

DONALD PAY

IBLA 84-265

Decided March 13, 1985

Appeal from a decision of the Acting District Manager, Miles City District Office, Montana, Bureau of Land Management, dismissing protest to the approval of environmental assessment. M 58002(SD).

Dismissed.

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

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. Denial of a protest makes an individual a party to a case. Such denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally cognizable interest has been adversely affected by denial of the protest.

APPEARANCES: Donald Pay, pro se; Mary Anne Sullivan, Esq., Washington, D.C., for Energy Transportation Systems, Inc.; Sheryl L. Katz, Esq., U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Donald Pay has appealed from a decision of the Acting District Manager, Miles City District Office, Montana, Bureau of Land Management (BLM), dated December 7, 1983, dismissing appellant's protest against the District Manager's approval of recommendations set forth in Environmental Assessment/Land Report (EA/LR) MT-020-88-3-83. Pay's protest, filed August 19, 1983, objected primarily to BLM's approval of a recommendation that right-of-way M 58002(SD) be granted to Energy Transportation Systems, Inc. (ETSI). The right-of-way at issue would allow ETSI to ditch, bury, and cover a 36-inch welded steel pipe along approximately 3 miles of public lands in South Dakota. This pipe

would carry water from Oahe Reservoir on the Missouri River some 270 miles to coal slurry preparation plants in Wyoming. <sup>1/</sup>

Appellant makes numerous charges in his pleadings, among them, that EA/LR MT-020-88-3-83 and a subsequent amended EA/LR fail to consider alternative routes for the West River Aqueduct, that portion of ETSI's project used to transport water from Oahe Reservoir to ETSI's plants in Wyoming. Appellant asks that an environmental impact statement (EIS) be prepared to supplement an existing EIS issued by BLM in July 1981. In this way, BLM might analyze the environmental and socio-economic impacts attributable to the proposed route changes to the West River Aqueduct, appellant declares.

Although counsel for ETSI and BLM address in their responsive pleadings the substantive issues raised by Pay, each also charges that Pay lacks standing to bring the present appeal. No allegations of fact have been made, BLM argues, showing how appellant will be adversely affected by the instant decision. BLM characterizes as bald assertions Pay's statements in his notice of appeal addressing the standing issue. Therein, Pay states: "Donald Pay claims that he will be adversely affected by this decision through degradation of the air, soil, and water of the affected lands, by reduced recreational opportunities, by decreased economic potential of the affected lands, and the loss of spiritual opportunities."

In response, Pay asserts that in order to gain standing he need only assert a "right, title or interest in the subject lands or any use of them which will be adversely affected by the actions complained of," citing Phelps Dodge Corp., 72 IBLA 226, 228 (1983). Access to the public lands identified in right-of-way M 58002(SD) is obtainable, appellant claims, by either public roads, adjacent public lands, or adjacent private lands. Pay states that he "has, does and can obtain" access to the affected lands.

[1] Regulation 43 CFR 4.410 sets forth the standards regarding who may appeal to the Board: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management \* \* \* shall have a right to appeal to the Board." In Oregon Natural Resources, 78 IBLA 124, 125 (1984), the Board examined this regulation accordingly:

There are two separate and discrete prerequisites to prosecution of an appeal before this Board: (1) that the appellant be a "party to the case," and (2) that the appellant be "adversely affected" by the decision appealed from. See 43 CFR 4.410. Denial of a protest makes an individual a party to a case. Such a denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally recognizable "interest" has been

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<sup>1/</sup> In Donald Pay, 68 IBLA 26 (1982), this Board dismissed an appeal by Pay from a Wyoming State Office decision granting right-of-way W-47191 to ETSI for the same coal slurry project. A change in the route of the water supply system after that decision caused BLM to prepare the EA/LR to which appellant objects.

adversely affected by denial of the protest. In Re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982).

BLM's dismissal of appellant's protest establishes Pay as a party to the case under the above-quoted standard. We conclude, however, that Pay's appeal must be dismissed because he is not adversely affected by BLM's decision. Our holding herein is consistent with prior decisions of this Board, as e.g., Oregon Natural Resources, wherein we stated:

Although determinations of judicial standing are not strictly relevant to a discussion of administrative standing under the respective procedural regulations, they may provide a useful guide as to the types of interests which are properly considered in adjudicating administrative appeals. In Re Pacific Coast Molybdenum Co., *supra*. A keystone in a discussion of standing is Sierra Club v. Morton, 405 U.S. 727 (1972), the Supreme Court's pronouncement on the subject. With respect to its review of the standing issue in that case, the Court declared that "mere 'interest in the problem', no matter how longstanding the interest and no matter how qualified the organization is in evaluating that problem, is not sufficient by itself." *Id.* at 739. It upheld the dismissal of a suit by a party who had declared itself to represent the public interest and rejected the attempt to substitute concern with the subject for the concrete injury required by the procedural authority conferring the right to seek review. *Id.* at 739-741. The "injury in fact" test applied requires that the party seeking review be among the injured. *Id.* at 735.

Oregon Natural Resources, 78 IBLA at 125. Thus, although Sierra Club v. Morton acknowledged that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values," the Court cautioned that broadening the categories of injury that may be alleged in support of standing was a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury. 405 U.S. at 738.

As noted above, appellant alleges that he will be adversely affected by the degradation of air, soil, and water of the affected lands, by reduced recreational opportunities, decreased economic potential of the affected lands, and by the loss of spiritual opportunities. Nowhere in the pleadings, however, does appellant allege facts <sup>2/</sup> showing that he uses the affected lands or has

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<sup>2/</sup> In Sierra Club v. Morton, 405 U.S. 727, 738 (1972), Mr. Justice Stewart declared:

"The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." [Footnote omitted.]

any right, title, or interest therein. Moreover, Pay states that he resides in Pierre, South Dakota, a distance of at least 100 miles by air from the nearest segment of affected lands.

In Sharon Long, 83 IBLA 304 (1984), the Board dismissed the appeals of two individuals who appealed to the Board from BLM's grant of a special recreation use permit allowing a snowmobile race to be run on the Iditarod National Historic Trail in Alaska. Therein, we held that the genuine concern of the individuals in opposing the permit did not constitute a cognizable interest. Id. at 307-09. A third individual who had used the land in dispute was held to be adversely affected and allowed to prosecute an appeal.

Pay's interest in ETSI's right-of-way can best be described as that of a deeply concerned citizen. In the absence of more, however, he has not shown that he has been adversely affected within the meaning of 43 CFR 4.410. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal must be dismissed.

James L. Burski  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Gail M. Frazier  
Administrative Judge

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3/ In light of our holding herein, appellant's request for an extension of time to amend his statement of reasons is hereby denied.

