLM's Aug. 9, 1988, letter to Texasgulf does not include a statement of the kind referred to in the last sentence of paragraph 1.b. of the Manual.

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

---

C. Randall Grant, Jr.  
Administrative Judge

I concur:

---

Will A. Irwin  
Administrative Judge

