



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
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WILDLANDS DEFENSE

IBLA 2019-162

Decided October 24, 2019

Appeal from a July 9, 2019, Order of an Administrative Law Judge in the Hearings Division denying WildLands Defense's petition for stay and motion to remand a BLM decision to renew a grazing permit and approve an allotment management plan for the Alder Creek grazing allotment.

Appeal Dismissed; Motion for an Extension of Time to File an Answer Denied as Moot.

APPEARANCES: Katie Fite, Public Lands Director, WildLands Defense, Boise, Idaho, for WildLands Defense; Carmen Thomas Morse, Esq., and Brad Grenham, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

WildLands Defense has filed with this Board a Notice of Appeal (NOA) of a July 9, 2019, Order of the Departmental Cases Hearings Division. In that Order, Administrative Law Judge (ALJ) Harvey C. Sweitzer denied WildLands Defense's petition for stay and motion to remand a BLM decision to renew grazing permits and approve an allotment management plan for the Alder Creek grazing allotment.

*Summary*

Regulations governing appeals to this Board require that an appellant file its appeal with the office of the official that made the decision. If that requirement is not met the Board is without jurisdiction to consider the appeal. Here, WildLands Defense wishes to appeal the ALJ's Order, and therefore was required to file its NOA in the Hearings Division. Because WildLands Defense did not comply with this requirement, and instead filed its appeal directly with the Board, we do not possess jurisdiction to consider its appeal. We therefore must dismiss the appeal.

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INDEX CODE:

43 C.F.R. § 4.22  
43 C.F.R. § 4.400  
43 C.F.R. § 4.401  
43 C.F.R. § 4.411  
43 C.F.R. § 4.478

195 IBLA 73

GFS(MISC) 13(2019)

*Procedural Background*

On April 18, 2019, the Field Manager for BLM's Three Rivers Resource Area in Oregon issued a final grazing decision renewing a grazing permit and approving an allotment management plan for the Alder Creek allotment.<sup>1</sup> WildLands Defense appealed the decision to the Departmental Cases Hearings Division of the Office of Hearings and Appeals,<sup>2</sup> alleging that the decision violated the National Environmental Policy Act (NEPA)<sup>3</sup> and Federal Land Policy and Management Act (FLPMA).<sup>4</sup> WildLands Defense also sought a stay of BLM's decision and moved for a remand of BLM's decision.<sup>5</sup> In support of its petition for a stay, WildLands Defense argued that BLM's decision would result in adverse impacts to various resources, including forest habitat for sensitive species.<sup>6</sup> With respect to its request for remand, WildLands Defense argued that the ALJ should remand BLM's decision because it was unsigned, not provided to all of the "Interested Public," and did not include the permittee names.<sup>7</sup>

On July 9, 2019, the ALJ issued an order denying the petition for stay and motion for remand.<sup>8</sup> The ALJ rejected WildLands Defense's reasons for remand of BLM's decision, stating that BLM provided the final grazing decision to WildLands Defense and "WildLands Defense has cited no authority, and none could be found, that supports a remand" for any of the reasons it gave.<sup>9</sup> The ALJ also denied WildLands Defense's petition for a stay, concluding that it was unlikely to succeed on the merits of any of its claims and "the relative harms of grazing under the [renewed permits] versus the prior grazing management if a stay were granted favor[ed] denial of the stay."<sup>10</sup>

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<sup>1</sup> Notice of Final Decision To Issue Grazing Permits and Accept an Allotment Management Plan, Construct Fences, Develop Offsite Water, and Treat Encroached Juniper (April 18, 2019).

<sup>2</sup> Notice of Appeal, Statement of Reasons, and Petition for Stay (May 24, 2019) (Appeal to Hearings Division).

<sup>3</sup> 42 U.S.C. §§ 4321-4370j (2012).

<sup>4</sup> 43 U.S.C. §§ 1701-1787 (2012).

<sup>5</sup> Appeal to Hearings Division at 73-83 (stay) and 7-8, 84 (remand).

<sup>6</sup> *Id.* at 73-78.

<sup>7</sup> *Id.* at 7-8.

<sup>8</sup> ALJ Order, Motion for Remand Denied; Petition for a Stay Denied (July 9, 2019).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 7-16 (NEPA claims), 16-18 (FLPMA claims).

WildLands Defense sent an NOA of the ALJ's July 9, 2019, Order to this Board and later submitted to the Board a document entitled "Correction and Errata," correcting the date of its NOA and including a statement of standing.<sup>11</sup> The certificates of service for both documents represent that they were filed with this Board and the Office of the Solicitor.<sup>12</sup>

BLM then filed a motion to dismiss WildLands Defense's appeal.<sup>13</sup> BLM argues that the Board's regulations require that WildLands Defense file its appeal with the Hearings Division rather than this Board.<sup>14</sup> BLM asserts that WildLands Defense did not do so, and the time for filing its appeal has expired.<sup>15</sup> BLM also requests an extension of time to file its answer if the Board denies its motion to dismiss.<sup>16</sup> WildLands Defense did not respond to BLM's motion.

#### DISCUSSION

*The Board Does Not Have Jurisdiction Unless an Appeal is Timely Filed  
in the Office of the Officer Who Made the Decision Being Appealed*

The Board's regulation at 43 C.F.R. § 4.411 requires a person who wishes to appeal a decision to the Board to file an NOA "in the office of the officer who made the decision (not the Board)."<sup>17</sup> If the NOA is not transmitted to the office that issued the decision being appealed, the Board does not have jurisdiction over the appeal and must dismiss it.<sup>18</sup> When an ALJ issues an order granting or denying a petition for stay, a person wishing to appeal that order must do so "in accordance with § 4.411,"<sup>19</sup> and the regulations specify that the definition of "[o]ffice or officer includes 'administrative law

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<sup>11</sup> Notice of Appeal (received Aug. 9, 2019); Correction and Errata (received Aug. 15, 2019).

<sup>12</sup> Notice of Appeal at 8; Correction and Errata at unpaginated (unp.) 2-3.

<sup>13</sup> BLM Motion to Dismiss; Motion for Extension of Time to File Answer (Aug. 30, 2019) (Motion to Dismiss).

<sup>14</sup> *Id.* at 1-2 (citing 43 C.F.R. Subpart G instead of Subpart E).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> 43 C.F.R. § 4.411(a)(1).

<sup>18</sup> *William R. Smith*, 149 IBLA 358, 361-62 (1999)<sup>3</sup>; *see id.* at 362 ("The language chosen for 43 C.F.R. § 4.411(a) leaves no room to question that the place-of-filing requirement is mandatory and, thus, not subject to waiver.").

<sup>19</sup> 43 C.F.R. § 4.478(a).

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a) GFS(MIN) 50(1999)

judge' or 'Board' where the context so requires."<sup>20</sup> In adding this definition to the regulations, the Department specifically used the notice of appeal filing requirement as an example: "The regulations would also specify that 'office' or 'officer' includes an administrative law judge or the Board where the context so requires, e.g., in Section 4.411(a)(1) requiring that a notice of appeal be filed in the office of the officer who made the decision being appealed."<sup>21</sup>

The Board has accordingly dismissed appeals of BLM decisions when appellants have filed their NOAs with the Board but not with the BLM office that made the decisions they sought to appeal.<sup>22</sup> The Board has similarly held that filing an NOA of a BLM decision in a BLM district office, when the BLM state office made the decision, does not meet the requirement to file an appeal in the office of the officer who made the decision.<sup>23</sup> We have explained that the purpose of the rule "is to provide first notice" to the office that issued the decision to be appealed.<sup>24</sup> "Were we to allow appellants to violate the place-of-filing rule, it would be impossible to ascertain whether [the office that issued the decision] is aware that a notice of appeal has been filed without communicating with it in every case."<sup>25</sup>

In addition, the regulations require an appellant to transmit its NOA in time for the appropriate office to receive it no later than 30 days after the date of service of the decision.<sup>26</sup> The 30-day appeal period cannot be extended.<sup>27</sup> But the Board's regulations provide a 10-day grace period for filing documents under which a document that is received after the 30-day appeal period has expired is nevertheless considered timely filed, so long as it was transmitted before the end of the 30-day deadline.<sup>28</sup> If an appeal is not filed in the office of the officer who issued the decision before the 30-day deadline

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<sup>20</sup> 43 C.F.R. § 4.400 (Definitions).

<sup>21</sup> 72 Fed. Reg. 10454, 10454-10455 (Mar. 8, 2007).<sup>b</sup>

<sup>22</sup> See, e.g., *Marc Thomsen*, 148 IBLA 263, 264 (1999); *Thelma M. Eckert*, 120 IBLA 367 (1991)<sup>c</sup>; *San Juan Coal Co.*, 83 IBLA 379 (1984)<sup>d</sup>

<sup>23</sup> See *Eklutna, Inc.*, 90 IBLA 196 (1986).<sup>e</sup>

<sup>24</sup> *San Juan Coal Co.*, 83 IBLA at 380.

<sup>25</sup> *Id.*

<sup>26</sup> 43 C.F.R. § 4.411(a)(2)(i).

<sup>27</sup> *Id.* § 4.411(c).

<sup>28</sup> *Id.* § 4.401(a) (waiving the requirement that the office receive a document by the deadline, "if . . . it is determined that the document was transmitted or probably transmitted to the office" before the filing deadline); see *Heather Bromm*, 193 IBLA 152, 155 (2018)<sup>f</sup>; *DKJ Enterprises*, 190 IBLA 221, 222 (2017).<sup>g</sup>

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b) GFS(MIN) 37(1999)

c) GFS(MISC) 67(1991)

d) GFS(MIN) 1(1985)

e) GFS(MISC) 6(1986)

f) GFS(MISC) 12(2018)

g) GFS(MIN) 18(2017)

(taking into account the 10-day grace period), then the Board does not have jurisdiction over the appeal and must dismiss it.<sup>29</sup>

*The Board Does Not Have Jurisdiction to Consider WildLands Defense's Appeal Because It Was Not Timely Filed in the Hearings Division*

In this case, the ALJ in the Hearings Division made the decision WildLands Defense seeks to appeal—the July 9, 2019, Order denying WildLands Defense's petition for stay and remand of BLM's decision. Under the regulations, WildLands Defense was required to file its NOA in the Hearings Division, which is “the office of the officer who made the decision (not the Board).”<sup>30</sup> But there is nothing in the record showing that WildLands Defense filed its NOA in the Hearings Division, and the certificates of service for its NOA and “Correction and Errata” specify that WildLands Defense filed its appeal with the Board and the Office of the Solicitor, not the Hearings Division.<sup>31</sup> WildLands Defense therefore did not comply with the requirement to file its appeal in the office of the officer who made the decision.

In addition, the 30-day appeal period for filing an appeal in the Hearings Division has passed. WildLands Defense received the ALJ's July 9, 2019, Order on July 19, 2019.<sup>32</sup> The 30-day deadline for filing the NOA accordingly fell on August 19, 2019,<sup>33</sup> and the date for receipt of an NOA by the Hearings Division, accounting for the 10-day grace period, fell on August 29, 2019. There is nothing in the record showing that WildLands Defense filed its NOA with the Hearings Division by this deadline.

*Conclusion*

The pleadings and record before the Board establish that WildLands Defense did not comply with the requirement to file its NOA with the office of the officer who made

<sup>29</sup> *Wilfred Plomis Trust*, 189 IBLA 284, 285 (2017)<sup>h</sup>; *Wendi S. Bierling*, 185 IBLA 257, 260 (2015)<sup>i</sup>; *Susan J. Kayler*, 162 IBLA 245, 255 (2004)<sup>j</sup>.

<sup>30</sup> 43 C.F.R. § 4.411(a)(1).

<sup>31</sup> Notice of Appeal at 8; Correction and Errata at unpag. 2-3; see Motion to Dismiss at 2 (“To BLM's knowledge, Appellant did not serve its appeal, correction, and errata on the Hearings Division within the allowable period.”).

<sup>32</sup> United States Postal Service Tracking Number 70170190000060614620 (showing receipt of the ALJ's Order by WildLands Defense on July 19, 2019).

<sup>33</sup> Because 30 days from July 19, 2019, was Sunday, Aug. 18, 2019, the next business day, Aug. 19, 2019, became the deadline. See 43 C.F.R. § 4.22(e).

h) GFS(O&G) 3(2017)  
i) GFS(MISC) 1(2015)  
j) GFS(MIN) 29(2004)

the decision—the Hearings Division—by the applicable deadline. Consequently, the Board does not possess jurisdiction over the appeal and must dismiss it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,<sup>34</sup> we dismiss WildLands Defense’s appeal and deny as moot BLM’s motion for an extension of time to file its answer.

\_\_\_\_\_/s/\_\_\_\_\_  
Amy B. Sosin  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Silvia Riechel Idziorek  
Acting Chief Administrative Judge

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<sup>34</sup> 43 C.F.R. § 4.1.