

WILDLIFE DAMAGE REVIEW

IBLA 91-446

Decided December 29, 1994

Appeal from a decision of the Egan Resource Area Manager, Bureau of Land Management, approving aerial spraying for a grasshopper control project. NV-04-93-3.

Appeal dismissed.

1. Appeals: Generally—Rules of Practice: Appeals: Dismissal

An appeal will normally be dismissed as moot where, prior to the filing of a notice of appeal, the action being challenged has already occurred and there is no effective relief which can be afforded the appellant. While the Board will decline to dismiss an appeal for mootness where it involves issues which are "capable of repetition but evading review," this exception is not applicable where such recurrence would not be evasive of review.

APPEARANCES: Nancy Zierenberg, Tucson, Arizona, for Wildlife Damage Review; Kenneth S. Walker, Ely District Manager, Ely, Nevada, for the Bureau of Land Management

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Wildlife Damage Review (WDR) has appealed from a decision of the Egan Resource Area Manager, Nevada, Bureau of Land Management (BLM), dated June 19, 1991, approving aerial spraying for a grasshopper control project on various seedings located on the west bench of the Egan Range. ^{1/} Two of the seedings were within the South Egan Range Wilderness Study Area (WSA). The BLM decision concluded that the control project proposed by the Animal

^{1/} We note that, while the Ely District Manager asserted there were three seedings involved in his memorandum in response to the appeal, a review of the attachment to the notice to the public dated May 24, 1991, indicates that there were five seedings involved.

Plant Health Inspection Service (APHIS) would prevent destruction of grasses by insects both inside and outside the WSA but would not impact wilderness values due to the short duration of aircraft operation and the degradable nature of the insecticide (malathion) which would be used.

In the fall of 1990, APHIS conducted an inventory of adult grasshoppers in areas where concentrations of damaging insects had been found the previous year. The inventory identified potential problem areas to be checked in the spring of 1991. In January 1991, APHIS announced public meetings to discuss its program. These meetings were held in February in the county seat of each county in which an economic infestation was anticipated.

In May 1991, BLM prepared a supplement to the 1987 District-wide Grasshopper Control Environmental Assessment (EA NV-040-7-21). This supplement, which was tiered to the EA and the Regional Grasshopper and Mormon Cricket Environmental Impact Statement, which had been prepared by APHIS in 1987, analyzed the site specific situation of the potential problem areas while noting that the final location and timing of spraying was dependent on spring larval surveys. The supplement determined that the proposed action was in conformance with the Egan Resource Area Land Use Plan and was consistent with the White Pine County Policy Plan for Public Lands and further found that no known threatened and/or endangered plant or animal species was located within the proposed area. With respect to other resources, including social and economic values, the supplement referred to EA NV-040-7-21. The supplement noted that any action within the WSA would be in conformance with the interim management policy and that any action within the WSA would require a notification and comment period for those affected public interests as identified on the district mailing lists. On May 13, 1991, the area manager approved the supplement to the EA and signed a Record of Decision approving cooperation with APHIS with respect to the proposed spraying and also adopted a Finding of No Significant Impact.

The spring larval count, which was performed on May 21, 1991, indicated that there was a damaging population within the South Egan WSA. On May 24, 1991, BLM issued a "Dear Concerned Citizen" letter announcing its proposal to conduct a grasshopper control project on a series of seedings on the west bench of the Egan Range near Lund, Nevada. This letter noted that, over the past 3 years, the grasshopper population had increased on the seedings and that BLM proposed to treat them with a one-time aerial spraying of malathion at ultra low volume concentrations. The letter recognized that two of the seedings involved were located within a WSA but concluded that spraying within the WSA was necessary if the program was to be effective. Finally, the letter advised its recipients that any comments should be submitted by June 7, having previously noted that the spraying had to be completed by mid-June to be effective.

By letter dated June 5, 1991, and received by BLM on June 12, 1991, WDR objected to the use of poisons on public lands, particularly within a wilderness study area. BLM replied on June 19, 1991, describing the

seedings involved and reiterating the conclusion that the spraying was both necessary to prevent destruction of the seedings and would not be harmful to any wilderness values because of its limited duration and the degradability of the insecticide used. The letter concluded by noting that it was estimated that the spraying would be completed by June 21, 1991. Appellant received this letter on June 22, 1991, by which time the spraying had, in fact, been concluded. This appeal followed.

The Ely District Manager has requested that the appeal be dismissed since the action challenged has already occurred and there is no specific remedy available. Ordinarily, an appeal will be dismissed as moot where there is no effective relief the Board can give an appellant because the action appealed from has been completed. See, e.g., The Hopi Tribe v. OSM, 109 IBLA 374 (1989); The Sierra Club, 104 IBLA 17 (1988). Admittedly, this rule is not absolute and admits of one major exception. Thus, the Board will decline to dismiss an appeal on the basis of mootness if the issues raised are, in the words of the United States Supreme Court in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), "capable of repetition, yet evading review." See Predator Project, 127 IBLA 50 (1993); Headwaters, Inc., 116 IBLA 129 (1990). Under that limited exception, jurisdiction may be exercised over a matter which is otherwise moot if (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same challenging party will be subject to the same action again. As we have emphasized, however, the mere fact that an issue may be a recurring one does not preclude dismissal for mootness if future actions will be subject to review. See In Re Jamison Cover Fire Salvage Timber Sale, 114 IBLA 51, 53 (1990).

This is not a situation where dismissing the appeal as moot would avoid review of a recurring issue. Appellant objects to BLM's use of any poison in the WSA. If BLM should again determine to permit spraying within the WSA, it will, consistent with the Interim Management Policy and Guidelines for Lands under Wilderness Review (IMP), 44 FR 72014 (Dec. 12, 1979) as amended, 48 FR 31854 (July 12, 1983), again provide notice and opportunity to comment. While the comment period may necessarily be of short duration, the inclusion of appellant on the mailing list should provide ample opportunity for appellant both to note its objection and timely appeal should a denial of its protest be forthcoming. ^{2/} Therefore, since WDR's

^{2/} Thus, the actions of the Area Office in the instant appeal should be contrasted with the situation disclosed in Predator Project, supra. In that latter appeal, the District Office had failed to timely notify a party which had expressly apprised BLM of its desire to be kept informed of proposed animal damage control activities. It was, in part, to clarify appellant's right to participate in the decisional process that the Board declined to dismiss that appeal as moot. Id. at 54 n.3. In the instant case, it was not until the comment period provided by BLM had already passed that the Area Office was made aware of appellant's interest in the grasshopper control project.

appeal does not meet the evasion prong on the exception standards, we deem its appeal properly dismissed as moot.

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.

L. Burski

Administrative Judge

James

I concur.

Franklin D. Amess
Administrative Judge