



DAVID GLYNN

182 IBLA 70

Decided February 8, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

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IBLA 2011-231

Decided February 8, 2012

Appeal from an August 1, 2011, Finding of No Significant Impact and Decision Record issued by the Acting Field Manager, Dolores (Colorado) Field Office, Bureau of Land Management, approving the Spring Creek Basin Wild Horse Gather. Environmental Assessment # DOI-BLM-CO-S010-0062EA.

Decision affirmed.

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

For a person whose interest involves interacting with a wild horse herd, an adverse effect on that interest by a wild horse gather does not require the removal of the entire herd. A significant change to the quality of the experience, such as the removal of more than half of a herd, presents a sufficient possible adverse effect for standing to appeal.

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

Offering substantive comments on a proposed BLM action in a public forum, attended by BLM officers in their official capacities, with recorded minutes that identify the commenter, provides BLM with notice of appellant's position and contentions with respect to the proposed action such that the commenter is a party to the case for purposes of standing to appeal.

3. Wild Free-Roaming Horses and Burros Act: Generally

BLM is entitled to rely on the opinions of its experts in setting an AML and collecting data within the HMA to determine whether and how to conduct a wild horse

gather, particularly when an appellant merely expresses a difference of opinion with the expert's conclusion.

APPEARANCES: David Glynn, Ophir, Colorado, *pro se*; Danielle DiMauro, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

On September 16, 2011, the Board denied a request by appellant David Glynn for the stay of the Finding Of No Significant Impact (FONSI) and Decision Record (DR) signed by the Acting Field Manager, Dolores (Colorado) Field Office, Bureau of Land Management (BLM), approving the Spring Creek Basin Wild Horse Gather (Wild Horse Gather). The gather took place from September 16, 2011, to September 18, 2011. BLM's Motion to Dismiss and Answer (Motion to Dismiss) at 5. BLM has since moved to dismiss this appeal on the ground that appellant lacks standing. Based on the following analysis, we deny BLM's motion and affirm the decision.

Background

The Spring Creek Basin Herd Management Area (HMA) is an area of western Colorado comprised of over 21,000 acres. Administrative Record (AR) 2.001 at 1. Within the HMA, BLM seeks to maintain wild horse levels at the Appropriate Management Level (AML) as established by the 1994 Spring Creek Basin HMA Plan and reaffirmed by the Spring Creek Grazing Allotment/Spring Creek Basin HMA Land Health Assessment in 2005. *Id.* The AML is 35-65 adults greater than one year old. *Id.*

Based on the applicable Environmental Assessment (EA) # DOI-BLM-CO-S010-2011-0062EA, BLM determined that the herd had grown to a size of approximately 88-91 animals, putting it in excess of the AML. DR at 1. In response, BLM chose to take two primary actions. First, it would helicopter drive trap and gather 60 horses with the goal of removing 50. *Id.* at 1, 3. Second, BLM would administer a primer dose of Porcine Zona Pellucida (PZP), a contraceptive drug designed to limit herd growth through breeding. *Id.* at 3. Prior to implementing these actions, BLM held a public hearing on April 25, 2011. Notice of the meeting was posted on BLM's website on April 8, 2011, and distributed to approximately 80 organizations and individuals on a contact list of parties who previously showed an interest in such matters. *See* AR 2.003-2.015. Following the meeting, BLM also accepted comments through May 13, 2011. After this scoping period, BLM issued a preliminary EA on June 8, 2011, by posting it on BLM's website and distributing it to certain individuals and organizations; BLM again accepted comments through

July 11, 2011. *See id.* 2.001 at 7. Commenters during both periods suggested, among other things, that BLM not conduct a horse roundup (*Id.* 2.024, 2.033, 2.034), not use helicopters (*Id.* 2.025, 2.031, 2.037, 2.038, 2.039), and reduce cattle and sheep grazing to accommodate the herd (*Id.* 2.030). A letter from the Cloud Foundation suggested, “[o]n behalf of the wild horses living on the range in this area as well as the American public,” that the gather be cancelled and that livestock grazing should cease within the HMA. *Id.* 2.051. Numerous other comments supported conducting the gather with various stipulations.

Ultimately, BLM issued the final EA on August 1, 2011. The final EA was posted on BLM’s website and publicized by a press release. BLM also issued the FONSI and DR on August 1, 2011. Subsequently, appellant appealed the decision.

Standing to Appeal

BLM has moved to dismiss the appeal on the ground that appellant lacks standing to appeal. To have standing to appeal a decision to the Board, a person must both be a party to a case and be adversely affected by the decision. 43 C.F.R. § 4.410(a); *see The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004). Failure to demonstrate both elements requires us to dismiss the appeal. *Colorado Environmental Coalition*, 173 IBLA 362, 367 (2008).

Possible Adverse Effect on Appellant’s Interest

In this case, appellant asserts that he has great interest in the affected herd and in BLM’s decision to conduct a gather for the purpose of reducing the size of the herd. “I have spent over 20 days in the herd area since April 8th [2011]; and nearing two hundred days over the years from horseback. . . . I more than anyone has [sic] spent more time interacting and observing this herd from horseback than any other.” Notice of Appeal (NOA) at unpaginated (unp.) 1. BLM argues that appellant has not shown how his claimed interest will be adversely affected by the FONSI/DR, and has not specifically shown how BLM’s decision will impede his visits to the herd area to interact and observe the herd. Motion to Dismiss at 8, 9. In his response to the Motion to Dismiss, appellant asserts that even though the injury to members of the herd should be sufficient, he had a favorite member of the herd that he clearly had observed for some time and that horse “is mentioned extensively in my soon to be published novel on wild horses.” Response to Motion to Dismiss (Response) at 2. Appellant continues that this particular horse was “the first horse to be killed during the gather.” *Id.*

[1] Here, appellant asserts that he has visited the herd area, observed and interacted with the herd with clear intent to continue to do so, and even identified a favorite member of the herd that was killed during the gather. The BLM decision

approves, in part, the gather and removal of more than half of the herd, most of them permanently. DR at 3. For standing to appeal a wild horse gather, the Board does not require the removal of the entire herd, thus literally preventing a putative appellant from “interacting and viewing’ the herd in the future.” Motion to Dismiss at 9. A significant change to the quality of the experience, such as the removal of more than half of a herd, presents a sufficient possible adverse effect. *See Missouri Coalition for the Environment*, 172 IBLA 226, 235-36 (2007) (finding possible adverse effect for birdwatchers where a decision would allow 112 acres of forest land to be destroyed – in a National Forest comprised of 1.5 million acres). Accordingly, we find that appellant has demonstrated possible adverse effect to his interest from BLM’s decision.

Party to the Case

An individual becomes a party to a case by “taking action that is the subject of the decision on appeal, [being] the object of that decision, or has otherwise participated in the process leading to the decision under appeal.” 43 C.F.R. § 4.410(b). Absent those circumstances, an individual’s appeal may be properly dismissed for lack of standing. *See Board of Commissioners of Pitkin County*, 173 IBLA 173, 179 (2007). However, a person’s participation in the decision making process, through letter writing or attendance at public meetings, may make him or her a party to a case. *See Tom Van Sant*, 174 IBLA 78, 79 n.3, 86 n.10 (2008); *Timbisha Shoshone Tribe of Death Valley*, 136 IBLA 35, 37 (1996); *Mark S. Altman*, 93 IBLA 265, 266 (1986).

BLM asserts that the record does not demonstrate that appellant ever participated in the “administrative process that led to the decision” under appeal. Motion to Dismiss at 8. However, BLM acknowledges that appellant attended a meeting in June¹ at which he made public comments regarding the Spring Creek

¹ Counsel for BLM refers to a “BLM Colorado Southwest Regional Advisory Committee Meeting” on June 3, 2011. Evidence indicates that BLM is referring to a meeting of the Southwest Resource Advisory Council (SWRAC) that took place on Friday, June 3, 2011, in Norwood, CO, a town relatively close to the HMA. *See* Motion to Dismiss, Ex. 3, Attachment 1 (SWRAC Minutes). BLM’s website for its Colorado State Office also provides a link to the meeting minutes. *See* http://www.blm.gov/co/st/en/BLM_Resources/racs/swrac.html. The meeting minutes mistakenly refer to the meeting as having taken place on Friday, June 4, 2011, even though that Friday fell on June 3. BLM had published a *Federal Register* notice announcing that the meeting was scheduled for June 3, 2011. Response at 1; 76 Fed. Reg. 24048 (Apr. 29, 2011). BLM also issued on May 24, 2011, a public notice of the meeting that indicated the Wild Horse Gather was on the meeting

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gather. Motion to Dismiss at 4. The meeting took place during the time BLM was soliciting comments on the Wild Horse Gather from the public.² Among other agenda items, the Wild Horse Gather was discussed by SWRAC members during the SWRAC Meeting and a number of BLM staff were in attendance.³ SWRAC Minutes at unp. 1, 4. During the public comment portion of the meeting, appellant spoke and his comments were recorded in the minutes under the heading “Public Comments.” *Id.* at unp. 5-6. He explained his personal involvement with the herd, provided his own estimate of the herd’s size, and criticized BLM’s past and proposed actions. *Id.* BLM states that, after the meeting, appellant spoke directly with the Acting Field Manager for the Dolores Field Office about the gather. Motion to Dismiss at 4-5; Declaration of Connie Clementson at unp. 2. BLM asserts that she offered to take appellant’s mailing address, but he did not provide it, BLM never sent him anything further, and appellant never submitted written comments on the preliminary EA, which later issued. *Id.*

The Board generally has followed the rule that parties to a case must “structure their participation so that it . . . alerts the agency to the [parties’] position and contentions.” *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 514-15 (D.C. Cir. 2010) (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (alteration in original) (quoting *Vermont Yankee*, 435 U.S. 519, 553 (1978))); see *Hualapai and Fort Mojave Indian Tribes*, 180 IBLA 158, 168 n.13 (2010); *Powder River Basin Resource Council*, 180 IBLA 119, 136-37 n.23 (2010). Here, BLM focuses on the facts that appellant did not attend the April 25, 2011, public hearing and scoping meeting, did not submit written scoping comments, did not submit written comments on the preliminary EA, and declined BLM’s invitation to provide his personal contact information. Motion to Dismiss at 4-5. BLM also points out that the SWRAC meeting appellant did attend “was not specifically related to the wild horse gather.” Motion to Dismiss at 4. BLM concludes, therefore, that appellant is not a party to the case and consequently does not have standing to appeal.

¹ (...continued)

agenda and that a public comment period would be included. AR 2.083.

² BLM had held a public hearing and scoping meeting on Apr. 25, 2011, and accepted scoping comments from the public until May 13, 2011. BLM then posted the preliminary EA on its website on June 8, 2011, and accepted comments through July 11, 2011. Motion to Dismiss at 3.

³ In attendance at the June SWRAC Meeting was Connie Clementson, then serving as BLM Acting Field Manager, who was the BLM official who later made the decision and signed the FONSI/DR for the Wild Horse Gather. Motion to Dismiss at 4; SWRAC Minutes at unp. 1; Motion to Dismiss, Ex. 3 (Declaration of Connie Clementson) at 1-2.

We, however, view those facts somewhat differently. For example, the Board has held that a person may qualify as a “party to the case” even if that person failed to submit written comments to BLM, so long as BLM had notice of that person’s objections to the project at issue. *Hualapai and Fort Mojave Indian Tribes*, 180 IBLA at 168 n.13. So, the issue before us is whether appellant’s attendance at and involvement in the SWRAC Meeting constitutes participation in the decision making process such that BLM had notice of appellant’s objections to the BLM decision being appealed here.

SWRAC is one of 24 citizen-based Resource Advisory Councils formed by BLM to “provide an opportunity for individuals . . . to have a voice in the management of [public land].” See http://www.blm.gov/wo/st/en/info/resource_advisory.html. SWRAC’s members are appointed by the Secretary of the Interior and meet periodically to develop recommendations for BLM and “provide representative citizen counsel and advice” on matters involving public land resources. See http://www.blm.gov/co/st/en/BLM_Resources/racs/swrac.html. In the case of the SWRAC Meeting relevant to this case, public notice of the meeting was published by the BLM Colorado State Director in the *Federal Register*, which notice advised the public that both written and oral comments could be presented there. 76 Fed. Reg. at 24048. A subsequent BLM public notice again announced the date and time of the meeting, listed the agenda items which included the Wild Horse Gather, and invited public attendance and comment. AR 2.083. BLM staff were in attendance at the meeting in their official capacities, including the BLM Acting Field Manager who later made the decision under appeal.

[2] The SWRAC meeting was a public forum attended by BLM employees in their official capacities for the purpose of receiving public comments on land use management. In this case, the land use management issues on the meeting agenda included the Wild Horse Gather. Appellant provided oral comments on and criticism of the Wild Horse Gather at that forum (as invited by the *Federal Register* notice and BLM public notice of the meeting), and the minutes of the meeting memorialized his and other comments,⁴ and were posted on BLM’s public website. BLM should have considered those comments in making its decision on the Wild Horse Gather, and indeed, a copy of the minutes should have been included in the administrative record.⁵

⁴ The minutes reflect that in addition to appellant, one other “concerned citizen” provided oral comments on the Wild Horse Gather during the public comment portion of the SWRAC meeting. SWRAC Meeting Minutes at unp. 5-6.

⁵ In fact, the record does contain a copy of an email dated Sept. 13, 2011, sent by the Acting Field Manager that confirms her “30-45 minute conversation with

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The Board notes that BLM's administrative record is otherwise extraordinarily thorough. For example, it includes a photocopy of a handwritten phone message which reads in its entirety: "Comment about wild horse herd. Please keep the wild horse herd. Maybe cut back on cattle grazing up there to maintain a healthy wild horse herd." AR 2.075. BLM logged this as "Comment-New 2011-094" and wrote a response to it. AR 2.078 at 26. Just as this brief oral comment was recorded and responded to by BLM and documented in BLM's administrative record of the Wild Horse Gather decision, appellant's more extensive oral comments, provided "live" at a formal public meeting attended by BLM staff and the ultimate decision maker, should have appeared in the record.

BLM clearly invited appellant's comments and had notice of appellant's position and contentions with respect to the Wild Horse Gather. Appellant's participation qualifies him as a party to the case and, consequently, he has standing to bring the instant appeal.

Analysis of Appellant's Arguments

Under the Wild Free-Roaming Horses and Burros Act (WFHBA), 16 U.S.C. §§ 1331-1340 (2006), BLM is responsible for protecting and managing wild horses on public lands. *Fund for Animals, Inc. v. BLM*, 460 F.3d 13, 15 (D.C. Cir. 2006). BLM manages wild horses "at the minimal feasible level" and "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a) (2006).⁶ The ultimate goal of wild horse management is that they be "managed as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat." 43 C.F.R. § 4700.0-6(a).

BLM is required by section 3(b)(1) of the WFHBA, 16 U.S.C. § 1333(b)(1) (2006), to maintain a "current inventory" of wild horses "on given areas of the public lands," for the purpose of determining, *inter alia*, AMLs, whether and where overpopulations of wild horses exist, and "whether action should be taken to remove

⁵ (...continued)

Mr. Glenn [sic] regarding the wild horse gather EA and planned gather." AR 4.009. The email also states that "[u]pon my return to the district I did inform [the Associate Manager, BLM Dolores Public Land Office] of Mr. Glenn [sic] and he was familiar with the situation (riding in the Spring Creek area, etc)." *Id.* The Associate Manager also was a decision maker for the Wild Horse Gather. EA at 42.

⁶ See *Fund for Animals, Inc. v. BLM*, 460 F.3d at 15-16; *American Horse Protection Association, Inc. v. Frizzell*, 403 F. Supp. 1206, 1217 (D. Nev. 1975); *Redwings Horse Sanctuary*, 148 IBLA 61, 63 (1999).

excess animals,” or to control population by other means. When a wild horse population exceeds the AML, it constitutes an overpopulation for a given area of the public lands, and removal is generally required by section 3(b)(2) of the WFHBA, 16 U.S.C. § 1333(b)(2) (2006). *See* 43 C.F.R. § 4720.1.

BLM’s determination to undertake a removal that it finds “necessary” in the HMA constitutes the exercise of its discretionary authority under the WFHBA. *See* 16 U.S.C. § 1333(b)(1) (2006) (“[BLM shall] determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels).”). Appellant asserts that BLM miscalculated the number of wild horses in the HMA, resulting in an excess population of only one horse. Response at unp. 1. This argument is unpersuasive. The EA documents BLM’s methodology for determining that an excess of wild horses existed in the HMA, by direct count of the horses and many years of monitoring data, as evaluated by its Rangeland Management Specialists, Range Technicians, and other staff. EA at 1-4; *see* EA at 42. We have held that under these circumstances, “the appellant bears the burden of demonstrating that BLM committed an error in ascertaining, collecting, or interpreting the data upon which it relies in its decision.” *Wild Horse Organized Assistance*, 172 IBLA 128, 136 (2007) (citing *Thomas M. Berry*, 162 IBLA 221, 225 (2004); *Animal Protection Institute of America, Inc.*, 151 IBLA 396, 401 (2000); *Joey R. Deeg*, 141 IBLA 67, 70 (1997)). Here, appellant has failed to carry that burden. BLM is entitled to rely on the opinions of its experts in setting the AML and collecting data within the HMA to determine whether and how to conduct a wild horse gather, “particularly when an appellant merely expresses a difference of opinion with the expert’s conclusion.” *See Michael & Edith Lederhause*, 174 IBLA 188, 193 (2008) (citing *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 400 (2007)). Furthermore, even if BLM determined that a herd exceeded the maximum range set for the AML by only one horse, BLM may choose to conduct a gather at its discretion. Here, however, BLM determined there were 55 excess horses. EA at 4.

Appellant’s other chief assertions are that the AML is too low, that BLM should encourage the herd to grow rather than conduct a gather, and that BLM has mismanaged the HMA by allowing cattle overgrazing and failing to maintain water sources. NOA at unp. 1. However, the AML was established by a previous decision of BLM and is not at issue here. *See* DR at 1. In addition, appellant provides no factual evidence supporting his assertions, and BLM is entitled to rely upon its experts with respect to analysis of the circumstances triggering the gather. Finally, we note that BLM considered many comments from other parties during the decision making process that raised concerns similar to those of appellant’s, and BLM responded to those concerns. *See generally* EA, Appendix G. Absent any other evidence of error, we find no ground to reverse BLM’s decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the motion to dismiss is denied and the decision is affirmed.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge