



IN RE GRASSHOPPER AND CRICKET SUPPRESSION

179 IBLA 185

Decided May 14, 2010

Editors Note: Request to IBLA that decisions of the BLM be put into full force and effect. Jurisdiction assumed by the Director, OHA; request to put decisions into full force and effect granted, Dir 2010-0046, 40 OHA 202, May 14, 2010.



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

IN RE GRASSHOPPER AND CRICKET SUPPRESSION

IBLA 2010-128

Decided May 14, 2010

Request to the Interior Board of Land Appeals that decisions of the Bureau of Land Management be put into full force and effect.

Dismissed.

1. Director, Office of Hearings and Appeals: Generally--Administrative Authority: Generally

The Director, Office of Hearings and Appeals, may assume jurisdiction of any case before the Interior Board of Land Appeals pursuant to his delegated authority from the Secretary. 43 C.F.R. § 4.5(b). Requests to this Board that are the subject of the Director's assumption of jurisdiction are properly dismissed as moot.

2. Administrative Review: Generally--Rules of Practice: Generally--Rules of Practice: Full Force and Effect

The Board of Land Appeals has jurisdiction to grant or deny a request under 43 C.F.R. § 4.21(a)(1) to put a bureau decision into full force and effect, whether or not an appeal from the decision has been filed.

APPEARANCE: Danielle DiMauro, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE H. BARRY HOLT

On May 6, 2010, the Bureau of Land Management (BLM) filed with this Board a request that decisions of ten BLM Field Offices in Wyoming be put into full force and effect immediately, pursuant to 43 C.F.R. § 4.21(a)(1). No appeal has yet been filed from the BLM decisions. Because the Director, Office of Hearings and Appeals (OHA), has assumed jurisdiction of BLM's request and issued a decision, we dismiss this matter as moot.

[1] The Director, OHA, may assume jurisdiction of any case before this Board, pursuant to his delegated authority from the Secretary. 43 C.F.R. § 4.5(b); *see, e.g., Southern Utah Wilderness Alliance*, 122 IBLA 334, 337 n.1 (1992); *State of Alaska v. Thorson (On Reconsideration)*, 83 IBLA 237, 239, 91 I.D. 331, 333 (1984). In this case, the Director has assumed such jurisdiction and, as a result, we properly dismiss BLM's request as moot.

As for BLM's request, in *In re Putah Creek Resort Concession Agreement*, 17 OHA 104 (1999), OHA Director Robert Baum held that neither he nor an Ad Hoc Board of Appeals appointed under 43 C.F.R. § 4.1(b)(4) had jurisdiction to put a bureau decision into full force and effect, since no appeal of the decision had been filed. Director Baum's holding, which could be applied equally not only to requests to the Director but also requests to any of OHA's Appeals Boards, would result in our rejecting a request like that made by BLM in this case, for lack of jurisdiction. Under those circumstances, the current Director assumed jurisdiction of BLM's request under 43 C.F.R. § 4.5(b) to consider the issue in light of the *Putah Creek Resort* decision.

[2] The Director has now issued a final decision on BLM's request. In that decision, the Director concluded that *Putah Creek Resort* was wrongly decided on the issue of an Appeals Board's authority to put a bureau decision into full force and effect, and that under 43 C.F.R. § 4.21(a)(1) an Appeals Board may put a decision into full force and effect immediately, whether or not an appeal has been filed. *Grasshopper Suppression on Lands Administered by the Bureau of Land Management in Wyoming*, 40 OHA 202 (2010). That decision makes it clear that this Board has jurisdiction to address agency requests under 43 C.F.R. § 4.21(a)(1).

As the Director has assumed jurisdiction over and issued a decision on BLM's request, this matter must be dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's request is dismissed as moot.

\_\_\_\_\_  
/s/  
H. Barry Holt  
Chief Administrative Judge

I concur:

\_\_\_\_\_  
/s/  
James F. Roberts  
Administrative Judge



United States Department of the Interior  
Office of Hearings and Appeals  
Office of the Director  
801 N. Quincy St., Suite 300  
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GRASSHOPPER SUPPRESSION ON LANDS ADMINISTERED BY  
THE BUREAU OF LAND MANAGEMENT IN WYOMING

DIR-2010-0046

Decided May 14, 2010

Request to the Interior Board of Land Appeals (docketed as IBLA-2010-128) that decisions of the Bureau of Land Management be put into full force and effect.

Jurisdiction of IBLA-2010-128 assumed by the Director, Office of Hearings and Appeals; request to put decisions into full force and effect granted.

1. Administrative Review: Generally—Rules of Practice: Appeals: Jurisdiction—Rules of Practice: Full Force and Effect

The Director or an Appeals Board has jurisdiction to grant or deny a request under 43 C.F.R. § 4.21(a)(1) to put a bureau decision into full force and effect, whether or not an appeal from the decision has been filed.

2. Public Lands: Generally

Where the Bureau of Land Management demonstrates that immediate implementation of its grasshopper suppression program on public lands in Wyoming is needed to avert serious environmental and economic harm, its decisions authorizing aerial and ground spraying of pesticides will be put into full force and effect.

APPEARANCE: Danielle DiMauro, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY DIRECTOR ROBERT S. MORE

On May 6, 2010, the Bureau of Land Management (BLM) filed with the Interior Board of Land Appeals (IBLA) a request that decisions of ten BLM Field Offices in Wyoming be put into full force and effect immediately, pursuant to 43 C.F.R. § 4.21(a)(1). Those ten decisions approved the use of insect growth

regulator and other pesticides, subject to mitigation measures, for the control of grasshoppers on public lands.<sup>1/</sup>

No party has filed an appeal to IBLA from BLM's decisions. In *In re Putah Creek Resort Concession Agreement*, 17 OHA 104 (1999), Office of Hearings and Appeals (OHA) Director Robert Baum held that neither he nor an Ad Hoc Board of Appeals appointed under 43 C.F.R. § 4.1(b)(4) had jurisdiction to put a bureau decision into full force and effect, since no appeal of the decision had been filed. Director Baum's holding in that case would apply equally to BLM's request in this case, such that IBLA would have no jurisdiction to grant the request. I have therefore assumed jurisdiction of BLM's request under 43 C.F.R. § 4.5(b) to consider the issue in light of the *Putah Creek Resort* decision.

For the reasons explained below, I conclude that *Putah Creek Resort* was wrongly decided on this point and should be overruled in part. I further conclude that the public interest requires that BLM's request be granted.

- A. *The Director or an Appeals Board has jurisdiction to put a bureau decision into full force and effect, whether or not an appeal from the decision has been filed.*

According to § 4.21(a)(1), "A decision will not be effective during the time in which a person adversely affected may file a notice of appeal; when the public interest requires, however, the Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effective immediately."

In *Putah Creek Resort*, the Bureau of Reclamation (BOR) filed a motion "to put its proposed decision to terminate the Putah Creek concession agreement . . . into full force and effect on the date that decision is issued." 17 OHA at 107. Director Baum denied BOR's motion on two grounds:

First, pursuant to 43 C.F.R. § 4.21, the Director can only order that a *decision* be put into full force and effect ("the Director or an Appeals Board may provide that a *decision*, or any part of a decision, shall be in full force and effective immediately") (emphasis added). Since BOR has not issued a decision, its motion to put its future decision into full force and effect is not ripe. Second, pursuant to 43 C.F.R. § 4.1(b)(4),

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<sup>1/</sup> The ten BLM decisions are April 30, and May 3, 2010, Decision Records and Findings of No Significant Impact issued by the Buffalo, Casper, Cody, Kemmerer, Lander, Newcastle, Pinedale, Rawlins, Rock Springs, and Worland Field Offices. They were all based on an April 30, 2010, Environmental Assessment (EA), WY-030-EA10-239, which was prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006). In its request and EA, BLM uses the term "grasshoppers" to refer both to grasshoppers and Mormon crickets.

the Director's office of OHA only has jurisdiction to review matters in which an appeal is pending ("Appeals . . . may be considered and ruled upon by the Director or by Ad Hoc Boards of Appeals appointed by the Director"). Since no appeal has been filed in this case, this office does not have jurisdiction to entertain BOR's motion.

17 OHA at 106 (emphasis in original). I agree with the first of these holdings, but not the second.

Director Baum correctly noted that § 4.1(b)(4) deals with appeals. It provides,

Appeals to the head of the Department which do not lie within the appellate review jurisdiction of an established Appeals Board and which are not specifically excepted in the general delegation of authority to the Director may be considered and ruled upon by the Director or by Ad Hoc Boards of Appeals appointed by the Director to consider the particular appeals and to issue decisions thereon, deciding finally for the Department all questions of fact and law necessary for the complete adjudication of the issues.

Likewise, § 4.1(b)(3) deals with appellate review by IBLA ("The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials . . .").

But OHA's jurisdiction is not limited to deciding appeals. According to § 4.1,

The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, *matters* within the jurisdiction of the Department involving hearings, and appeals *and other review functions* of the Secretary.

(Emphasis added.)

[1] As quoted above, § 4.21(a)(1) authorizes the Director or an Appeals Board to put a bureau decision into full force and effect, including during the period allowed for filing a notice of appeal. That period would logically include the time before anyone actually files a notice of appeal. A bureau request that its decision be put into full force and effect, if submitted before any notice of appeal has been filed, would qualify as a "matter within the jurisdiction of the Department involving . . . other review functions of the Secretary" under § 4.1. Thus, the Director or an Appeals Board would have jurisdiction to grant or deny the request, even if no appeal has been filed.

Under Director Baum's interpretation of the regulations, if a bureau needs to implement a decision immediately—as BLM asserts is true in this case—it may

nevertheless have to wait to submit a request under § 4.21(a)(1) until the entire period for filing an appeal has elapsed, if no one files an appeal before the deadline. At that point, of course, the bureau decision would take effect anyway. Thus, the full-force-and-effect provision in § 4.21(a)(1) would be useful only in cases where a party filed a notice of appeal significantly in advance of the appeal deadline. It is unlikely that the Secretary intended the provision to have so limited a scope.

In fact, in several prior cases, the Secretary has directed IBLA by memorandum to put bureau decisions into full force and effect under § 4.21(a)(1), even where no appeal was pending.<sup>2/</sup>

I conclude, therefore, that the OHA Director or an Appeals Board has jurisdiction to consider a request that a bureau decision be put into full force and effect under § 4.21(a)(1), whether or not an appeal of the decision has been filed. Director Baum's decision in *In re Putah Creek Resort Concession Agreement*, 17 OHA 104 (1999), is overruled to the extent it holds otherwise.

*B. The public interest requires that BLM's decisions to implement a grasshopper suppression program on public lands in Wyoming be put into full force and effect.*

According to BLM's May 6 request,

The enclosed decisions reflect the BLM's determination that emergency grasshopper and Mormon cricket suppression activities are needed on BLM lands in Wyoming. As explained in the Background section of the enclosed Environmental Assessment ("EA"), recent survey information indicates that in 2010, populations of these species are likely to exceed the "economic threshold" ("ET") level at which the cost of damage caused by the infestation exceeds the cost of treatment. The BLM estimates that 6.7 percent (1.2 million acres) of the approximately 18 million acres of BLM-administered lands in Wyoming are currently threatened at an ET level by the predicted infestation of grasshoppers and Mormon crickets.

As further detailed in the EA, grasshoppers in high densities can severely reduce the forage value and ecological conditions of rangeland. Grasshopper feeding causes direct damage to plants' growth and seed production, thus reducing valuable forage for wildlife and livestock. Other indirect effects of severe grasshopper infestations include soil erosion and degradation, disruption of nutrient cycles, increased risk of

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<sup>2/</sup> *E.g., Friends of the Bow*, IBLA 94-373, 94-395 (Apr. 29, 1994); *In re BLM Animal Damage Control Decision for the District of Casper, Wyoming*, IBLA 94-000 (Apr. 1, 1994); *In re BLM Animal Damage Control Decisions in Rock Springs and Rawlins, Wyoming*, IBLA 94-000 (Mar. 16, 1994).

weedy plant invasion or proliferation, interference with water infiltration, and potential changes in the flora and fauna of the rangeland ecosystem.

Request at 1-2. The request goes on to describe the serious economic harm that could result if the threatened infestation occurs, including impacts on private rangeland and cropland adjacent to the public lands.

BLM further notes,

Grasshopper suppression programs are most effective when implemented in May and June, when the earliest grasshoppers hatch. During those months, insect growth regulator pesticides may be used to disrupt the growth of immature grasshoppers. Growth regulator pesticides are ecologically safer and more economical than pesticides that target adult grasshoppers.

Request at 1.

Based on these representations and the supporting material, I conclude that the public interest requires that BLM's decisions be put into full force and effect immediately.

Therefore, pursuant to the authority delegated to the Director, Office of Hearings and Appeals, by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's request is granted, and the April 30 and May 3, 2010, decisions of the Wyoming BLM Field Offices approving the use of pesticides for the control of grasshoppers on public lands are in full force and effect. The decisions will remain in full force and effect until IBLA takes final action on any petition for a stay or appeal that may be filed.

\_\_\_\_\_/s/\_\_\_\_\_  
Robert S. More  
Director