



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

703-235-3750

703-235-8349 (fax)

November 2, 2021

IBLA 2021-236)	DOI-BLM-CO-N050-2020-0056-EA
IBLA 2021-237)	
IBLA 2021-238)	Wild Horses and Burros
)	
CAROLYN CONTI)	
DERRICK BRETТА)	Motion to Consolidate Denied;
LISA NERIO)	Motion to Dismiss Granted

ORDER

Carolyn Conti, Derrick Bretta, and Lisa Nerio have separately appealed from a Decision issued by the White River Field Office of the Bureau of Land Management (BLM) in Colorado. The Decision approved the Piceance-East Douglas Herd Management Area Gather and Fertility Control Plan, “which is a 10-year plan to use BLM-approved methods to gather and remove excess wild horses within the [management area] and to use non-permanent fertility treatments to reduce the population growth rate of those wild horses remaining” within the Piceance-East Douglas Herd Management Area (PEDHMA).¹

Each of the Appellants has objected to the PEDHMA Plan by timely filing an appeal.² However, none of them participated in the decision-making process leading up

¹ Decision Record for the Piceance-East Douglas Herd Management Area Gather and Fertility Control Plan at 2 (Feb. 22, 2021)

https://eplanning.blm.gov/public_projects/2003177/200391671/20035176/250041373/doiblmcoN05020200056ea_DR_signed.pdf (last visited Nov. 2, 2021). The Decision and related supporting documentation are found at <https://eplanning.blm.gov/eplanning-ui/project/2003177/570> (last visited Nov. 2, 2021).

² Carolyn Conti Notice of Appeal (NOA) in IBLA 2021-236 (filed with BLM on Mar. 29, 2021) (her filing met the requirements of our grace period regulation found at

to the Decision. BLM has filed a motion to dismiss each of the appeals for lack of standing because of their lack of prior participation.³ BLM has also moved to consolidate the appeals.⁴ None of the Appellants has responded to either motion.

Because we must examine each Appellant’s standing individually, we decline to formally consolidate the appeals. Nonetheless, because all the Appellants challenge the same Decision and each has the same type of standing problem, we address the three appeals together in this Order for administrative efficiency.

As discussed below, the Board only has jurisdiction to adjudicate an appeal if the appellant has standing to bring the appeal. Under our regulations, an appellant lacks standing if they did not participate in the administrative process leading to the decision under appeal. Here, none of the Appellants provided comments to BLM on the environmental document BLM prepared to inform its decision or otherwise participated in the development of the PEDHMA Plan. Accordingly, each of them lacks standing to bring an appeal, and we dismiss all three appeals.

BACKGROUND

Under the Wild Free-Roaming Horses and Burros Act (the Act),⁵ BLM, as the delegate of the Secretary of the Interior, is responsible for protecting and managing wild horses on public lands.⁶ Specifically, BLM is to manage wild horses “in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.”⁷ Among other duties, the Act requires BLM to maintain “a current inventory” of wild horses “on given areas of the public lands.”⁸ The purpose of this inventory is to determine: (a) “whether and where an overpopulation [of wild horses] exists and whether action should be taken to remove excess animals”; (b) the “appropriate

43 C.F.R. § 4.401(a) (2020)); Derrick Bretta NOA in IBLA 2021-237 (filed with BLM on Mar. 23, 2021); Lisa Nerio NOA in IBLA 2021-238 (filed with BLM on Mar. 23, 2021).

³ BLM Motion to Dismiss (filed May 4, 2021) (MTD).

⁴ BLM Motion to Consolidate (filed May 10, 2021).

⁵ 16 U.S.C. §§ 1331-1340. All citations to the United States Code are to the current (2018) edition.

⁶ *Front Range Equine Rescue*, 187 IBLA 269, 270 (2016); *David Glynn*, 182 IBLA 70, 76 (2012).

⁷ 16 U.S.C. § 1333(a); see *David Glynn*, 182 IBLA at 76.

⁸ 16 U.S.C. § 1333(b)(1).

management levels” (AML) of wild horses; and (c) whether AML “should be achieved by the removal or destruction of excess animals” or through other means, such as “sterilization, or natural controls on population levels.”⁹ When a wild horse population exceeds AML, removal of excess horses may be necessary.¹⁰

With respect to the PEDHMA, BLM set the AML through its planning process as a range between 135 to 235 horses.¹¹ Based on a 2016 aerial inventory showing that there were 337 wild horses within the PEDHMA, BLM estimated that the population exceeded over 830 wild horses by the fall of 2020.¹² BLM determined that an excess of wild horses existed within the PEDHMA and began development of a 10-year plan to reduce the wild horse population to the AML and maintain it at that level.¹³

As part of its decision-making process, BLM prepared an Environmental Assessment (EA) to analyze the environmental impacts of two action alternatives (gathering wild horses with and without accompanying fertility treatments) and the no-action alternative.¹⁴ On November 23, 2020, BLM released its draft EA and unsigned Finding of No Significant Impact (FONSI), and it opened a one-month comment period that ended on December 23, 2020.¹⁵ BLM received and responded to 15 public

⁹ *Id.*

¹⁰ *Id.* § 1333(b)(2) (“Where the Secretary determines . . . that an overpopulation exists . . . and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve [AML].”); *see also id.* § 1332(f) (defining “excess animals” as those which “must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area”).

¹¹ Decision at 1.

¹² Finding of No Significant Impact (FONSI) at 1 (Feb. 22, 2021), https://eplanning.blm.gov/public_projects/2003177/200391671/20035175/250041372/doiblmcoN05020200056ea_FONSI_signed.pdf (last visited Nov. 2, 2021).

¹³ *See* Decision at 1-2.

¹⁴ Final EA, DOI-BLM-CO-N050-2020-0056, at 11 (Feb. 2021), https://eplanning.blm.gov/public_projects/2003177/200391671/20035168/250041365/doiblmcoN05020200056ea.pdf (last visited Nov. 2, 2021).

¹⁵ Decision at 5 (summarizing public involvement).

comments, none of them from any of the Appellants.¹⁶ On February 22, 2021, BLM issued its Final EA, FONSI, and Decision.

In March 2021, BLM received separate notices of appeal (NOAs) from Carolyn Conti, Derrick Bretta, and Lisa Nerio. None of the Appellants explained how they had standing to bring an appeal, and none of them alleged to have participated in BLM's decision-making process. In May 2021, BLM filed its motion to dismiss, asserting that the Appellants lack standing. As part of its motion, BLM submitted the affidavit of the wild horse manager for BLM's White River Field Office.¹⁷ She attests that none of the Appellants participated in the decision-making process before filing their appeals:

None of the appellants at any time participated in the process leading to the decision under appeal. None of the appellants submitted public comments on any draft or final document associated with the Environmental Assessment, or submitted any comments through the public project website. None of the appellants filed any protest to a proposed action.^[18]

The Appellants did not respond to BLM's motion to dismiss, and their time to do so elapsed in June of this year.

ANALYSIS

To appeal a BLM decision to this Board, an appellant must have standing under 43 C.F.R. § 4.410. To have standing, an appellant must be a "party to a case" and be "adversely affected" by the decision it seeks to appeal.¹⁹ An appellant must demonstrate both elements of standing to proceed; if either element is lacking, we must dismiss the appeal for lack of jurisdiction.²⁰

¹⁶ See MTD, Exhibit A, Affidavit of Melissa J. Kindall ¶ 5 (Apr. 30, 2021) (Kindall Aff.); see also Final EA, Appendix I (Response to Comments), https://eplanning.blm.gov/public_projects/2003177/200391671/20035169/250041366/doiblmcoN05020200056ea_Appendices.pdf (last visited Nov. 2, 2021).

¹⁷ Kindall Aff. ¶ 1.

¹⁸ *Id.* ¶ 5.

¹⁹ 43 C.F.R. § 4.410(a) (2020).

²⁰ *WildLands Defense*, 192 IBLA 209, 214 (2018).

The “party to a case” requirement is satisfied when an appellant has “participated in the process leading to the decision under appeal, e.g., . . . by commenting on an environmental document, or by filing a protest to a proposed action.”²¹ The requirement is satisfied “where an appellant commented on a draft EA that is the subject of the decision being appealed” or “expressly requested leave to participate in [a decision making] process, but BLM foreclosed the opportunity to do so.”²²

In this instance, BLM has provided un rebutted evidence that none of the Appellants participated in the process leading to the Decision despite having the opportunity to do so. Accordingly, neither Carolyn Conti, Derrick Reddick nor Lisa Nerio is a party to the case, and none of them has standing to pursue an appeal of the Decision. Given the lack of standing, we must dismiss the appeals.

CONCLUSION

For the reasons discussed above, we grant BLM’s motion to dismiss the appeals filed by Carolyn Conti (IBLA 2021-236), Derrick Bretta (IBLA 2021-237), and Lisa Nerio (IBLA 2021-238).

_____ I concur: _____
K. Jack Haugrud Steven J. Lechner
Administrative Judge Deputy Chief Administrative Judge

²¹ 43 C.F.R. § 4.410(b) (2020).

²² *WildLands Defense*, 189 IBLA 203, 206 (2017) (quoting *WildLands Defense*, 187 IBLA 233, 236-37 (2016)).