

NEVADA OUTDOOR RECREATION ASSOCIATION

IBLA 2001-398

Decided January 22, 2003

Appeal of a recommendation to the Nevada State Office, Bureau of Land Management, to adjust the boundaries of an interim conveyance under the Nevada-Florida Land Exchange Authorization Act of 1988.

Appeal dismissed.

1. Appeals--Board of Land Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing

Standing to appeal requires that a party to the case be adversely affected by a decision of the authorized officer. 43 CFR 4.410(a). An appeal of a recommendation by the U.S. Fish and Wildlife Service to redefine the boundaries of an interim conveyance to enhance wildlife protection is properly dismissed in the absence of a decision by BLM to implement the recommendation.

2. Administrative Procedure: Generally--Appeals: Jurisdiction--Board of Land Appeals--Rules of Practice: Appeals: Generally

As an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over BLM except in the context of deciding an appeal over which the Board has jurisdiction. The Board will decline to render advisory opinions on questions not involved in a properly-filed appeal.

APPEARANCES: Charles S. Watson, Jr., Co-founder and Director, Nevada Outdoor Recreation Association, Carson City, Nevada; Amy L. Aufdemberge, Esq., Assistant Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Nevada Outdoor Recreation Association (NORA) has filed an appeal with the Board of Land Appeals asking the Board "to enjoin the [Nevada State Office, Bureau of Land Management (BLM)] from proceeding with the

exchange [involving Coyote Springs Investment, LLC] and other activities that are associated with promoting development at Coyote Springs Valley." Appellant NORA references an article appearing in the Las Vegas Review Journal on June 12, 2001, outlining a "land deal" involving 592.5 acres of public land in Clark County, Nevada. While a request for injunctive relief, by its nature, involves a stay, a stay request has also been noted by appellant.

At issue here are lands subject to the Nevada-Florida Land Exchange Authorization Act of 1988 (NFLEAA), P.L. No. 100-275, 102 Stat. 52. Under section 3 of this Act, the Department was directed to convey approximately 28,000 acres of public lands in Nevada to Aerojet-General Corporation (Aerojet) in exchange for receipt by the United States of title from Aerojet to certain lands in the area of the Florida Everglades. 102 Stat. 52-53. While the NFLEAA contained some conditions on post-exchange use of the lands designed to mitigate impacts to the environment and threatened or endangered species, it did not otherwise restrict the use of lands conveyed to Aerojet or restrict the right of Aerojet to assign its interest. In 1988, 19,422.57 acres were conveyed to Aerojet by patent. As some of the lands to be conveyed had not been surveyed, but only depicted on a map, approximately 9,633 acres were conveyed by Interim Conveyance pending survey, as provided by section 3(c) of NFLEAA. 102 Stat. 53. To date, these lands have not been surveyed and a final patent has not been issued. In addition, a tract of public lands located in the center of and surrounded by the conveyed lands was leased to Aerojet pursuant to section 4 of the Act, with the purpose of retaining control of development thereon in order to minimize adverse impacts to desert tortoises and other sensitive species of wildlife or plants. 102 Stat. 53-54.

In 1996 Aerojet sold and assigned its interests to Harrich Investments, LLC, which in turn sold and assigned those interests to Coyote Springs Investment LLC (CSI), a residential real estate development firm. Assignment of the lease to CSI was approved by BLM on September 17, 1998. When consulted by BLM and CSI regarding impacts of development of the private lands, the U.S. Fish and Wildlife Service (FWS) opined that the original configuration of the leased tract is unsuitable for the purpose of protecting the desert tortoise and that approximately 592 acres from the northern portion of the leased lands as depicted should be added to the lands to be conveyed while eliminating 592 acres of the southern section of lands designated for conveyance and adding these to the leased lands. This would amount to a slight shift in the location of the "island" of leased lands designed to protect desert tortoise habitat within the surrounding area of conveyed lands. There would be no loss in amount of lands leased or conveyed, but only a redefining of the boundaries.

Appellant is particularly concerned with the prospect that BLM may approve this revision of the description of the lands to be conveyed and leased, which it perceives to be designed to promote development of the conveyed lands by Aerojet's successor in interest, without consideration of the environmental impacts of such development. In this regard, NORA cites reports that the proposed boundary revision may be implemented under provisions of the NFLEAA which authorize correction of errors in land

descriptions 1/ without preparation of the environmental analysis that would be necessary to undertake an exchange under other statutory authority. 2/

In response, counsel for BLM acknowledges that BLM is currently considering a ministerial boundary adjustment proposal, but states BLM has not yet made a decision or taken any action. (BLM Motion to Dismiss and Answer to Stay Request at 2, 4.) Hence, BLM has moved to dismiss the appeal for lack of standing. Dismissal for lack of standing is also urged by BLM on the ground that NORA has no legally cognizable interest that is adversely affected by this matter. In support, BLM contends that an organizational interest in the public lands by itself is not sufficient. Id. at 5.

Appellant has filed a response to the motion to dismiss asserting that its members have used the public lands that were conveyed and leased to Aerojet. Conceding that no final appealable decision has been made by BLM in this matter, NORA urges the Board to order BLM to begin the NEPA process in this matter.

[1] The relevant Departmental appeals regulation confers standing to appeal upon a party to the case adversely affected by "a decision of an officer of the Bureau of Land Management." 43 CFR 4.410(a). While standards governing questions of standing to appeal administrative decisions are generally less restrictive than those applied to standing in the courts, the requirement that there be "a decision of an officer" before there can be an appeal is essential. Joe Trow, 119 IBLA 388, 392 (1991). The "decision" referred to by the regulation has been interpreted to mean that some action affecting individuals having interests in the public lands is either authorized or prohibited. Id., citing California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977) (finding that users of the California desert had standing to appeal closure of BLM lands to vehicular use); Colorado Open Space Council, 109 IBLA 274 (1989) (holding that organizations of recreational users protesting suspension of an oil and gas well drilling requirement lacked standing to appeal because the effect of BLM's suspension order on their rights as users of the public lands was too speculative). Generally, standing to appeal requires a BLM decision adjudicating the rights of the parties in a given factual context. Blackwood and Nichols, 139 IBLA 227, 229 (1997). When an adverse impact on a party is contingent upon some future occurrence, or where the adverse impact is

1/ Sec. 3(e) of the NFLEAA, 102 Stat. 53, authorizes subsequent correction of clerical and typographical errors in the legal descriptions.

2/ Sec. 10(b) of the NFLEAA contains an express finding by Congress that studies completed prior to passage of the Act have made sufficient information available to meet the requirements of the National Environmental Policy Act of 1969 (NEPA) and other relevant laws and sec. 10(c) barred judicial review of the "execution or consummation of any agreement, or the issuance of an interim conveyance, patent, or lease, pursuant to and in accordance with the provisions of this Act * * *." 102 Stat. 59-60.

merely hypothetical, it is premature for this Board to decide the matter. Blackwood and Nichols, supra; Phillips Petroleum Co., 109 IBLA 4, 15 (1989); Lone Star Steel Co., 77 IBLA 96, 97 (1983).

Thus, the existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). In the present case it does not appear that BLM has made a decision regarding the lands at issue. A recommendation by the FWS to redefine the boundaries of an interim conveyance to enhance wildlife protection is not an appealable decision as no action has been taken. Accordingly, an appeal of such a recommendation will be dismissed. Moreover, any public announcement outlining the proposal may not be appealed as no decision committing BLM to action is involved. In this case there has been no determination that authorizes or precludes action which will affect appellant's interests. Consequently, no decision adverse to NORA subject to appeal to this Board under 43 CFR 4.410(a) has been rendered. See Cities of Colorado Springs & Aurora, 77 IBLA 395 (1983). The appeal is therefore properly dismissed for lack of standing. 3/

[2] In its reply to BLM's motion to dismiss, NORA pointedly asks the Board to "instruct the BLM on the need for an [environmental impact statement] on any significant federal action involving the leased lands * * *." (Reply at 4.) The Board does not exercise supervisory authority over BLM except in the context of deciding an actual appeal case over which the Board has jurisdiction. State of Alaska, 85 IBLA 170, 172 (1985). Similarly, the Board does not render advisory opinions in hypothetical cases as we do not "deem it appropriate to ascertain and announce applicable legal principles, dependent as they are on the shape of specific factual contexts, before the facts have taken shape. Perhaps when and as the facts evolve, there will be no legal controversy of consequence." Id., citing Alton & Southern Railway Co. v. International Association of Machinists and Aerospace Workers, 463 F.2d 872, 882 (D.C. Cir. 1972). Accordingly, appellant's request must be denied.

We note that an objection to a course of action proposed to be undertaken is properly treated by BLM as a protest, rather than an appeal. See Kenneth W. Bosley, 99 IBLA 327, 332 (1987). Under 43 CFR 4.450-3, "any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." As we have stated on numerous occasions, a document which contains the word "appeal" may be a protest, and vice versa. Kenneth W. Bosley, 99 IBLA at 332, and cases cited. Thus, to the extent an appellant files a timely protest of a proposed action, jurisdiction to consider this protest would rest with BLM rather than with this Board. Remand to BLM to consider the instant "protest," however, would be premature here as the record does not

3/ In view of our finding herein, we need not address BLM's assertion that appellant has not demonstrated an interest in the public lands which would be affected by any potential decision in this matter.

show that BLM has yet proposed a course of action to be undertaken. Should BLM propose an exchange as suggested by FWS, appellant is not precluded from filing a protest. 4/

Therefore, 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 and the stay request is denied.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

4/ Standing to appeal from a protest decision still requires a showing that appellant's interests were adversely affected by the decision. A mere interest in the problem, no matter how qualified the appellant is in evaluating the problem, is not sufficient to establish standing in the absence of an adverse impact to a legally cognizable interest. Donald Pay, 85 IBLA 283, 285-86 (1985); Oregon Natural Resources Council, 78 IBLA 124, 125 (1983), quoting Sierra Club v. Morton, 405 U.S. 727 (1972).