

KLAMATH SISKIYOU WILDLANDS CENTER
SISKIYOU PROJECT

IBLA 2001-67

Decided September 27, 2001

Appeal from a decision issued by the Medford (Oregon) District Office, Bureau of Land Management, denying a protest of the Double Salt Timber Sale. OR110-TS00-03.

Motion to dismiss denied; briefing ordered.

1. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Burden of Proof

The regulation at 43 CFR 1.3 does not stand alone and necessarily must be read in conjunction with 43 CFR 1.5. When an individual "signs a paper in practice before the Department," it constitutes an averment that the individual is one of those persons identified in 43 CFR 1.3 who is therefore authorized to appear before the Department. The certification effected by the act of signing a paper in practice before the Department ordinarily will be sufficient to permit the individual to practice, absent facts or circumstances which call the certification into question.

2. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Burden of Proof

When BLM challenges a certification that a person is qualified to practice before the Department, it has the burden of coming forward with affirmative allegations, which if true, would demonstrate that the individual is not authorized to practice before the Department to justify going behind the legal effect of the certification established by 43 CFR 1.5. That burden is not carried merely by expressing general doubt as to the person's authority or inviting the Board to probe it as a fishing exercise or litigation stratagem, because such a practice would completely vitiate the mandate of 43 CFR 1.5. When BLM formally moves to dismiss the appeal, affirmatively alleges that the individual is not authorized to practice, and

articulates the specific facts and reasoning which support its motion, BLM has met its burden.

3. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Burden of Proof

Where the director of the organization appealing a BLM decision submits a declaration averring that the individual who has appeared to represent the organization works sufficient hours to be regarded as a full-time employee in response to BLM's motion to dismiss, and BLM offers no further evidence or argument challenging the sufficiency of the declaration, authority to practice before the Department will be established, as provided by 43 CFR 1.3(b)(3)(iii).

4. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Burden of Proof

Where BLM challenges an organization's standing to appeal on the ground that it is not a party to the case, the question of whether an individual is an officer who may represent the organization is properly taken under advisement pending briefing and resolution of the standing issue, which may moot that question.

APPEARANCES: Lori J. Cooper, Esq., and Tom Dimitre, Williams, Oregon, for appellants; Lance Nimmo, Field Manager, Medford (Oregon) District Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

On behalf of Klamath Siskiyou Wildlands Center (KSWC) and the Siskiyou Project/Siskiyou Regional Education Project (SREP), 1/ Tom Dimitre, Project Analyst, filed a Notice of Appeal of an October 13, 2000, decision of Medford (Oregon) District, Bureau of Land Management (BLM). The decision was issued by the Field Manager of the Butte Falls Resource Area and denied KSWC's and SP's protest of the Double Salt Timber sale, which was analyzed in the Bieber Wasson Environmental Assessment, OR-110-99-15 (EA). On December 14, 2000, Dimitre filed a Statement of Reasons (SOR) and petition for a stay on behalf of KSWC and SREP. 2/

1/ Siskiyou Project (SP) and Siskiyou Regional Education Project (SREP) are at the same address, and although it thus appears that SP may be an abbreviated name for SREP, that matter is not established by the pleadings. BLM has not raised a question regarding the relationship between SP and SREP, however, and on that basis, we assume that SP and SREP in fact are the same organization. We will refer to the organization as SREP.

2/ The petition for stay will be dealt with in a separate order.

On February 12, 2001, BLM filed its response to appellants' SOR, and on April 6, 2001, moved to dismiss the appeal on the ground that Dimitre is not qualified to practice before the Department under 43 CFR 1.3(b). Referencing KSWC's letter of protest dated September 15, 2000, its Notice of Appeal dated November 13, 2000, and the SOR, BLM stated that nothing submitted by KSWC shows that Dimitre is an attorney who represents KSWC or SREP, or that he is an officer or full-time employee of either organization. (Motion at 1-2.) In addition, BLM alleged that SREP had neither commented on the timber sale nor protested the decision and thus was not a party to the case.

KSWC filed its opposition to the Motion on May 29, 2001 (Response). The pleading was signed in the following manner:

Lori J. Cooper
 Attorney at law (Oregon State Bar #91240)
 KS Wild Board of Directors

for all appellants

(Response at 2.)

As reasons why BLM's Motion should be denied, KSWC states that Dimitre is an "officer" of both KSWC and SREP because he is employed by them, 3/ arguing that the regulations do not define "officer," and therefore it is "the sole discretionary privilege of appellants to determine in what capacity they wish to employ officers of their organizations." (Response at 1.) Appellants argue that BLM's objection to Dimitre's authority to practice before the Department is arbitrary, because BLM never challenged his authority when he appeared on behalf of Headwaters, Inc., in previous appeals before this Board. (Response at 1-2.) On a related note, appellants contend that the provisions of 43 CFR 1.3(b) (3)(iii) are arbitrary and capricious and violate due process in that there is "no rational explanation for limiting representation of a corporation before the Department only to officers and full time employees." (Response at 2.)

In addition, with their Response appellants submitted the Declaration of Spencer Lennard, the Director of KSWC, as well as the Declaration of Steve Marsden, Executive Director of the SREP. Lennard avers that Dimitre is responsible for commenting on Federal timber sale planning documents and appealing decisions to this Board on KSWC's behalf and that "[a]s such, he is an 'officer' of [KSWC's] public lands oversight campaign." Lennard also avers that KSWC "does not have any full-time employees that work 40 or more hours per week." Marsden's description of Dimitre's responsibilities is the same as Lennard's, and he also states that Dimitre is an "officer" by reason of his performance of such duties.

3/ KSWC also states that Dimitre is an "officer" of the Oregon Natural Resources Council (ONRC). However, ONRC is not an appellant in IBLA 2001-67.

The regulation at 43 CFR 1.3(b) authorizes practice before the Department by attorneys at law. A person who is not an attorney at law may practice before the Department in a matter in which he represents himself, a member of his family, a partnership of which he is a member, or a corporation, business trust, or association of which he is an officer or a full-time employee. An appeal brought by an individual who does not fall within the foregoing categories is subject to dismissal. See, e.g., The Friends and Residents of Log Creek, 150 IBLA 44, 47-48 (1999); Building and Construction Trades Council, 139 IBLA 115, 116 (1997); Southern Utah Wilderness Alliance, 108 IBLA 318, 321 (1989); Leonard J. Olheiser, 100 IBLA 214, 215 (1988).

We have held that an individual who purports to represent another has the responsibility of showing that he is qualified to do so. Resource Associates of Alaska, 114 IBLA 216, 218-19 (1990), citing Robert G. Young, 87 IBLA 249, 250 (1985) and David D. Beal, 90 IBLA 87, 89 (1985). Indeed, we have expressly held that an affirmative showing of one's qualifications is required. Lee Roy Newsom, 117 IBLA 386, 387 n.2 (1991), and The Wilderness Society, 109 IBLA 175, 176 (1989). On the basis of such precedent, BLM's Motion is well-taken. However, 43 CFR 1.3 does not stand alone and necessarily must be read in conjunction with 43 CFR 1.5. The relationship between the two regulations apparently has not been articulated by the Board before now.

The regulation, 43 CFR 1.5, states:

When an individual who appears in a representative capacity signs a paper in practice before the Department, his signature shall constitute his certificate:

(a) That under the provisions of this part and the law, he is authorized and qualified to represent the particular party in the matter;

* * * * *

(d) That he has read the paper, that to the best of his knowledge, information, and belief there is good ground to support its contents; that it contains no scandalous or indecent matter; and that it is not interposed for delay.

[1] Accordingly, when an individual "signs a paper in practice before the Department," it constitutes an averment that the individual is one of those persons identified in 43 CFR 1.3 who is therefore authorized to appear before the Department. The certification effected by the act of signing a paper in practice before the Department ordinarily will be sufficient to permit the individual to practice, absent facts or circumstances which call the certification into question. A signature that completely fails to identify the nature of the relationship between the signatory and the organization he purports to represent, or a filing that discloses facts showing that the signatory cannot represent the organization, for example, would provide reason for this Board, on its own motion, to require the

appellant to make a further showing of his authority. See, e.g., Daniel J. Boles, Jr., 137 IBLA 35, 36 n.3 (1996); Joe Bob Hall, 135 IBLA 284, 285 (1996); In Re Bare Nelson Timber Sale, 126 IBLA 93, n.1 (1993).

[2] Absent such patent circumstances, BLM has the burden of coming forward with affirmative allegations, which if true, would demonstrate that the individual is not authorized to practice before the Department to justify going behind the legal effect of the certification established by 43 CFR 1.5. ^{4/} That burden is not carried merely by expressing general doubt as to the person's authority or inviting the Board to probe it as a fishing exercise or litigation stratagem. See, e.g., Estate of Edna Turney, 123 IBLA 354, 356, n.5 (1992) (BLM questioned papers signed by the personal representative of Turney's estate). Such a practice would completely vitiate the mandate of 43 CFR 1.5 and Board cases apparently applying that regulation. See, e.g., The Ecology Center, 147 IBLA 66, n.1 (1998); Lanny Perry, 131 IBLA 1, 2-3, n.3 (1994).

However, when BLM formally moves to dismiss the appeal, affirmatively alleges that the individual is not authorized to practice, and articulates the specific facts and reasoning which support its motion, as it has in this case, BLM has met its burden. See, e.g., Commission for the Preservation of Wild Horses, 139 IBLA 24, 28, n.4 (1997); Jean LeFaivre, 141 IBLA 310, 319 (1997); Resource Associates of Alaska, 114 IBLA 216, *supra*, at 219. The burden then shifts to the appellant to respond with sufficient evidence to show that the person is qualified to practice before the Department, in accordance with Resource Associates of Alaska, *supra*; The Wildemess Society, *supra*; Lee Roy Newsom, *supra*; and like cases. Appellants' showing thereafter may be rebutted by BLM with adequate evidence to the contrary, but the burden initially rests with BLM to challenge a party's 43 CFR 1.5 certification with specific, credible allegations. ^{5/}

^{4/} This is consistent with the treatment of other practitioners before the Department. Thus, in the absence of a specific and credible challenge, attorneys are not required to demonstrate that they are members of the bar in good standing, persons signing as the president or secretary of a corporation are not required to present a corporate resolution designating them as such, and BLM realty specialists, for example, are not required to submit evidence of a delegation of authority to represent a BLM District Office. This was not always the case. See n.5, post.

^{5/} We reviewed much of the regulatory history of Part 1, and regrettably, it provides no insight into the intended relationship between 43 CFR 1.3 and 1.5. However, from 1943 to 1954, a five-member Committee on Practitioners administered the regulations governing practice before the Department, and was empowered to hold hearings "to pass upon applications for admission," among other things. 43 CFR 1.3, *Committee on Practitioners* (1943), 8 FR 7023 (May 27, 1943). The Committee, and Departmental hearing officers with respect to matters pending before them, had discretionary authority to require an attorney "to file a written statement concerning his status as an attorney, his character and repute, and setting forth

In the case at hand, in our view appellants have discharged their burden by presenting Declarations of the senior officers of KSWC and SREP, and these were filed over the signature of an attorney at law admitted to the Oregon Bar, who is also on KSWC's Board of Directors. BLM has not challenged the facts alleged by filing a further pleading, and accordingly, the issue is ripe for decision.

[3] In KSWC's case, Lennard (in his Declaration) and Cooper (as an attorney signing the Response) have both averred that Dimitre works sufficient hours to be regarded as a full-time employee. ^{6/} That fact establishes that Dimitre is authorized to practice before the Department, as provided by 43 CFR 1.3(b)(3)(iii).

[4] With respect to SREP, however, the situation presents a mixed bag. Marsden states that Dimitre is an "officer" of the organization by virtue of the responsibilities he fulfills on behalf of SREP, and makes no representation regarding Dimitre's status as a full-time employee. Unlike KSWC, we have no knowledge of SREP's public representations regarding who

fn. 5 (continued)

such other information as may be required of him, before the attorney was permitted to practice." In its discretion, the Committee could "admit to practice" an individual who was not an attorney "upon a clear showing that, by virtue of his peculiar technical knowledge and experience, he is specially qualified to render valuable service to parties before the Department." However, the privilege of practicing before the Department was to be conferred "only in unusual circumstances." 43 CFR 1.4, *Who may practice* (1943). The regulations further provided that "upon the first appearance of a practitioner in any matter, he shall file a statement in the case setting forth (a) his name and address; (b) where admitted to the bar, or if he is not an attorney, the facts showing that he is within one of the categories of those who may also practice under these regulations; (c) the name and address and the interest of the party who he represents." 43 CFR 1.7, *Statement upon appearance* (1943). The 1943 version of 43 CFR 1.5 consisted of the text of subparagraphs (a) and (d) of the current version of 43 CFR 1.5.

The Committee and its authority to inquire into qualifications to practice before the Department were initially retained in subsequent rulemaking, albeit with fewer members. 19 FR 8835 (Dec. 23, 1954). However, the Part 1 regulations adopted later in 1954 omitted without explanation the Committee and the Department's formalistic approach to establishing qualifications to practice. 19 FR 9388 (Dec. 31, 1954). There have been no major substantive revisions of the relevant provisions of 43 CFR 1.3 and 1.5 since. See 28 FR 13504 (Dec. 13, 1963); 29 FR 143 (Jan. 7, 1964).

^{6/} Since KSWC has established that Dimitre is considered a full-time employee at KSWC, there is no need to further consider whether he is also an officer, although we note that at its website at www.KlamathSiskiyouWildlands.org, KSWC identifies the persons who are its officers and those who are staff. Dimitre is identified as a staff person, not an officer, evidence that we would consider compelling, were it necessary to reach the issue.

its officers are, but appellants correctly note that the Department's regulations do not define the term "officer."

However, BLM also challenges SREP's standing to appeal, arguing that SREP neither commented on the Double Salt Timber Sale nor protested the decision, and contends that SREP is therefore not a party to the case under 43 CFR 4.410(a). These allegations go not to the question of whether Dimitre can represent the organization, but whether SREP has standing to maintain the appeal, regardless of who appears before the Department. LASER, Inc., 136 IBLA 271, 273 (1996); Western Shoshone National Council, 130 IBLA 69, 70 (1994); Southern Utah Wilderness Alliance, 129 IBLA 124, 125-27 (1994); Resource Associates of Alaska, *supra*, at 219. SREP did not respond to these particular allegations, but we think that it must do so, failing which the appeal will be dismissed for lack of standing. In light of the standing challenge, the issue of whether Dimitre is an "officer" of the organization may be moot, and accordingly, we take the matter under advisement pending receipt of further submissions from the parties. Within 30 days of receipt of this order, SREP shall respond to the allegation that it did not comment on the Double Salt Timber Sale or file a protest against it. BLM shall have 30 days after receipt of SREP's response to file a reply, should it wish to do so. In addition, the parties may find it prudent to submit evidence and legal argument bearing upon SREP's designation of its officers and employees.

Lastly, it is not clear whether Cooper now will represent appellants' interests in this appeal or appeared for the limited purpose of ensuring that KSWC's and SREP's arguments were received and considered by the Board. Appellants should clarify this matter when SREP files its response to the standing issue raised by BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's Motion to Dismiss is denied, the parties are ordered to brief the issue of SREP's standing as described herein and clarify Cooper's role in prosecuting these appeals, and are encouraged to avail themselves of the opportunity to present further evidence and argument regarding SREP's designation of its officers and employees.

T. Britt Price
Administrative Judge

I concur:

David L. Hughes
Administrative Judge