

CENTER FOR NATIVE ECOSYSTEMS

IBLA 2003-352

Decided April 9, 2004

Motion to compel service of the administrative record for an appeal denying protest to the inclusion of certain parcels in the February 18, 2003, Federal competitive oil and gas lease sale in Utah. UT-924.

Denied.

1. Administrative Procedure: Administrative Record--Rules of Practice: Appeals: Service on Adverse Party

Departmental regulation 43 CFR 4.22(b) requires that a copy of each document filed in a proceeding before the Office of Hearings and Appeals be served by the filing party on the other party or parties in the case, and that regulation, together with 43 CFR 4.27(b), prohibit written communications concerning the merits of a proceeding between any party to the proceeding, including BLM, and the Board, unless a copy of the written communication is served on all other parties to the case.

2. Administrative Procedure: Administrative Record--Rules of Practice: Appeals: Service on Adverse Party

Under 43 CFR 4.411, a proceeding before the Board is initiated by the filing of a notice of appeal in the office of the agency official who made the decision being appealed. Before the notice of appeal is filed, there is no proceeding before the Board, and the service obligations of 43 CFR 4.22(b) and 4.27(b) do not apply. The administrative record relating to a decision appealed to the Board is created before the Board proceeding is initiated. As a result, it is not "filed" in the Board proceeding.

3. Administrative Procedure: Administrative Record--Rules of Practice: Appeals: Service on Adverse Party

BLM is not required to serve an appellant with the administrative record that was in existence before the appellant initiated a proceeding before the Board. That administrative record consists of public records, of which the Board is entitled to take official notice under 43 CFR 4.24(b), and those records are also open to inspection by the public. Where BLM has provided an appellant an opportunity to inspect an administrative record, a motion to compel service will be denied.

APPEARANCES: Melinda Harm Benson, Esq., Laramie, Wyoming, for Center for Native Ecosystems; Jared C. Bennett, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Center for Native Ecosystems (CNE) has appealed from a March 17, 2003, decision by the Utah State Office, Bureau of Land Management (BLM), denying in part a protest against inclusion of certain parcels in the February 18, 2003, Federal competitive oil and gas lease sale in Utah. CNE has moved that this Board compel BLM to serve it with a copy of the administrative record in the case. Appellant suggests that BLM's refusal to serve the administrative record creates a hardship for appellant because its counsel is located in Laramie, Wyoming, and the administrative record is housed at the BLM office in Salt Lake City, Utah. Appellant further asserts, citing a number of Board decisions, that 43 CFR 4.22(b) requires service of the administrative record, and that BLM's refusal violates that regulation. Appellant misconstrues the regulation and misinterprets Board precedent.

[1] 43 CFR 4.22(b) states: "A copy of each document filed in a proceeding before the Office of Hearings and Appeals [including the IBLA] must be served by the filing party on the other party or parties in the case * * *." This provision cannot be viewed in isolation, but must be construed together with 43 CFR 4.27(b), which prohibits ex parte communications once a proceeding has been initiated before the Board.

Under 43 CFR 4.22(b) and 4.27(b), there shall be no written communications concerning the merits of a proceeding between any party to the proceeding, including BLM, and the Board, unless a copy of

the written communication is served on all other parties to the case. The purpose of this requirement is to ensure that all parties have a full and fair opportunity to respond to all contentions brought before the Board.

Harriett B. Ravenscroft, 105 IBLA 324, 331 (1988) (Judge Hughes, concurring).

[2] A proceeding before the Board is initiated by the filing of a notice of appeal in the office of the agency official who made the decision being appealed. 43 CFR 4.411. Before the notice of appeal is filed, there is no proceeding before the Board, and the obligations of 43 CFR 4.22(b) and 4.27(b) do not apply. The administrative record relating to a decision appealed to the Board is created before the Board proceeding is initiated. As a result, it is not “filed” in the Board proceeding. Thus, it is only those documents filed with the Board after the initiation of an appeal, which also become part of the administrative record, that are subject to those regulations.

The Board has long been consistent in its interpretation of these regulations, requiring service of documents added to an administrative record after a notice of appeal has been filed, but not before. See, e.g., Geneva Barry, 54 IBLA 48, 52 (1981) (“The file to which appellants refer is the record in this case, compiled by BLM. It contains no ex parte communications to this Board * * *.”); Amoco Production Co., 101 IBLA 152, 156 (1988) (Judge Irwin concurring) (“But if it [a document] is provided after an appellant files a notice of appeal or statement of reasons, a copy of it must be served on the appellant * * *. If it is placed in the file after BLM makes its decision but before a person files a notice of appeal, there is no regulation requiring that it be sent to affected parties * * *.”); Lone Star Steel Co., 101 IBLA 369, 372 n.3 (1988) (“Because the memorandum was included [in the case file] while this proceeding was pending * * * the Board considered the document a prohibited ex parte communication * * * in the absence of any indication that it was served upon all parties.”); Harriett B. Ravenscroft, 105 IBLA at 331 (Judge Hughes concurring) (“The Board has interpreted this [ex parte communication] prohibition to include any documents placed in the case record after the notice of appeal is filed.” (emphasis in original) (citations omitted)).

Appellant cites a number of Board decisions purportedly supporting their interpretation of 43 CFR 4.22(b). However, appellant apparently failed to understand the context of those decisions, which clearly support the Board’s longstanding interpretation. See Carl S. Hansen, 130 IBLA 369, 371-72 (1994) (“[T]his Board issued an order completing service of appellant’s statements dated

February 12, 1993, and April 20, 1994 [after appellant's April 1, 1992 notice of appeal], because there was no evidence that appellant had served counsel for BLM * * * as required by 43 CFR 4.22(b). * * * [The Board also] served appellant with various documents in the file that had been placed there by BLM after the filing of his notice of appeal, but for which there was no evidence of service." (emphasis added)); Victor P. Smith, 101 IBLA 100, 101 n.1 (1988) (After the Board began review of the appeal, BLM "forwarded additional background information, including a presale geologic report. Nothing in the record indicated that BLM had served this information on appellant, as required by 43 CFR 4.22(b). Therefore, the Board considered it an ex parte communication * * *"); Champlin Petroleum Co., 100 IBLA 157, 162 n.4 (1987) ("This memorandum was prepared by BLM following receipt of Champlin's appeal and was part of the casefile transmitted to the Board by BLM. * * * [I]t appeared that it had not been served on Champlin, as required by 43 CFR 4.22(b). In accordance with 43 CFR 4.27(b), the Board considered the memorandum to be an ex parte communication * * *." (emphasis added))

[3] BLM need not serve appellant with the administrative record that was in existence before appellant filed a notice of appeal that initiated a proceeding before the Board. That administrative record consists of public records, of which the Board is entitled to take official notice. 43 CFR 4.24(b). Those records are also, however, open to inspection by the public. See 5 U.S.C. § 552 (2000). Accordingly, appellant is entitled to inspect the administrative record in this case at the BLM office in Salt Lake City, Utah. In fact, the BLM apparently has already offered to make the administrative record available to counsel for CNE at the BLM office in Wyoming nearest to CNE's counsel's office in Laramie, among other offers to accommodate CNE. (BLM Response to Motion to Compel at 2-3). Or, appellant may request copies of relevant portions of the administrative record under the Freedom of Information Act. See 5 U.S.C. § 552 (2000).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's motion to compel is denied.

H. Barry Holt
Chief Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge