

Editor's note: Clarification denied by order dated April 5, 1995

OREGON NATURAL RESOURCES COUNCIL
OREGON NATURAL DESERT ASSOCIATION

v.

BUREAU OF LAND MANAGEMENT
MC BEATY BUTTE GRAZING ASSOCIATION

IBLA 93-672

Decided May 17, 1994

Appeal from order of Administrative Law Judge Ramon Child dismissing appeal from decision of the Lakeview, Oregon, Area Manager, Bureau of Land Management, issuing grazing permit and authorizing grazing on the Beaty Butte Allotment. OR-010-93-02.

Appeal dismissed in part; Administrative Law Judge's order vacated; agency decision set aside; and case remanded to agency.

1. Administrative Procedure: Standing--Grazing and Grazing Lands--Rules of Practice: Appeals: Standing to Appeal

Where an entity was not named as an "affected interest" under 43 CFR 4100.0-5 concerning a BLM decision to grant a grazing permit and where there is no indication that the entity participated in any other way in any of BLM's dealings with the granting of the permit, it lacks standing to appeal the decision to the Board of Land Appeals, as it was not a "party to the case" under 43 CFR 4.410(a).

2. Administrative Procedure: Standing--Grazing and Grazing Lands--Rules of Practice: Appeals: Standing to Appeal

An entity that applies for and receives status as an "affected interest" under 43 CFR 4100.0-5 prior to BLM's granting of an application for a grazing permit was a "party to the case" under 43 CFR 4.410(a). Where that entity has alleged and filed supporting evidence showing that its members frequently use and enjoy areas of the grazing allotment affected by the permit for diverse recreational, educational, scientific, and aesthetic pursuits, it has made an adequately specific, colorable allegation that it is "adversely affected"

by the appealed decision, completing the showing required for standing under 43 CFR 4.410(a), so that a motion to dismiss for lack of standing is properly denied.

3. Administrative Procedure: Administrative Law Judges--Grazing and Grazing Lands

An order by Administrative Law Judge denying an appeal as frivolous will be vacated where appellant's statement of reasons set out numerous specific objections to the propriety of BLM's decision granting a grazing permit, along with citations to Departmental regulations and the BLM Manual, presenting legitimate issues of fact and law requiring resolution.

4. Grazing and Grazing Lands

An application for a grazing permit following transfer of ownership of base lands is an "application for permit" within the meaning of 43 CFR 4160.1-1, governing proposed decisions on permits or leases. Further, a BLM decision effectively extending the term of a grazing permit and recognizing a new entity as permittee is a "proposed action relating to terms and conditions of permits" under that provision.

5. Grazing and Grazing Lands

Under 43 CFR 4160.1-1, BLM must do two discrete things: (1) it must serve a copy of a proposed decision concerning an application for permit on any applicant unless BLM and the permittee have reached a "documented agreement"; and (2) it must also send a copy of such proposed decision to any entity named as an "affected interest" pursuant to 43 CFR 4100.0-5. The regulation is mandatory, and where BLM fails to comply, its decision approving the permit application is properly set aside and remanded with instructions to re-adjudicate the application in light of the objections of the "affected interest."

APPEARANCES: Mark Hubbard, Esq., for appellants Oregon Natural Resources Council and Oregon Natural Desert Association; Donald P. Lawton, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for respondent Bureau of Land Management; Steven J. Lechner, Esq., William Perry Pendley, Esq., for respondent MC Beaty Butte Grazing Association; Richard Krause, Esq., John H. Hobson, Esq., and Carolyn S. Richardson, Esq., for amici curiae Oregon Farm Bureau Federation, et al.; Susan Morath Hunter, Esq., for amici curiae National Wildlife Federation, et al.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Oregon Natural Resources Council (ONRC) and Oregon Natural Desert Association (ONDA) have appealed from an order of Administrative Law Judge Ramon Child dismissing their grazing appeal as frivolous.

On December 29, 1992, the Lakeview, Oregon, Area Manager, Bureau of Land Management (BLM), signed a permit (OR-010-93-02) authorizing the MC Beaty Butte Grazing Association (the Association) to graze livestock on three pastures, Greaser Drift, Hill Camp Greaser, and Beaty Butte Common. The three pastures are known collectively as the Beaty Butte Allotment (Allotment). The term of the permit was from September 21, 1992, to September 20, 2002.

Issuance of the permit to the Association resulted from a purchase by the Association of base property from the Gillett MC Ranch. 1/ BLM had issued a permit to Gillett MC Ranch for the same number of animal unit months (also given serial number OR-010-93-02) on February 4, 1992. The term of that permit was from March 1, 1990, to February 28, 2000. On or around September 21, 1992, the Association filed a "grazing application" with BLM seeking grazing use on the Allotment corresponding to that previously permitted to the Gillett MC Ranch (BLM Answer, Exh. B; BLM Motion to Dismiss before Administrative Law Judge, Exh. 2). As noted above, BLM issued its decision granting the application for permit on December 29, 1992.

Previously, on or about August 24, 1992, ONRC had requested that BLM grant it "affected interest" status concerning the allotment, pursuant to 43 CFR 4100.0-5. By letter dated October 1, 1992, BLM granted ONRC's request. 2/

On June 17, 1993, ONRC and ONDA (appellants) filed a joint notice of appeal of "the decisions of [BLM] to issue a ten year grazing permit" to the Association for the allotment. The notice of appeal stated that ONRC first received notice of the issuance of the permit on or about May 19, 1993, when it received a letter dated May 17, 1993, from BLM enclosing a copy of the permit. Appellants requested in their notice of appeal that the 10-year grazing permit and the 1993 annual grazing authorization be

1/ Counsel for the Association states that, "[i]n 1992, the MC Group purchased the Gillette MC Ranch," and that "[o]n or about September 21, 1992, the MC Group, d/b/a the Grazing Association, applied for a transfer of the 'grazing preference' for the Allotment" (Association's Answer at 1; emphasis supplied). We shall treat the MC Group as synonymous with the Association.

2/ The regulation at 43 CFR 4100.0-5 provides that an "affected interest" is "an individual or organization that has expressed in writing to the authorized officer concern for the management of livestock grazing on specific grazing allotments and who has been determined by the authorized officer to be an affected interest." It is not disputed that appellant ONDA has neither applied for nor been granted "affected interest" status.

vacated; ^{3/} that BLM be ordered to consult with ONRC and notify it as an "affected interest" regarding management decisions affecting the allotment, including transfer of the grazing preference and issuance of the new grazing permit; and that BLM prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1988). ^{4/}

Appellants also noted that BLM had designated ONRC an "affected interest" with respect to the Allotment, pursuant to 43 CFR 4100.0-5; that BLM is required by regulation to send copies of proposed decisions to affected interests under 43 CFR 4160.1-1; and that BLM Manual Part 4100.06(C) establishes a policy that BLM will consult with interested parties to develop livestock grazing management decisions and coordinate with affected interests to determine mutually acceptable management practices. Appellants requested that BLM's decision be vacated so that ONRC could consult with BLM on two questions: whether the grazing permit should have been issued to the Association as purchaser of the base property, and (if so) what terms and conditions should have been included in that permit.

The appeal was assigned to Administrative Law Judge Child for hearing. Before Judge Child, BLM, through counsel, filed a motion to dismiss the appeal because it was "legally without merit and therefore frivolous," and because it contained immaterial issues or issues which were included in a prior final decision from which no timely appeal was made, citing 43 CFR 4.470(d). In the motion to dismiss, BLM also disputed appellants' asserted right to consultation as an "affected interest" pursuant to 43 CFR 4160.1-1. BLM claimed that there was no need for a proposed decision, as the new permittee assumed the terms of the earlier grazing permit and generally disputed appellants' allegations concerning NEPA compliance.

In response, appellants specifically challenged BLM's assertion that the new permit did not include new terms, pointing out that the expiration date for the lease term had been extended from February 28, 2000, to September 20, 2002, a difference of more than 2-1/2 years. Appellants also noted that BLM changed the permittee from Gillett MC Ranch to the Association, and that a "different permittee may have different base properties attached to the allotment and different qualifications for the preference" (Appellants' Response before Administrative Law Judge, Aug. 5, 1993, at 4).

Judge Child dismissed the appeal on the basis of the pleadings, without convening a hearing. He ruled that it was "frivolous and without

^{3/} Appellants noted that "[t]he terms of the 1993 annual grazing authorization are unknown because Appellants have not received copies of such authorization."

^{4/} Appellants' arguments concerning lack of compliance with NEPA are not detailed herein because it is unnecessary to reach them in view of our decision to remand the matter to BLM. See note 9, *infra*.

merit * * * [f]or the reasons set forth in [BLM's] 'Motion to Dismiss.'" Beyond that statement, he did not explain his reasons for dismissing the appeal. ONRC and ONDA appealed Judge Child's dismissal. 5/

[1] Respondent Association has moved that both appeals be dismissed for lack of standing. ONDA was not named as an "affected interest," and there is no indication that it participated in any other way in any of BLM's dealings with the granting of the permit to the Association.

Standing to appeal to the Board of Land Appeals is founded in part on an appellant being a "party to [the] case" under 43 CFR 4.410(a). See Storm Master Owners, 103 IBLA 162, 177 (1988). This generally means that the appellant has participated in the decisionmaking process which led up to the decision on appeal. See Stanley Energy, Inc., 122 IBLA 118, 120 (1992). The purpose of this requirement is to ensure that BLM has already considered the impact of its decision on the appellant, thus promoting the proper use of administrative resources. State of Alaska, 127 IBLA 1, 3 (1993); see California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977). ONDA was not named as an "affected interest" under 43 CFR 4100.0-5 and did not otherwise participate in the proceedings leading to the granting of the permit to the Association. Accordingly, we hold, ONDA was not a party to the case within the meaning of 43 CFR 4.410(a), and its appeal is properly dismissed for lack of standing. 6/

[2] Appellant ONRC, however, by applying for and receiving status as an "affected interest" prior to BLM's granting of the Association's application for permit, was clearly a party to the case. Further, ONRC has alleged and filed supporting evidence showing that its "members * * * frequently use and enjoy the wide open spaces of Oregon's high desert

5/ By order dated Dec. 14, 1993, the Association was recognized as a party respondent in the appeal, and appellants' motion to suspend the effect of BLM's decision to transfer the grazing permit to the Association during

the pendency of the appeal was denied. Appellants have moved for expedited reconsideration of that order, insofar as it denied the request for suspension of effect. In the course of reviewing the motion for reconsideration, we have determined that BLM improperly denied ONRC the right to participate in the decisionmaking process. As we now vacate the decision granting the permit, the present decision negates the Dec. 14, 1993, order, and the motion to reconsider the petition for stay is therefore denied as moot.

Several other parties have filed requests to appear as amicus curiae and supporting briefs: Oregon Farm Bureau Federation, California Farm Bureau Federation, Nevada Farm Bureau Federation, Montana Farm Bureau Federation, Arizona Farm Bureau Federation, Washington Farm Bureau Federation, New Mexico Farm and Livestock Bureau, Idaho Farm Bureau Federation, Utah Farm Bureau Federation, Wyoming Farm Bureau Federation, and Hawaii Farm Bureau Federation; and the National Wildlife Federation, Southern Utah Wilderness Association, The Wilderness Society, and the Oregon Wildlife Federation. Those requests are granted.

6/ We therefore need not consider whether ONDA was adversely affected by the decision.

including areas of [the Allotment] for diverse recreational, educational, scientific, and aesthetic pursuits." That is an adequately specific, colorable allegation of "adverse effect" under 43 CFR 4.410. Predator Project, 127 IBLA 50, 53 (1993); see Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Powder River Basin Resource Council, 124 IBLA 83, 88-89 (1992); Animal Protection Institute of America, 117 IBLA 208, 209-10 (1990). Allowing standing to appellant, we hold, will assist the Department in fulfillment of its decisionmaking function regarding grazing. See High Desert Multiple-Use Coalition, 116 IBLA 47, 48-49 n.1 (1990). Accordingly, respondent Association's motion to dismiss the appeal of ONRC for lack of standing is denied.

[3] Judge Child's order dismissing the appeal as frivolous is vacated. A grazing appeal may properly be dismissed by an Administrative Law Judge if frivolous. 43 CFR 4.470(d). However, our review of appellant's statement of reasons indicates that its appeal was not frivolous. As detailed above, the statement of reasons for appeal before Judge Child set out numerous specific objections to the propriety of BLM's decision approving transfer of the grazing permit, along with citations to Departmental regulations and the BLM Manual. Those objections presented legitimate issues of fact and law requiring resolution.

It is not necessary to remand the matter to the Administrative Law Judge for assembly of record and issuance of decision as required by 43 CFR 4.475, as we agree with appellants that BLM improperly failed to include ONRC, as a recognized "affected interest," in the administrative process leading up to BLM's decision to approve the issuance of a new grazing permit to the Association.

[4] Under 43 CFR 4160.1-1, governing proposed decisions on permits or leases:

In the absence of a documented agreement between the authorized officer and the permittee(s) or lessee(s), the authorized officer shall serve a proposed decision on any applicant, permittee or lessee, or the agent of record, or both, who is affected by the proposed action on applications for permits (including range improvement permits) or leases, or by the proposed action relating to terms and conditions of permits (including range improvement permits) or leases, by certified mail or personal delivery. The authorized officer shall also send copies to other affected interests. The proposed decision shall state reasons for the action, including reference to pertinent terms, conditions and/or provisions of these regulations, and shall provide for a period of 15 days after receipt for the filing of a protest. [Emphasis supplied.]

The regulation thus covers situations where BLM takes action either "on applications for permits" or "relating to terms and conditions of permits."

The first issue is whether the issuance of a new 10-year permit to the Association for the allotment is "action on an application for permit," or "action relating to terms and conditions of a permit" within the meaning of 43 CFR 4160.1-1. Under 43 CFR 4110.2-1(d):

If a permittee or lessee loses ownership or control of all or part of his/her base property, the permit or lease, to the extent it was based upon such lost property, shall terminate immediately without further notice from the authorized officer. However, if, prior to losing ownership or control of the base property, the permittee or lessee requests, in writing, that the permit or lease be extended to the end of the grazing season or grazing year, the termination date may be extended as determined by the authorized officer after consultation with the new owner. When a permit or lease terminates because of a loss of ownership or control of a base property, the grazing preference shall remain with the base property and be available through application and transfer procedures at 43 CFR 4110.2-3, to the new owner or person in control of that base property. [Emphasis supplied.]

Under 43 CFR 4110.2-3(a)(4), "[t]he transferee shall file an application for a grazing permit or lease to the extent of the transferred preference simultaneously with filing a transfer application" (emphasis supplied). Thus, there is no doubt that a successor to a grazing preference who acquires such by purchasing the base lands must file an application for a grazing permit. BLM has provided a copy of the Association's grazing application, dated September 21, 1992 (BLM Answer at Exh. B). That application was an "application for permit" within the meaning of 43 CFR 4160.1-1.

In any event, there can be no doubt that 43 CFR 4160.1-1 applies here, in view of the fact that the permit in question was extended for more than 2-1/2 years. Further, the substitution of a different permittee raised the possibility that the new permittee was in some way unqualified. ^{7/} By issuing a new permit to the Association, BLM took "action relating to terms and conditions of permits." 43 CFR 4160.1-1.

The Association argues that BLM's approval of the Association's application was a routine administrative task, and that BLM has "no discretion in issuing a grazing permit to a new owner of base property. It notes that the issuance of the grazing permit arose out of the sale of the base property, and asserts that, when base property is transferred, under 43 CFR 4110.2-1(d), the grazing preference shall remain with the property, and be available to the new owner of the base property through application and transfer procedures at 43 CFR 4110.2-3. If the new owner of the base property meets certain qualifications set out at 43 CFR 4110.1, the

^{7/} To the extent that our Dec. 17, 1993, order suggested that BLM had renewed the permit under the same terms applicable prior to the transfer of grazing rights to the Association, it is expressly modified.

Association argues, BLM has no choice but to transfer the grazing preferences. Further, citing 43 CFR 4110.2-3, it argues that BLM has no choice but to issue a grazing permit to the extent of the transferred grazing preference (Association Answer at 13-14).

Transfers of grazing preferences are not automatic, since (as the Association recognizes) BLM may exercise its authority to deny such where a prospective transferee is not qualified. See 43 CFR 4110.2-3(a)(1). Indeed, the regulations expressly address a situation in which an unqualified party acquires rights in base property. 43 CFR 4110.2-3(e). The strictures imposed on the prospective transferee by 43 CFR 4110.2-3 (requiring the transferee to accept the terms and conditions of cooperative agreements and range improvement permits, as well as the terms and conditions of the previous grazing permit) are not insignificant. If a permittee refused to accept them, the regulations authorize BLM to reject an application to transfer the grazing preference. 43 CFR 4110.2-3(f).

[5] It remains to determine whether BLM was required by 43 CFR 4160.1-1 to issue a proposed decision and provide a copy to ONRC as an interested party. Respondents maintain that no proposed decision was required because there was no disagreement between BLM and the permittee, citing the phrase in the first sentence of 43 CFR 4160.1-1 that BLM's authorized officer shall serve a proposed decision "in the absence of a documented agreement between the authorized officer and the permittee(s) or lessee(s)." As there was agreement between BLM and the Association, respondents conclude, there was no requirement that a copy of a proposed decision be supplied to ONRC, as an affected interest.

Respondents' construction of 43 CFR 4160.1-1 (quoted above) does not bear scrutiny. The restrictive phrase in question introduces a sentence describing BLM's obligation to "serve a proposed decision on any applicant * * * who is affected by the proposed action" (emphasis supplied). The second sentence, containing no similar restrictive phrase, describes BLM's obligation to "send copies to other affected interests." That these are separate requirements is highlighted by the inclusion of the word "also" in the second sentence.

It only stands to reason that BLM would not need to send a copy of a proposed decision to an applicant where there is already a documented agreement between the applicant and BLM, as that agreement would provide full notice of the terms of BLM's proposed decision. ^{8/} By contrast, where BLM has acknowledged the right of an entity to participate in its decisionmaking process by formally recognizing it as an "affected interest," it is fitting to require BLM to notify those parties of the terms of the proposed action. The last sentence of 43 CFR 4160.1-1 sets a 15-day deadline for interested parties to object to the terms by filing a protest. This procedure, which is mandatory, applies in the instant case.

^{8/} In view of our ruling on this question, it is unnecessary to consider whether there was a "documented agreement" in this case.

BLM points to the preamble to the proposed rulemaking for 43 CFR 4160.1-1 to support its position that it was not obliged to serve a copy of the proposed decision on affected interests. Appellant responds persuasively noting that the Department had proposed to eliminate the provision that enabled entities other than the grazing applicant, lessee, or permittee to receive notice of and protest proposed decisions. See 48 FR 21826 (May 13, 1983). The proposed rule was not promulgated, precisely because of its limits on "the non-livestock oriented public's ability to receive notice about public land grazing decisions," and the fact that it would "limit the opportunity to appeal decisions which would affect their interests." 49 FR 6448 (Feb. 21, 1984). BLM adopted the present rule, expressly noting that "it would be in the public interest to modify the proposed language to include affected interests in the procedures for proposed decisions about livestock grazing." Id. Contrary to BLM's assertion, the regulatory history favors a reading promoting the right of entities other than permittees to participate in and to initiate administrative review of BLM grazing decisions.

BLM also points to the BLM Manual at paragraph H-4160-1.1, stating that "proposed decisions are not issued where agreement is reached or no change in grazing use is proposed." The BLM Manual is not a regulation, as it is not promulgated with due notice to the public and opportunity to comment. Accordingly, it does not have the force and effect of law, and is not binding on this Board. Beard Oil Co., 111 IBLA 191 (1989); Mesa Petroleum Co., 107 IBLA 184 (1989); Cities Service Oil & Gas Corp., 109 IBLA 322 (1989); The Joyce Foundation, 102 IBLA 342 (1988). To the extent that the Manual is inconsistent with Departmental regulations, the latter control.

BLM also argues that its obligation vis-a-vis affected interests is to involve them in planning decisions concerning grazing, citing the BLM Manual at H-4100.06(C.). Although the second and third provisions of that section support that interpretation, the first requires BLM to "consult with * * * other interested parties in the * * * implementation of * * * livestock grazing management decisions." That provision is broad enough to cover the situation at hand.

In these circumstances, it is appropriate to set aside BLM's approval decision and remand the matter to it so that it complies with 43 CFR 4160.1-1. 9/

9/ BLM argues that the Board lacks jurisdiction to consider the merits of appellant's objections to the approval of the transfer of the permit, as they are based on the inadequacy of the 1981 Lakeview Grazing EIS and the 1982 Rangeland Program Summary and Record of Decision. At this stage, in view of BLM's failure to consult with ONRC prior to reaching its decision and the absence of a decision on the merits at the hearing level, we reserve judgment on the adequacy of the appeal on its merits. The questions raised by ONRC can most appropriately be resolved in the context of a BLM decision reconsidering whether to approve the transfer, on the basis of facts of record. Any future decision by BLM approving or denying the application for permit shall be subject to appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of ONDA is dismissed; the order of the Administrative Law Judge is vacated; the decision of the Lakeview Resource Area Office, BLM, is set aside; and the case is remanded to BLM for further action consistent with this decision.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge