

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 91-345

Decided October 14, 1993

Appeal from an administrative determination by the Moab District Manager, Bureau of Land Management, that the Lawrence-Tan Seeps Road is a R.S. § 2477 right-of-way.

Appeal dismissed.

1. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial determinations on standing.

2. Act of July 26, 1866--Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

The appeal of an administrative determination by BLM that a road is a R.S. § 2477 right-of-way will be dismissed for lack of standing where the appellant makes no colorable allegation of adverse effect. That a group's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not subject to dispute. However, the group may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest.

APPEARANCES: Wayne G. Petty, Esq., Salt Lake City, Utah, for Southern Utah Wilderness Alliance; David K. Grayson, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Patricia Geary, Esq., Deputy Emery County Attorney, Castle Dale, Utah, for Emery County.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Southern Utah Wilderness Alliance (SUWA) has appealed from a May 1, 1991, administrative determination of the Moab District Manager, Bureau

of Land Management (BLM), that the Lawrence-Tan Seeps Road (Emery County Road No. 332), also referred to in the record as the "Buckhorn Wash trail," the Buck Horn Wash, or the "Buckhorn Road," situated in Emery County, Utah, is a "valid right-of-way under the provisions of the Act of July 26, 1866, Revised Statute (RS) 2477, (43 U.S.C. 932 (repealed 1976))." 1/ Emery County had requested such a determination from BLM in a letter dated August 30, 1990. 2/

In response to SUWA's statement of reasons (SOR), BLM moves to dismiss the appeal for lack of standing charging that SUWA has not alleged and cannot show that it has been adversely affected by BLM's determination. BLM contends that SUWA does not deny the road has been maintained by the County and does not object to the maintenance (BLM Answer at 5).

SUWA answers that it identified its interest in a January 11, 1991, letter to the Moab District Manager in which it stated:

[SUWA] is a non-profit organization dedicated to protection of the public lands. SUWA has over 5,000 members. Many members of SUWA regularly travel to southern Utah and spend time on the federal public lands enjoying the many resources and opportunities for study and solitude found on these lands. The Buckhorn Wash trail and adjoining public lands located within the Moab District is a frequent destination for SUWA members.

(Reply to BLM Answer at 3).

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1/ Section 8 of that act, commonly referred to as R.S. § 2477, simply provided that: "The right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932 (1976). R.S. § 2477 was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793. However, nothing in FLPMA was to be construed as terminating any valid existing right-of-way. Section 701(a) of FLPMA, 90 Stat. 2786. BLM set forth the exact location of the right-of-way in a land description and map, which accompanied the decision as attachments 1 and 2, respectively.

2/ In a "MEMORANDUM OF UNDERSTANDING To Clarify Road Construction and Maintenance Responsibilities on Public Land in Emery County (MOU)," between BLM and the Emery County Board of Commissioners, effective Dec. 11, 1980, the County agreed that the Lawrence-Tan Seeps road was an R.S. § 2477 right-of-way and the parties agreed that the County would provide maintenance for the road. That MOU was to continue in "force and effect for 10 years unless sooner terminated by mutual agreement or upon a written notice by either party" (MOU at 5). Emery County asserts in its motion to intervene, which the Board granted by order dated Jan. 3, 1992, that official county logs show the Lawrence-Tan Seeps road as a county road as early as the 1960's and that the County routinely maintained the road with county funds in the 1970's and 1980's.

SUWA also relies on the district court's opinion in Sierra Club v. Hodel, 675 F. Supp. 594, 600 (D. Utah 1987), which rejected the Department's contention in that case that the plaintiffs, including SUWA, lacked standing. <sup>3/</sup> SUWA insists that it "clearly stated its interest in the road and the public lands involved in its letter to BLM dated January 11, 1991" and that its "interest in the lands governed by FLPMA is no less here than in Sierra Club v. Hodel" (Reply to BLM Answer at 4). SUWA concludes it satisfies the "'injury-in-fact' or 'adversely affected' requirement." Id.

A person appealing a decision issued by an official of the Bureau of Land Management must be, in accordance with 43 CFR 4.410(a), a party to the case and also must have a legally cognizable interest that is adversely affected by the decision in issue. E.g. Resource Associates of Alaska, 114 IBLA 216, 219 (1990); Sharon Long, 83 IBLA 304, 307-308 (1984); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1977). The issue presented by BLM's request that we dismiss the appeal is whether SUWA has shown that it has a legally cognizable interest that is adversely affected by BLM's determination.

[1] We have stated that in considering whether an appellant has standing to seek administrative review, the determinations of courts on judicial standing are not controlling. Colorado Open Space Council, 109 IBLA 274, 286 (1989); In re Pacific Coast Molybdenum, supra. But we have looked to those cases as a useful guide to the types of interests which are properly considered in adjudicating administrative appeals. Sharon Long, supra at 308; Oregon Natural Resources Council, 78 IBLA 124 (1984). We have not limited affected interests to property rights or economic interests; we have recognized that cultural, recreational, or aesthetic interests in the use and enjoyment of the land in dispute or ownership of adjoining land may constitute a sufficient interest. Sharon Long, supra; California Association of Four Wheel Drive Clubs, 30 IBLA 383, 386 (1977). <sup>4/</sup> In addition, we have stated that standing also rests in part on whether allowing standing will assist the agency in fulfillment of its functions. High Desert Multiple-Use Coalition, Inc., 116 IBLA 47, 48-49 n.1 (1990). Nevertheless, in any case there must be at least colorable allegations of adverse effect identifying specific facts giving rise to a conclusion. Powder River Basin Resource Council, 124 IBLA 83, 89 (1992).

In this case, SUWA's asserted interests are those of a non-profit organization dedicated to the preservation of the public lands some of whose members travel the Lawrence-Seeps Road and enjoy the neighboring

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<sup>3/</sup> The district court's decision was affirmed in part and reversed in part in Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988).

<sup>4/</sup> BLM also seeks to dismiss this appeal for lack of standing alleging that the issue involved is a property rights question between Emery County and the United States and SUWA has asserted no property interest in the real property involved. Clearly, failure to allege a real property interest in the land involved is not determinative of the standing issue.

public lands. It argues that such interests were found to confer standing in Sierra Club v. Hodel, *supra*.

[2] Even if Sierra Club v. Hodel were directly applicable, which it is not, it is distinguishable from the present case. In that case, and the public lands involved in its letter to BLM dated January 11, 1991" and that its "interest in the lands governed by FLPMA is no less here than in Sierra Club v. Hodel" (Reply to BLM Answer at 4). SUWA concludes it satisfies the "'injury-in-fact' or 'adversely affected' requirement." Id.

A person appealing a decision issued by an official of the Bureau of Land Management must be, in accordance with 43 CFR 4.410(a), a party to Garfield County had proposed a road improvement project to upgrade and, in some areas, widen a dirt road in southern Utah, known as Burr Trail, part of which served as the boundary between two wilderness study areas. Plaintiffs in that case alleged that BLM had failed to fulfill its responsibilities under the National Environmental Policy Act of 1969 (NEPA) and FLPMA in its participation in the project. As detailed by the court

[p]laintiffs' principal concern is that the increased traffic which could result from an improved road will detract from the sense of solitude and intimacy with nature that the area now offers. \* \* \* Plaintiffs also claim that the project will have an adverse impact on the plants, wildlife and archaeological sites in the area.

675 F. Supp. at 599.

SUWA points to the court's conclusion on standing in Sierra Club in support of its claim that it has standing in this case. Therein, the court stated, after citing Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970), for the proposition that a party has standing where it demonstrates injury in fact to an interest arguably within the zone of interests to be protected or regulated by the statute: "Plaintiffs in this case have alleged sufficient injury to their environmental concerns to meet the injury in fact requirement." 675 F. Supp. at 600. The court continued by stating that because the plaintiffs' interests were among those protected by NEPA, they had standing to request that an environmental impact statement be prepared. It also concluded that plaintiffs' zone of interests fell within those protected by FLPMA, and that, therefore, they had standing to challenge the existence, location, and scope of the right-of-way as it passes through the public lands. Id.

First, we have previously rejected an assertion that standing before this Board involves a "zone of interest" test. In Animal Protection Institute of America, 117 IBLA 208 (1990), the Board stated in response to an argument by BLM that its decision did not adversely affect the appellant within the zone of interest to be protected by the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333 (1988):

BLM seeks to superimpose a zone of interest test on the Board's standing requirement that a party be adversely

affected. The zone of interest test implements the requirement that a person be "adversely affected or aggrieved by agency action within the meaning of a relevant statute" so as to be entitled to judicial review of an agency action under 5 U.S.C. § 702 (1988). See Lujan v. National Wildlife Federation, [497 U.S. 871, 883 (1990)]; Clarke v. Securities

Industries Assn., 479 U.S. 388, 396-97 (1987). Standing before this Board is governed by 43 CFR 4.410(a), and is not governed by section 702 of the Administrative Procedure Act. The language "within the meaning of [a] relevant statute" which is implemented by the zone of interest test does not appear in 43 CFR 4.410(a), and therefore the zone of interest test is not dispositive of standing before this Board.

117 IBLA at 209.

Second, the court's conclusion in Sierra Club is tied directly to the plaintiffs' allegations of injury, which are set forth above, and are specifically related to the road improvement project involved in that case. Herein, SUWA has provided no colorable allegation that it will be adversely affected by BLM's administrative determination that Emery County holds a R.S. § 2477 right-of-way for the Lawrence-Tan Seeps road. There is no road project at issue in this case. <sup>5/</sup> On the other hand, on the basis of plaintiffs' allegations in Sierra Club, the court held: "Plaintiffs in this case have alleged sufficient injury to their environmental concerns." 675 F. Supp. at 600.

We find that the language relied on by SUWA in Sierra Club must be read in light of the allegations of injury made in that case. That SUWA's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not in dispute. However, SUWA may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest. It has not done so in this case.

As we stated in Powder River Basin Resource Council in dismissing the appeal of Wyoming Outdoor Council which had alleged injury only to environmental informational interests:

Allegations of injury to informational interests do not establish that appellants were adversely affected within the meaning of 43 CFR 4.410(a). Standing on this basis cannot be squared

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<sup>5/</sup> SUWA presently has pending with this Board two appeals from actions of the San Rafael Area Manager relating to proposed improvement of the Lawrence-Tan Seeps Road by Emery County. The first, docketed as IBLA 93-18, challenges BLM's Sept. 1, 1992, Finding of No Significant Impact, based on EA UT-067-90-034. The second, docketed as IBLA 93-50, seeks review of BLM's October 9, 1992, Decision Record granting right-of-way UTU-66121 and associated temporary work areas to Emery County in connection with the road improvement project.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1., the appeal is dismissed for lack of standing. 6/

Bruce R. Harris

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Deputy Chief Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge

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6/ Given our dismissal of this appeal on procedural grounds, we need not address the substantive questions raised by SUWA whether BLM's administrative determination was necessary to facilitate proper administration of the public lands or was a factor in a land use decision. See Instruction Memorandum No. UT-91-235, Change 1 (July 22, 1991).