



WESTERN WATERSHEDS PROJECT v. BUREAU OF LAND MANAGEMENT

182 IBLA 1

Decided January 24, 2012



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

WESTERN WATERSHEDS PROJECT
v.
BUREAU OF LAND MANAGEMENT

IBLA 2011-114

Decided January 24, 2012

Interlocutory appeal from an order of Administrative Law Judge James H. Heffernan denying a motion to dismiss an appeal of a grazing decision. WYR-01-2009-1.

Request to file interlocutory appeal granted; order denying motion to dismiss affirmed.

1. Administrative Appeals--Administrative Procedure:
Administrative Law Judges--Administrative Procedure:
Generally--Rules of Practice: Appeals: Generally

Under 43 C.F.R. § 4.28, an interlocutory appeal from a ruling by an administrative law judge may be filed if the Board grants permission and the administrative law judge certifies the interlocutory ruling for appeal or abuses his discretion in denying certification. Permission to file an interlocutory appeal is properly granted where the ruling involves a controlling question of law such as jurisdiction and an immediate appeal therefrom may materially advance the final decision.

2. Administrative Procedure: Standing--Appeals: Standing--Grazing Leases: Generally--Grazing Permits and Licenses: Appeals--Rules of Practice: Standing to Appeal

Under 43 C.F.R. § 4.470(a), any person “whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge.” A person will be deemed to be adversely affected if that person can demonstrate an injury in fact to a cognizable

legal interest. Such interests include aesthetic and recreational values.

3. Administrative Procedure: Standing--Appeals: Standing--Grazing Leases: Generally--Grazing Permits and Licenses: Appeals--Rules of Practice: Standing to Appeal

An assertion of standing based upon a single visit in the past to an area affected by a BLM decision with only a vague intention to return does not establish use sufficient to provide a basis for finding injury in determining whether an appellant has standing to appeal that decision. However, repeated recreational use accompanied by a credible allegation of desired future use can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person.

4. Administrative Procedure: Standing--Appeals: Standing--Grazing Leases: Generally--Grazing Permits and Licenses: Appeals--Rules of Practice: Standing to Appeal

A legally cognizable interest must exist as of the time of issuance of the decision being appealed in order to have standing to appeal. Thus, when an appellant asserts use of the land in question in support of its standing to appeal, the asserted use must have taken place on or before the date of issuance of the decision being appealed. Evidence of use taking place after that date does not support a claim of standing to appeal that decision.

5. Administrative Procedure: Standing--Appeals: Standing--Grazing Leases: Generally--Grazing Permits and Licenses: Appeals--Rules of Practice: Standing to Appeal

Where land outside a grazing allotment is perceptibly affected by grazing within an allotment, an appellant who uses that land may be adversely affected even if he does not intend to use land within the allotment.

APPEARANCES: Jonathan B. Ratner, Director, Wyoming Office, Western Watersheds Project, Pinedale, Wyoming, for appellant; John S. Retrum, Esq., Office of the

Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Bureau of Land Management (BLM) has filed an interlocutory appeal of a March 2, 2011, order by Administrative Law Judge (ALJ) James H. Heffernan denying BLM's motion to dismiss an appeal by Western Watersheds Project (WWP) of a BLM grazing decision. BLM contended that WWP had failed to demonstrate that any member of that organization was "adversely affected" within the meaning of 43 C.F.R. § 4.470(a), which provides that any person "whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge."

[1] The regulation governing interlocutory appeals in a case such as this, 43 C.F.R. § 4.28, provides that an interlocutory appeal from a ruling by an ALJ may be filed if this Board grants permission and the ALJ certifies the interlocutory ruling for appeal or abuses his discretion in denying certification. In either case, we will not permit the interlocutory appeal unless a showing is made that the ruling involves "a controlling question of law and that an immediate appeal therefrom may materially advance the final decision." *Id.* By order dated March 7, 2011, Judge Heffernan granted BLM's motion for certification of his ruling, finding that it presented a controlling question of law (jurisdiction) and its resolution could materially advance the final decision, because, if his order were reversed, WWP's appeal would be dismissed. *See Western Watersheds Project v. BLM*, 164 IBLA 300, 304-05 (2005). We agree. Accordingly, we grant BLM's request to file this interlocutory appeal.

Background

On March 30, 2009, WWP filed an appeal with Judge Heffernan from the final decision of BLM's Worland Field Office to combine the Snyder and Tatman Mountain Common allotments into one allotment to be known as the Tatman Mountain Common allotment (Allotment) and to transfer and issue 10-year grazing permits for the new Allotment. The decision also delayed the start of the grazing season to reduce impact during the forage growing season and incorporate a forage utilization stipulation in the permits. WWP filed a motion for summary judgment that was denied by order dated February 19, 2010.

Judge Heffernan commenced a hearing on December 7, 2010, which he recessed on December 9 for the parties to conduct discovery. BLM served a set of interrogatories that, *inter alia*, sought information about the basis of WWP's standing to appeal, inasmuch as WWP had asserted in its Statement of Reasons (SOR) that its members and staff regularly visit the Allotment for various activities and intend to

continue doing so. Specifically, BLM asked WWP to identify its members who had visited the Allotment before April 19, 2009, when WWP filed its SOR.

Jonathan B. Ratner, the Director of WWP's Wyoming Office, responded to BLM's interrogatories, stating that he had visited the Allotment "approximately" during the summer of 2005 and that another WWP employee, Sean Sheehan, had visited the Allotment on March 28, 2009. BLM filed its motion to dismiss WWP's appeal for lack of standing on February 28, 2011, citing our decision in *Center for Tribal Water Advocacy v. BLM*, 173 IBLA 165, 171-72 (2007) (*CTWA*), where we recognized that one visit in the past and another visit after issuance of the decision under appeal were insufficient to show that a person had used the land in a manner that could be "adversely affected" by a BLM grazing decision as required by 43 C.F.R. § 4.470(a).

WWP's response to BLM's motion to dismiss included a declaration by Ratner in which he again referred to his 2005 visit to the Allotment. Declaration, ¶ 8. He points out that the Allotment drains into the Greybull River on the north and 15 Mile Creek, a tributary of the Bighorn River, on the south. Declaration, ¶ 11. He states that he has visited those watersheds on numerous occasions (estimated at "well over a dozen") between 2005 and May 2010 for camping, hiking, wildlife observation, and soil and vegetation condition observations. Declaration, ¶¶ 12-13. He refers to excessive erosion within the Allotment and in watersheds below it, and attributes the degraded conditions within the Allotment and downstream areas to improper management of grazing in the Allotment. Declaration, ¶¶ 14-15. He states an intention to continue visiting the Allotment and surrounding areas. Declaration, ¶ 18.

Judge Heffernan's Decision

Judge Heffernan referred to the Supreme Court's decisions in *Summers v. Earth Island Inst.*, 555 U.S. 488, 495-97 (2009), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992), which held that indefinite intentions to return to land in the future do not provide sufficient support for a finding of injury on which to base standing. However, Judge Heffernan found that during the course of the hearing, Ratner had introduced evidence that "reflect[s] a commitment by Mr. Ratner and WWP to conduct ongoing, post-decisional surveillance and monitoring" of the Allotment sufficient to establish standing. Decision at 2. He also based his decision on Ratner's "averred visits to the adjacent watersheds in the immediate vicinity of the allotments." Decision at 3.

BLM's Interlocutory Appeal

In its appeal, BLM points to various statements from WWP on its standing to bring the appeal that BLM views as inconsistent. First, BLM points to WWP's SOR in which WWP asserted that its members and staff regularly visit the land within the Allotment and intend to continue doing so for educational, recreational, spiritual, and scientific activities, including watching wildlife. BLM Request at 3 (quoting SOR at 1). In BLM's interrogatories, BLM asked WWP to identify each member who had visited the allotments prior to the filing of the SOR, the date and time of the visits, the precise area visited, and the purpose of the visit. BLM Request at 3-4. As noted above, Ratner responded by stating that he had visited the southern end of the Allotment in the summer of 2005 and that another WWP employee had visited the Allotment on March 28, 2009, a date that BLM points out was after issuance of the BLM decision under appeal. Finally, BLM points to Ratner's declaration in response to BLM's motion to dismiss in which Ratner refers to his visit to the Allotment and watersheds affected by BLM's management of it. BLM Request at 10, 12.¹

BLM faults Judge Heffernan for overlooking the inconsistencies in Ratner's positions and relying on his response to the interrogatories and his declaration even though the allegations in the SOR "have not been withdrawn." BLM Request at 11-12. In any event, BLM argues that Judge Heffernan's decision is based on facts that do not support his conclusion that WWP is "adversely affected" as required by 43 C.F.R. § 4.470(a), citing our decision in *CTWA* and other cases. *Id.*

Analysis

1. *The Inconsistencies in WWP's Responses on Standing*

The conduct of the parties in this appeal reminds us that arguments over standing often appear as lawyers' games of artful pleading, with organizations providing as little information as possible with the hope of obtaining precedents that would establish low thresholds for standing. *E.g., Sierra Club v. Morton*, 405 U.S. 727 (1972). Nevertheless, "[a]dministrative proceedings . . . are not games for lawyers." *Sun Oil Co. v. Federal Power Commission*, 445 F.2d 764, 774 (D.C. Cir. 1971). WWP's piecemeal responses effectively treat the issue of standing as a procedural striptease in which WWP would only gradually bare the extent of its members' exposure to the adverse effects of BLM's proposed action. Even in responding to BLM's motion to dismiss, WWP asked to be allowed to continue its performance if Judge Heffernan found that it had not bared enough: "[W]e request that we be allowed to submit declarations by other members prior to an order being issued." Response at 3.

¹ Although BLM states that the watersheds are "unidentified," BLM Request at 12, Ratner specifically identified them in his Declaration at ¶ 11. *See supra*.

Inasmuch as any appellant should be able to identify how it is adversely affected under 43 C.F.R. § 4.470(a) *before* a notice of appeal can be filed in good faith, we find it troublesome that the basis is shifting two years after BLM issued the proposed decision leading to this appeal.

On the other hand, we must resist BLM's invitation "to create a 'gotcha' trap whereby parties who reasonably think their standing is self-evident nonetheless may have their cases summarily dismissed if they fail to document fully their standing at the earliest possible stage in the litigation." *American Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005). It is not unusual for organizations like WWP to file appeals in which they state that members use the area affected by a BLM decision but only undertake the burden of seeking affidavits from members after their standing is challenged. *E.g., Western Slope Environmental Resource Council*, 163 IBLA 262, 267 (2004). Nevertheless, Board adjudications require that such organizations file affidavits of its members to "provide as much specific evidence as possible about what interests are allegedly injured and what the connections are between those interests and the decision it seeks to appeal." *Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 88 (2005). This is beneficial to the organization because "it is not our responsibility to speculate how an appellant is adversely affected, and we will dismiss an appeal rather than engage in such speculation." *Mark S. Altman*, 93 IBLA 265, 266 (1986)." *Id.*

When BLM's interrogatory requested Ratner to identify WWP members who had used the Allotment, Ratner responded by referring to his 2005 visit and his post-decisional visit. Rather than construe this as an admission that his initial pleading was not accurate, we conclude that Ratner did not seek out members as a result of his belief that his declaration would be sufficient. When confronted with BLM's motion to dismiss, Ratner submitted his declaration that provided added information about his use of watersheds outside the Allotment that would be adversely affected by BLM's management within the Allotment. Although BLM regards this declaration as inconsistent with his response to the interrogatories, BLM only asked about use of land within the Allotment; BLM did not ask about any WWP member's use of adjacent areas where adverse effects could also be experienced. We will not fault Ratner for not providing answers to questions that BLM did not ask. Although BLM would have us focus exclusively on Ratner's answer to BLM's interrogatories, Judge Heffernan properly looked to the whole record to provide a basis for his decision. Decision at 1; *see* 5 U.S.C. § 556(d) (2006).

2. *Whether WWP is Adversely Affected*

[2] Under 43 C.F.R. § 4.470(a), any person "whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative

law judge.”² A person will be deemed to be adversely affected if he can demonstrate an injury in fact to a cognizable legal interest. *Theodore Roosevelt Conservation Partnership*, 178 IBLA 201, 206-07 (2009). Such interests include aesthetic and recreational values: “[A]dversely affect[ing] the scenery, natural and historic objects and wildlife . . . may amount to an ‘injury in fact’ sufficient to lay the basis for standing.” *Sierra Club v. Morton*, 405 U.S. at 734. Appellants “adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club*, 405 U.S. at 735); see *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000).

Although we cite Federal court opinions, we are mindful that judicial standing and administrative standing do not turn on the same considerations because an administrative adjudication is not an Article III proceeding to which either the “case or controversy” or prudential standing requirements apply. See *Koniag, Inc. v. Andrus*, 580 F.2d 601, 611-17 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied*, 439 U.S. 1052 (1978). “[A]dministrative standing is more properly determined by an analysis embracing ‘the nature of the asserted interest, the relationship of his interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions.’” *In re Pacific Coast Molybdenum*, 68 IBLA 325, 331-32 (1982) (quoting *Koniag*, 580 F.2d at 615 (Bazelon, J., concurring)).

Nevertheless, despite the theoretical distinctions between administrative and judicial standing, the differences as a practical matter are difficult to discern.³ Both focus on the injury to an interest because the courts must find a “case or controversy” and agencies must ensure due process in adjudications, which involves balancing “the private interest that will be affected by the official action” and “the Government’s interest, including the function involved and the fiscal and administrative burdens that [an] additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). The Department’s choice to limit the right of appeal to those who are “adversely affected” satisfies the requirements of due process and serves the interest in administrative economy by avoiding costly adjudications in circumstances where no one has shown actual harm.

² In order to bring an appeal to this Board, one must likewise be “adversely affected,” but must also be a “party to a case.” See 43 C.F.R. § 4.410(a); *Western Watersheds Project v. BLM*, 164 IBLA at 302.

³ See *Swanson-Superior Forest Products, Inc.*, 127 IBLA 379, 387-88 (1993) (Burski, A.J., concurring), lead opinion clarified in *National Wildlife Federation v. BLM*, 129 IBLA 124, 127-28 (1994).

Accordingly, in considering whether an appellant is adversely affected, we have been guided by court decisions discussing whether a plaintiff has demonstrated an “injury in fact.” *See, e.g., Theodore Roosevelt Conservation Partnership*, 178 IBLA at 204-05. Similarly, cases deciding whether a plaintiff has demonstrated that he is “adversely affected,” as required by 5 U.S.C. § 702 (2006), provide guidance in deciding whether an appellant is “adversely affected” under 43 C.F.R. §§ 4.410(a) and 4.470(a). *Oregon Natural Resources Council*, 78 IBLA 124, 125 n.1 (1983).⁴

[3] A single visit in the past with only a vague intention to return does not establish use sufficient to provide a basis for finding injury. *Lujan v. Defenders of Wildlife*, 504 U.S. at 563-64. However, “[r]epeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person.” *Ecological Rights Found.*, 230 F.3d at 1149; *see also Reed v. Salazar*, 744 F. Supp. 2d 98, 114 (D.D.C. 2010). As one court recently explained:

[U]nless there is evidence of repetitious use of each of the specific lands in question, there cannot be a “credible allegation of desired future use” without specific concrete plans, and as such, no immediacy of harm. And as a plaintiff shows that he or she has more regularly relied upon or visited a specific environmental site, his or her stated intent to do so in the future is less speculative, and the probability of injury more concrete and imminent.

Southern Utah Wilderness Alliance v. Sierra, 2010 WL 4782976 at *6 (D. Utah, Nov. 16, 2010). In *Wildearth Guardians v. Salazar*, 2011 WL 5826554 at *6 (D. Colo. Nov. 18, 2011), the court held that an organization lacked standing to bring a suit, holding that its declarant’s “history of usage does not establish a repeated, habitual pattern of visits,” and that the declarant failed to “specifically plead concrete plans to return to the area.”

⁴ *But see Laser, Inc.*, 136 IBLA 271, 273-74 (1996); *Animal Protection Institute*, 117 IBLA 208, 209 (1990). In those cases, the Board states that standing to appeal to the Board is not governed by cases construing 5 U.S.C. § 702 because that statute requires a plaintiff to show that he is “adversely affected *within the meaning of the relevant statute*” and the courts impose a “zone of interest” test in addition to the requirement that a plaintiff show an injury. But even if we are not guided by the courts’ application of the “zone of interest” test, court decisions applying 5 U.S.C. § 702 still provide analogous authority in deciding whether an interest is “adversely affected.”

[4] In this case, the only use of land within the Allotment demonstrated by a member of WWP prior to the issuance of the decision was Ratner's 2005 visit, which cannot provide credible support for any intention of future use as of the time BLM issued its decision. Appellants who had no clear intention to visit a site cannot "manufacture standing" by visiting a site after a decision has been issued for the purposes of litigation. *See Center for Native Ecosystems*, 163 IBLA 86, 90 (2004). In that case, we stated:

A legally cognizable interest must exist as of the time of issuance of the decision being appealed in order to have standing to appeal under 43 CFR 4.410(a). Thus, when an appellant asserts use of the land in question in support of its standing to appeal, the asserted use must have taken place on or before the date of issuance of the decision being appealed. Evidence of use taking place after that date does not support a claim of standing to appeal that decision.

Id. Thus, Judge Heffernan improperly considered Ratner's post decision visits as evidence of an intent to return. If the "affected area" were limited to the boundaries of the Allotment in question, we would agree with BLM that WWP has failed to establish that it is adversely affected on the basis of Ratner's single visit in 2005 and visits subsequent to the issuance of BLM's decision in connection with this litigation. *See CTWA*, 173 IBLA at 171-72; *Center for Native Ecosystems*, 163 IBLA at 90.

[5] Although adverse effect "may be shown through evidence of use of the land in question," *Wyoming Outdoor Council*, 153 IBLA 379, 384 (2000), the Department has recognized that "an interest in resources affected by a decision may be [a] legally cognizable [interest]." 68 Fed. Reg. 33794 (June 5, 2003). Accordingly, this Board has concluded: "[O]ne may also establish he or she is adversely affected by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests." *Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 84 (2005).

In *Defenders of Wildlife*, 504 U.S. at 565, the Supreme Court rejected an "ecosystem nexus" approach that would grant standing to "any person who uses any part of a 'contiguous ecosystem' adversely affected by a funded activity . . . even if the activity is located a great distance away." It emphasized, however, that it was rejecting standing for "persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question." *Id.* at 566. In *Southwest Center for Biological Diversity v. United States Forest Service*, 82 F. Supp. 2d 1070, 1076-77 (D. Ariz. 2000), the court recognized that *Defenders of Wildlife* does not apply in cases where land outside a grazing allotment is "perceptibly affected" by grazing within an allotment. Thus, if adverse effects would extend beyond the boundaries of the

allotment, an appellant may be adversely affected even if he does not intend to use land within the allotment.

In *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 450-51 (10th Cir. 1996), the court recognized that residents in the watershed of a ski area who lived 12 to 15 miles downstream could be adversely affected by the management of the ski area. In *Western Land Exchange Project v. United States*, 315 F. Supp. 2d 1068, 1078-79 (D. Nev. 2004), the court found that a plaintiff and her organization had standing even though the areas she visited were 30 miles away from the lands BLM proposed to sell because the development of those lands could affect hydrology throughout the region, including the seeps and springs on lands visited by the plaintiff.⁵

Although Judge Heffernan may have improperly relied on Ratner's visits to the Allotment that occurred after BLM issued its decision in determining whether WWP was adversely affected, he properly relied on Ratner's declaration submitted in response to BLM's motion to dismiss where he refers to repeated visits to watersheds downstream from the Allotment that are affected by BLM's management of the Allotment. Accordingly, we conclude that he properly denied BLM's motion to dismiss the appeal.

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 petition to file this interlocutory appeal is granted, and the decision appealed from is affirmed.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge

⁵ This Board denied BLM's motion to dismiss an administrative appeal of the same organization involving the same land sale. *Western Land Exchange Project*, IBLA 2002-7 (Feb. 14, 2002).