

STEPHEN MILLER
v.
BUREAU OF LAND MANAGEMENT

JAMES G. KATSILOMETES
v.
BUREAU OF LAND MANAGEMENT

IBLA 2005-116
IBLA 2005-143

Decided May 10, 2005

Appeals from an order of Administrative Law Judge James H. Heffernan vacating the final grazing decision of the Field Office Manager, Pocatello Field Office, Idaho, Bureau of Land Management, and remanding the case to that Field Office. ID-0320-05-01 and ID-0320-05-02.

Reversed and remanded; petition for stay denied as moot.

1. Administrative Procedure: Generally--Grazing and Grazing Lands: Generally--Rules of Practice: Generally

Regulation 43 CFR 4160.1(a) provides that “[p]roposed decisions” by BLM concerning authorized grazing on the public lands “shall be served on any affected applicant, permittee or lessee, and any agent and lien holder of record * * * by certified mail or personal delivery.” Further, 43 CFR 4160.2 provides a right to protest such a proposed decision by any applicant, permittee, lessee, or other interested public either “in person or in writing to the authorized officer within 15 days after receipt of such decision.”

2. Administrative Procedure: Generally---Grazing and
Grazing Lands: Generally--Rules of Practice: Generally

Delivery of a notice of certified mail to a person's last address of record does not establish the date of delivery of the document being sent by certified mail. It is only (1) when someone accepts delivery of the item by signing the certified mail return receipt card or (2) the certified mail is returned to BLM by the U.S. Postal Service as undeliverable, for whatever reason, that the "person will be deemed to have received the communication" within the meaning of 43 CFR 1810.2(b). When BLM sends a proposed grazing decision by certified mail to a person's last address of record, which is a post office box, the date the notice of certified mail is placed in the box does not establish the date of receipt for purposes of 43 CFR 4160.2.

APPEARANCES: Murray D. Feldman, Esq., Boise, Idaho, for James G. Katsilometes; W. Alan Schroeder, Esq., Boise, Idaho, for Stephen Miller; Kenneth M. Sebby, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Stephen Miller and James G. Katsilometes have each appealed from a March 17, 2005, order of Administrative Law Judge James H. Heffernan vacating a December 17, 2004, "Notice of Final Decision" of the Field Office Manager, Pocatello Field Office, Idaho, Bureau of Land Management (BLM). In that decision, BLM determined the permitted grazing use (200 animal unit months (AUM), for sheep) for the Moonlight Mountain Allotment (Allotment) (No. 06090), and allocated that use between Katsilometes (89 AUMs) and the Pete and Christine Miller Revocable Trust (Trust) (111 AUMs).^{1/}

^{1/} By order dated Jan. 24, 2005, Judge Heffernan consolidated separate appeals of that Final Decision filed by Katsilometes (ID-0320-05-01) and Stephen Miller (ID-0320-05-02). Miller has pending with BLM a Dec. 2, 2003, application seeking a transfer of the grazing privileges of the Trust, based on Miller's Sept. 15, 2003, acquisition from the Trust of its corresponding base property. Miller appealed the Final Decision because of BLM's failure to approve that application and issue a grazing permit to him. Pete Miller is Stephen Miller's father. The Trust was

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In his order, Judge Heffernan found that on August 4, 2004, the Field Office Manager issued a “Notice of Proposed Decision,” determining the approved grazing use (200 AUMs, for sheep) for the Allotment, and allocating that authorized grazing use to Katsilometes (142 AUMs) and the Trust (58 AUMs), based on their relative ownership of private lands within the 896-acre base property; that Miller received the Proposed Decision on August 5, 2004, since it was, in accordance with 43 CFR 1810.2(b), received at Miller’s last address of record with BLM on that date;^{2/} and that Miller was, in accordance with 43 CFR 4160.2, required to have filed his protest of the Proposed Decision within 15 days of his receipt of the decision, or on or before August 20, 2004.^{3/} Judge Heffernan therefore held that Miller’s protest filed August 24, 2004, was untimely under 43 CFR 4160.2. As a result, he concluded that the August 2004 Proposed Decision became a Final Decision by operation of law, pursuant to 43 CFR 4160.3(a). He also held that, “because the Proposed Decision became final by operation of law, BLM should have issued a new proposed decision before issuing the December 17 Final Decision,” and “[t]he failure to issue a new proposed decision renders the December 17 Final Decision voidable but not void.” (Order at 7.) He concluded, however, that “there is a good reason for voiding the Final Decision and remanding the matters to BLM for further consideration, namely that BLM, the agency responsible for management of the range, rather than this office, should be the first to consider James G.’s [Katsilometes] objections to BLM limiting his allocation of AUMs based on his 2003 application for 89 AUMs.” Id. at 7-8. Thus, Judge Heffernan also remanded the case to BLM to issue a new proposed grazing decision, “strongly encourag[ing]” it to do so before the upcoming grazing season, which begins on May 16, 2005. Id. at 8. Miller also petitions for a stay of the effect of the Judge’s order.

^{1/} (...continued)

established by Stephen Miller’s father and mother.

^{2/} Regulation 43 CFR 1810.2(b) provides, in relevant part, that “[w]here the authorized [BLM] officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of [43 CFR] [C]hapter [II], that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him.”

^{3/} Regulation 43 CFR 4160.2 provides that “[a]ny applicant, permittee, lessee or other interested public may protest the proposed decision under §4160.1 of [43 CFR] in person or in writing to the authorized [BLM] officer within 15 days after receipt of such decision.”

This case stems from an earlier October 4, 2002, decision by the Board in Katsilometes v. BLM, 157 IBLA 230 (2002). That decision sets forth the background of conflicting claims to grazing use in the Allotment and will not be repeated herein, as the parties are well aware of it.

The question presented by the appeals is whether Judge Heffernan erred in vacating the Final Decision based on his finding that Miller's protest was untimely. We conclude that he did. Therefore, for the following reasons, we reverse his order and remand the case to him. Miller's petition for stay is denied as moot.

The relevant facts are that BLM sent the Proposed Decision, by certified mail, return receipt requested, to Miller's last address of record with BLM, which was a post office box in Pocatello, Idaho. The U.S. Postal Service first placed a notice of certified mail in the post office box on August 5, 2004.^{4/} On August 19, 2004, Miller claimed the certified mail.^{5/}

Miller challenged the Proposed Decision in a protest filed with BLM on August 24, 2004. This protest was deemed to be "timely" by BLM. (Notice of Final Decision, dated Dec. 17, 2004, at 3.) No protest was filed by Katsilometes.

In his December 2004 Final Decision, the Field Office Manager concluded that he had erred in his Proposed Decision in allocating authorized grazing use, because he had failed to take into account the fact that, while the Trust's predecessor-in-interest had originally applied for 144 AUMs on April 10, 1990, Katsilometes had, most recently, only applied for 89 AUMs on April 10, 2003. He, reallocated the 200 AUMs of authorized grazing use in the Allotment, affording Katsilometes all the AUMs for which he had applied (89) and providing the remaining AUMs (111) to the Trust.

^{4/} The Aug. 5 date of certified mail notice is evidenced by a copy of the Jan. 12, 2005, U.S. Postal Service "Track/Confirm - Intranet Item Inquiry - Domestic" in the record.

^{5/} The Aug. 19 date of receipt is evidenced by a copy of the signed certified mail return receipt card in the record, which bears that date. Miller notes that the decision was claimed by his wife on that date, when she went to the U.S. Post Office. He elsewhere attests to the fact that it was "not unusual" for him and his wife to let a 2-week period elapse before they retrieved mail from the post office box, because of the distance from their home to the post office and other reasons. See Declaration of Stephen Miller, dated Mar. 4, 2005 (attached to Reply in Support of Motions for Summary Judgment, Mar. 14, 2005), at 2, ¶3.

Both Katsilometes and Miller appealed from that Final Decision, each arguing the merits of the authorization of grazing use in the Allotment effected by BLM's decision. However, Katsilometes argued that Miller's protest was untimely and that the August 2004 Proposed Decision had become BLM's final grazing decision. Thereafter, Judge Heffernan issued his order that is the subject of the present appeals.

We first address Katsilometes' argument that Miller lacks standing to appeal because he is not adversely affected by Judge Heffernan's order within the meaning of 43 CFR 4.410(d).^{6/} That argument centers on the fact that Miller has never held grazing privileges in the Allotment, but only has a pending application for transfer of the grazing privileges held by the Trust. Katsilometes asserts that Miller's application was not the "subject" of either the Proposed or Final Decision: "BLM did not attempt, in either the proposed or final decision, to award any AUMs to Stephen Miller or to act on Miller's transfer application. The BLM's Proposed and Final Decisions only decided the relative rights of the Miller Trust and Katsilometes to AUMs on the Moonlight Mountain Allotment." (Opposition to Petition for Stay at 4, 5.)

While Miller's pending transfer application does not constitute a present interest in authorized grazing use in the Allotment, we have long held that an appellant will be deemed to have a legally cognizable interest, for purposes of establishing standing to appeal, where he has a pending application for an interest in Federal land or resources. See, e.g., Storm Master Owners, 103 IBLA 162, 177, 182-83 (1988), and cases cited therein. Miller has a pending transfer application. Katsilometes' argument that Miller lacks standing to appeal is rejected.

We turn to Miller's arguments on the merits of Judge Heffernan's order. Miller asserts that 43 CFR 4160.2 defines the protest period as the "15 days after receipt of [the proposed] decision." He concludes that, under the plain meaning of the regulation, the 15-day protest period for challenging BLM's August 2004 Proposed Decision only began when he "received the Proposed Decision" on August 19, 2004, and, therefore, his August 24 protest was timely filed under 43 CFR 4160.2. (Miller Notice of Appeal/Statement of Reasons (NA/SOR) at 4.) Miller argues that Judge Heffernan erred in relying on the language in 43 CFR 1810.2(b) to conclude that Miller received the Proposed Decision on the date notice of certified mail was placed in his post office box. He states that, on August 5, he received only "notice from the

^{6/} That regulation provides that "[a] party to a case is adversely affected * * * when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest."

United States Postal Service that there was certified mail for him to claim,” which did not trigger the 15-day protest period. (NA/SOR at 4.)

[1] We are persuaded by Miller’s arguments on appeal. Regulation 43 CFR 4160.1(a) provides that “[p]roposed decisions” by BLM concerning authorized grazing on the public lands “shall be served on any affected applicant, permittee or lessee, and any agent and lien holder of record * * * by certified mail or personal delivery.” Further, 43 CFR 4160.2 provides a right to protest such a proposed decision by any applicant, permittee, lessee, or other interested public either “in person or in writing to the authorized officer within 15 days after receipt of such decision.” (Emphasis added.) In addition, 43 CFR 4160.3(a) and (b) provide for what happens when a protest is either filed or not filed. “In the absence of a protest,” subsection (a) states that the “proposed decision will become the final decision of the authorized officer without further notice unless otherwise provided in the proposed decision.” (Emphasis added.) Subsection (b) states:

Upon the timely filing of a protest, the authorized officer shall reconsider her/his proposed decision in light of the protestant’s statement of reasons for protest and in light of other information pertinent to the case. At the conclusion to her/his review of the protest, the authorized officer shall serve her/his final decision on the protestant or her/his agent, or both, and the interested public.
[Emphasis added.]

Finally, 43 CFR 4160.3(c) provides a right of appeal in either situation: “A period of 30 days following receipt of the final decision, or 30 days after the date the proposed decision becomes final as provided in paragraph (a) of this section, is provided for filing an appeal and petition for stay of the decision pending final determination on appeal.” See 43 CFR 4.470(a) and 4160.4.

The term “receipt,” as used in 43 CFR 4160.2, is not defined in that regulation. However, in the context of this case, “receipt” clearly occurred on August 19, 2004, when Miller’s wife collected the certified mail for which Miller had received notice.

Regulation 43 CFR 1810.2(b) comes into play only when it is necessary to determine whether there has been constructive delivery of a BLM decision or other written communication. It initially states that, when BLM mails a communication to someone entitled to it, “that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him.” Id. Although providing for constructive receipt of a

communication by the person to whom it is addressed (even where no actual receipt occurs), the regulation does not specify when the communication is deemed to have been received, except to state that it occurs when the communication itself, *i.e.*, “it,” is “delivered to [the person’s] last address of record in the appropriate office of [BLM].” *Id.*

However, we have long held that, under 43 CFR 1810.2(b), when BLM sends a notice or decision by certified mail, return receipt requested, to the person’s last address of record and it is delivered, it is deemed to have been received by the addressee on the service date stated on the certified mail return receipt card, regardless of whether it was in fact received by the addressee. In short, delivery to the last address of record establishes constructive notice to the addressee, even when the person who took delivery was not the person to whom the communication was addressed. *See, e.g., J-O’B Operating Co.*, 97 IBLA 89, 91 (1987); *Lawrence E. Welsh, Jr.*, 91 IBLA 324, 326 (1986); *Richard L. Knowles*, 88 IBLA 120, 121 (1985); *Lloyd M. Baldwin*, 75 IBLA 251, 252-53 (1983). Thus, it does not matter if the last address of record is a personal residence or a post office box. The critical service date is the same in each case, *i.e.*, the date entered on the certified mail return receipt card by the person accepting service, regardless of whether that person is the addressee.^{7/} In this case, Miller does not dispute that delivery was consummated when his wife picked up the envelope containing the Proposed Decision, which had been sent certified mail.

The regulation also covers the situation where delivery cannot be consummated at the last record address, whether a personal residence, place of business, or a post office box, and the communication is returned to BLM. The regulation provides that receipt will be deemed to have occurred even when “[a]n offer of delivery * * * cannot be consummated at [the] last address of record,” so long as the “attempt to deliver is substantiated by post office authorities.”^{8/}

^{7/} Miller is quite correct that all that can be deemed to have been delivered when a certified mail notice is placed in a post office box is the notice itself. Delivery of this notice is then followed by a period of time afforded by the U.S. Postal Service for the addressee to take physical delivery of the communication. This Board has taken official notice of relevant U.S. Postal Service rules governing time periods for holding undelivered certified mail before it is returned to the sender. *See, e.g., Rick Lee McMullen, Jr.*, 105 IBLA 80, 82-83 (1988); *Michele M. Dawursk*, 71 IBLA 343, 346-47 (1983).

^{8/} The regulation gives examples of circumstances where delivery might not be consummated at the last record address: “[T]he addressee had moved therefrom

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In the present case, delivery was consummated when Miller's wife responded to the certified mail notification left in Miller's post office box. However, had Miller not responded, and the U.S. Postal Service returned the envelope containing the decision to BLM, the decision would have been considered constructively delivered on the date of the return by the U.S. Postal Service of the undelivered envelope to BLM. See, e.g., Fidelity Trust Building, Inc., 129 IBLA 57, 60-61 (1994); John H. Blackwood, 89 IBLA 379, 381 (1985); Tom Hurd, 80 IBLA 107, 109 (1984). Under the theory endorsed by Judge Heffernan, it does not matter whether a document sent certified mail is ever claimed because the service date would always be the same--the date of first notice by the U.S. Postal Service of certified mail. Such a construction is inconsistent with case precedent as set out herein and misapplies the cases cited in his decision in support of his position.

The three cases cited by Judge Heffernan (Melvin P. Springer, 141 IBLA 34 (1997); Commission for the Preservation of Wild Horses, 133 IBLA 97, 100 (1995); and Robert D. Nininger, 16 IBLA 200, 202 (1974), *aff'd*, Nininger v. Morton, No. 74-1246 (D.D.C. Mar. 25, 1975)) all stand for the proposition that delivery of a document to the last address of record establishes constructive notice to the addressee. None stands for the proposition that delivery of a notice of certified mail establishes a service date for the document being sent by certified mail. The regulation, 43 CFR 1810.2(b), as stated in Nininger, 16 IBLA at 202, and quoted by Judge Heffernan at page 7 of his order, "is reasonable and necessary to expeditious administration. The conduct of Government business cannot be made to await the pleasure or convenience of those individuals who have neglected to arrange their own affairs so that they might receive official communication promptly." However, delivery of a notice of certified mail to a person's last address of record does not establish a date of delivery of the document being sent by certified mail. It is only (1) when someone accepts delivery of the item by signing the certified mail return receipt card or (2) the certified mail is returned to BLM by the U.S. Postal Service as undeliverable, for whatever reason, that the "person will be deemed to have received the communication" within the meaning of 43 CFR 1810.2(b). By establishing an exact date for receipt of a communication, this construction protects the rights of diligent citizens and provides for the efficient conduct of Government business.

Miller received the Proposed Decision on August 19, 2004. He filed a timely protest of that Proposed Decision with BLM within 15 days after receipt of that decision. See 43 CFR 4160.1(a). In view of the timely filing of the protest, BLM was

^{8/} (...continued)

without leaving a forwarding address or * * * delivery was refused or * * * no such address exists[.]” 43 CFR 1810.2(b); see John Oakason, 13 IBLA 99, 104 (1973).

required by 43 CFR 4160.3(b) to “reconsider” its Proposed Decision and, at the conclusion of such review, issue a “final decision.” BLM did so here, issuing its December 2004 Final Decision, which was the “final decision” subject to the 30-day appeal period under 43 CFR 4160.3(c).

To the extent not addressed herein, all other arguments advanced by Miller or Katsilometes are rejected as contrary to the facts or law, or immaterial.

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 March 2005 order, vacating BLM’s December 2004 Final Decision and remanding the case to BLM for further adjudication, is reversed. Miller’s petition to stay the effect of the Judge’s order is denied as moot. The case is remanded to Judge Heffernan for consideration of the appeals of the Final Decision.^{2/}

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge

^{2/} We note that BLM filed a motion for alternative dispute resolution (ADR) with Judge Heffernan on Jan. 24, 2005. Judge Heffernan denied that motion on the same day “because there is no indication that any other party has agreed to such an assignment.” It appears that Judge Heffernan may have felt that BLM filed its motion prematurely without gauging the interest of the other parties in pursuing ADR. On the other hand, nothing prevents an administrative law judge from inquiring of the parties concerning their interest in ADR. On remand, we strongly encourage the parties to explore the possibility of resolving this longstanding matter through settlement negotiations or other ADR means in order to conserve substantial time and financial resources that might otherwise be devoted to this matter.