

EDWIN O. LARSON  
v.  
BUREAU OF LAND MANAGEMENT  
(ON RECONSIDERATION)

IBLA 93-532

Decided May 2, 1994

Reconsideration of a Board of Land Appeals order declining to accept a Bureau of Land Management request for permission to file an interlocutory appeal from an Administrative Law Judge order denying a motion for summary dismissal of an appeal. NV 050-92-02.

Decision reaffirmed.

1. Administrative Procedure: Generally -- Administrative Procedure: Administrative Review -- Evidence: Presumptions -- Rules of Practice: Generally -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Hearings

For summary judgment there must be no true issue of fact when all factual inferences are drawn in the light most favorable to the opposing party. Therefore, the party seeking permission to file an interlocutory appeal from the denial of a motion for summary dismissal, pursuant to 43 CFR 4.28, must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. The degree to which a FWS Biological Opinion may or may not have foreclosed BLM's obligation and discretionary authority to act in accordance with the Taylor Grazing Act and other applicable laws is an unresolved issue of sufficient magnitude and import to justify denying a motion for summary dismissal.

APPEARANCES: Burton J. Stanley, Esq, Office of the Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Edwin O. Larson, Cedar City, Utah, pro se; Laurens H. Silver, Esq., San Francisco, California, and Johanna Wald, Esq., Washington, D.C., for Sierra Club Legal Defense Fund, Natural Resources Defense Counsel and Desert Protective Council, amici curiae; Daniel B. Frank, Esq., Cheyenne, Wyoming, for Desert Livestock Producers, amicus curiae.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

This is a reconsideration of an August 11, 1993, Interior Board of Land Appeals (Board) order declining to accept an interlocutory appeal from a July 2, 1993, order issued by Administrative Law Judge Ramon M. Child denying a Bureau of Land Management (BLM) motion for summary dismissal of an appeal. NV 050-92-02.

Procedural Background

On January 31, 1992, the Area Manager, Caliente Resource Area, Caliente, Nevada, issued a decision canceling an existing grazing permit for the Beacon Grazing Allotment, issuing a new grazing permit for that allotment, and implementing management actions outlined in a Biological Opinion rendered by the U.S. Fish and Wildlife Service (FWS). Edwin O. Larson, who holds a grazing interest in the Beacon Grazing Allotment, appealed the Area Manager's decision, which was issued pursuant to the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315 and 316 (1988) (Grazing Act).

The matter was referred to the Hearings Division and assigned to Judge Child. On June 16, 1993, BLM moved for summary dismissal of Larson's appeal alleging that Larson had "asserted no error in the decision appealed from, that has not been properly decided by the biological opinion issued by [FWS]" and that "the decision appealed from does nothing but adopt the mandatory requirements of the FWS' biological opinion." On July 2, 1993, Judge Child issued an order denying BLM's motion for summary dismissal, stating in material part:

Since the last sentence of the [motion to dismiss] suggests that the Area Manager did ". . . nothing but adopt the mandatory requirements of the FWS' biological opinion," the Motion for Summary Judgment should be denied. Surely the Area Manager must do more than abandon his judgment and discretion and blindly adopt the requirements of the biological opinion of the Fish and Wildlife Service.

On July 20, 1993, BLM sought permission to file an interlocutory appeal, pursuant to 43 CFR 4.28, from Judge Child's July 2, 1993, order. On August 11, 1993, this Board issued an order declining to accept an interlocutory appeal.

On August 26, 1993, BLM filed a request with the Acting Director, Office of Hearings and Appeals, seeking to have the hearing, scheduled for August 30, 1993, suspended and seeking to have the Director direct this Board to reconsider, en banc, its August 11, 1993, order. By an order issued on August 26, 1993, the Acting Director, Office of Hearings and Appeals, granted BLM's motion and directed the Board to reconsider its August 11 order, without directing that the reconsideration be en banc.

On October 22, 1993, the Sierra Club Legal Defense Fund, Natural Resources Defense Council, and Desert Protective Council moved to intervene

in the reconsideration of the order denying BLM's request to file an interlocutory appeal. On November 18, 1993, the Board issued an order denying intervenor status, but granting amicus curiae status, and advising them that the Board would consider pleadings filed on their behalf when reconsidering our August 11, 1993, order. On December 27, 1993, the Desert Livestock Producers sought to intervene, or in the alternative to appear as an amicus curiae, and on December 27, 1993, it filed a brief responding to those filed by BLM and the other amici. We hereby grant amicus curiae status to the Desert Livestock Producers and accept the brief it filed in support of Larson.

### Issue Under Consideration

At this point we deem it necessary to state the issue now before this Board, as it is apparent from the pleadings that it is easy to lose sight of the only issue before us. That issue is whether BLM has presented sufficient evidence that Administrative Law Judge Child erred when finding that there was a question of fact or issue of law justifying his proceeding with a hearing. Said another way, we have been directed to reconsider whether the pleadings filed by BLM demonstrated to our satisfaction that no question of fact or issue of law remained to be heard by Judge Child, mandating dismissal, and making his denial of BLM's motion for summary dismissal a judicial error.

### Discussion

[1] To obtain summary judgment there must be no true issue of fact. Friends of the Earth v. Carey, 401 F. Supp 1386 (S.D.N.Y. 1975); Doehler Metal Furniture Co. v. United States, 149 F.2d 130 (2d Cir. 1945). When contemplating summary judgment all factual inferences must be drawn in the light most favorable to the opposing party. S. J. Groves & Sons v. International Brotherhood of Teamsters, 581 F.2d 1241, 1244 (7th Cir. 1978); Fitzsimmons v. Best, 528 F.2d 692, 694 (7th Cir. 1976).

A party seeking permission to file an interlocutory appeal pursuant to 43 CFR 4.28 must show "that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision." 43 CFR 4.28. Therefore, the party seeking permission to file an interlocutory appeal from denial of a motion for summary dismissal must show that there is no true issue of fact and that an immediate appeal from the denial order will materially advance the final decision. 1/

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1/ A hearing before Judge Child was initially set for July 12, 1993. It was then rescheduled for Aug. 30, 1993, in his order denying BLM's motion to dismiss. On Aug. 26, 1993, the hearing scheduled for Aug. 30, 1993, was continued without date in an order issued by Judge Child, noting the Acting Director's order of the same date.

In its request for interlocutory appeal, BLM cited this Board's holding in Lundgren v. BLM, 126 IBLA 238 (1993), that a FWS Biological Opinion is not subject to administrative review as to the matters decided therein. BLM argued that "appellant has asserted no error in the decision appealed from that has not been properly decided by the Biological Opinion issued by [FWS]," and that Judge Child erred when he denied BLM's motion for summary dismissal.

The underlying appeal to the Administrative Law Judge was from a BLM Area Manager's decision, not from a Biological Opinion issued by FWS. The BLM's authority to manage grazing lands pursuant to the Taylor Grazing Act, and its applicable regulations, is quite distinct from the authority to formulate and issue a FWS Biological Opinion. When regulating livestock operations on the public rangelands, BLM is required by law to consider various management options and alternatives. 43 CFR 4100.0-2.

When it declined to accept a BLM request for permission to file an interlocutory appeal, the Board considered the factual inferences in the light most favorable to Larson and found nothing in the record mandating the conclusion that BLM's discretionary authority under the Grazing Act and the other acts applicable to grazing decisions has been completely and totally preempted and foreclosed by the FWS Biological Opinion. <sup>2/</sup> The fact of the matter is that the degree to which the FWS Biological Opinion may or may not have foreclosed BLM's obligation to and discretionary authority to act under and in accordance with the Taylor Grazing Act and other applicable laws is itself an unresolved issue of sufficient magnitude and import to justify denying the BLM motion for summary dismissal.

There is nothing that has been submitted either as a part of the request for permission to file an interlocutory appeal or briefs filed in support of reconsideration that has caused us to change our mind. When considered in the proper context, Judge Child's denial of BLM's motion for summary dismissal is clearly consistent with the decision in Lundgren and the Secretarial memoranda. This being the case, the Board did not err when it declined to grant permission to file an interlocutory appeal from Judge Child's order.

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<sup>2/</sup> 43 CFR 4.28 does not require the Administrative Law Judge to certify the interlocutory ruling. Interlocutory appeals are ordinarily limited to those cases where it is clear that a controlling question of law may materially advance the final decision. See Leber v. Pennsylvania Department of Environmental Resources, 80 IBLA 200, 91 I.D. 197 (1984), aff'd. 780 F.2d 372 (3rd Cir. 1986). To this extent, an interlocutory appeal to the Board is similar to a 28 U.S.C. § 1292 (1988) appeal. An order refusing to grant summary judgment is not a final decision, and the courts are not prone to review a lower court's denial of summary judgment by means of prerogative writs. Chappell & Co. v. Frankel, 367 F.2d 197 (2nd Cir. 1966). If Judge Child had refused BLM's request that he certify the interlocutory ruling in this case, his action would not have been an abuse of discretion.

Having found an existing issue of fact on a matter recognized as being material by the parties and amici curiae, we choose not to further belabor this opinion by citing additional issues or permutations of the issue we have identified. Our holding in this case is not intended to limit the scope of the hearing any further than it is now limited by statutes, regulations, and the January 8, 1993, Secretarial memorandum.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's August 11, 1993, order declining to accept a BLM request for permission to file an interlocutory appeal from Judge Child's July 2, 1993, order denying a motion for summary dismissal of the appeal filed by Edwin O. Larson is reaffirmed.

R. W. Mullen  
Administrative Judge

I concur:

C. Randall Grant, Jr.  
Administrative Judge

