

WESTERN WATERSHEDS PROJECT  
v.  
BUREAU OF LAND MANAGEMENT  
BARRICK GOLDSTRIKE MINES, INC., & ELLISON RANCHING CO., Intervenors

IBLA 2005-135

Decided June 9, 2005

Joint appeal from a portion of an order of Administrative Law Judge James H. Heffernan granting a petition for a stay of the effect of a Final Multiple Use Decision of the Elko Field Office, Nevada, Bureau of Land Management, adopting livestock grazing and other management actions for grazing allotments. NV-010-2004-01 and NV-010-2004-02.

Joint appeal dismissed.

1. Administrative Appeals–Appeals: Jurisdiction–Board of Land Appeals–Grazing Permits and Licenses: Appeals–Rules of Practice: Appeals: Jurisdiction

The Board will dismiss an appeal, filed pursuant to 43 CFR 4.478(a), from an order of an administrative law judge granting or denying a petition for a stay of the effect of a BLM grazing decision when the appellant challenging the stay order fails to comply with the general appeal regulations of the Board that require an appeal from a decision of an administrative law judge to be filed within 30 days following the date of service of the decision on the appellant. In such circumstances, the Board is deprived of jurisdiction to adjudicate the appeal.

APPEARANCES: Jim Butler, Esq., and Josh M. Reid, Esq., Salt Lake City, Utah, for Barrick Goldstrike Mines, Inc.; Amy L. Aufdemberge, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Todd C. Tucci, Esq., Boise, Idaho, for the Western Watersheds

Project; Karen Budd-Falen, Esq., Cheyenne, Wyoming, for Ellison Ranching Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

On April 15, 2005, the Bureau of Land Management (BLM) and Barrick Goldstrike Mines, Inc. (Barrick), a respondent intervenor in the proceedings below, filed with the Hearings Division, Office of Hearings and Appeals (OHA), in Salt Lake City, Utah, a “Joint Appeal of Portions of Administrative Law Judge’s September 14, 2004[,] Order Granting Petition for Stay” (Joint Appeal), pursuant to 43 CFR 4.478(a). The underlying proceedings arose from an appeal filed by Western Watersheds Project (WWP) of a June 30, 2004, Final Multiple Use Decision (FMUD) of the Elko Field Office, Nevada, BLM. The appeal is pending before Administrative Law Judge James H. Heffernan. The FMUD established management actions for grazing use by livestock, as well as grazing use by wild horses and wildlife, and range improvements in the adjacent Squaw Valley and Spanish Ranch Allotments (formerly, the Rock Creek Allotment).<sup>1/</sup> Barrick holds the grazing permit in the Squaw Valley Allotment and intervened as a respondent in WWP’s appeal.

In their Joint Appeal, BLM and Barrick seek a “narrow” ruling by the Board allowing completion of a fence dividing the two grazing allotments, either by ruling that the completion of the fence is outside the scope of Judge Heffernan’s September 14, 2004, Order (Stay Order), or by modifying the Stay Order to allow completion of the fence. (Joint Appeal at 2, 19.) BLM and Barrick consider this 34-mile long allotment division fence that separates the Squaw Valley and Spanish Ranch allotments along the northern boundary of the Squaw Valley Allotment to be necessary for short-term protection and rehabilitation of streams that contain habitat and potential habitat for a threatened fish species, the Lahontan cutthroat trout (LCT), in the Squaw Valley Allotment. *Id.* at 2.

BLM and Barrick assert that completion of the approximately six and one-half miles of the allotment division fence is necessary before the start of “hot season grazing (generally defined as beginning in mid to late June),” since such grazing

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<sup>1/</sup> For some time prior to 2004, the two allotments were grazed by a single operator, Ellison Ranching Company (Ellison). *See* Declaration of Donna Nyrehn, Rangeland Management Specialist, Elko Field Office, BLM, dated Apr. 14, 2005 (Joint Appeal, Ex. 11 at 3, ¶11).

without the fence may affect the fish habitat.<sup>2/</sup> (Joint Appeal at 2.) They note that, although the judge stayed the effect of the FMUD, grazing use as it had been authorized during the preceding grazing year can continue, in accordance with 43 CFR 4160.3(d), with possible negative consequences for the fish habitat: “Until the \* \* \* allotment division fence is completed, there is no physical barrier to keep cattle from drifting southward onto the Squaw Valley allotment and into the LCT stream areas. \* \* \* In fact, this is exactly what occurred in the late summer of 2004.” (Joint Appeal at 12.)

BLM and Barrick contend that the Stay Order should be reversed, to the extent it is deemed to have stayed BLM’s approval of the completion of the allotment division fence. They argue that any stay was improper, first because construction was separately approved by BLM outside of the FMUD approval process, and second because the judge failed to weigh properly the relative harms to the parties and the associated public interest.

By order dated April 28, 2005, we established an expedited briefing schedule, providing for the submission of WWP’s answer to BLM and Barrick’s Joint Appeal on or before May 16, 2005, and stated that no further briefing was permitted.<sup>3/</sup>

WWP timely answered the Joint Appeal, asserting that BLM and Barrick waived their right to appeal the Stay Order because they unreasonably delayed their challenge, and, therefore, the Board “should refuse to entertain this appeal.” In the alternative, it argues that, if the Board decides to review it, the appeal should be denied on its merits. (Answer to Joint Appeal (Answer) at 10-11.)

WWP originally challenged the approval of the FMUD, except for Term and Condition 1 and 2a, and Wildlife Decisions 1, 3, and 5. (Notice of Appeal/Statement of Reasons/Petition for Stay (Petition) at 5.) BLM opposed the Petition. Judge

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<sup>2/</sup> We note that much of the allotment division fence has been constructed. What is at issue in this case is the segment of the fence designated on maps provided by BLM and Barrick as the “Proposed East Division.” (Joint Appeal, Exs. 2 and 7.) That segment is approximately six and one-half miles in length, although approximately two miles of that segment have been partially completed. (Joint Appeal, Ex. 2.)

<sup>3/</sup> By order dated May 2, 2005, we granted a motion by Bill Hall, who is the general manager of Ellison, which holds the grazing permit for the Spanish Ranch Allotment, to intervene in the present proceeding. While Hall was permitted to intervene as a respondent, it is clear that he was acting on behalf of Ellison. We thus revise our order to provide that Ellison has intervenor status in the present Board proceeding.

Heffernan granted WWP's stay petition, pursuant to 43 CFR 4.471. A copy of the Stay Order was served on BLM, by certified mail, return receipt requested, on September 15, 2004. BLM and Barrick filed motions for reconsideration of the Stay Order on October 13 and 14, 2004, which motions were denied by the judge in October 14 and 15, 2004, orders. Copies of those orders were served on BLM and Barrick, by certified mail, return receipt requested, on October 18, 2004. Judge Heffernan then went forward with a 10-day administrative hearing during February and March 2005.

BLM and Barrick now assert that the completion of the allotment division fence was not within the scope of WWP's Petition or the Stay Order because WWP did not appeal that part of the FMUD that necessitated construction of the allotment division fence (short-term rest requirements for fish habitat area), and because the fence was the subject of separate analysis and decision under the National Environmental Policy Act (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000). (Joint Appeal at 6.) During the administrative hearing, however, Barrick sought specific clarification from the judge regarding whether construction of the allotment division fence was within the scope of his Stay Order. Id. Judge Heffernan responded at the conclusion of the hearing on March 11, 2005, that it was within the scope of his Stay Order, and he denied a motion by Barrick to amend the Stay Order to exclude the completion of the fence. Id.

BLM and Barrick filed their Joint Appeal on April 15, 2005. They contend that their appeal of the Stay Order should not be considered untimely, since "until March 11, 2005, neither BLM nor Barrick viewed the Stay Order as an impediment to completion of the allotment division fence," and so "there was no need for an appeal." (Joint Appeal at 7 n.5.)

Turning first to the scope of the FMUD and WWP's Petition, the FMUD adopted various livestock grazing and other management actions including a set of decisions identified as "Livestock Grazing Management Decision," that included eight specific management decisions.<sup>4/</sup> Those decisions included grazing systems and prescriptions for the Squaw Valley (Barrick) and Spanish Ranch (Ellison) Allotments.

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<sup>4/</sup> In conjunction with the issuance of the FMUD, BLM issued a Finding of No Significant Impact/Decision Record (FONSI/DR) on June 30, 2004. Therein, BLM determined to authorize, through issuance of the FMUD, the actions set forth in its Oct. 2, 2003, Proposed Multiple Use Decision (PMUD). It also found, based on the Spanish Ranch and Squaw Valley Allotments Multiple Use Decision EA (MUD EA) (No. BLM/EK/PL-2004-019) assessing the potential environmental impacts of adopting the PMUD, that no significant impact was likely to occur from doing so.

Decision number 5 provided for, among other range improvements, the construction of new or reconstructed fencing, including the Squaw Valley/Spanish Ranch “Allotment Boundary Fence.” (FMUD at 23.) The FMUD stated that the “Allotment Boundary Fence between Spanish Ranch and Squaw Valley, and the Lower Squaw Valley Field Fence, are first priority. These fences are needed to divide the allotments and control livestock from crossing the boundary and to allow scheduled rest periods within riparian pastures.” *Id.* at 23-24.

In its Petition, WWP stated that it was appealing the “Livestock Grazing Management Decision” of the FMUD, principally on the basis that BLM had violated section 102(2)(C) of NEPA. (Petition at 2; *see id.* at 6-31.) WWP specifically objected to BLM’s proposal to construct the new livestock projects, including 117 or more miles of new fence. *Id.* at 2, 3; *see id.* at 20-22. WWP asserted that the proposed fencing would have significant negative impacts on various resources, including wild horses, wildlife, and fragile wildlife habitats. *Id.* at 35.

As for the Stay Order, Judge Heffernan referred at page 4 to WWP’s Petition and the corresponding portions of the FMUD which WWP sought to stay, as follows:

The selected livestock management actions of the FMUD which Appellant[] seek[s] to stay include short- and long-term provisions to improve riparian and wetland habitat and resources by resting portions of that habitat from grazing for one or more years during a 4-year grazing cycle, placing restrictions on trailing and sheep bedding therein, reducing or eliminating hot season grazing therein, monitoring riparian habitats during the 4-year cycle to ensure that certain utilization and/or stream bank alteration limits are not exceeded, and/or prohibiting grazing until the achievement of four of six 4-year stream riparian objectives. To implement these changes, the creation of several new pastures is required, with the attendant construction of fencing to divide the two allotments, separate the pastures, and prevent the drifting of livestock into the riparian or wetland areas receiving rest or reduced usage. Fencing construction is prioritized and dependent upon funding, feasibility, and manpower. [Emphasis added.]

Judge Heffernan clearly recognized that an integral element of the proposed livestock grazing system was the allotment division fence. He elsewhere acknowledged that one of WWP’s principal contentions regarding harm to its members’ use and enjoyment of the public lands at issue was the harm likely to result from fence construction. (Stay Order at 9.)

After discussing the four stay criteria of 43 CFR 4.471(c), the judge held: “APPELLANT’S PETITION FOR A STAY IS GRANTED IN THAT THE FMUD IS STAYED, EXCEPT TERMS AND CONDITIONS 1 AND 2A THROUGH 2F FOR LIVESTOCK MANAGEMENT AND SELECTED ACTIONS 1, 3, AND 5 FOR WILDLIFE MANAGEMENT.” (Stay Order at 10.) None of the above-mentioned exceptions relate to the authorization of fence construction in conjunction with the short and long-term grazing systems.

BLM and Barrick contend that fence construction was not stayed by the Stay Order because, while it listed such construction, the FMUD itself did not approve the construction: “[T]he allotment division fence \* \* \* was \* \* \* planned, evaluated and approved through a series of decisions separate and apart from the FMUD.” (Joint Appeal at 12, emphasis added.) They assert that the proposed construction arose in connection with Barrick’s proposed “gold mining operations on the Carlin Trend (southeast of the allotments),” known as the “Betze Project.” Id. at 8. They state that BLM, in a January 2003 Final Supplemental Environmental Impact Statement (SEIS) (Joint Appeal, Ex. 8), assessed the potential environmental consequences of proposed groundwater pumping and water management operations in connection with the ongoing gold mining operations. They note that this assessment encompassed construction of the allotment division fence, since it had been identified by the Fish and Wildlife Service (FWS), as a “minimizing/enhancement measure” intended to benefit fish habitat in the Squaw Valley Allotment, during consultation pursuant to section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536 (2000). (Joint Appeal at 8.) They also note that BLM approved the proposed operations, including fence construction and other minimizing/enhancement measures set forth in a Mitigation Plan, in an April 1, 2003, Record of Decision (ROD) (Joint Appeal, Ex. 9). (Joint Appeal at 9.)

We agree with BLM and Barrick that the allotment division fence was mentioned as one of several minimizing/enhancement measures in FWS’ July 15, 2002, Memorandum to BLM, which is Appendix C of the Final SEIS. (July 15, 2002, FWS Memorandum at 7; see Joint Appeal at 9.) BLM and Barrick also state that the fence and the other minimizing/enhancement measures were incorporated into the Betze Project SEIS Mitigation Plan, and that implementation of the Mitigation Plan was approved in the April 1, 2003, ROD. (Joint Appeal at 9.) But, we have carefully reviewed the Mitigation Plan itself, which is Appendix A of the Final SEIS, and the Upper Willow Creek Habitat Enhancement Plan (Enhancement Plan), which is Appendix B of the Final SEIS and which is incorporated in the Mitigation Plan, and find no mention of the allotment division fence. Nor is the fence described anywhere in the April 1, 2003, ROD, which merely incorporates the monitoring and mitigation

measures of the Mitigation and Enhancement Plans. We find no evidence that BLM approved construction of the allotment division fence in that ROD.

BLM and Barrick state that construction of the allotment division fence and two other riparian management fences received site-specific environmental review in a December 2003 Squaw Valley Riparian Management Fences EA (Fences EA) (No. BLM/EK/PL-2004/001). The three “proposed” fences were identified as “the Spanish Ranch and Squaw Valley Allotments Division Fence, a gap fence separating important LCT habitat from the rest of the Squaw Valley Allotment (Lower Squaw Creek Fence), and a fence protecting the identified Upper Willow Creek Habitat Enhancement Area (UWCHEA) for the purpose of improving livestock management for LCT.” (Fences EA at 1.) The allotment division fence was said to be composed of four segments identified as “Buffalo Segment,” “Soldier Cap Segment,” “Winters Creek Reconstruction,” and “East Segment.” *Id.* at 3, “MAP 1.” The proposed Buffalo Segment, Soldier Cap Segment, and Winters Creek Reconstruction made up, along with existing fence, most of the western half of the allotment boundary. *Id.* at “MAP 1.” The proposed East Segment made up most the eastern half of the boundary. *Id.*

BLM and Barrick note that BLM approved construction of the western portion of the East Segment of the allotment division fence in a May 10, 2004, FONSI/DR, based on the Fences EA, and construction began June 21, 2004, and ended October 18, 2004. *See* Nyrehn Declaration at 3, ¶9. It appears that that portion of the East Segment of the allotment division fence did not include the remaining four and one-half mile long section described as “Proposed East Division” on the map provided by BLM and Barrick (Ex. 2). *Id.* In fact, BLM and Barrick state that no FONSI/DR has been issued by BLM approving the four and one-half mile long eastern portion of the East Segment of the allotment division fence. <sup>5/</sup> *See* Joint Appeal at 10-11; Nyrehn Declaration at 3, ¶10 (“BLM has not yet issued a decision record on the final segment of the eastern portion of the Allotment Division Fence”). In these circumstances, the FMUD, together with the June 2004 FONSI/DR, constituted the authorization to undertake that work, which WWP then appealed and sought to stay.

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<sup>5/</sup> BLM and Barrick state that there is an “anticipated decision record for the final segment of the fence.” (Joint Appeal at 12.) We note, however, that when BLM issued its FMUD, it also issued a June 2004 FONSI/DR, authorizing the “actions” outlined in its PMUD “as described in the Proposed Action of [EA No.] BLM/EK/PL-2004/019,” which included “[c]onstruct[ion] [of] \* \* \* [the] SV/SR Allotment Boundary Fence.” (FONSI/DR, dated June 30, 2004; MUD EA at 20-21.) Thus, it appears that no FONSI/DR needs to be issued now to approve construction of the remainder of the East Segment of the allotment division fence.

Based on our review of the FMUD, WWP's Petition, and other related documents, we conclude that the Stay Order stayed BLM's approval of construction of the remainder of the allotment division fence. Accordingly, the decision being appealed is the Stay Order issued by Judge Heffernan on September 14, 2004.

[1] The right of appeal from a stay order arises under 43 CFR 4.478(a).<sup>6/</sup> 43 CFR 4.478 references the general appeal procedures under 43 CFR Part 4, see 43 CFR 4.478(e), the general requirements for who may appeal to the Board under 43 CFR 4.410, see 43 CFR 4.478(a), and provides no exemption for stay appeals from the effect of 43 CFR 4.411(a), which broadly applies to all appeals to the Board. Accordingly, we hold that appeals under 43 CFR 4.478(a) are subject to the provisions of 43 CFR 4.411. Subsection (a) thereof specifies the manner in which "a[ny] person who wishes to appeal to the Board" from a decision of an administrative law judge must proceed in order to effect a proper appeal. Regulation 43 CFR 4.411(a) requires that a notice of appeal be filed "within 30 days after the date of service" of the decision being appealed. In this case, BLM was served with the Stay Order on September 15, 2004, and Barrick, after submitting its motion for reconsideration of the Stay Order, received Judge Heffernan's order denying reconsideration on October 15, 2004.<sup>7/</sup> However, their joint notice of appeal was not filed until April 15, 2005, many more than 30 days after their receipt of the Stay Order being appealed.

BLM and Barrick's justification for their late appeal is their assertion that, until the judge's March 11, 2005, ruling from the bench, neither of them "viewed the Stay Order as an impediment to completion of the allotment division fence," and thus saw "no need for an appeal." (Joint Appeal at 7 n.5.) However, we find their apparent confusion over the scope of the Stay Order not to be justified in this case. Therefore, the question is not when BLM or Barrick saw the "need for an appeal," but rather when the decision from which they are appealing was served on them. We conclude that the decision they are appealing was served on BLM on September 15, 2004, and effectively served on Barrick on October 15, 2004, and the Joint Appeal is untimely.

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<sup>6/</sup> "Any person who has a right of appeal under [43 CFR] § 4.410 \* \* \* may appeal to the Board from an order of an administrative law judge granting or denying a petition for a stay."

<sup>7/</sup> Barrick, as a respondent intervenor, was not a party when the Stay Order was initially issued. Although shortly thereafter Barrick had notice of the Stay Order, leading to its motion for reconsideration, Barrick clearly was served with the Stay Order at least by Oct. 15, 2004, when it received Judge Heffernan's order denying reconsideration.

It is well settled that the timely filing of a notice of appeal, within the 30-day appeal period, is necessary to establish the jurisdiction of the Board to decide the appeal under 43 CFR 4.411(c), and, absent such jurisdiction, the appeal must be dismissed. Southern California Sunbelt Developers, Inc., 154 IBLA 115, 117-18 (2001); Lew Landers, 109 IBLA 391, 392-93 (1989). In this case, we conclude that we lack the jurisdiction necessary to rule on the merits of the joint appeal by BLM and Barrick, because that appeal was untimely. Lacking jurisdiction, we must dismiss the appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM and Barrick's joint appeal is dismissed.

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H. Barry Holt  
Chief Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge