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Cindy MacDonald ~ Appellant
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March 27, 2008

RE: Petition for Reconsideration
Appeal of Ruling/Dismissal Granted by
Administrative Law Judge Harvey C. Sweitzer
Docket No. N2-2008-05
Appeal of Final Decision issued January 14, 2008 to Kudnra Nevada, LLC
Soldier Meadows Allotment - Winnemucca Field Office, Nevada

**Appeal of Ruling Granting Dismissal/Petition for Reconsideration
Method of Appeal Calculation Deadline**

I, Cindy MacDonald, am appealing the recent decision by Administrative Law Judge Harvey C. Sweitzer that affirmed the Bureau of Land Managements appeal calculation methods, which appear contrary to strict regulations and laws regarding the method that must

be employed in determining deadlines and timeliness for filing an appeal of decision that is found to be adverse.

(1)

Reviewing the CFR's cited within the dismissal granted by Judge Sweitzer as authorizing the decision issued March 17, 2008, the proposed rule changes that may have effected appeal deadline calculations methods posted in the Federal Register dated May 22, 2003, as well as the reasons cited by Judge Sweitzer for granting the dismissal, I can find no supporting regulations or laws that affirm Judge Sweitzers authority to deviate from the standard procedures required for determining appeal calculation deadlines and the determinations used to decide the timeliness of appeals.

Therefore, I am petitioning the Interior Board of Land Appeals to reconsider and examine Judge Sweitzer's decision based on well-defined appeal calculation methods used for determining timeliness of appeals and to clarify these methods, if necessary, for all future appeals by parties who are affected adversely by decisions issued and who need to have appeal calculation methods clearly defined.

Statement of Reasons

On February 29, 2008, BLM filed a memorandum requesting my appeal be dismissed on the grounds that it was not timely filed and included the date of service, January 23, 2008, as the beginning of the appeal calculation deadline. By including the date of service, BLM asserted that the appeal deadline was Friday, February 22, 2008 and Judge Sweitzer has affirmed that BLMs inclusion of the date of service and calculation methods were correct and thus, dismissed my appeal as untimely.

On March 10, 2008, I filed a response to BLMs memorandum that challenged their appeal calculation methods of including the date of service based on 43 C.F.R. 4.22(e) that strictly and clearly defines the methods and exceptions that must be employed in determining appeal calculation deadlines and timelines of appeals.

On March 17, 2008, Judge Sweitzer affirmed BLMs calculation method that included the date of service and cited his authority to do so based on 43 C.F.R. 4.411(a), 43 C.F.R. 4.470(a) and (d), 43 C.F.R. 4160.4 as well as *Kimber v. BLM*, 164 IBLA 70, 73 (2004) and *Western Watersheds Project v. BLM*, 166 IBLA 30, 38 (2005).

Judge Sweitzer also stated that it was his decision that BLMs calculation method was correct, that beginning on the date of service, January 23, 2008 and calculating the 30th day from this date, the end of my appeal period was Friday, February 22, 2008, “which was not a Federal legal holiday or other non-business day.”

It is my contention that Judge Sweitzer has overstepped his authority by incorrectly offering his own reinterpretation of strict methods that must be employed in calculating appeal timelines and that he has re-worded regulations and prior rulings to suit a predetermined outcome in order to support BLMs request for dismissal despite being contrary to established regulation and law.

Furthermore, based on my research, it is possible that an oversight has transpired in establishing clear methods for calculating appeal deadlines that require examination by a superior court to rectify this possible oversight for all future appeals.

(2)

Basis for Statement of Reasons and Reconsideration

Section 43 C.F.R. 4.22(e) provides a clear, specific and comprehensive mandate for determining the timeliness of appeals and how to calculate appeal deadlines. It states:

“Computation of time for filing and service. Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days shall be excluded in the computation.”

On May 22, 2003, Volume 68, Number 99, Proposed Rules, Page 27955-27960, Federal Register Online, the Department of the Interior through the Secretary of the Interior issued a proposed rule change for the General Rules Relating to Procedures and Practice; Special Rules Applicable to Public Land Hearings and Appeals.

The summary provided in the Federal Register read as follows: “The Office of Hearings and Appeals (OHA) is proposing to revise its existing regulations governing petitions for stays and requests to put bureau decisions into immediate effect. The revisions would specifically authorize OHA administrative law judges to decide such petitions and requests, which arise most frequently in the context of appeals from grazing decisions that the Bureau of Land

Management (BLM) issues. This change would expedite the administrative review process by eliminating an inefficient division of authority. The revisions would also improve the format and clarity of the regulations.”

The general thrust of the proposed rule change is most clearly understood with this paragraph issued in that proposal: “This division of responsibility [between IBLA and OHA] results in delays and inefficiencies that would be alleviated if the ALJs also had authority to rule on petitions for a stay and requests to place grazing decisions into immediate effect.”

Within the entire framework of the proposed rule changes, at no time was it mentioned or discussed that the scope of the proposal was including radical changes to the methods and exceptions of how timeliness of appeals are determined as already established by 43 CFR 4.22(e).

Additionally, if it was the intent of the proposed rule change of Section 4.22 to revise calculations for determining appeal timeliness methods, no new specific guidelines have been added that would update the very specific mandates that were formerly established through Section 4.22(e) and has now left appeal calculation methods open to interpretation.

Furthermore, in all cited CFRs used by Judge Sweitzer as authorizing his authority to dismiss my appeal, each and every CFR and IBLA decision he used affirms, though not quite as clearly as 43 CFR 4.22(e) does, that the appeal time is to begin after the date of service.

(3)

43 C.F.R. 4.411(a), “A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the FEDERAL REGISTER, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication.”

43 CFR 4.470(a), “Any applicant, permittee, lessee, or other person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge within 30 days after receiving it or within 30 days after a proposed decision becomes final as provided in §4160.3(a) of this title. To do so, the person must file an appeal with the BLM field office that issued the decision and serve a copy of the appeal on any person named in the decision.”

43 CFR 4.470(d), “Any person who, after proper notification, does not appeal a final BLM grazing decision within the period provided in paragraph (a) of this section may not later challenge the matters adjudicated in the final BLM decision.”

43 C.F.R. 4160.4(a), Any person whose interest is adversely affected who wishes to appeal or seek a stay of a final BLM grazing decision must follow the requirements set forth in §4.472 of this title. The appeal and any petition for stay must be filed with the BLM office that issued the decision within 30 days after its receipt or within 30 days after the proposed decision becomes final as provided in §4160.3(a).

Kimber v. BLM, 164 IBLA 70, 73 (2004)

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.”

Western Watersheds Project v. BLM, 166 IBLA 30, 38 (2005)

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.”

Yet in Judge Sweitzers decision issued on March 17, 2008 that granted BLMs request for dismissal, Judge Sweitzer stated: “I find, however, that BLM was correct in calculating an appeal deadline of February 22, 2008. Pursuat to 43 C.F.R. 4.470(a) and 4160.4, an appeal of a final BLM grazing decision must be filed with BLM within 30 days of an appellants receipt of the decision being appealed”

(4)

Within this statement, Judge Sweitzer does not accurately quote the very citations he uses to justify his position and ruling. He states that the decision must be filed within 30 days, not after 30 days and this distinction is paramount in regards to properly applying the procedures and requirements as outlined in every regulation and ruling he cited as giving him the authority to grant this dismissal.

Furthermore, in all of the citations used to justify his dismissal, none of them provide any exception for Federal legal holidays or non-business days.

So on what basis did Judge Sweitzer use a Federal legal holiday or non-business day as part of his consideration in determining that Friday, February 22, 2008 was valid because it did not fall on a Federal legal holiday or other nonbusiness day and resulted in his ruling to grant the dismissal of my appeal as untimely?

This is the exact quote taken from the Judge Sweitzers Dismissal;

“I find, however, that BLM was correct in calculating an appeal deadline of February 22, 2008. Pursuant to 43 C.F.R. 4.470(a) and 4160.4, an appeal of a final BLM grazing decision must be filed with BLM within 30 days of an appellant’s receipt of the decision being appealed. The 30th day after January 23, 2008, was Friday, February 22, 2008, which was not a Federal legal holiday or other nonbusiness day. Consequently, the deadline for filing the appeal was February 22, 2008, not February 25, 2008, as Ms. MacDonald contends. *See* 43 C.F.R. 4.22(e)”

In this quote, Judge Sweitzer vacillates between using within versus after the date of service inclusion on calculaton methods as well as selectively referring to the requirements outlined in 4.22(e), which provide the only reference to the exceptions of exclusion of Federal legal holidays or other nonbusiness days on appeals, exclusions he admits to using in his consideration of BLMs asserted appeal deadline date of Friday, February 22, 2008.

If Judge Sweitzer is using another regulation to support his consideration of Federal legal holidays or other nonbusiness days in affirming the appeal deadline was Friday, February 22, 2008, then the C.F.R. he is using as consideration of these exceptions should be clearly cited within the context of his dismissal and decision.

As it stands, it appears that Judge Sweitzer is selectively censoring requirements by using the mandates outlined in C.F.R. 4.22(e) that provide exceptions and special rules if the appeal period ends on Federal legal holidays and other nonbusiness days, while ignoring the clear stipulations that state the date of service is not to be included in the appeal calculation methods for determining deadlines and timeliness.

For my perspective, the requirements outlined in Judge Sweitzers decision by citing 43 C.F.R. 4.411(a), 43 C.F.R. 4.470(a) and (d), 43 C.F.R. 4160.4 as well as *Kimber v. BLM*, 164 IBLA 70, 73 (2004) and *Western Watersheds Project v. BLM*, 166 IBLA 30, 38 (2005), provide no clear and specific exceptions to any date or standing of any day within the context of 30 days.

Based on the criteria Judge Sweitzer is attempting to assert and affirm, there are no guidelines and no exceptions, whether the end of the appeal period falls on a Federal legal holiday or a nonbusiness day, all days count in the determination of the end of the appeal period. If the adverse parties appeal falls on one of these exceptions, too bad, their appeal period gets cut short a day, or two days or even three, depending on when it falls.

Judge Sweitzer has also extended his authority to reduce the appeal period further by including the date of service in the calculation methods, thereby cutting another day from the supposed 30-day appeal period. None of his citations support these vague guidelines he is attempting to assert as valid and all generally affirm that the appeal calculation methods to be used require the appeal time period to begin after the date of service.

If the Department of the Interior has other regulations or rules that provide for these exceptions, that clearly establish there are no exceptions to Federal legal holidays or other non-business days, that affirm the date of service is to be included in the appeal calculation deadlines, they are NOT clearly posted or visible, nor are they being referenced in decisions such as the one Judge Sweitzer has issued.

What the Department of the Interior and its C.F.R.s do have are clearly established specific and detailed requirements that outline each of these exceptions and the procedures that must be adhered to if the appeal deadline falls on one of these exception days and that the date of service is not to be included in the appeal calculation deadlines as per 43 C.F.R. 4.22(e). Additionally, the 2003 proposed rule change was not suppose to effect nor does it address any proposed changes in these requirements of appeal calculation procedures.

If BLM and Judge Sweitzer were properly adhering to and administering the legal mandates established as to the requirements to determine timeliness of filing an appeal, my appeal could not be dismissed on the grounds that it was untimely. They have chosen to include the date of service contrary to established regulations and have failed to provide any regulations that clearly establish and define why they are now allowed to circumvent prior regulations and procedures, which now include the date of service within their calculation methods. Without that inclusion, my appeal deadline falls on the nonbusiness day of Saturday, February 23, 2008 and as such, must be moved to Monday, February 25, 2008. This specific method of calculation is clearly outlined in 43 C.F.R. 4.22(e), yet both parties are trying to deliberately ignore this specific mandate and overextend their authority to reinterpret appeal procedures and calculation methods.

The Winnemucca Field Office has provided definitive proof that I transmitted my appeal within the last day of the appeal period, which I continue to assert is Monday, February 25, 2008 and as such, I am legally entitled to the grace period and to have my appeal considered as timely.

Based on this information, I urge the Interior Board of Land of Appeals to reconsider Judge Sweitzers dismissal and to once and for all, issue a ruling that clearly establishes the exact methods, exceptions and rules to be upheld regarding the appeal calculation methods established in the various C.F.R.s cited in his dismissal of my appeal, if they do indeed vary from the strict and specific requirements established through C.F.R. 4.22(e).

Thank you for your consideration.

(6)