INTERIOR BOARD OF LAND APPEALS

National Wildlife Federation, Southern Utah Wilderness Alliance,
and Joseph M. Feller
v.
Bureau of Land Management

American Farm Bureau Federation, Utah Farm Bureau Federation,
and Ute Mountain Ute Indian Tribe,
Intervenors-Appellants

129 IBLA 124 (April 13, 1994)

Title page added by:
ibiadecisions.com

NATIONAL WILDLIFE FEDERATION,
SOUTHERN UTAH WILDERNESS ALLIANCE,
and JOSEPH M. FELLER,
Appellants-Appellees
v.

BUREAU OF LAND MANAGEMENT,
Respondent-Appellant

AMERICAN FARM BUREAU FEDERATION,
UTAH FARM BUREAU FEDERATION, and
UTE MOUNTAIN UTE INDIAN TRIBE,
Intervenors-Appellants

IBLA 94-264 Decided April 13, 1994

Appeals from a decision by District Chief Administrative Law Judge John R. Rampton, Jr., addressing appeals from decisions of the Moab District Manager and the San Juan Resource Area Manager relating to grazing in the Comb Wash Allotment. Hearings Division Docket Nos. UT-06-91-01 and UT-06-93-01.

Motion to dismiss for lack of standing granted in part and denied in part; amicus curiae status granted; briefing schedule established.

1. Rules of Practice: Appeals: Standing to Appeal

In order for an individual or organization to establish standing to appeal under 43 CFR 4.410, the individual or organization must show that he or she is a party to the case and that a legally cognizable interest is adversely affected by the decision being appealed. In order to show adverse effect, one need only present colorable allegations of injury to a legally cognizable interest.

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

Where the standing of an organization is challenged in an appeal to the Board of Land Appeals of an Administrative Law Judge's decision in a grazing case on the basis that the organization is not adversely affected, the Board will find adverse effect where the organization presents colorable allegations of injury through production of the affidavits of three of its members

holding grazing authorizations in adjacent or nearby allotments within the same resource area, whose ability to continue grazing livestock is threatened by the legal rulings being challenged.

Swanson--Superior Forest Products, Inc., 127 IBLA 379 (1993), clarified.

APPEARANCES: David H. Israel, Esq., Scottsdale, Arizona, for the Ute Mountain Ute Indian Tribe; Glen E. Davies, Esq., Salt Lake City, Utah, for the American Farm Bureau Federation and the Utah Farm Bureau Federation; David K. Grayson, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; J. Jay Tutchton, Esq., Thomas D. Lustig, Esq., Boulder, Colorado, and Joseph M. Feller, Esq., Tempe, Arizona, for National Wildlife Federation, Southern Utah Wilderness Alliance, and Joseph M. Feller.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

In our decision in National Wildlife Federation v. Bureau of Land Management, 128 IBLA 231 (1994), the Board, inter alia, took under advisement the motion of National Wildlife Federation, Southern Utah Wilderness Alliance, and Joseph M. Feller (NWF et al.) requesting dismissal of the American Farm Bureau Federation (AFBF) and the Utah Farm Bureau Federation (UFBF) (collectively, the Bureaus) for lack of standing to appeal the December 20, 1993, decision of District Chief Administrative Law Judge John R. Rampton, Jr., involving appeals (UT-06-91-01 and UT-06-93-01) concerning a grazing permit and annual grazing authorizations for the Comb Wash Allotment. Therein, we granted the Bureaus 30 days from their receipt of a copy of that motion in which to file a response thereto. The Bureaus have filed a response, and NWF et al., in a document filed on March 23, 1994, assert that no reply is necessary because the Bureaus have failed to "claim that any of their members use the Comb Wash Allotment for any purpose."

[1] The procedural regulations at 43 CFR 4.410(a) provide that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right of appeal to the Board * * *." Thus, one must be both a party to a case and have a legally cognizable interest that is adversely affected by the decision in issue. E.g., Resource Associates of Alaska, 114 IBLA 216, 219 (1990); Mark S. Altman, 93 IBLA 265, 266 (1986); Sharon Long, 83 IBLA 304, 307 (1984). "If either element is lacking, an appeal must be dismissed * * *." Mark S. Altman, supra at 266. However, in order to show adverse effect we have not required a showing that an injury has occurred; rather, colorable allegations of injury are all that are required. Powder River Basin Resource Council, 124 IBLA 83, 89 (1992); Donald K. Majors, 123 IBLA 142, 145 (1992). 1/

1/ "[W]here, as here, at least colorable allegations of injury exist, the existence of standing cannot be made dependent upon ultimate substantive success on appeal." California State Lands Commission, 58 IBLA 213, 217 (1981).

"Party to a case" is not an issue herein; adverse effect is. In general, a party to a case is the responsible party who took the action which is the subject of the decision on appeal, or who filed the instrument, e.g. application, offer, etc., that resulted in the decision, or who otherwise actively participated in the decisionmaking process leading to that decision. See Stanley Energy, Inc., 122 IBLA 118, 120 (1992). The Bureaus are clearly a "party to a case." They actively participated as intervenors in the proceeding before Judge Rampton.

In their motion, NWF et al. assert that the Bureaus lack standing because they are not adversely affected by Judge Rampton's December 20, 1993, decision in this case. They argue that the Bureaus have not alleged any injury to their, or any of their members', economic or property interests. They contend that the Bureaus have not asserted that their members use the public lands of the Comb Wash Allotment. They also claim there has been no allegation that the Bureaus' members own land adjoining the Comb Wash Allotment that has been somehow injured by Judge Rampton's decision. Finally, NWF et al. dismiss the Bureaus' contention that because of their interest in the administration of grazing on public lands, the precedent set by Judge Rampton's decision adversely affects their interests, by stating that "[m]ere concern with the 'precedent' set by the decision is not the injury in fact necessary to confer standing" (Motion at 4).

In its reply to the motion, the Bureaus assert that Judge Rampton's decision has a far broader impact than whether grazing should be allowed in the five canyons in the Comb Wash Allotment. They contend that the decision addresses many fundamental environmental and public land issues and that the positions taken by Judge Rampton on those issues "put at risk not only grazing on the Comb Wash Allotment but livestock grazing on allotments throughout the San Juan Resource Area and the western United States" (Reply at 3). The Bureaus provide the affidavits of three members of the UFBF that hold grazing permits for individual allotments (Corey Perkins, the Perkins Brothers Allotment; Keith Ivins, the White Mesa Allotment; and Merlin Grover, the Lower Horse Canyon Allotment) in the San Juan Resource Area, two of which (Perkins Brothers Allotment and White Mesa Allotment) are in the vicinity of or adjacent to the Comb Wash Allotment. The Bureaus contend that continued grazing on those three allotments arguably would be precluded if Judge Rampton's decision is upheld "until the site specific NEPA [National Environmental Policy Act] analysis and cost benefit analysis required by FLPMA [Federal Land Policy and Management Act of 1976], under Judge Rampton's construction of those laws, is completed by the BLM" (Reply at 5).

The Bureaus argue that, contrary to the contentions of NWF et al., Board precedents do not require that their members actually graze livestock in or otherwise use the Comb Wash Allotment. The Bureaus assert that "the decision has the potential for adverse impact on grazing rights as a result of the precedent which it asserts," and that potential adverse impact is sufficient to confer standing (Reply at 8).

[2] The Bureaus are correct that an organization, which is a party to a case, may establish standing to appeal where some of its members are

adversely affected by the decision under review. See, e.g., Powder River Basin Resource Council, supra at 88; National Wildlife Federation, 82 IBLA 303, 307-08 (1984). However, the Board has not recognized a mere deep concern with the issues of a case, no matter how genuine, as constituting the requisite adverse effect. See, e.g., Sharon Long, supra at 309; Oregon Natural Resources Council, 78 IBLA 124, 125 (1978). What we have required is that the interest allegedly affected by the decision under review be a legally cognizable interest and that the allegation of adverse effect must be colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect. Powder River Basin Resource Council, supra at 89.

The Bureaus assert that the fact that an injury has not yet occurred or that it might never occur is not controlling so long as the appellant has identified specific facts giving rise to the conclusion that a legally cognizable interest is adversely affected by the decision on appeal. While we agree with that contention, we wish to clarify the effect of a Board decision relied on by the Bureaus, Swanson--Superior Forest Products, Inc., 127 IBLA 379 (1993), and a statement therein concerning Barret S. Duff, 122 IBLA 244 (1992).

Swanson--Superior involved a challenge to a BLM land exchange by a timber processor who alleged that it would like to bid on the timber on the BLM parcel involved in the exchange and that completion of the exchange would preclude it from doing so. The Board resolved the appeal in a two-judge split decision in which the concurring judge agreed only with the "ultimate resolution" of the appeal, i.e., that BLM had properly denied Swanson--Superior's protest of the exchange, and that Swanson--Superior had alleged sufficient facts to "predicate a finding of standing to appeal." Id. at 387 (Burski, A J. concurring). Other aspects of the lead opinion's discussion regarding standing were vigorously disputed. Moreover, the statement in Swanson--Superior, characterizing the Duff case, relied on by the Bureaus, is inaccurate. The lead opinion in Swanson--Superior stated at page 382:

> Similarly, in Barret S. Duff, 122 IBLA 244, 246 (1992), a Federal oil and gas lessee had standing to appeal a land exchange decision that would divide the surface and mineral estates in the vicinity of his leases. Although his leases were not directly affected by the exchange and he had no interest in the surface estates to be conveyed, Duff nevertheless was found to be adversely affected so as to have standing to appeal because of an alleged inconvenience connected with the increased environmental reporting requirements and considerations of surface access for development of the mineral resource caused by the change in surface management. [Emphasis added.]

It is clear why the Bureaus chose to quote from Swanson--Superior, rather than Duff, since Duff contains no discussion of standing, and no finding of adverse effect. In addition, the Swanson--Superior statement misstates the facts in Duff. Duff involved a protest to a land exchange by an oil and gas lessee. While Swanson--Superior states that Duff "had

no interest in the surface estates to be conveyed," a comparison of the land description of the selected land in the Notice of Realty Action to the description of Duff's four oil and gas leases shows that all the lands embraced by Duff's leases were included in the selected lands. 2/ Thus, Duff's concern was that the surface estate of his leases would be transferred from the Federal Government to private parties allegedly resulting in a diminution in value of his leases because of the potential for increased permitting costs and potential access problems. Duff did not involve a situation where lands "in the vicinity" of his leases were being exchanged; the surface of his leases were part of the selected lands. Duff was clearly adversely affected by BLM's decision to exchange the surface of his leased lands. The Duff case does not represent a situation similar to that of the Bureaus in the present case. In this case, neither the Bureaus nor its members control or use the lands within the Comb Wash Allotment. Nor do they allege that they do.

Nevertheless, we find that the Bureaus have identified specific facts that support a conclusion that members of the UFBF are adversely affected by Judge Rampton's decision. The three affidavits provided by the Bureaus show that three members of UFBF hold grazing permits for allotments in the San Juan Resource Area and that Judge Rampton's decision could result in an interruption or cessation of their ability to graze livestock on those allotments. Accordingly, we conclude that UFBF has standing to appeal Judge Rampton's decision. 3/ The same cannot be said for AFBF, however. None of the affidavits indicate that any of the permittees is a member of AFBF. Thus, we must find that AFBF has nothing more than a genuine concern with the resolution of the issues presented in this case. As indicated above, such an interest is not sufficient to support a finding that AFBF is adversely affected by Judge Rampton's decision. Nonetheless, we will accord AFBF amicus curiae status.

We establish the following briefing schedule in this case. BLM and UFBF shall file their statements of reasons on or before 30 days from receipt of this decision. 4/ AFBF shall have 30 days from receipt of this

---

2/ The Duff decision states at page 246 that, while BLM modified the list of lands to be exchanged in response to Duff's protest, "this modification did not affect those lands encompassed by Duff's oil and gas leases as described above."

3/ NWF et al.'s contention in its Mar. 23, 1994, filing that the Bureaus failed to show "use" of the lands in the Comb Wash Allotment is not controlling. Use of the land is not the only way of establishing adverse effect.

4/ BLM's statement of reasons was due on Mar. 31, 1994. On Mar. 30, 1994, BLM filed a request for "Extension of Time to Answer Appellants' Statement of Reasons." As indicated in our earlier decision, BLM is an appellant before this Board and its first pleading to be filed is a statement of reasons in support of its appeal of Judge Rampton's decision. In that decision, we also stated that if we denied the motion to dismiss filed by NWF et al., we would establish a time for the filing of a statement of reasons.

decision in which to file an amicus brief. 5/ The Ute Mountain Ute Indian Tribe has filed a statement of reasons in this case, but it is granted 30 days from receipt of this decision in which to file any additional reasons for appeal. NWF et al. shall have 60 days from receipt of the last statement of reasons filed by an appellant to file a consolidated answer in this case. 6/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss for lack of standing is granted in part and denied in part; amicus curiae status is granted to AFBF; and pleadings are to be filed in accordance with the schedule set forth herein.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

5/ For convenience, if AFBF desires to file an amicus brief, it may combine that filing with the statement of reasons of UFBF.

6/ In their filing received on Mar. 23, 1994, NWF et al. requested that it be granted "no less than 60 days" from their receipt of the last brief filed by appellants in this proceeding in which to file an answer. The 60-day period shall be gauged based upon the date of receipt by NWF et al.'s counsel in Boulder, Colorado.