

CALIFORNIA ASSOCIATION OF FOUR WHEEL DRIVE CLUBS, ET AL.

IBLA 77-226

Decided June 10, 1977

Motion to dismiss appeal from a decision of the California State Director, Bureau of Land Management, closing certain open corridors in the Imperial Sand Dunes to vehicular use.

Motion denied.

1. Rules of Practice: Appeals: Generally -- Rules of Practice: Appeals: Standing to Appeal -- Rules of Practice: Protests

The thrust of 43 CFR 4.410, which limits the right to appeal to those who are parties to a case, is not to restrict access to administrative review of actions of Bureau of Land Management officials, but to provide a logical framework within which such review might be exercised. An "appeal" by an individual or group which has not, prior to the "appeal," participated in the formulation of the action to which objection is being voiced, should be treated as a protest under the provisions of 43 CFR 4.450-2.

2. Rules of Practice: Protests

The filing of a written protest ordinarily stays the action being protested until such time as a decision on the protest is issued and, under 43 CFR 4.21, the time in which a person adversely affected may file a notice of appeal therefrom.

APPEARANCES: Kevin Midlam, Esq., Johnson and Midlam, San Diego, California, for the appellants; Burton J. Stanley, Esq., Office of the Field Solicitor, Department of the Interior, Sacramento, California, for the Bureau of Land Management.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

On February 17, 1977, the California State Director, Bureau of Land Management, caused to have published in the Federal Register notification of the closure to vehicular use of open corridors in the Imperial Sand Dunes, the closure to be effective on March 17, 1977. On March 10, 1977, an attorney representing the California Association of Four Wheel Drive Clubs and the California Off-Road Vehicle Association filed a notice of appeal from the State Director's action.

The State Director transmitted the appeal to the Board together with a memorandum from the Office of the Regional Solicitor, which argued that while the "appeal" might properly be treated as a protest under 43 CFR 4.450-2, appellants were not "parties to the case" within the contemplation of 43 CFR 4.410 and thus did not have the right to appeal the action of the State Director directly to the Board.

On March 24, 1977, the Office of the Regional Solicitor filed a motion to dismiss the appeal on the ground that appellants were not parties to a case within the meaning of 43 CFR 4.410. On March 28, 1977, attorney for the appellants filed a statement in opposition to the motion to dismiss. We hereby deny the motion filed by the Regional Solicitor for the reasons given below.

[1] The interaction of 43 CFR 4.21, 4.410 and 4.450-2 is a matter which the Board has recently been required to examine in a number of cases. Briefly, 43 CFR 4.21 states that no decision may become effective "during the time in which a person adversely affected may file a notice of appeal," 43 CFR 4.410 permits appeals by "any party to a case who is adversely affected by a decision," and 43 CFR 4.450-2 provides that "where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances."

The Solicitor's Office argues that there is no case to which appellants could be parties, and that to allow appellants the status of parties would allow any member of the public, by filing a notice of appeal, to stay an action of the Bureau. The Regional Solicitor states, "To hold otherwise would be to permit 'injunction by typewriter' which would enable any single individual to effectively frustrate governmental action at will and without regard to the merits of the issue."

We believe the argument of the Solicitor's Office to be inapposite to the real issue. As we understand the intermeshings

of the various regulations, the purpose of the requirement that an individual be a "party to a case" before a notice of appeal to this Board will lie is not to limit the rights of those who disagree with Bureau actions, but to afford a framework by which decisionmaking at the departmental and State Office level may be intelligently made.

If an individual has been a "party to a case" and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual's input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited upon such an individual as a result of its actions. On the other hand, when an individual appears for the first time to object to proposed actions, treatment of this person's objections as an "appeal" effectively forecloses any consideration by the local authorized officer of the merits of the objection, since this Board has consistently held that upon the filing of a notice of appeal the State Office loses all jurisdiction over the matter being appealed. In this latter situation, the Board is, in effect, forced to make an initial decision, even though it is vested with appellate authority.

The above problem is vitiated if the objection of those who have not had prior input into a decision is treated as a protest under 43 CFR 4.450-2. The BLM State Office is provided with the opportunity to examine the merits of the submission and issue a decision thereon. Should the action taken by the State Office on the protest be perceived as adverse to the protestant's interests, he may then appeal that action to the Board under 43 CFR 4.410. See Crooks Creek Commune, 10 IBLA 243 (1973).

[2] The argument of the Regional Solicitor, however, appears to be premised upon the assumption that action which is being protested may nonetheless proceed in the face of the protest. Such is not the case. The applicable regulation clearly states, "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal \* \* \*." 43 CFR 4.21(a). We have noted above that an appeal will lie from the dismissal of a protest. Logic requires that inasmuch as the appeal from the dismissal of the protest would suspend the action being protested, the pendency of the protest should ordinarily prevent the State Office from going forward with the action until ruling upon the protest.

This procedure works no great hardship upon the State Office, since the State Office is in total control of the manner and speed in which the protest will be handled. And, as regards the subsequent right of appeal to the Board, if matters of a truly emergency nature arise, the State Office may always petition the Board, pursuant to 43 CFR 4.21(a), to place the decision appealed from into effect during the pendency of the appeal.

Our analysis, then, would appear to indicate that the proper procedure herein would be to remand the case for treatment as a protest. We now turn to the reasons why we feel that in the instant case appellants' submissions can properly be treated as an appeal.

The essential determinant of the Board's action herein is United States District Court Judge Samuel Conti's Order in the case of Citizens' Committee to Save Our Public Lands v. Thomas Kleppe, C 76-32 SC (January 23, 1976). Therein, Judge Conti ruled that appellant, Citizens' Committee to Save Our Public Lands, had administrative standing to appeal a decision of the Bureau of Land Management granting a right-of-way to the Louisiana Pacific Corporation. Judge Conti based his ruling on an analysis both of the departmental procedures involved herein as well as decisions of the United States Supreme Court on the question of standing. Judge Conti ruled that appellant Citizens' Committee was a "party to the case" for four reasons: (1) the members of the group used the land; (2) the action of the Department was reviewable by the Court; (3) the pertinent regulations did not define the term "party," nor was the court shown any case law on the subject; and (4):

[W]here an individual or group such as the Citizens' Committee uses the Federal land in question and is recognized by the Federal Land Management as a bona fide representative of the community and is provided with notice of all proceedings and actions by the Bureau of Land Management regarding the land in question, and actively and extensively participates in formulating land use plans for the land in question, and takes the position in a dispute concerning the use of the land in question contrary to another individual or group, that individual or group is a party within the meaning of 43 C.F.R. 4.410.

(Reporter's Transcript at 5). Only two of the factors listed in Judge Conti's decision are relevant herein: namely, alleged use of the land by the appellants and their status and prior input into the decisionmaking process.

In the instant case appellants clearly contend that their members made use of the corridors prior to the actions of the State Director in seeking to close them. Moreover, they argue that they are bona fide representatives of the public, at least that part of the public which is concerned with ORV use, and have extensively participated in the Interim Critical Management Plan for the California desert, which plan had been effectively amended by the actions of the State Director. Additionally, this Board notes that after having been apprised of the objections voiced by the appellants

to his proposed action, the State Director has shown no inclination to change his original decision. (See the letter to the Board of Land Appeals from the Acting State Director, California, dated March 18, 1977.) Accordingly, it is doubtful that any useful purpose would be served by remanding the case to the State Director at this time. Accordingly, the motion to dismiss is denied.

It goes without saying that the proposed actions of the State Director are hereby stayed during the pendency of the above appeal. Should the State Director feel that immediate implementation of his original decision is in order, he may, of course, petition this Board to suspend the effect of the decision during the pendency of the appeal pursuant to 43 CFR 4.21(a). In any event the Board intends to handle this appeal on an expedited basis. Appellants are allowed until July 8, 1977, in which to supplement their statement of reasons for appeal should they so desire. The Regional Solicitor is allowed until July 29, 1977, in which to file an Answer to appellants' statement of reasons for appeal, including any additional showings BLM wishes to have considered.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss filed by the Office of the Regional Solicitor is denied.

Newton Frishberg  
Chief Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Frederick Fishman  
Administrative Judge

