

11/2006



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Interior Board of Land Appeals

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THE CENTER FOR TRIBAL WATER ADVOCACY

v.

BUREAU OF LAND MANAGEMENT

IBLA 2007-14

Decided December 13, 2007

Appeal from the dismissal of an appeal to the Hearings Division, Office of Hearings and Appeals, for lack of standing. OR-020-05-01.

Affirmed.

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

Any applicant, permittee, lessee, or other person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge under 43 C.F.R. § 4.470. A party may show adverse effect through evidence of use of the lands in question. A party may also show it is adversely affected by setting forth a legally cognizable interest, in resources or in other land affected by a decision, and showing how the decision has caused or is substantially likely to cause injury to those interests.

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

An organization has failed to demonstrate under 43 C.F.R. § 4.470(a) that it has a legally cognizable interest that is adversely affected by a BLM decision to construct a fence in a grazing Allotment, when the interest asserted is based upon two visits to the Allotment area by the organization's attorney, the first of which took place when he was not a member of the organization, and

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the second of which took place a month after BLM issued the appealed decision.

APPEARANCES: Harold S. Shepherd, Esq., Pendleton, Oregon, for appellant; Brad Grenham, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Center for Tribal Water Advocacy (CTWA or the Center) has appealed from a September 20, 2006, order of Administrative Law Judge Robert G. Holt granting the Renewed Motion to Dismiss for Lack of Standing filed by counsel for the Burns, Oregon, District Office, Bureau of Land Management (BLM), in the above-captioned appeal. For the reasons that follow, we affirm Judge Holt's order.

#### BACKGROUND

This matter began in October 2004 when BLM completed Environmental Assessment (EA) OR-026-02-043 to analyze the environmental impacts of completing the Defenbaugh Fence project, which involved the construction of 4.12 miles of temporary 3-wire fence in the Trout Creek Mountain Allotment (Allotment). The fence would be constructed in two locations. A 2.26-mile fence would be constructed in the Mahogany Ridge Wilderness Study Area (WSA) in the Mahogany Pasture, and a 1.86-mile fence would be constructed outside the WSA in the Buckskin Mountain Pasture. Both Pastures are located in Harney County, Oregon.

On April 1, 2005, BLM issued a Finding of No Significant Impact (FONSI) and Notice of the Field Manager's Proposed Decision (Proposed Decision), which determined that construction of the Defenbaugh Fence would improve management of the pastures in the Allotment, and being temporary, could be removed if the WSA were eventually established as wilderness. In the FONSI, the Field Manager concluded that the proposed action was not likely to significantly impact the human environment, considering the factors set forth at 40 C.F.R. § 1508.27, and thus that BLM was not required by section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000), to prepare an environmental impact statement.

On April 18, 2005, CTWA filed a protest of the Proposed Decision. BLM denied CTWA's protest and issued a Notice of Final Decision on May 19, 2005. CTWA then filed an appeal with the Hearings Division and requested a stay. As part of its opposition to the stay, BLM argued that CTWA had failed to sufficiently demonstrate standing to maintain its appeal.

In its Appeal and Request for Stay before the Hearings Division, CTWA stated that its members “derive educational, scientific, aesthetic, recreational, spiritual, and other benefits from their use of BLM public lands”; that it “submitted comments in the proposed decision and EA”; that it had “submitted a protest to the Final Decision to change the livestock access route into the Mahogany Ridge Pasture, for managing livestock utilization patterns in the riparian areas of Big Trout Creek in August 2005”<sup>1</sup>; that its “members regularly use and will continue to use the John Day area for camping, nature study, hiking, wilderness solitude, white water rafting and other recreational and aesthetic pursuits”; and that BLM’s decision “to construct over 2 miles of fence in the Mahogany Ridge Wilderness Study [Area] will impair the unique qualities for which the John Day area was originally placed into public ownership and significantly and irreversibly affect use and enjoyment of the area by CTWA members.” CTWA’s Appeal and Request for Stay at 3.

In its Response to Appeal and Request for Stay, dated July 8, 2005, BLM stated that “Harold Shepherd, attorney for the CTWA (an entity previously unknown to Burns District BLM,) has indicated through several phone calls to the Andrews Field Manager, that he does not know how to get to the Trout Creek Mountains, and he does not know how long it will take him to travel from Pendleton, Oregon, to the site of the proposed project.” Response to Appeal and Request for Stay at 2. BLM stated that “[t]he Trout Creek Mountains are located more than 200 miles south and east of the John Day area, and actions in the Trout Creek Mountains will not affect [CTWA’s] use and enjoyment of the John Day area,” and that “[w]hite water rafting, in particular, is not a use ascribed to the Trout Creek Mountains, as there are no suitable rivers.” *Id.* BLM stated that the nearest white water rafting is 65 miles away in the Owyhee River area in BLM’s Vale District. BLM requested that CTWA’s appeal and request for stay be dismissed for lack of standing, in that CTWA failed to meet the “adversely affected” prong of the standing requirement. Citing *Wyoming Outdoor Council*, 153 IBLA 379, 384 (2000), BLM argued that CTWA had failed to show that its members use the public land in question.

By order dated July 13, 2005, Judge Sweitzer set a deadline for CTWA to respond to BLM’s challenge to CTWA’s standing to appeal the Final Decision. CTWA filed a response on July 22, 2005, in which Shepherd stated that he “at no time suggested to the Andrew’s Field Manager that he did not know how to get to Trout Creek Mountains,” and that as, as described in his affidavit, “he visited the Trout Creek Mountain allotment and other locations within the Trout Creek Mountains in 1989 when BLM began the Trout Creek Mountains project.” CTWA’s Response at 2. He stated that “nothing in standing law, prohibits an appellant from asking directions to get to the project site in question.” *Id.* He stated that he “did visit the Trout Creek

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<sup>1</sup> BLM points out that CTWA’s protest of the Proposed Decision was filed in April 2005 rather than August 2005.

Mountains area including the allotment and vicinity of the proposed fence for 2 days over the 4<sup>th</sup> of July weekend 2005”; that “[w]hile there he noticed a large number of cattle in the Trout Creek Mountain allotment which were damaging range vegetation”; and that “the over-stocking problems [he] noticed in the Trout Creek Mountain Allotment are exactly why CTWA filed its appeal and stay request.” *Id.* at 3. In his attached affidavit, Shepherd provides the following statements, which are pivotal to his standing argument:

2. As an intern for the National Wildlife Federation office in Portland (NWF), Oregon, I visited the Trout Creek Mountain allotment and other locations within the Trout Creek Mountain area in 1989 when BLM began the Trout Creek Mountains Project (Project). NWF was listed as an affected interest in the management of the Trout Creek Mountains allotment and this visit was designed to introduce interested parties in management of the Trout Creek Mountains area. During this visit, I expressed my concern to BLM Burns District staff about the significant impact livestock grazing was having in the Trout Creek Mountain Area including the Mahogany Ridge WSA and the Trout Creek Mountains allotment.

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5. I did visit the Trout Creek Mountains area including the allotment and vicinity of the proposed fence for 2 days over the 4<sup>th</sup> of July weekend 2005 with my family. While there, I noticed that some areas along Willow Creek on BLM lands had improved from 15 years previously but that large numbers of cattle were still present in the Trout Creek Mountain allotment which were damaging range vegetation and significantly affecting my and my families [sic] use and enjoyment of the area as we hiked through the allotment.

July 26, 2005, Affidavit at 1-3.

By order dated August 5, 2005, Judge Sweitzer denied CTWA's petition for stay. With regard to BLM's motion to dismiss for lack of standing, he stated: "For purposes of ruling on the petition for stay I will assume, without deciding, that CTWA has standing to bring the appeal and petition for stay." Order, Aug. 5, 2005, at 2. CTWA appealed Judge Sweitzer's order to this Board, which affirmed it by order dated March 7, 2006. Judge Holt scheduled a hearing on the merits of CTWA's appeal for 2 days beginning April 25, 2007, and BLM, through counsel, filed a Renewed Motion to Dismiss for Lack of Standing (Renewed Motion to Dismiss).

In its Renewed Motion to Dismiss, BLM relied upon the standing requirements found at 43 C.F.R. § 4.410, *i.e.*, that an appellant show that it is a party to the case and that it is adversely affected by the BLM decision, in arguing that CTWA lacks standing to challenge the Defenbaugh Fence project. Citing *Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 82 (2005), and *Wyoming Outdoor Council*, 153 IBLA at 384, BLM contended that CTWA has failed to demonstrate an injury to a “legally cognizable interest.” BLM stated:

Nowhere in any of the appellant’s filings does it demonstrate that any of its members have used or plan to use the lands or resources allegedly affected by the BLM decision. While the attorney for the appellant alleges that he has been to the Trout Creek Mountain allotment, he does not at any point assert that he is a member of CTWA, and, instead, only refers to himself as the “attorney of record” for the appellant. *See* Affidavit of Harold Shepherd, dated July 26, 2005, ¶ 1. Thus absent a demonstration that CTWA’s members have used the allotment, there is no organizational standing.

Renewed Motion to Dismiss at 3.

BLM argued that even if “Shepherd can establish that he is a member of CTWA, his affidavit fails to demonstrate that CTWA has such a legally cognizable interest in the Trout Creek Mountain Allotment.” *Id.* “First,” contended BLM, “his visit to the area over 15 years ago was conducted as an intern representing the National Wildlife Federation which is not an Appellant in the present case,” and “[s]econd, [his] more recent visit does not demonstrate a recreational use that would give CTWA a ‘legally cognizable interest’ in the allotment,” but was “conducted in conjunction with his representation of CTWA in this appeal.” *Id.*

In responding to BLM’s Renewed Motion to Dismiss, Shepherd contended that his two visits to the area demonstrate a recreational use that will be adversely affected by the project. He deems it irrelevant as to when he visited the area; rather, he contends that his two visits “illustrated that . . . he is a regular visitor to the affected area . . . .” CTWA’s Response at 4. Based upon these two visits, Shepherd posited that “CTWA members regularly use and will continue to use the Trout Creek Mountains area for camping, nature study, hiking, wilderness solitude, white water rafting and other recreational and aesthetic pursuits.” *Id.*

On September 30, 2006, Judge Holt issued the order subject to CTWA’s appeal to this Board. Judge Holt dismissed CTWA’s appeal and cancelled the scheduled hearing. He began by observing that the standing requirements for appeals to an ALJ are contained in 43 C.F.R. § 4.470(a), which provides: “Any applicant, permittee, lessee, or *other person whose interest is adversely affected by a*

*final BLM grazing decision* may appeal the decision to an administrative law judge . . . .” (Emphasis added by Judge Holt.) He noted that in *Western Watersheds Project v. BLM*, 164 IBLA 300, 306-07 (2005), the Board stated that the “party to a case” requirement for standing to appeal to the Board under 43 C.F.R. § 4.410(a) does not apply directly to grazing appeals to an ALJ under 43 C.F.R. § 4.470. However, he applied the Board’s ruling in *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 86, that for “an organization, such as the Center, to have an adversely affected interest it must show that one or more of its members has an interest in their own right that is adversely affected by the decision,” and that “[s]uch a ‘legally cognizable interest’ may be directly shown through use of the land.” ALJ Decision at 4. Further, he stated that under *Center for Native Ecosystems*, 163 IBLA 86, 90 (2004), “where an appellant asserts use of the land to support its standing, the use must have taken place before the date of the decision being appealed.” ALJ Decision at 4. Thus, he reasoned that “[b]ecause the Center asserts its use of the land as the basis for its interest, the Center must show that one of its members used the allotment before BLM issued its decision on May 19, 2005.” *Id.*

Judge Holt determined that neither of the two trips to the Allotment made by CTWA’s attorney, as described in his affidavit, established standing to appeal BLM’s decision. He stated that the first trip occurred when Shepherd was an intern with NWF, not when he was a member of CTWA, and that “even if [he] was a member of the Center or its staff in 1989, the affidavit describes no use of the allotment which would be adversely affected by the appealed decision.” *Id.* at 5. Judge Holt found that the affidavit supported a finding that Shepherd was a member of CTWA when he visited the Allotment the second time, albeit as CTWA’s attorney, and that his use involved the pursuit of “interests (i.e., camping and hiking) adversely affected by the decision.” *Id.* However, Judge Holt found that this second visit took place after the date of the decision and, under *Center for Native Ecosystems*, 163 IBLA at 90, “this use cannot support organizational standing for the Center.” ALJ Decision at 5.

Shepherd filed a “Notice of Appeal & Brief of Appellant” in this matter, reiterating that under 43 C.F.R. § 4.410, CTWA “has established itself as a ‘party to the case’ by participating in every step of the public comment process for this EA beginning with the filing of comments . . . and filing of a protest of the BLM’s proposed decision,” and that it has demonstrated a “legally cognizable interest” through his two visits to the Trout Creek Mountains area. ALJ Decision at 6. He states that “[d]uring these visits [he] noticed substantial numbers of livestock and significant damage from livestock grazing.” *Id.* at 7.

#### ANALYSIS

[1] Whether CTWA has a right of appeal to an administrative law judge from BLM’s final decision to construct the Defenbaugh Fence is governed by 43 C.F.R.

§ 4.470(a), which provides: “Any applicant, permittee, lessee, or *other person whose interest is adversely affected by a final BLM grazing decision* may appeal the decision to an administrative law judge . . . .” (Emphasis added.) Whether CTWA meets the criteria of 43 C.F.R. § 4.470(a) turns upon whether Shepherd’s assertions demonstrate an interest of CTWA that has been adversely affected by BLM’s decision.

In considering whether CTWA, as an organization, demonstrated an adversely affected interest under 43 C.F.R. § 4.470(a), Judge Holt was properly guided by the Board’s decision in *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 86, which addressed whether an organization had shown under 43 C.F.R. § 4.410 that it has been adversely affected by a BLM oil and gas leasing decision. CTWA bases its argument that it has shown such an interest upon Shepherd’s affidavit, in which he describes his two visits to the Allotment area. As noted, he contends that his two visits “illustrated that . . . he is a regular visitor to the affected area” and that “CTWA members regularly use and will continue to use the Trout Creek Mountains area for camping, nature study, hiking, wilderness solitude, white water rafting and other recreational and aesthetic pursuits.” CTWA’s Response at 4.

[2] Judge Holt’s inquiry was framed in terms of the Board’s statement in *The Coalition of Concerned National Park [Service] Retirees*, that “adverse effect ‘may be shown through evidence of use of the land in question.’” 165 IBLA at 83, quoting *Wyoming Outdoor Council*, 153 IBLA at 384. Judge Holt evaluated Shepherd’s affidavit in terms of the “use” asserted, careful to recognize that “a ‘legally cognizable interest’ *may* be directly shown through use of the land,” suggesting that such use is not the only way to demonstrate an adverse effect. ALJ Decision at 4. However, because CTWA based its standing to appeal BLM’s decision upon Shepherd’s use of the Allotment area and on no other grounds, Judge Holt properly confined his analysis to that use.

We agree with Judge Holt that CTWA’s asserted use, *i.e.*, the two visits described in Shepherd’s affidavit, does not confer standing under 43 C.F.R. § 4.470(a). Judge Holt correctly observed that Shepherd made his 1989 visit to the Allotment when he was an intern with NWF, not as a member of CTWA, and that even if he had been a member of the latter, he had not shown a “use of the allotment which would be adversely affected by the appealed decision.” ALJ Decision at 5.

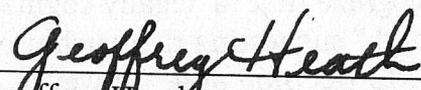
Moreover, we agree with Judge Holt that Shepherd’s second visit to the Allotment area, taking place as it did more than a month after BLM issued the challenged decision on May 19, 2005, does not establish a legally cognizable interest that was adversely affected by construction of the Defenbaugh Fence. In *Center for*

*Native Ecosystems*, 163 IBLA at 90, in applying 43 C.F.R. § 4.410, the Board stated that “[a] legally cognizable interest must exist as of the time of issuance of the decision being appealed in order to have standing to appeal . . . .” The Board held that when an appellant asserts use of the land in question in support of its standing to appeal, the asserted use must have taken place on or before the date of issuance of the decision being appealed. Evidence of use taking place after that date does not support a claim of standing to appeal that decision. *Id.* In basing its contention of adverse effect upon the two visits Shepherd made to the Allotment, CTWA places the timing of those visits into issue. Consistent with *Center for Native Ecosystems*, we conclude that Shepherd’s second visit to the Allotment for recreational use over a month after BLM issued its decision, does not confer standing under 43 C.F.R. § 4.470(a).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Holt’s decision is affirmed.

  
James F. Roberts  
Administrative Judge

I concur:

  
Geoffrey Heath  
Administrative Judge