



DEE SCHMAUS AND FAMILY

187 IBLA 136

Decided March 15, 2016



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
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DEE SCHMAUS AND FAMILY

IBLA 2016-50

Decided March 15, 2016

Appeal from a Bureau of Land Management letter dated October 30, 2015, concerning an application, submitted August 6, 2015, for rights-of-way in the Spokane Hills near Helena, Montana. MTM-107656.

Motion to Dismiss granted; appeal dismissed.

1. Administrative Procedure: Decisions--Administrative Review: Administrative Finality--Rules of Practice: Appeals: Dismissal

Only a final agency decision is appealable to the Board. In the absence of an identifiable decision, there is no “final agency decision,” and an appeal is properly dismissed.

2. Administrative Procedure: Decisions--Administrative Review: Administrative Finality--Rules of Practice: Appeals: Dismissal

In determining whether an identifiable decision exists, the Board takes into account the totality of the circumstances, including the Department’s actions taken after issuance of the decision at issue and prior to the filing of an appeal.

3. Administrative Procedure: Decisions--Administrative Review: Administrative Finality--Rules of Practice: Appeals: Dismissal

Where an agency does not send a denial to the named applicant of an application for rights-of-way and requests additional information from the purported authorized agent, there is no identifiable decision to appeal.

APPEARANCES: Joseph H. Schmaus, Helena, Montana, for Dee Schmaus and Family; Karan L. Dunnigan, Esq., Field Solicitor, Office of the Solicitor, Rocky Mountain Region, Billings, Montana, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE JONES

Joseph H. Schmaus filed an appeal on behalf of Dee Schmaus and Family from an October 30, 2015, letter issued by the Field Manager, Butte Field Office (Montana), Bureau of Land Management (BLM). BLM moves to dismiss on the basis that the appeal is premature. As discussed herein, the Board grants the motion to dismiss.

*Background*

On June 18, 2014, Joseph H. Schmaus, on his own behalf, submitted an application with BLM for rights-of-way across BLM-administered lands. See Decision, July 9, 2014, at 1 (enclosure to Letter, Oct. 30, 2015). On July 9, 2014, the Field Manager of BLM's Butte Field Office denied Mr. Schmaus' application. *Id.*

On August 6, 2015, Mr. Schmaus submitted another application to BLM for rights-of-way. This time Mr. Schmaus filed the application on behalf of Dee Schmaus and Family. He listed himself under the "agent" box on the application. Although the applicant was identified as "Dee Schmaus & Family," Mr. Schmaus indicated on the same form that the applicant was an "individual." See Application dated Aug. 6, 2015. On October 30, 2015, the Field Manager wrote a letter concerning the August 6, 2015, application, which he addressed to "Dee Schmaus & Family," with a copy to Joseph H. Schmaus. The Field Manager stated: "Upon review of your [August 6, 2015] application, the BLM has determined that the right[s]-of-way you have applied for are in essentially the same location as the previous application submitted by Joseph H. Schmaus on June 18, 2014." Letter, Oct. 30, 2015. The Field Manager explained:

Per decision dated July 9, 2014, (copy enclosed), the BLM informed Mr. Schmaus that the lands where the right[s]-of-way[] were applied for were acquired through a Warranty Deed, which contain[] restrictions prohibiting the BLM from granting right[s]-of-way across the property to other lands. Based on these legal restrictions, the BLM is not able to grant right[s]-of-way[] across the lands for which you have applied.

Subsequent to BLM's October 30, 2015, letter, and prior to this appeal, Mr. Schmaus and an Assistant Field Manager in the Butte Field Office exchanged e-mails. Mr. Schmaus questioned whether BLM had officially denied the August 6, 2015, application, and BLM requested information concerning Joseph H. Schmaus' authority to represent Dee Schmaus and Family. Mr. Schmaus asserted "[t]here was no official denial of the Right[s]-of-Way applied for which seems very peculiar to me."

E-Mail from Joseph H. Schmaus to Corey Meier, Nov. 5, 2015. He argued, “BLM is required to either accept, process, or modify the application made by Dee Schmaus and Family, which it did not.” *Id.* On the following day, the BLM Assistant Field Manager responded to Mr. Schmaus by e-mail: “Regarding the ROW [rights-of-way] application . . . you listed yourself as an authorized agent for Dee Schmaus and Family. Can you please provide us with documentation that designates you as an authorized agent? Upon receipt, we can then proceed with issuing a decision to the proper party.” E-Mail, Meier to Mr. Schmaus, Nov. 6, 2015. There is no record of Mr. Schmaus responding to BLM’s information request prior to appeal.

### *Analysis*

The issue before the Board is whether we must dismiss the appeal as premature, because BLM’s October 30, 2015, letter is not an appealable decision of the August 6, 2015, application. See BLM’s Response to Join Joseph H. Schmaus as an Additional Party, filed Jan. 11, 2016, which includes a motion to dismiss, at 3-4. For the reasons that follow, we find, based on a totality of the circumstances, that BLM’s October 30, 2015, letter is not an appealable decision. We therefore grant BLM’s motion to dismiss.

[1] The Board’s regulations and interpretative case law govern the issue before us. The applicable regulations identify certain agency “decisions” that are appealable to the Board. See 43 C.F.R. §§ 4.1(b)(2), 4.410(a). In case law, the Board has interpreted the meaning of “decision” within the meaning of those regulations. In *Uranium Watch*, 182 IBLA 311, 314 (2012), we noted that a decision is something that generally “take[s] or prohibit[s] some action that affects a person having or seeking some right, title, or interest in public lands or resources.” In addition, a decision must be “identifiable.” *Id.* at 315.

[2] In case law we have also held that even when the Department has issued a decision, the Board may consider it not final and therefore not ripe for appeal, by considering the totality of the circumstances. A totality of the circumstances analysis includes consideration of the Department’s actions taken after the issuance of a decision and prior to the filing of an appeal. See *American Petroleum Energy Co.*, 160 IBLA 59, 76 (2003); *Kirby Exploration Co. of Texas (On Reconsideration)*, 149 IBLA 205, 208-09 (1999); *Mobil Oil Corp.*, 65 IBLA 295, 301-02 (1982); *Shell Oil Co.*, 52 IBLA 74, 77 (1981).

Our decision in *Shell* is instructive in this case. In *Shell*, an agency sent a letter informing appellant that the agency had improperly reduced the amount of royalties due, and directing appellant to pay the royalties within 30 days. 52 IBLA at 75. The appellant contacted the agency to express disagreement, and the agency agreed to

meet appellant's representatives to discuss the agency's position concerning the payments. *Id.* Although the Board found the agency's letter bore "all the indicia of a final order, [the agency's] willingness to schedule a conference with [the appellant] to discuss its position suggests that it may have been inclined to negotiate a solution to the issue at hand. Such posture is contradictory to the idea of a final decision." *Id.* at 77. The Board observed that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). The Board held that, in light of the agency's scheduling of the meeting, the letter was not final for purposes of filing an appeal. *Id.*

[3] Similar to *Shell*, in the matter presently before the Board, the agency's request for documents showing Mr. Schmaus represented Dee Schmaus and Family is not consistent with a final decision. In its November 6, 2015, e-mail, BLM suggests it intends to decide whether Mr. Schmaus is authorized to represent Dee Schmaus and Family. BLM then stated that after it received such documentation from Mr. Schmaus it would "proceed with issuing a decision to the proper party." This statement is a clear indication that BLM had not yet issued a decision on the pending application. In the absence of an identifiable decision, BLM has not taken action affecting the use of public land. See *Uranium Watch*, 182 IBLA at 314. Further, whether the applicant is Mr. Schmaus in his individual capacity or Mr. Schmaus as authorized representative of Dee Schmaus and Family should be, in the first instance, resolved by BLM. Only then will BLM be able to provide a final appealable decision to the appropriate party.

Considering the totality of the circumstances, we hold that the October 30, 2015, letter is not a final decision and therefore not ripe for appeal. Accordingly, the appeal is premature and must be dismissed. We note that dismissal at this juncture will not preclude appeal from BLM's future, final decision on the August 6, 2015, application.

In reaching the conclusion to dismiss this appeal, we carefully considered Mr. Schmaus' arguments made in his response to BLM's motion to dismiss. Mr. Schmaus argues that prior to filing the appeal he "overlooked" BLM's November 6, 2015, e-mail requesting information. Response to Motion to Dismiss at 4. Without citing to supporting legal authority, he contends BLM should have submitted the request not by e-mail, but by an "official request" by U.S. Postal Service, addressed to "Dee Schmaus and Family." *Id.* at 3-4. However, it was Mr. Schmaus himself (not Dee Schmaus and Family) who initiated contact with BLM via e-mail, and BLM responded in kind to Mr. Schmaus the very next day with the request for further information. Further, neither our regulations nor case law support the proposition asserted by Mr. Schmaus that BLM was obliged to send its request via the U.S. Postal Service.

Mr. Schmaus further contends counsel for BLM has conceded that Mr. Schmaus is an authorized agent of the applicant. Response to Motion to Dismiss at 2. In the motion to dismiss, counsel for BLM stated, “[the applicant] also represented that her authorized agent for purposes of the application was Joseph H. Schmaus.” Motion to Dismiss at 2 (no citation to the record provided). However, on the next 2 pages of BLM’s motion to dismiss, counsel clarifies that “the application” lists Mr. Schmaus as an agent, but Mr. Schmaus had not provided proof of his authority to represent the applicant. *Id.* at 3-4. We are not persuaded that BLM has admitted or agrees that Mr. Schmaus is the authorized agent for the applicant. That question remains open for BLM to decide.

Mr. Schmaus also contends the issue of representation is moot in light of his filings with the Board subsequent to the appeal, which include a power of attorney from Dee Schmaus to Joseph H. Schmaus concerning real estate matters. Response to Motion to Dismiss at 10; *see* additional documents, filed Jan. 27, 2016, Exhibit E. At the time of the filing of this appeal, however, whether Mr. Schmaus was authorized to represent Dee Schmaus and Family was unresolved. Significantly, prior to the appeal, BLM had not received a response to its request for information about who was authorized to represent Dee Schmaus and Family. Moreover, the question of whether Mr. Schmaus is the representative of Dee Schmaus and Family for the purposes of an application for rights-of-way remains open today, even with the paperwork Mr. Schmaus presented on appeal. Consequently, BLM will have an opportunity to decide that issue as well as issue a decision regarding the August 6, 2015, application to the proper party.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we grant the motion to dismiss and dismiss the appeal.

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/s/  
Eileen Jones  
Chief Administrative Judge

I concur:

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/s/  
Amy B. Sosin  
Administrative Judge