

## PREDATOR PROJECT

IBLA 93-347

Decided July 20, 1993

Appeal from a decision of the Grand Junction, Colorado, District Office, Bureau of Land Management, authorizing animal control activities on the public lands. EA No. CO-076-3-20.

Motion to dismiss denied; decision set aside and remanded.

1. Administrative Procedure: Standing--Appeals: Generally Animal Damage Control--Rules of Practice: Appeals: Standing to Appeal

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

2. Animal Damage Control

Where BLM fails to submit an adequate case record in support of its record of decision authorizing ADC action, its decision is properly set aside and remanded.

3. Animal Damage Control

Where BLM fails to establish the need for an ADC program and where the record demonstrates only an extremely low level of reported (although not confirmed) losses (four sheep lost to coyotes) from BLM lands, BLM's decision is properly set aside and remanded.

4. Animal Damage Control--Federal Land Policy and Management Act of 1976: Public Participation

Where BLM fails to accommodate a third party's desire to participate in its decisionmaking process concerning

ADC, and where BLM issues on Feb. 25, 1993, a decision authorizing ADC commencing on Oct. 1, 1992, BLM's decision may be properly set aside and remanded to allow third parties to participate to ensure that BLM's ADC decisions predate the authorized ADC activity.

APPEARANCES: Tom Skeelee and Jerry Grubbs, Bozeman, Montana, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Predator Project has appealed the February 25, 1993, decision of the Grand Junction, Colorado, District Office, Bureau of Land Management (BLM), authorizing the Animal Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, to conduct animal damage control (ADC) activities on the public lands in the Grand Junction District, BLM.

The case file submitted by BLM contains only BLM's February 25, 1993, Record of Decision (ROD), Finding of No Significant Impact (FONSI), and Environmental Assessment (EA), along with several items of correspondence between BLM and Predator Project. No supporting documentation is included.

It appears from the ROD that BLM, APHIS, and the Colorado State Division of Wildlife (CDW) entered into a memorandum of understanding (MOU) September 9, 1987, governing ADC. Under the terms of that MOU, an annual ADC work plan is prepared by mutual agreement of those three agencies. That plan, prepared following a meeting with APHIS and BLM personnel, determines where ADC will be authorized in the BLM Grand Junction District. According to the ROD, ADC

activities are conducted to minimize animal depredation or to minimize damage to human health and safety, other wildlife, forest, range and agricultural resources. ADC needs for each calendar year are based on requests from previous years. Generally, the need for ADC in this District concerns livestock depredation losses due to coyotes, bear and mountain lions. Growing concern has also been expressed concerning loss of young antelope to coyotes.

BLM's ROD notes that a programmatic environmental impact statement (EIS) was issued by the U.S. Fish and Wildlife Service (FWS), U.S. Department of the Interior, prior to the program being "shifted" to APHIS in 1978, and that an updated EIS is "in progress."

The ROD contained as an attachment the ADC Plan for the Grand Junction District, BLM, for Fiscal Year 1993, which was accepted by BLM, APHIS, CDW, and the Colorado State Department of Agriculture Division of Animal Industry. <sup>1/</sup> The ROD also contains a table setting out "reported losses" of

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<sup>1/</sup> The role of the last agency is not immediately apparent from the case record.

livestock during Fiscal Year 1992 from coyote, mountain lion, and bear. No information was provided concerning the source of that data.

Predator Project's involvement in this matter evidently dates from September 1991, when it wrote to BLM asking "to learn more about \* \* \* avenues for public input on the [ADC] program," including when an annual meeting between APHIS-ADC and BLM concerning ADC activities would be convened. Predator Project also asked to receive the ADC reports "for any work on the District" and "announcements specific to range management, wildlife management and predator control."

On April 15, 1992, BLM sent Predator Project written notice of the meeting between APHIS and BLM concerning the 1993 ADC plan, which was evidently held on April 20, 1992. However, BLM advised that that meeting was "just an internal working meeting and we are not planning on receiving public input."

BLM has provided proof that, on November 17, 1992, it published public notice that it and APHIS were preparing the 1993 annual ADC plan and EA in the Grand Junction, Colorado, Daily Sentinel. It does not appear that BLM sent any notice directly to Predator Project. BLM states in its ROD that no official comments were received on the proposal.

By letter dated March 18, 1993, BLM sent a copy of its ROD/FONSI to Predator Project. No appeal information was included in that transmission. Nevertheless, on April 19, 1993, Predator Project (appellant) filed an apparently timely notice of appeal. 2/

In its notice of appeal, appellant stated its "understanding that, pursuant to 43 C.F.R. 4.21(a) (1991), the filing of this notice effects an automatic suspension of the Grand Junction District's predator control authorization," and that it expected "this program to be stayed until resolution of the appeal." On April 28, 1993, BLM transmitted the appeal to this Board. In the transmittal memorandum, BLM noted that it "considers the decision to be in full force and effect, pursuant to 43 CFR 4.21 (1993) (58 FR 4939 (Jan. 19, 1993))." On May 3, 1993, BLM wrote directly to appellant, stating as follows:

Regarding your expectation of a stay, 43 CFR 4.21(a) dated January 19, 1993, requires that an appellant file a petition for stay that justifies why a stay is necessary according to specified standards described in [43 CFR 4.21(b)(1)(i) through (iv)]. Your letter did not include this petition and, therefore, the decision will not be stayed.

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2/ Nothing in the record indicates when Predator Project was served with BLM's decision. Accordingly, it is impossible to state with certainty whether the notice of appeal was filed within 30 days of that date, as required by 43 CFR 4.411(a). In the absence of such proof, we shall presume that the appeal is timely. Southern Utah Wilderness Alliance, 122 IBLA 6, 9 (1991).

On May 18, 1993, appellant filed its statement of reasons, in which it renews its request that the ADC program be stayed. Appellant generally asserts that BLM's EA was inadequate and that its decision was made without adequate public involvement.

In reviewing the request for stay in connection with the recent revision to 43 CFR 4.21, and a motion to dismiss the appeal filed by BLM, we have, of necessity, considered the merits of the appeal. In view of the shortcomings of BLM's decision, enumerated below, we have decided, on our own motion, to grant expedited consideration to this appeal in the interest of administrative economy.

[1] Initially, we deny BLM's motion to dismiss the appeal for lack of standing. BLM argues that appellant was not a "party to the case" under 43 CFR 4.410(a) because it did not show that it actively participated in the process leading to the publication of the decision that it appealed. A party to a case is the responsible party who took the action which is the subject of the BLM decision on appeal, or who filed the instrument, application, offer, etc., that resulted in the decisionmaking process leading to that decision. Stanley Energy, Inc., 122 IBLA 118, 120 (1992). Although appellant may not have participated in the decisionmaking process, it requested leave to do so. Further, BLM led appellant to believe that it would have an opportunity to comment on the proposed EA, but none was offered. In these circumstances, appellant was a "party to the case" as described in 43 CFR 4.410(a).

Also, we reject BLM's contention that the appeal should be dismissed because appellant failed to demonstrate that it is "adversely affected" under that provision. Its allegation that its members use the area affected by the ADC plan for recreation is an adequately specific, colorable allegation of adverse effect. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Powder River Basin Resource Council, 124 IBLA 83, 88-89 (1992); Animal Protection Institute of America, 117 IBLA 208, 209-10 (1990). Allowing standing to appellant, we hold, will assist the Department in fulfillment of its decisionmaking function regarding ADC. See High Desert Multiple-Use Coalition, 116 IBLA 47, 48-49 n.1 (1990).

[2] BLM has failed to submit an adequate case record in support of its ROD. Although the ROD itself is a complete statement of BLM's ADC decision and sets out the rationale for it, the record is devoid of any supporting documentation showing the need for ADC, or the appropriate level of ADC. It is impossible without such supporting documentation to determine whether BLM's decision may be affirmed. In such circumstances, BLM's decision is properly set aside and remanded. See Wayne D. Klump, 104 IBLA 164, 166 (1988); Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (1986); Forest Gray, 88 IBLA 64 (1985); Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982).

[3] The record presently before us does not establish the need for an ADC program in the Grand Junction District. See Appeal of the Committee for Idaho's High Desert, SEC 92-ID 101 (Dec. 17, 1992); Appeal of Southern Utah Wilderness Alliance, SEC 92-ID 101 (Dec. 17, 1992). This is a significant failure, in view of the extremely low level of reported

(although not confirmed) losses (four sheep lost to coyotes) from BLM lands. Compare Committee for Idaho's High Desert, supra at 10-11. BLM's decision is properly set aside for this reason also.

[4] We are not satisfied that BLM adequately accommodated appellant's desire to participate in the ADC decisionmaking process. See Committee for Idaho's High Desert, supra at 1, 7. Although appellant had expressly asked to be involved in that process, BLM failed to notify it that an ADC plan was being prepared in order to allow appellant to submit comments. Third-party participation in BLM decisionmaking is to be encouraged. See 43 U.S.C. § 1701(a)(5) (1988).

It also appears that BLM issued authorization for Fiscal Year 1993 ADC activities after the fact in this decision. The decision on appeal purports to authorize activity commencing on October 1, 1992, yet it was not issued until February 25, 1993. Copies were not distributed until almost 1 month later. As ADC activities were not authorized past May 31, 1993, BLM's decisionmaking effectively renders ADC activities immune from administrative review. BLM should consider reforming its decisionmaking in ADC matters so that its ADC decisions predate the authorized ADC activity. 3/ Doing so would both allow meaningful public participation and the opportunity for administrative review prior to the implementation of the plan.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for appropriate further action.

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David L. Hughes  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

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3/ We also reject BLM's motion to dismiss this appeal as moot. An appeal from a decision will not be dismissed as moot even though the disputed action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review. Headwaters, Inc., 116 IBLA 129 (1990). As BLM has evidently engaged in a series of annual ADC decisions, and as it states in its motion to dismiss that it will prepare separate environmental analyses for any ADC work done on public lands in the Grand Junction District after May 31, 1993, it is appropriate to issue this decision clarifying appellant's right to participate and BLM's obligation to issue its ADC decisions timely.

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