

STEVEN G. KIMBER
v.
BUREAU OF LAND MANAGEMENT

IBLA 2004-209

Decided November 24, 2004

Appeal from an order of Administrative Law Judge James H. Heffernan dismissing appeal UT-020-02-47 for lack of jurisdiction because the appeal was not timely filed.

Affirmed.

1. Rules of Practice: Appeals: Dismissal

Pursuant to 43 CFR 4.470, an appeal of a BLM final grazing decision must be filed within 30 days after the date the person appealing receives the decision. Notwithstanding the characterization of an appeal from such a decision as a cross appeal, the timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

APPEARANCES: Karen Budd-Falen, Esq., and Brandon L. Jensen, Esq., for appellant; John W. Steiger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Steven G. Kimber appealed an April 6, 2004, order (Order) of Administrative Law Judge James H. Heffernan, dismissing Kimber's grazing appeal for lack of jurisdiction because the appeal was not timely filed. On September 20, 2001, the Salt Lake City Field Office Manager, Bureau of Land Management (BLM), issued a "Notice of Final Decision" (Final Decision) relating to the renewal of, and establishment of terms and conditions for, 25 grazing permits in the following eight grazing allotments: Grouse Creek, Dry Canyon, Lynn, Kimball Creek, Buckskin,

Red Butte, Ingham, and Owl Springs. Kimber is the permittee of one of those permits, #432601, allowing grazing in three of the allotments, Owl Spring, Buckskin, and Grouse Creek. On October 12, 2001, Southern Utah Wilderness Alliance (SUWA) and Western Watersheds Project, Inc. (WWP) filed an appeal of BLM's Final Decision, objecting to renewal of the permits and requesting a stay of the Final Decision.^{1/} In addition, several permittees filed appeals of the Final Decision challenging two terms and conditions imposed on their permits in particular allotments, including the Grouse Creek Allotment.^{2/} Kimber did not appeal the Final Decision as it related to his permit.

On September 4, 2002, various permittees, through counsel, filed with the Hearings Division a pleading styled "Motion to Intervene, Notice of Cross Appeal and Consolidated Statement of Reasons," wherein they sought involvement in seven listed appeals filed by SUWA and WWP, including UT-020-02-08. The Hearings Division docketed this filing as appeal UT-020-02-47. Counsel stated that the decisions being challenged by SUWA and WWP renewed the permittees' individual grazing permits, and that the permittees "strongly support" those decisions. (Motion at 10.) She further stated that the permittees "have intervened on behalf of the BLM to oppose" the appeals filed by SUWA and WWP. *Id.* at 10-11. Concerning the "Notice of Cross Appeal," she stated that BLM's decisions had imposed various terms and conditions on the renewed permits, including the 5-inch stubble height standard and the 20% utilization standard, and that the permittees "specifically appeal these two terms and conditions as they are analyzed in the BLM's NEPA [National Environmental Policy Act] documents and as they are applied to the individual allotments in this case."

^{1/} Kimber asserts that in the fall of 2001, SUWA and WWP jointly appealed the renewal of approximately 151 grazing permits, encompassing approximately 78 allotments in Box Elder, Rich, and Tooele Counties, Utah. The Hearings Division, Office of Hearings and Appeals, docketed SUWA's and WWP's appeal of the Final Decision as UT-020-02-08. This Board docketed the petition for stay as IBLA 2002-85, and denied it by Order dated January 31, 2002. In December 2003, the Department revised the applicable regulations concerning administrative appeals of BLM grazing decisions, consolidating in the Hearings Division, Office of Hearings and Appeals, the functions of (1) resolving petitions for a stay of the effect of grazing decisions during the pendency of such appeals, and (2) deciding such appeals. See 68 FR 68765 (Dec. 10, 2003). Those regulations were effective Jan. 9, 2004.

^{2/} Those terms and conditions are referred to as the 5-inch stubble height standard and the 20% utilization standard.

Id. at 11. Counsel listed Kimber as one of the permittees filing the pleading.^{3/} Ten grazing permittees, including Kimber,^{4/} later entered into the “Grouse Creek Settlement Agreement” with BLM dated February 20, 2004.^{5/} Seven of those settling permittees^{6/} filed a Joint Motion to Dismiss their appeals, dated March 11, 2004.

By Order dated April 6, 2004, Judge Heffernan denied the Joint Motion to Dismiss as to Kimber’s cross appeal, and dismissed Kimber’s cross appeal with prejudice for lack of jurisdiction because the appeal was not timely. We now affirm Judge Heffernan’s Order.

[1] A grazing permittee whose interest is adversely affected by a final decision of the BLM may appeal the decision to an administrative law judge, and must file that appeal with BLM within 30 days after receipt of the decision or be barred from challenging the decision. 43 CFR 4.470(a), (b). The regulations make no distinction between an appeal and a “cross appeal,” and clearly make no accommodation for appeals filed after the 30-day period. This Board has received and considered pleadings captioned as “cross appeal.” However, these generally have been submitted by a current party to an appeal, and have been filed within the 30-day period. See, e.g., United States v. Hess, 46 IBLA 1, 3 (1980).

When the Board has directly addressed a “cross appeal” filed after the 30-day period, it has rejected the “cross appeal” as untimely. See BLM v. Falen, 141 IBLA 394 (1997); Adkins v. Office of Surface Mining Reclamation and Enforcement,

^{3/} While the caption of the pleading listed SUWA’s and WWP’s seven appeals, it also listed 23 appeals filed by permittees, 17 of which were appeals of the Final Decision. One of those appeals, UT-020-02-33, filed by Simplot Land & Livestock, is listed as applying to the Final Decision, as well as two other BLM decisions.

^{4/} The Settlement Agreement was executed by nine Grouse Creek Allotment permittees, and Roxanne Jensen, a Grouse Creek Allotment permittee who had not filed an appeal or a cross appeal, but who allegedly “has the right to intervene in the Appeals and Cross Appeals to the extent OHA has jurisdiction to consider the latter.” Settlement Agreement at 2.

^{5/} The Settlement Agreement at page 5 describes the appeal (UT-020-33) filed by one of those permittees, Simplot Land & Livestock, as a “cross-appeal.”

^{6/} Two of those permittees, Tanner and Tanner Enterprises and Simplot Land & Livestock, who had challenged the Final Decision as to more than one allotment, joined the Joint Motion to Dismiss only with respect to the Grouse Creek Allotment. Roxanne Jensen, a Grouse Creek Allotment permittee who also executed the Settlement Agreement, did not join the Joint Motion to Dismiss because she had no appeal pending that could be dismissed.

128 IBLA 1 (1993); State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (1985). Kimber's reliance on the Board's decision in United States v. Meyers, 17 IBLA 313 (1974), as authority for reversal of Judge Heffernan's order, is misplaced. In that case, the Government filed a timely appeal of the portion of an administrative law judge's decision declaring that certain lands within a placer mining claim were mineral in character. Meyers filed a "Notice of Cross Appeal," which was, in fact, untimely. However, the Board did not directly rule on or approve the filing of an untimely cross appeal, but merely confirmed that once any timely appeal is filed, the Board may review the entire record in the course of its adjudication of the appeal. ^{7/}

In the present case, the Board is not presented with the untimely filing of a cross appeal from an administrative law judge's decision, as it was in each of the cited cases. What is before us is a timely appeal from an administrative law judge's order dismissing a cross appeal as untimely. However captioned, an appeal from a final BLM grazing decision must be filed within 30 days after receipt of that final decision, in accordance with regulatory requirements. If it is filed untimely, it must be dismissed. ^{8/}

Kimber entered this matter for the first time when he joined the Cross Appeal, filed on September 4, 2002, almost an entire year following the Final Decision. Kimber's attempt to appeal that Final Decision clearly was untimely, and Judge Heffernan properly dismissed Kimber's Cross Appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Heffernan's Order is affirmed.

H. Barry Holt
Chief Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

^{7/} The additional authorities cited by Kimber restate this proposition.

^{8/} All alleged grounds of error must be stated in a timely appeal; otherwise, those grounds will be considered waived and may not be presented at the hearing unless ordered or permitted by the administrative law judge. 43 CFR 4.470(a).