

WESTERN WATERSHEDS PROJECT  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 2005-48

Decided January 24, 2005

Interlocutory appeal from an order of Administrative Law Judge James H. Heffernan denying a motion to dismiss appeals. NV-010-2004-1, NV-010-2004-2.

Petition to file interlocutory appeal granted; expedited review granted; order denying motion to dismiss affirmed as modified.

1. Administrative Procedure: Administrative Law Judges--  
Administrative Procedure: Generally

Although there is no standard set forth in 43 CFR 4.28 for an administrative law judge to utilize in determining whether to certify an interlocutory ruling, the administrative law judge should apply the same standard set forth therein governing the granting by the Board of permission to file an interlocutory appeal, *i.e.*, whether there is a showing that the ruling complained of involves a controlling question of law and that an appeal therefrom may materially advance the final decision. When the party seeking certification makes such a showing, the administrative law judge abuses his discretion in denying the request to certify.

2. Administrative Procedure: Standing

Any person whose interest is adversely affected by a final BLM grazing decision may appeal that decision. It is not necessary that the person protest the proposed grazing

decision in order to be entitled to appeal the final decision.

3. Administrative Procedure: Standing

The “party to a case” requirement for standing to appeal to the Board under 43 CFR 4.410(a) does not apply directly to grazing appeals to an administrative law judge under 43 CFR 4.470. However, any person entitled to appeal to an administrative law judge under 43 CFR 4.470 would, in fact, be a party to a case under 43 CFR 4.410 with respect to an appeal to the Board from the administrative law judge’s decision, because that person would have participated in the process leading to the administrative law judge’s decision under appeal.

4. Administrative Procedure: Adjudication: Generally

Although the Board generally does not consider issues raised for the first time on appeal, that practice does not apply directly to grazing appeals before an administrative law judge. Issues that may be considered during those appeals are governed by the relevant regulations and the administrative law judge.

APPEARANCES: Amy L. Aufdemberge, Esq., Office of the Solicitor, Pacific Southwest Region, U.S. Department of the Interior, Sacramento, California, for petitioner Bureau of Land Management; Todd C. Tucci, Esq., Advocates for the West, Boise, Idaho, for Western Watersheds Project.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Bureau of Land Management (BLM) has petitioned the Board for permission to proceed with an interlocutory appeal and filed a request for expedited consideration of that appeal of an October 14, 2004, order by Administrative Law Judge James H. Heffernan denying BLM’s motion to dismiss an appeal by Western Watersheds Project (WWP) because WWP was not a “party to the case” and had no right of appeal under 43 CFR 4.410, and was foreclosed from raising issues for the first time on appeal. In accordance with 43 CFR 4.28, BLM sought certification by Judge Heffernan of that ruling. Judge Heffernan denied certification of his ruling by order dated November 19, 2004.

Following receipt of Judge Heffernan's November 19, 2004, order, BLM filed a petition with the Board seeking permission to file the interlocutory appeal. We hereby grant BLM's petition to file an interlocutory appeal and BLM's request for expedited consideration of that appeal, for the reasons set forth below, and then proceed to decide the interlocutory appeal.

The regulation governing interlocutory appeals in a case such as this, 43 CFR 4.28, provides that an interlocutory appeal from a ruling by an administrative law judge (ALJ) may be filed if this Board grants permission and the ALJ certifies the interlocutory ruling for appeal or abuses his discretion in denying certification. In either case, we will not permit the interlocutory appeal unless a showing is made that the ruling involves "a controlling question of law and that an immediate appeal therefrom may materially advance the final decision." 43 CFR 4.28.

This matter began when WWP appealed, to the Hearings Division of the Department of the Interior's Office of Hearings and Appeals (Hearings Division), the BLM Elko Assistant Field Manager's June 30, 2004, Final Multiple Use Decision for the Squaw Valley and Spanish Ranch Allotments (FMUD). BLM filed a motion to dismiss the appeal, arguing in relevant part that because WWP did not protest BLM's earlier Proposed Multiple Use Decision (PMUD), WWP was not a "party to a case" entitled to appeal under 43 CFR 4.410.<sup>1/</sup> Judge Heffernan denied BLM's motion, pointing out that the "party to a case" requirement does not appear in those regulations governing appeals of grazing decisions to an ALJ, 43 CFR 4.470. Under that regulation, any person "whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge \* \* \*." 43 CFR 4.470(a). BLM filed its interlocutory appeal of that denial and requested that Judge Heffernan certify his ruling to the Board.<sup>2/</sup>

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<sup>1/</sup> "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right of appeal to the Board \* \* \*." 43 CFR 4.410(a). A "party to a case" is defined, for the purposes of this matter, as one who "has otherwise participated in the process leading to the decision under appeal, e.g., by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action." 43 CFR 4.410(b).

<sup>2/</sup> Both BLM and WWP have since filed additional pleadings in this matter, the most recent being BLM's Reply to Appellant's Response to BLM's Petition for Permission to Appeal dated Dec. 17, 2004 (BLM Reply).

Judge Heffernan denied certification, suggesting that “an interlocutory appeal \* \* \* will not be entertained unless [the] question is one as to which there is substantial ground for difference of opinion.” (November 19, 2004, Order (November Order) at 2.) He concluded that the plain language of the relevant regulations provides “no substantial ground for difference of opinion.” Id.

Judge Heffernan referenced the decision in Larson v. BLM (On Reconsideration), 129 IBLA 250 (1994), “as another case where a party requested permission to file an interlocutory appeal of an ALJ order denying a motion for summary dismissal,” and a statement therein at page 253, n.2 that “an interlocutory appeal to the Board is similar to a 28 U.S.C. § 1292 (1988) appeal.”<sup>3/</sup> He then concluded that the Board’s denial of permission to file an interlocutory appeal in Larson was “consistent with the general rule applied by the federal courts under 28 U.S.C. § 1292 that even if a ruling involves a controlling question of law whose resolution will dispose of the litigation or at least materially advance its termination, an interlocutory appeal of that ruling will not be entertained unless that question is one as to which there is substantial ground for difference of opinion.”<sup>4/</sup> (November Order at 2.)

While it may have been reasonable for Judge Heffernan to turn to 28 U.S.C. § 1292 (2000) for guidance, given our reference thereto in Larson, particularly in light of the fact that the controlling regulation, 43 CFR 4.28, does not expressly set forth a standard to be used by an ALJ in determining whether to certify a ruling, we believe the ALJ should be limited to the same standard applicable to the Board in

<sup>3/</sup> The Larson case involved the denial by an ALJ of a motion for summary judgment, a circumstance involving consideration of the parties’ pleadings and the factual inferences therefrom. The instant case involves a motion to dismiss on jurisdictional grounds, based upon regulatory interpretation.

<sup>4/</sup> That statutory provision, 28 U.S.C. § 1292 (2000), is entitled “Interlocutory decisions.” Subpart (a) provides that appeals of certain interlocutory orders or decrees of certain courts shall fall within the jurisdiction of courts of appeals. Subpart (b) states, in pertinent part:

“When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order \* \* \*.”

deciding whether to grant permission to appeal. That standard, set forth in 43 CFR 4.28, requires that the party seeking permission to appeal must establish two elements: (1) that the ruling complained of involves a controlling question of law, and (2) an immediate appeal may materially advance the final decision.

In this case, BLM's motion to dismiss raised a facial inconsistency between two related regulatory schemes, the grazing appeal regulations and the Board's appeal regulations. Under the grazing appeal regulations, any adversely affected person may appeal a BLM final grazing decision to an ALJ. 68 FR 68765, 68770 (Dec. 10, 2003) (to be codified at 43 CFR 4.470(a)). Further, those regulations entitle any party affected by the resulting decision of the ALJ to appeal to this Board, "under the procedures in this part [Part 4-Department Hearings and Appeals Procedures]." 68 FR at 68771 (to be codified at 43 CFR 4.478(e)). However, the plain language of the Board's appeal regulations, referred to in the grazing regulations as governing grazing appeals to the Board, adds an additional necessary element to appeal entitlement. Those regulations state that "[a]ny party to a case" who is adversely affected by a decision has a right to appeal to the Board. 43 CFR 4.410(a). The regulations then proceed to define "party to a case" as one who, in relevant part, "has participated in the process leading to the decision under appeal," citing as examples commenting on an environmental document or filing a protest of a decision, among other actions. 43 CFR 4.410(b). Judge Heffernan concluded, however, that there was "no substantial ground for difference of opinion regarding the correctness of the denial of the motion to dismiss." (November Order at 2.)

[1] As set out above, the correct standard for Judge Heffernan to have applied is whether the ruling involved a controlling question of law, and, if so, whether resolution thereof could materially advance the final decision. The ruling clearly presented a controlling question of law (jurisdiction) and resolution thereof could materially advance the final decision, because, if BLM's interpretation were to prevail, it would require dismissal of WWP's appeal. Accordingly, we hold that Judge Heffernan's denial of certification was an abuse of discretion.<sup>5/</sup> Applying the same standard, we grant BLM's petition to file an interlocutory appeal.

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<sup>5/</sup> If we were inclined to consider Judge Heffernan's suggested standard of "substantial ground for difference of opinion" for certifying an interlocutory appeal, we would find that the apparent inconsistency in the plain language of the two applicable regulations provides a basis for a difference of opinion as to the appropriate interpretation and application of those regulations in the instant circumstances.

As for BLM's request for expedited review of its interlocutory appeal, the hearing for WWP's appeal of the FMUD is scheduled for February 14, 2005. An interlocutory appeal will not suspend or delay the hearing unless otherwise ordered by the Board. 43 CFR 4.28. Rather than order a suspension of the hearing, we find it more appropriate to grant BLM's request and proceed to decide its interlocutory appeal.

BLM raises two issues on appeal. First, BLM asserts that WWP does not have standing to bring an appeal in this case, because WWP did not protest the PMUD and therefore does not meet the "party to a case" requirement under the Board's appeal regulations, 43 CFR 4.410(b). (Notice of Appeal, Statement of Reasons, and Request for Expedited Review (Notice of Appeal) at 3-4.) Second, BLM argues that, because WWP did not raise issues with respect to the PMUD in a protest, WWP may not raise any issues for the first time on appeal to the ALJ. (Notice of Appeal at 5.)

The essence of BLM's argument with respect to WWP's standing is that the regulations authorizing appeals of grazing decisions state "[a]ny \* \* \* person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge \* \* \*." 43 CFR 4.470(a). This "any person" standard appears to be less strict than that set forth in the regulations addressing appeals to the Board, which state "[a]ny party to a case who is adversely affected by a decision \* \* \* shall have a right to appeal to the Board \* \* \*." 43 CFR 4.410(a) (emphasis added). BLM then suggests that these seemingly inconsistent provisions can be harmonized by focusing on another provision of the regulations authorizing appeals of grazing decisions, which provision states that "[a]ny party affected by the administrative law judge's decision \* \* \* has the right to appeal to the Board of Land Appeals under the procedures in this part." 43 CFR 4.478(e) (emphasis added). BLM asserts that this last provision "means that one has a right to appeal an ALJ decision to IBLA only if they meet the requirements of part 4, including 43 C.F.R. § 4.410[ ]. Therefore, it does not make sense that the requirements for standing are relaxed when appealing to an ALJ, but stiffened when appealing to IBLA." (Notice of Appeal at 3-4.)

BLM attempts to bolster its argument by referencing the Board's decision in Committee for Idaho's High Desert (CIHD), 159 IBLA 370 (2003). In that case, the Board held that, with respect to a proposed land exchange, because the regulatory procedures provided for a protest period, the filing of a timely protest was required in order to have standing to appeal to the Board. (BLM Reply at 2, citing CIHD, 159 IBLA at 374.) BLM argues in their instant appeal that, because the grazing regulations provide for a protest period, "participation in the protest period is essential to confer standing to appeal a final decision." (BLM Reply at 2.)

In CIHD, we dismissed the appeal because the appellant had not protested a notice of a land exchange decision. The land exchange regulations specifically state that “[a] right of appeal from a protest decision of the authorized officer may be pursued in accordance with the applicable appeal procedures of 43 CFR part 4.” 43 CFR 2201.7-1(c). BLM is correct that we determined, under the land exchange regulations, that “a protest is required in order to have standing to appeal.” CIHD, 159 IBLA at 373. However, the instant appeal involves not a land exchange, but a grazing decision, and the grazing appeal regulatory scheme is somewhat different.

[2] Although BLM correctly observes that the grazing regulations provide for a protest period for a proposed grazing decision (BLM Reply at 2, citing 43 CFR 4160.2), BLM fails to consider the entire regulatory scheme. Once BLM issues a proposed grazing decision, protests may be filed within a 15-day period from receipt of that decision. 43 CFR 4160.2. If a protest is not filed, then the proposed decision will become final without further notice, unless otherwise provided in the proposed decision. 43 CFR 4160.3(a). If a protest is timely filed, BLM will consider the protest and then issue a final decision. 43 CFR 4160.3(b). The subsequent regulatory provision is particularly revealing. It states:

A period of 30 days following receipt of the final decision, or 30 days after the date the proposed decision becomes final as provided in paragraph (a) of this section, is provided for filing an appeal \* \* \*. See §§ 4.21 and 4.470 of this title for general provisions of the appeal and stay processes.

43 CFR 4160.3(c) (emphasis added). Because a proposed decision becomes final under paragraph (a) only in the absence of a protest, this regulatory scheme clearly contemplates and allows for an appeal to an ALJ under 43 CFR 4.470, without the need for a protest. These regulations provide no grounds for a dismissal of WWP’s appeal, as requested by BLM.

BLM’s discomfort over the apparently inconsistent regulations at 43 CFR 4.470(a) and 4.410(a) that seem to provide a right of appeal to an ALJ for a non-protestant, but then deprive that non-protestant of a right to appeal an adverse ALJ decision to this Board, also can be resolved by a closer look at the regulations. 43 CFR 4.470(a) states that “any person” who is adversely affected may appeal a final grazing decision to an ALJ. That language clearly does not restrict such appeals to protestants. To appeal an ALJ’s decision to the Board requires that an adversely affected person be a “party to a case.” 43 CFR 4.410(a). Although the regulations provide examples of persons who would be “parties to a case,” such as those who file a protest of a decision or comment on an environmental document, 43 CFR 4.410(b),

the specific examples are not exhaustive. The determinative language states that a party to a case is one who has “participated in the process leading to the decision under appeal \* \* \*.” Id.

[3] In the case of a grazing appeal to this Board, the “decision under appeal” is the ALJ’s decision. A non-protestant who appeals a grazing decision to an ALJ, and who then appeals an adverse ALJ decision to the Board, clearly has “participated in the process leading to the [ALJ] decision under appeal” and qualifies as a “party to a case” under 43 CFR 4.410(a). If WWP were to receive an adverse ruling on its appeal to Judge Heffernan in this case, WWP would be a “party to a case” under the regulations and entitled to appeal Judge Heffernan’s ruling to the Board. Accordingly, there is no inconsistency between 43 CFR 4.470 and 43 CFR 4.410 that would require dismissal of WWP’s appeal.<sup>6/</sup>

[4] As for BLM’s argument that WWP’s appeal to Judge Heffernan should be dismissed because WWP raised no issues in a preceding protest and is therefore foreclosed from raising any issues on appeal, BLM again has failed to review carefully the relevant authorities. BLM cites the Board’s decisions in Southern Utah Wilderness Alliance (SUWA), 128 IBLA 52 (1993), and Henry A. Alker, 62 IBLA 211 (1982), in support of its argument.<sup>7/</sup> Unfortunately, BLM has missed the essential meaning of those decisions. “Except in extraordinary circumstances, this Board does not review issues which have not been the subject of a decision which is before us on appeal \* \* \*” Alker, 62 IBLA at 212 (emphasis added). Similarly, “the Board may limit its review of an SDR decision to allegations of error in the disposition of the

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<sup>6/</sup> The Board has followed this approach and entertained appeals from non-protestants in grazing matters. See, e.g., Thoman v. BLM, 125 IBLA 100, 103 (1993) (“[A]ppellant could have protested the Area Manager’s proposed decision no later than \* \* \* 15 days after he received it, which he did not do, or could have filed a notice of appeal within 30 days after the proposed decision became a final decision \* \* \* which he did do \* \* \*.”); Sorensen v. BLM, 155 IBLA 207 (2001) (“The proposed decision became final in the absence of a protest [and] \* \* \* Sorensen timely appealed \* \* \*.”) See also 68 FR at 68766 (“Other ways a person \* \* \* could have previously participated in the decisionmaking process might include \* \* \* intervening in the case before the ALJ to oppose the stay petition.”).

<sup>7/</sup> SUWA involved an appeal of a State Director Review (SDR) decision in which the appellant raised issues on appeal that were not raised during SDR and were not addressed in the SDR decision. Alker involved an appeal of a decision dismissing a protest in which the appellant attempted to raise additional issues on appeal that were not raised in its earlier protest.

issues presented during SDR.” SUWA, 128 IBLA at 59 (emphasis added). With respect to their application to the instant case, these decisions indicate that the Board generally would not address issues raised by WWP before the Board that had not been raised during its appeal to Judge Heffernan. More fundamentally, however, the cases address those issues raised during an appeal to the Board. BLM’s Motion to Dismiss attempts to misapply them to an appeal before an ALJ. Issues that may be raised before an ALJ in a grazing appeal are addressed in the relevant regulations<sup>8/</sup> and are, in the first instance, within the purview of the ALJ hearing the appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM’s petition to file an interlocutory appeal is granted, BLM’s request for expedited review is granted, and Judge Heffernan’s October 14, 2004, order denying BLM’s motion to dismiss WWP’s appeal is affirmed as modified, for the reasons provided herein.

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H. Barry Holt  
Chief Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge

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<sup>8/</sup> For example, 43 CFR 4.470(b) states “[t]he appeal [to the ALJ] must state clearly and concisely the reasons why the appellant thinks the BLM grazing decision is wrong.” 43 CFR 4.470(c) states “[a]ny ground for appeal not included in the appeal is waived. The appellant may not present a waived ground for appeal at the hearing unless permitted or ordered to do so by the [ALJ].”