

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA

IBLA 2002-127

Decided April 13, 2005

Appeal from a decision of the Utah State Office, Bureau of Land Management, regulating paleontological activities under H-8270-1.

Affirmed in part, reversed in part, dismissed as moot in part.

1. Public Lands: Leases and Permits--Special Use Permits

Paleontological resources on public lands are owned by the United States. The Federal Land Policy and Management Act of 1976 (FLPMA) provides general authority for BLM to manage and protect paleontological resources on public lands. BLM's paleontological use permit program arises from section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), and, among other authorities, 43 CFR 8365.1-5, which states: "On all public lands, unless otherwise authorized, no person shall; (1) Willfully deface, disturb, remove or destroy any \* \* \* scientific, cultural, archaeological or historic resource, natural object or area \* \* \*."

2. Public Lands: Leases and Permits--Special Use Permits

Decisions involving paleontological use permits are committed to the discretion of the Secretary, through BLM, and the exercise of that discretion must have a rational basis. When the record reveals extensive evidence supporting a disputed finding in such a decision, there is a rational basis for the finding, and that portion of the decision will be affirmed.

3. Public Lands: Leases and Permits--Special Use Permits

BLM may impose administrative sanctions for permit violations even in the absence of specific regulatory provisions establishing such sanctions, so long as BLM provides notice of the possible range of sanctions. A decision imposing sanctions without such notice must be reversed.

APPEARANCES: Sally E. Garrison, Esq., Norman, Oklahoma, for appellant; David C. Jones, Esq., Assistant Attorney General, State of Utah, Salt Lake City, Utah, for respondent intervenor College of Eastern Utah; Emily Roosevelt, Esq., Office of the Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Board of Regents of the University of Oklahoma (appellant) appealed a November 15, 2001, decision of the Utah State Office, Bureau of Land Management (BLM), relating to the actions of two individuals who were engaged in paleontological investigations on Federally-administered lands in Utah. Those two individuals, to whom BLM directed the decision, are paleontologists Dr. Richard Cifelli and Dr. W. Desmond Maxwell. Cifelli presumably was an employee of the Sam Noble Museum of Natural History of the University of Oklahoma, and Maxwell was affiliated with appellant.<sup>1/</sup> At the time in question, Cifelli had previously held several 1-year paleontological resource use survey and surface collection permits (survey permits), currently held such a permit encompassing all public lands in Utah,<sup>2/</sup> and had applied for a paleontological resource use excavation permit (excavation permit) first on January 4, 2000, for several different locations in Utah (see AR III, Document 41), and then on April 16, 2001, for the specific location at issue in this appeal, the “Cifelli 2 Quarry” (see AR III, Document 27). The College of Eastern Utah (CEU), the holder of an approved excavation permit for the locality

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<sup>1/</sup> By initiating this appeal on behalf of Cifelli and Maxwell, appellant acknowledges that those individuals were agents of appellant for purposes of this appeal and the events precipitating BLM’s decision. In the absence of such a relationship, the standing of the Board of Regents of the University of Oklahoma (OU) to bring this appeal would be open to question.

<sup>2/</sup> BLM originally issued this survey permit with effective dates of May 15, 1999, through Dec. 31, 2002. See Administrative Record (AR) III, Document 42. BLM later amended the permit, and then suspended it indefinitely because of Cifelli’s and Maxwell’s lack of cooperation with respect to the return of specimens, which is the principal focus of BLM’s decision. See AR III, Document 16.

commonly called the Cifelli 2 Quarry<sup>3/</sup> (see AR I, Document 4, Attachment 25), sought to intervene in the appeal. By order dated January 11, 2002, this Board granted CEU intervenor status as a respondent to the appeal.

The decision related a number of “unacceptable” actions of Cifelli and Maxwell,<sup>4/</sup> which generally occurred during the years 2000 and 2001 and related to the Cifelli 2 Quarry, including unauthorized excavation and unauthorized removal of paleontological specimens to Maxwell’s laboratory in California. This portion of the decision stated that it “constitutes an official notification of these incidents of non-compliance. Copies of this letter [decision] shall be documented in your permit files and will be considered when BLM evaluates any pending or future permit applications from you.”

The decision also imposed sanctions on Maxwell, prohibiting his working under any paleontological permit on BLM lands in Utah for a period of 3 years. The decision denied Cifelli’s January 4, 2000, application for a single excavation permit covering several different sites, because “BLM does not issue general excavation permits \* \* \* [and] BLM requires that, at the time you apply for a permit, you provide specific locational data for each excavation you are interested in pursuing.” The decision then invited Cifelli to re-apply to excavate any specific locality other than the Cifelli 2 Quarry.

The decision discussed Cifelli’s April 16, 2001, application for an excavation permit at the Cifelli 2 Quarry. BLM encouraged Cifelli to work with CEU at the quarry and described the procedures necessary for BLM to amend CEU’s permit to allow Cifelli’s participation under CEU’s permit. The decision then denied Cifelli’s application, but indicated a willingness to review and consider future proposals for excavation at the quarry that would begin after CEU’s permit expired on May 31, 2002.<sup>5/</sup> Finally, the decision reinstated Cifelli’s surface collecting permit through its

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<sup>3/</sup> BLM originally issued CEU’s excavation permit with effective dates of June 1, 1999, through May 31, 2002.

<sup>4/</sup> Maxwell apparently was an employee of the University of the Pacific in Stockton, California, but associated and worked with Cifelli and appellant at least during the year 2000 field season.

<sup>5/</sup> Appellant questions this because “[i]t is clearly stated in the BLM rules that permits are not exclusive,” and BLM’s decision would make CEU’s an exclusive permit. (Statement of Reasons (SOR) at 5.) Appellant misunderstands the meaning of BLM’s standard terms and conditions for permits, which state “[t]his permit shall not be exclusive in character, and there is hereby reserved unto the Federal

(continued...)

expiration date of December 31, 2002, but prohibited its use at the Cifelli 2 Quarry. The rest of the decision discussed BLM's paleontology permitting policies.

Appellant filed a timely notice of appeal and motion for stay.<sup>6/</sup> By order dated April 5, 2002, this Board denied in part appellant's motion for stay, but stayed both BLM's proposed sanctions against Maxwell and BLM's consideration of Cifelli's and Maxwell's alleged permit noncompliance with respect to future permit applications.<sup>7/</sup> That partial stay is now dissolved, in light of our disposition of this matter.

In this appeal, appellant objects to the decision's finding of noncompliance by Cifelli and Maxwell and its determination to retain the decision in Cifelli's and Maxwell's permit files for consideration when BLM evaluates permit applications from those individuals. Appellant also objects to BLM's proposed ban of Maxwell from conducting paleontological field investigations on BLM lands in Utah for a

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<sup>5/</sup> (...continued)

Government the right to use, lease or permit the use of said land or any part thereof for any purpose." (AR II, Document 2, Appendix 3.) Generally, this provision entitles BLM to allow other non-paleontological uses of public lands that are included in survey or excavation permits. In addition, although it is reasonable that a survey permit for all public lands in Utah would not be exclusive, and other uses including paleontological uses could reasonably be allowed, it might not be reasonable (except under extraordinary circumstances) for BLM to issue to different investigators multiple excavation permits for the same specific locality for the same time period. The possibility of competing scientific interests, and personalities, would seem to make issuance of only one excavation permit to one principal investigator the more reasonable course.

<sup>6/</sup> BLM's Paleontological Resource Management Handbook H-8270-1 (Handbook) provides permit applicants an opportunity to "dispute" an adverse decision by requesting review up to the BLM Director. (Handbook IV.C.8.a.) After the dispute opportunities have been exhausted, the applicant may appeal to the Board. *Id.* at IV.C.8.b. BLM's decision indicated that Cifelli could appeal to the Board either within 30 days after receiving a final decision resulting from the dispute process or within 30 days of receiving the decision itself. In this instance, appellant chose to appeal to the Board directly.

<sup>7/</sup> In its motion for stay, appellant asked that the Board prohibit any further excavation at the Cifelli 2 Quarry by any entity (including CEU, which at that time held a valid excavation permit for the quarry). The Board's Apr. 5, 2002, order considered this request to be an appeal of CEU's permit, which was issued by BLM on June 1, 1999, and dismissed that portion of appellant's appeal as untimely.

period of 3 years. Finally, appellant objects to BLM's denial of Cifelli's April 16, 2001, application for a permit to conduct excavations at the Cifelli 2 Quarry.

[1] Public lands and their associated resources, including paleontological resources, are owned by the United States. 43 U.S.C. § 1702(e) (2000). The Federal Land Policy and Management Act of 1976 (FLPMA) provides general authority for BLM to manage and protect paleontological resources on public lands. See 43 U.S.C. §§ 1732, 1733 (2000). "Section 302(b) of [FLPMA, 43 U.S.C. § 1732(b) (2000),] allows the Secretary of the Interior, through BLM, the discretion to issue permits for special uses of lands." Eastern Sierra Audubon Society, 126 IBLA 222, 227 (1993). BLM's paleontological use permit program arises from that provision of FLPMA and, among other authorities, 43 CFR 8365.1-5, which states: "On all public lands, unless otherwise authorized, no person shall; (1) Willfully deface, disturb, remove or destroy any \* \* \* scientific, cultural, archaeological or historic resource, natural object or area \* \* \*."

Pursuant to these authorities, BLM developed and utilizes manual provisions (BLM Manual 8270 Paleontological Resource Management) and the Handbook, both issued July 13, 1998, as guidance for issuing and managing paleontological use permits (permits). All collecting of paleontological resources on public lands requires a permit,<sup>8/</sup> either for survey and surface collection (surface disturbance of less than 1-square meter) or excavation. (Handbook IV.B.1.) Such permits are issued (or modified) only by the office of the BLM State Director. (Handbook IV.C.3 and IV.C.5; see also BLM Instructional Memorandum No. 85-1 (October 1, 1984) (redelegating permit authority from the Director, BLM, to State Directors, and confirming that redelegation to District Managers is not authorized).) The United States retains ownership of paleontological resources collected under a permit. (BLM Manual 8270.09.G.)

With respect to the issues before us, appellant first objects to BLM's retaining the decision in the permit files of Cifelli and Maxwell and considering it during future permit application processing. BLM characterized that portion of the decision describing the questionable actions of Cifelli and Maxwell as "official notification of these incidents of non-compliance." BLM is required to document such incidents in the relevant permit file and provide written notification to the permittee of noncompliance and any action taken. (Handbook IV.C.7.)

The decision notes two specific instances of noncompliance: First, prior to beginning their excavations at the Cifelli 2 Quarry in May and June, 2000, Cifelli and

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<sup>8/</sup> This requirement is subject to certain limited exceptions for common invertebrate fossils, petrified wood, and other items not relevant here. See 43 CFR 8365.1-5.

Maxwell did not have an excavation permit, nor had they reached agreement with CEU's principal investigator and Director of the CEU Prehistoric Museum, Don Burge, to work under and be added to CEU's permit; second, after completing excavations in 2000 purportedly under the general authority of CEU's permit, Maxwell removed the excavated specimens from Utah to a laboratory in California without permission from either BLM or CEU, in violation of CEU's permit designating the CEU Prehistoric Museum as the only authorized specimen repository.

As to the excavation without a permit, appellant implicitly admits that Cifelli and Maxwell had no permit, but argues that while BLM was processing their permit application, BLM assured them that "excavation was considered acceptable by the BLM." (SOR at 2.) "In fact, the BLM by and through its agent, Mr. Leschin, encouraged Dr. Cifelli and Dr. Maxwell to proceed anyway, telling them they could excavate while the permit was in process \* \* \*. The BLM did not require that agreement [with CEU] be reached prior to excavation activity." *Id.* at 2-3.

Evidence cited by appellant demonstrates that Cifelli was well aware that an excavation permit was required before he could excavate, and that he had not been issued such a permit for the 2000 field season. (SOR Ex. H; SOR Ex. Y (Affidavit of Dr. Richard Cifelli ¶ 6).) It is also clear that BLM field personnel cannot authorize or otherwise allow paleontological investigations (including excavation) in the absence of a current permit, which authority rests with the Office of the BLM State Director. (Handbook IV.C.3 and IV.C.5.) Finally, the record contradicts appellant's assertion that BLM somehow otherwise authorized excavation. Although BLM field personnel encouraged Cifelli and Maxwell to reach an agreement with CEU so that they might conduct their investigations under the authority of CEU's permit,

[i]n no way did I encourage Dr. Cifelli or Dr. Maxwell to bypass the BLM paleontological use permitting process. It was absolutely clear that because they did not have an approved excavation permit for the 'Cifelli 2' locality, they would have to work out an agreement with CEU to work under its permit \* \* \*. The excavation work that Dr. Maxwell, Dr. Cifelli, and their crew were doing \* \* \* was only allowed because it was being conducted under CEU's permit for the site. I made that very clear to Dr. Maxwell several times.

(BLM Answer Ex. B (Declaration of Michael Leschin ¶¶ 6, 8).) Not only was an agreement with CEU a precondition for Cifelli and Maxwell to excavate at the Cifelli 2 Quarry (under CEU's permit), it is clear that, although discussions between Cifelli and Burge were ongoing, no such agreement was in place prior to their initiation of excavation and removal of specimens. CEU employees confirm these circumstances.

“Rich [Cifelli] and Des [Maxwell] did excavate at the Eolambia site [Cifelli 2 Quarry] soon after our field meeting of May 24, 2000, probably within a week,<sup>2/</sup> and did so without any written permit from the BLM and without ever agreeing to the terms to work under CEU’s excavation permit.” (CEU Answer Ex. E (Affidavit of John Bird, CEU field supervisor).) “Until we see evidence that they are willing to resolve these two main problems, we are not going to submit a written amendment to our excavation permit. I guess that means they are excavating illegally.” (AR I, Document 4, Attachment 17a (Correspondence from Burge to Julie Howard, Utah State BLM Office, dated June 22, 2000).) Nothing in the record contradicts these statements.

With respect to Maxwell’s removing the excavated specimens from Utah to California without permission from either BLM or CEU, again the record is clear. Cifelli knew that CEU was the only specimen repository approved on CEU’s permit. “I understand that your (CEU’s) permit spells out CEU as a repository.” (CEU Answer Ex. G (E-mail from Cifelli to Pam Miller (CEU), dated June 12, 2000).) Despite Cifelli’s acknowledgment, CEU anticipated that appellant might remove specimens without approval. “I think their (Cifelli’s) field season ends soon and I am concerned that the specimens will leave the state without resolution of this situation.” (AR I, Attachment 17a (Correspondence from Burge to Howard dated June 22, 2000).)

CEU’s suspicion was soon confirmed, as Cifelli apparently intended and directed Maxwell to remove the specimens with or without approval. “I ‘take my orders’ from Rich Cifelli \* \* \*. My most recent conversation with him, a few days before my departure \* \* \* left me with no doubt that the material that I collected in the past five weeks was going to be transported to California for study. I’m really in no position to contribute to the on-going discussion about [the Cifelli 2 Quarry] site and the material that I collected from it \* \* \*.” (SOR Ex. U (E-mail from Maxwell to Leschin dated June 25, 2000).) Cifelli himself confirmed his role in the removal of the specimens from Utah. “I told [CEU] that ‘I told you to take the stuff to CA, because that is what I took to be the arrangement.’” (BLM Answer Ex. W (E-mail from Cifelli to Maxwell dated Nov. 2, 2000).) Cifelli did not seek approval from BLM for the removal. “I did not speak to a BLM official directly about using the laboratory in Stockton. The BLM made it clear to me that I was to resolve these issues with Mr. Burge [CEU].” (BLM Answer Ex. Y at 3 (Affidavit of Dr. Richard Cifelli ¶ 12).) It is clear from the record that Cifelli and Maxwell reached no agreement with CEU,

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<sup>2/</sup> An e-mail from Maxwell to Leschin dated June 25, 2000, confirms the timing of the excavations by describing the specimens excavated as “material I collected in the past five weeks.” AR III, Document 35.

failed to seek permission from BLM,<sup>10/</sup> and removed the specimens from Utah to California on their own initiative.

As for Cifelli's and Maxwell's refusal to honor repeated requests to return the specimens to Utah, appellant asserts that "[t]he only demand that [appellant] received was a letter dated August 17, 2001 which required the transport of the specimens to Price, Utah by or on the 17th of September, 2001." (SOR at 3.) However, appellant fails to mention at least 10 separate pieces of correspondence to and from appellant's agents Cifelli and Maxwell, CEU (holder of the only valid excavation permit and the approved specimen repository), and BLM, beginning months before August 17, 2001, demanding the return of the specimens to CEU or acknowledging that demand.<sup>11/</sup> See CEU Response to Motion for Stay Ex. J; CEU Answer Ex. J, M; AR III, Documents 12, 14, 15, 16, 19, 24, 25. This correspondence even included letters from BLM to Cifelli suspending his surface collection permit because of "the lack of cooperation \* \* \* regarding the return of fossil specimens collected in 2000 under Don Burge's (CEU) permit" (AR III, Document 15 (dated May 24, 2001)), and extending that suspension and suggesting the involvement of the U.S. Attorney to pursue civil and criminal sanctions for the failure to return the specimens (AR III, Document 14 (dated June 8, 2001)). Despite these well-documented demands for the return of the specimens, Cifelli and Maxwell did not return the specimens until after they received the August 17, 2001, letter from BLM that again threatened legal action against them. See SOR Ex. BB.

[2] Decisions involving permits for special uses of public lands, such as paleontological resource use permits, are committed to the discretion of the Secretary, through BLM. The exercise of that discretion "must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion." Judy K. Stewart, 153 IBLA 245, 251 (2000);

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<sup>10/</sup> BLM acknowledged that it considered allowing the transport of the specimens to the laboratory facility in California, but only if there were agreement between appellant and CEU regarding treatment of the specimens. However, "[t]he specimens were removed from Utah without these conditions being met." (BLM Answer, Ex. B (Declaration of Michael Leschin ¶ 9).)

<sup>11/</sup> We are mystified by appellant's failure to acknowledge the existence of this extensive history of correspondence, particularly with respect to correspondence from CEU counsel to appellant's counsel dated June 29, 2001 (CEU Answer Ex. M) and from appellant's counsel to BLM dated July 27, 2001 (AR III, Document 12). We will presume that appellant's stated ignorance of BLM's demands arises from an astonishing oversight, rather than from a purposeful attempt to mislead this Board.



see also Larry Amos, 163 IBLA 181, 188-89 (2004).<sup>12/</sup> Our review of the record in this case reveals extensive evidence of noncompliance by Cifelli and Maxwell, which provides a rational basis for the decision.<sup>13/</sup> Accordingly, that portion of the decision is affirmed.

With respect to BLM's 3-year ban against Maxwell working under any permit on BLM lands in Utah, appellant argues that Maxwell somehow was not at fault with respect to the unauthorized excavation, the unauthorized removal of the specimens to California, and his failure timely to return the specimens to Utah despite repeated demands from CEU and BLM. "Dr. Maxwell made every effort to comply with the requirements of the BLM." (SOR at 4.) The record reflects otherwise.

[3] There is a more fundamental issue, however, relating to the ban. BLM clearly has the authority to impose administrative sanctions for violations of its permit program or permit provisions, even in the absence of specific regulatory provisions establishing those sanctions. Carrol White, 132 IBLA 141, 150 (1995); Rogue Excursions Unlimited, Inc., 104 IBLA 322, 325 (1988) ("The Board has recognized that BLM has inherent authority 'to impose sanctions where, in BLM's opinion, an outfitter has violated \* \* \* [SRP] permit conditions'"); David Farley, 90 IBLA 112 (1985), aff'd, No. 86-436-RE (D. Or.), aff'd sub nom., Ken Warren Outdoors, Inc. v. United States, 852 F.2d 571 (9<sup>th</sup> Cir. 1988) (Board affirmed BLM denial of commercial SRP and revocation of "authorized outfitter status" which status is required for receipt of commercial SRP). However, BLM must first provide notice to the violator of the possible range of sanctions. Carrol White, 132 IBLA at 150; Dvorak, 127 IBLA at 152 ("A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interest, and, notwithstanding a failure to promulgate regulations, if BLM notifies a permittee of sanctions for failure to comply, it may invoke those sanctions upon noncompliance").

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<sup>12/</sup> Because BLM's primary authority for issuing various kinds of permits for uses of the public lands, including paleontological use permits and special recreation permits (SRPs), arises under sec. 302(b) of FLPMA, our decisions addressing BLM's discretionary issuance or enforcement of any such permits generally are applicable to paleontological resource use permits. See Dvorak Expeditions, 127 IBLA 145, 150 (1993).

<sup>13/</sup> Although appellant also objects to BLM documenting the instances of noncompliance in appellant's permit files, the Handbook requires such documentation. The act of documenting noncompliance and appropriately preserving such official government documentation is not a decision subject to appeal.

Section 302(c) of FLPMA, 43 U.S.C. § 1732(c) (2000), authorizes the suspension or revocation of a permit for violations, and the Handbook and BLM's standard permit form provide for similar sanctions. See Handbook IV.C.7 and Appendix 3 (Permit Terms and Conditions 2). Cifelli's survey permit included this provision as did CEU's excavation permit under which Cifelli and Maxwell purportedly conducted their excavation. (AR III, Document 42; CEU Answer Ex. B.) In addition, BLM suspended Cifelli's survey permit and then extended the suspension, because of the continuing refusal to return the specimens. (AR III, Documents 14, 15.) Appellant clearly had notice of suspension of existing permits as a possible sanction for permit program violations.<sup>14/</sup> In this case, however, BLM imposed a 3-year ban on Maxwell, but there is no evidence that appellant or Maxwell had notice of such ban as a possible sanction. Accordingly, that portion of the decision imposing a 3-year ban on Maxwell must be reversed.<sup>15/</sup>

Finally, as to the denial of Cifelli's April 16, 2001, permit application, the decision states that BLM will not issue a separate permit to Cifelli to excavate at the Cifelli 2 Quarry, but will review subsequent proposals for excavation at the quarry that would begin after CEU's permit expires on May 31, 2002. Because the decision does not prohibit Cifelli from submitting a "subsequent proposal" for excavation at the Cifelli 2 Quarry, and considering CEU's permit has already expired, we can grant appellant no effective relief, and that portion of the decision is dismissed as moot. Coalition for the High Rock/Black Rock Emigrant Trail National Conservation Area, 147 IBLA 92, 94-95 (1998).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is affirmed in part, reversed in part, and dismissed as moot in part.

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H. Barry Holt  
Chief Administrative Judge

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<sup>14/</sup> BLM also could have pursued sanctions under 43 CFR 8360.0-7 (fine and/or imprisonment for unauthorized removal of scientific resources) or 18 U.S.C. § 641 (2000) (fine and/or imprisonment for theft of government property).

<sup>15/</sup> Of course, BLM may, in fact must, consider an applicant's misconduct in evaluating future permit applications. (Handbook IV.C.3.)

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge