

INTERIOR BOARD OF LAND APPEALS

Bear River Land and Grazing, et al.

v.

Bureau of Land Management

132 IBLA 110 (February 28, 1995)

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BEAR RIVER LAND & GRAZING, ET AL.
v.
THE BUREAU OF LAND MANAGEMENT

IBLA 94-214

Decided February 28, 1995

Appeal from a decision by Administrative Law Judge Ramon M. Child dismissing consolidated appeals of decisions to designate seven individuals as affected interests for the Cumberland/Uinta Grazing Allotment. WY-040-93-05 through WY-040-93-07, WY-040-93-10 through WY-040-93-13.

Permission to intervene granted; decision affirmed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits–Federal Land Policy and Management Act of 1976: Public Participation–Grazing Permits and Licenses: Generally

The definition of "affected interest" at 43 CFR 4100.0-5 has two parts. The first is the requirement that an individual express concern for management of a particular allotment in writing. The second is the provision for discretionary determination by the authorized officer that the individual should be granted affected interest status. To the extent a party's use of land within an allotment has been and will be affected by BLM's anagement of grazing, there is a factual basis for designating the party an affected interest. A written request for designation as an affected interest which states that the party uses an allotment and expresses concern about the management of livestock grazing provides a factual basis supporting a decision granting the designation and precludes it from being arbitrary and capricious.

APPEARANCES: Edward M. Bown, Esq., Robert A. Burton, Esq., and Robert L. Janick, Esq., Salt Lake City, Utah, for appellants; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; J. Jay Tutchton, Esq., and Thomas D. Lustig, Esq., Boulder, Colorado, for the applicant-intervenors.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Bear River Land and Grazing, jointly with other parties who appear to hold interests in either land or grazing leases or permits in the Cumberland/Uinta Grazing Allotment, 1/ have appealed a November 23, 1993, decision by Administrative Law Judge Ramon M. Child dismissing consolidated appeals of decisions by the District Manager of the Rock Springs District Office, Bureau of Land Management (BLM), to designate seven individuals as affected interests for the allotment. 2/ Judge Child rejected the appeals without a hearing because he concluded that the decisions comported with 43 CFR 4100.0-5 and were within the proper exercise of the district manager's discretion. Appellants request that the decision be set aside and remanded for an evidentiary hearing or, in the alternative, that the Board issue a decision "setting forth proper and reasonable standards and criteria for granting, denying, and providing for protests and appeals on affected interests" (Notice of Appeal at 4).

Appellants' notice of appeal asserts that Judge Child erred because (1) BLM lacks procedures for granting, denying, and providing for protests and appeals on decisions concerning designation of an affected interest, (2) BLM has not defined the duties of a person granted affected interest status, and (3) lacking guidelines and criteria, BLM's designations of the seven individuals as affected interests were arbitrary and capricious, as illustrated by its decision to give Meredith Taylor affected interest status only after she stated she had used the allotment. Appellants' supplemental statement of reasons filed on January 10, 1994, sets forth

1/ As listed on pleadings, the other appellants are the Bell Butte Grazing Partnership, the John L. Coles Family Limited Partnership, John L. Coles, Floyd K. Cornia, Helen K. Cornia, Keith Cornia, the William D. Cornia estate, William D. Kennedy, the Diamond W Ranch Co., Inc., the G & J Hatch Ranch Limited, the Hatch Land & Livestock Co., the JW Ranching Co., Inc., the Jackson Land & Livestock Co., the Rees Land & Livestock Co., William S. Rex, Wallace Schulthess, Dean Stuart, Roger Telford, Kay Thornock, the Uinta Livestock Grazing Partnership, Jerry Aimone, and Roy Ropelato.

2/ BLM issued separate decisions granting the following individuals affected interest status:

<u>Name</u>	<u>Decision Date</u>
Susan Hunzie	June 2, 1993
Neal Lesmeister	June 1, 1993
Robert Crooks	May 28, 1993
Meredith Taylor	July 7, 1993
Dan Kruckenberg	July 6, 1993
Scott Miller	July 1, 1993
Alice Eddy	June 30, 1993

12 reasons they believe the district manager erred. In a supplemental memorandum filed January 14, 1994, appellants argue that the definition of "affected interest" at 43 CFR 4100.0-5 requires an "affected interest" to be concerned with the management of livestock grazing, rather than other aspects of the allotment such as hunting, fishing, and aesthetic values, and to have been directly affected by livestock grazing (Supplement at 4-5, 8). Appellants also argue that BLM's designations of parties as affected interests denies them equal protection and due process resulting in an unconstitutional taking. *Id.* at 5-8.

BLM's answer filed on January 7, 1994, asserts that this appeal, like those to Judge Child, is frivolous. BLM contends that the requirements for obtaining recognition as an affected interest are clearly identified at 43 CFR 4100.0-5 and that appellants neither argue nor offer evidence that the requirements have not been met (BLM Answer at 1-2). BLM points out that the purpose of designating affected interests is to assist decisionmaking about the use of public lands. BLM also contends that the decision to designate Taylor an affected interest after she stated that she used the land demonstrates that its decisions were well-considered and not arbitrary or capricious. A second answer by BLM filed on January 21, 1994, asserts that the 12 errors claimed by appellants merely repeat allegations made before Judge Child and are irrelevant because they are directed to the district manager's decision. On February 18, 1994, BLM filed a reply to appellants' supplemental memorandum, including their constitutional arguments. BLM contends that appellants misconstrue 43 CFR 4100.0-5 and that the applicants' "concerns about the management of the wildlife, recreational and aesthetic resources in the allotment necessarily include a concern for the management of livestock grazing" (Supplemental Reply at 2). BLM also contends that appellants' request to have the case remanded for a hearing is groundless because they have not identified any disputed facts. *Id.* at 7-8.

On January 24, 1994, Susan Hunzie, Neal Lesmeister, Robert Crooks, and Meredith Taylor (applicants) filed a joint petition to intervene before this Board as respondents in support of BLM's decision. The applicants also contend they are entitled to intervene under Donald K. Majors, 123 IBLA 142 (1992).

On January 28, 1994, appellants filed a "Motion to Strike Petition to Intervene." They point out that the applicants' motion to intervene in the proceedings before Judge Child was not ruled upon, and they describe the present appeal as concerning his order granting BLM's motion to dismiss. The applicants also had petitioned to intervene as respondents in the proceeding before Judge Child who held that their request was mooted by his order dismissing the appeal. Appellants argue that the applicants do not have a right to appeal or intervene under 43 CFR 4.410(a) because (1) they were neither parties to the motion to dismiss nor allowed to

intervene and (2) they were not adversely affected by Judge Child's order which was favorable to them (Motion to Strike at 2-3).

On February 22, 1994, the applicants filed a "Consolidated Answer" addressing appellants' opposition to their intervention as well as the arguments appellants raise on appeal. Applicants assert they are "parties to the case" because their designations as affected interests is the subject matter of the appeal (Consolidated Answer at 4-5). As in their petition, the applicants assert both that they have been adversely affected by BLM grazing decisions and that the appeal threatens to overturn their status as affected interests. *Id.* at 5, 7. In regard to their status, they point out that public participation in decisions concerning management of the public lands is mandated by provisions of the Federal Land Policy and Management Act of 1976, including 43 U.S.C. §§ 1701(a), 1702(d), 1712(f), and 1739(e) (1988), and that the regulations concerning affected interests were promulgated pursuant to the provisions. *Id.* at 9-10. They challenge appellants' claim that 43 CFR 4100.0-5 lacks criteria and also the claim that BLM failed to follow its criteria. They further argue that other claims of error by appellants are based on "criteria" which are not part of the regulation.

On March 9, 1994, appellants filed a response to the applicants' answer, renewing their contention that the case should be remanded for a hearing to determine the truth of the representations on which the district manager acted in designating the applicants to be affected interests. They assert "there is no 'record' which this board can rely upon in determining whether the authorized officer abused his discretion" (Response at 2). They also contend that the Board's decision "cannot be based upon unsubstantiated representations made by applicants in letters to the district manager" and that there must be a hearing "to truly determine whether applicants constitute affected interests." *Id.* at 3. On April 28, 1994, the applicants responded, arguing that the record supports BLM's decision and that there are no controverted issues of fact. The appellants filed another reply on June 6, 1994, again asserting that "there is no record available to be reviewed."

The applicants' motion to intervene is granted. The law governing intervention in appeals before the Board is well defined. Appellants' arguments against intervention are framed without regard for the decisions the Board has issued. Indeed, the Board routinely grants intervention to a party receiving a favorable decision from BLM which is challenged by an adverse party. For example, mine operators may intervene in appeals of decisions challenging approval of their plans of operations. See, e.g., Kendall's Concerned Area Residents, 129 IBLA 130, 132 (1994); The Wilderness Society, 110 IBLA 67, 68 (1989); see also Lloyd & Sue Heger, 121 IBLA 321 (1991) (lessee may intervene in appeal of relocation of a road through leased lands); Beard Oil Co., 105 IBLA 285, 287 (1988) (applicant receiving oil and gas lease was adverse party to decision rejecting rival applicant).

The routine allowance of intervention also occurred in Donald K. Majors, supra. Majors appealed a decision designating Gary T. Skiba an affected interest. Rejecting the argument that Skiba lacked standing because he did not "make a living from the land," the Board considered his right to intervene to be so obvious that it simply noted: "Skiba seeks to intervene in this proceeding. He could have independently maintained an appeal." Id. at 148 n.11. Indeed, the real question of standing in the case was whether Majors could appeal because it was not apparent that he was adversely affected by the decision to designate Skiba an affected interest. Id. at 143-46. 3/

[1] The grazing regulations define "affected interest" to mean: "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." 43 CFR 4100.0-5. In Majors the Board stated:

It can be seen that this regulation has two parts. The first is the requirement that an individual must express concern for management of a particular allotment "in writing." The second is the provision for a discretionary determination by the authorized officer that the individual should be granted "affected interest" status. This Board will afford considerable deference to the party exercising discretionary authority when the exercise appears to be reasonable and supported by the evidence.

The Department has not set out a regulatory definition of the term "affected." Black's Law Dictionary (5th ed. 1979), at page 53, defines "affect" as "to act upon; influence; [or] change." Thus, someone will be deemed "affected" if he has been acted upon, influenced, or changed. Accepting this definition there is no basis for deeming the decision arbitrary, and there is sufficient evidence to support BLM's decision that Skiba holds an affected interest in BLM's management of grazing use on the Cross Canyon allotment. He stated his use of that land and expressed his concern in writing. To the extent that he has thus been and will be affected by BLM's management of grazing on the allotment, there is a factual basis for a discretionary finding that he has an "affected interest." [Citations omitted.]

3/ As noted in Majors, supra at 146, affected interest status does not give a right to appeal a BLM decision concerning grazing management on the allotment. Nor does intervention in the present appeal confer standing to appeal a grazing management decision. Rather, standing to appeal will depend upon whether the individual designated an affected interest was a party to the case and adversely affected by the decision.

Id. at 147-48. The applicants in this case informed the district manager in writing about their use of the land and expressed their concern about management of livestock grazing on the allotment. Such was all that was required of them, all that was necessary for a factual basis supporting the decisions designating them affected interests, and it was sufficient to preclude the decisions from being deemed arbitrary and capricious.

We note that the first paragraph of a memorandum by the Acting Wyoming State Director dated May 4, 1993, acknowledges that BLM lacks "procedures for granting, denying, or for providing for protests and appeals on affected interests." However, he goes on to direct BLM in Wyoming to use the administrative procedures at 43 CFR Part 4160. The allegation that BLM has failed to define the duties of an affected interest disregards the fact a party designated an affected interest is notified and allowed to participate in decisionmaking but is not required to do so and that procedures for protests and appeals are provided by Departmental regulations. See 43 CFR 4.410, 4.450-1, 4.450-2, 4.452-9, 4.470, 4.476, 4160.2, 4160.3, 4160.4. Appellants' claim that 43 CFR 4100.0-5 requires a party to express concern with the management of livestock grazing is correct on its face but is blind to the fact a party may be concerned about the management of livestock grazing because it affects other activities on the land, including hunting, fishing, and hiking. See Donald K. Majors, supra at 149 ("Those who use the land for any legitimate purpose can be found to have an interest or stake in the welfare of that land.")

We find no merit to the 12 allegations of error contained in appellants' statement of reasons. No regulation or decision of this Board requires a party requesting designation as an affected interest to define the nature of their use and interest in the land to the extent argued by appellants. Thus, they are not required to (1) have a "background, knowledge, expertise, training and experience to * * * significantly and realistically contribute to the planning process," (2) inform BLM how the party would be "adversely affected by not being recognized" as an affected interest, (3) make substantial use of the allotment, (4) use the allotment for activities other than hunting, hiking, fishing, camping, or other recreation, (5) provide evidence of adverse effects or damage caused by BLM, or (6) indicate that the applicant's living standards or quality of life has been affected by prior use of the allotment. Also, we find no basis for appellants' conclusions that (1) there is an appropriate "stage of the proceedings on the Cumberland/Uinta Grazing Allotment" for designation of affected interests, (2) designation as an affected interest results in involvement "in the administration and use of appellants' privately owned and controlled lands," (3) the regulations are "vague, overbroad and ambiguous" and lack objective criteria, (4) the designations of affected interests were inconsistent with the memorandum by the acting Wyoming State Director, (5) the applicants have been given equal status with the appellants, and (6) the applicants have been given "the right to interfere with Appellants' use of their privately owned lands."

The record on appeal supports Judge Child's finding that the district manager's decisions regarding them comported with 43 CFR 4100.0-5 and were within the proper exercise of his discretion, and we deny appellants' request for a hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the applicants are granted permission to intervene and Judge Child's decision of November 23, 1993, is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

David L. Hughes
Administrative Judge