

INTERIOR BOARD OF LAND APPEALS

Petroleum Association of Wyoming, et al.

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PETROLEUM ASSOCIATION OF WYOMING, ET AL.

IBLA 92-549, 92-550, 92-551,
92-552, and 92-581

Decided September 7, 1995

Appeals from a decision of the Platte River Resource Area Manager, Bureau of Land Management, approving the Bald Eagle Habitat Management Plan for the Platte River Resource Area and Jackson Canyon Area of Critical Environmental Concern. EA WY-062-2-006.

Appeals dismissed.

1. Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Federal Land Policy and Management Act of 1976: Land Use Planning--Rules of Practice: Appeals: Jurisdiction

Although the Board of Land Appeals has no jurisdiction to review appeals of decisions to approve or amend a resource management plan, approval of an activity plan designed to implement a resource management plan is appealable to the Board.

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

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where a party appeals a BLM record of decision approving a habitat management plan that, by itself, has no adverse consequences, actual or threatened, because it does not finally implement the challenged approved alternatives but rather identifies the additional actions necessary to implement the plan, including the opportunities for affected parties to participate in and appeal from the final implementation actions, the party lacks standing to appeal because it has not yet been adversely affected by BLM's decision, and its appeal is properly dismissed.

APPEARANCES: Laura Lindley, Esq., Denver, Colorado, and Karen J. Budd, Esq., Cheyenne, Wyoming, for the Petroleum Association of Wyoming; Tom Varcalli, President, Casper, Wyoming, for the Murie Audubon Society;

Marcelle Shoop, Esq., Cheyenne, Wyoming, and Marilyn S. Kite, Esq., Jackson, Wyoming, for the Eagle Ranch Corporation, Oliver K. Scott, Deborah A. Scott, and Charles K. Scott, Malvin and Susan Cole, Casper, Wyoming, *pro sese*; Richard G. Studenmund, Director of Stewardship, Lander, Wyoming, for the Nature Conservancy; and Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Petroleum Association of Wyoming (PAW), the Murie Audubon Society, the Eagle Ridge Ranch Corporation, *et al.* (Eagle Ridge Ranch), ^{1/} and Malvin and Susan Cole have each separately appealed from the record of decision and finding of no significant impact (ROD/FONSI) of the Platte River Resource Area (PRRA) Manager, Bureau of Land Management (BLM), dated June 19, 1992, approving the preferred alternative identified and evaluated in the May 1992 Final Bald Eagle Habitat Management Plan (HMP) for the PRRA and Jackson Canyon Area of Critical Environmental Concern (ACEC) and associated environmental assessment (EA) (EA No. WY-062-2-006). These appeals have been docketed as IBLA 92-549, IBLA 92-550, IBLA 92-551, and IBLA 92-552, respectively. ^{2/} Because the dispositive issue raised by each of these appeals is identical, we have consolidated the appeals for review.

BLM prepared the HMP, which it characterized as an activity plan, in accordance with the directions of the 1985 PRRA Resource Management Plan (RMP) in order to analyze known and reasonably foreseeable future actions on public lands containing bald eagle habitat (HMP at 1). Appendix A attached to the ROD/FONSI delineates the approved HMP decisions for the Jackson Canyon ACEC and for other resource area bald eagle roosts, nests, feeding areas, and flyways, describes the additional BLM actions required to implement the approved decisions, and explains the opportunities for adverse parties and the public to participate in and appeal from the implementation decisions. The actions addressed in the HMP and ROD/ FONSI involve recreation, access, land exchanges with the State of Wyoming, forestry, fire management, ACEC boundary adjustments, rangelands, and salable, locatable, and leasable minerals.

^{1/} Oliver K. Scott, Deborah A. Scott, and Charles K. Scott, the officers and/or stockholders of the Eagle Ridge Ranch Corporation, are also named as appellants in this appeal.

^{2/} BLM also forwarded to the Board a letter from the Nature Conservancy to the Murie Audubon Society, which the Board docketed as IBLA 92-581. That letter, however, a copy of which was attached to the statement of reasons filed by the Murie Audubon Society, explicitly indicates that it is not a separate appeal but rather a statement of support for the Murie Audubon Society's appeal which it asks the Society to reference and attach to the Society's appeal. Because the Nature Conservancy's letter was mistakenly docketed as a separate appeal, we dismiss IBLA 92-581.

Appellants have challenged various components of the approved HMP. PAW objects to the restrictions the HMP places on oil and gas leasing, asserting that BLM has inadequate data to support those limitations, that the year-round no surface occupancy (NSO) stipulations for oil and gas lease activities, absent provisions for waivers, exceptions, and modifications, improperly single out and unduly impede oil and gas operations, and that BLM's constraints on oil and gas leasing constitute an unlawful de facto designation of critical habitat for the bald eagle.

The Murie Audubon Society, Eagle Ridge Ranch, and Malvin and Susan Cole each separately challenge BLM's decisions to pursue a land exchange with the State of Wyoming and to revise the ACEC boundary by enlarging it only approximately one-fourth mile to the south. The Murie Audubon Society contends that the limited expansion of the ACEC boundary coupled with the proposed exchange of lands immediately outside the expanded boundary to the State of Wyoming for eventual use as a limestone quarry will not adequately limit disturbance to eagles in their roosts or in their flight approaches to the roosts. The Society seeks adoption of the ACEC boundary amendment it recommended in February 1992 and for deletion from the exchange proposal of any public lands immediately adjacent to the revised ACEC boundary, wherever it is ultimately established.

Eagle Ridge Ranch alleges that its interests as the possessor of Federal and State grazing leases within the ACEC, as the owner of the majority of private land within the ACEC, and as the grantor of private conservation easements both within and without the ACEC will be adversely affected by BLM's land exchange proposal and failure to adopt the ACEC boundary changes suggested by the Murie Audubon Society. The Ranch avers that BLM's failure to ensure that the land exchange and limited boundary expansion identified in the ROD/FONSI will not adversely jeopardize the continued existence of the endangered bald eagle and its habitat violates various provisions of the Administrative Procedures Act, the Endangered Species Act, the National Environmental Policy Act, and the Federal Land Policy and Management Act of 1976, and that those decisions must therefore be reversed.

Malvin and Susan Cole, private landowners within the ACEC, also dispute the land exchange and ACEC boundary decisions contained in the ROD/FONSI. They maintain that the U.S. Fish and Wildlife Service concurrence in the finding of no significant impact on eagle habitat was based on inadequate observations and should be reevaluated with input from existing experts in the area. They further charge that access control problems resulting from the exchange of land adjacent to the ACEC to the State for limestone mining have not been adequately addressed.

In separate answers, BLM moves that these appeals be dismissed on the ground that the challenged BLM decision is a planning decision over which the Board has no jurisdiction, essentially equating the habitat management plan to a resource management plan, the approval or amendment of which lies

beyond the Board's review authority. BLM also asserts that the ROD/FONSI, which expressly identifies each of the additional BLM actions necessary to implement the various components of the HMP and explains the opportunities for public involvement, including appeal rights, is not an action adversely affecting any of the appellants before the Board or any other party. Specifically, BLM argues that the decision to impose an NSO stipulation on mineral development in the ACEC does not pertain to the maintenance and operation of existing lease facilities unless the existing lease contains such a stipulation and, thus, does not affect any existing operations of PAW's membership. PAW or its members, BLM avers, may appeal specific implementing decisions in the future if they are adversely affected but cannot presently challenge a planning decision before the actions necessary for implementation have been proposed.

BLM similarly insists that neither the establishment of the ACEC boundary by the HMP nor the proposal to exchange certain State land within the ACEC boundary for public lands outside the ACEC, by itself, affects any of the resources either within or outside the ACEC, and that, therefore, those planning decisions in the HMP do not adversely affect the Murie Audubon Society, Eagle Ridge Ranch, or Malvin and Susan Cole. BLM stresses that the ROD/FONSI specifically explains both the further BLM actions necessary to implement the ACEC boundary change and the exchange proposal and the opportunities for public participation and appeal. Since appellants will be able to appeal any specific future implementation decision which adversely affects them, BLM submits that the current appeals are premature.

Both PAW and Eagle Ridge Ranch have replied to BLM's request for dismissal. PAW contends that the Bald Eagle HMP is not an RMP since, as the HMP itself states, that document is an activity plan developed to implement the PRRA RMP. PAW asserts that BLM's failure to prepare an environmental impact statement (EIS) addressing the effects of the HMP further demonstrates that the HMP is not an RMP given that the applicable regulation, 43 CFR 1601.0-6, categorizes approval of an RMP as a major Federal action significantly affecting the quality of the human environment mandating development of an EIS. PAW distinguishes the precedent cited by BLM, averring that the Bald Eagle HMP makes very specific decisions adversely affecting PAW, such as prohibiting new roads or existing road improvements within specifically designated parcels in the ACEC and other winter roosting areas. PAW claims that this decision adversely affects it and its members since access is critical to their ability to develop their oil and gas leases. These specific access restriction decisions, PAW insists, render the HMP more than simply an unreviewable guide for future action. Thus, PAW argues that the Board has jurisdiction to review the HMP.

Eagle Ridge Ranch similarly maintains that BLM's decision approving the HMP is not unreviewable since the HMP is an appealable activity plan describing numerous decisions and actions designed to implement the PRRA RMP. The Ranch notes that implementation decisions in the HMP

specify particular lands and approved uses, including the delineation of precise parcels of approximately 40 acres of BLM-managed land adjoining the ACEC to be exchanged for State of Wyoming land within the ACEC. While Eagle Ridge Ranch acknowledges that the HMP does not finalize the land exchange, the Ranch asserts that BLM's land identification decision is final and precludes consideration of other possible alternatives having less impact on bald eagles. Eagle Ridge Ranch recognizes that BLM intends to pursue the land exchange by publishing a Notice of Realty Action (NORA) but contends that uncertainty over whether BLM will conduct additional environmental review and consultation prior to finalizing the land exchange supports the propriety of reviewing the land exchange decision now. The HMP's proposal to adjust the ACEC boundary is also properly before the Board, the Ranch avers, because the HMP's designation of the specific land to be encompassed within the ACEC forecloses consideration of alternative boundary extensions, and BLM's description of the additional actions necessary to implement the boundary adjustment, including amending the RMP, does not indicate that expanded environmental analysis will occur prior to final implementation. The Ranch maintains that the Board has jurisdiction to consider its challenge to the HMP's decision to open land outside the ACEC to mineral development without seasonal or occupancy restrictions, subject only to some access and blasting limitations from November 1 through March 31, since that decision implements the RMP as to the lands in question. ^{3/}

Our disposition of these appeals focusses on whether the issues raised are properly before the Board at this time. Because we find that the challenged decisions, by themselves, have no actual or threatened consequences as far as appellants are concerned, we dismiss the appeals.

[1] Preliminarily, we reject BLM's assertion that the HMP is essentially an RMP not subject to the Board's jurisdiction. While the development of an activity plan such as an HMP may be considered an extension of the resource management planning process, the Board has long recognized the regulatory review distinction between an RMP and an activity plan or implementation decision. Lawrence V. Smart Trust, *supra* at 357 n.1.

An RMP is a land use plan "designed to guide and control future management actions and the development of subsequent, more detailed and

^{3/} Although both PAW and Eagle Ridge Ranch observe that the transmittal letter accompanying the ROD/FONSI specifically advised the public that the decision and HMP were final decisions appealable to the Board, we have stated many times that the Board of Land Appeals is the sole arbiter of its jurisdiction and employees of BLM may not create the right of appeal where it does not exist nor deny that right where it does exist. See Lawrence V. Smart Trust, 129 IBLA 351, 358 (1994) (Harris, D.C.A.J., concurring); Oregon Natural Resources Council, 78 IBLA 124, 127 (1983); Phelps Dodge Corp., 72 IBLA 226, 229 (1983); Texas Oil & Gas Corp., 58 IBLA 175, 179-80, 88 I.D. 879, 881-82 (1981).

limited scope plans for resources and uses," 43 CFR 1601.0-2, and "not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." 43 CFR 1601.0-5(k); see, e.g., Animal Protection Institute of America, 117 IBLA 208, 218 n.4 (1990); California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140, 141 (1989). Decisions approving an RMP or amendment of an RMP are subject to review only by the Director, BLM, whose decision is final for the Department. See 43 CFR 1610.5-2; Lawrence V. Smart Trust, *supra*; Animal Protection Institute of America, *supra*; California Association of Four Wheel Drive Clubs, Inc., *supra*; Wilderness Society, 90 IBLA 221, 224 (1986). Decisions which implement RMPs or amendments, however, are appealable to the Board. See 43 CFR 1610.5-3(b); Lawrence V. Smart Trust, *supra*; Animal Protection Institute of America, *supra*; California Association of Four Wheel Drive Clubs, Inc., *supra*; Wilderness Society, *supra*. The Bald Eagle HMP, while not the final implementation decision for all the identified actions (see discussion, *infra*), expressly defines itself as an activity plan designed to implement various aspects of the PRRA RMP, and its impacts were evaluated in an EA rather than in an EIS as required for an RMP. See 43 CFR 1601.0-6. Thus, we conclude that Board review of BLM's approval of the HMP is not precluded by 43 CFR 1610.5-2.

[2] We, nevertheless, dismiss these appeals because we find that appellants have not been adversely affected by the disputed HMP decisions and thus lack standing to challenge the HMP. The applicable regulation, 43 CFR 4.410(a), confers the right to appeal upon "[a]ny party to a case who is adversely affected by a decision" of a BLM officer. Thus, to have standing, an appellant must be both a party to the case and adversely affected by the decision being appealed. Audubon Society of Portland, 128 IBLA 370, 373 (1994), and cases cited.

Appellants' participation in the process leading to the approval of the HMP qualifies them as parties. See Kendall's Concerned Area Residents, 129 IBLA 130, 137 (1994). However, the mere fact that they are parties does not necessarily establish that they have been adversely affected by the challenged decisions. See Colorado Open Space Council, 109 IBLA 274, 280 (1989), and cases cited therein. Rather, appellants must establish or the record must show that appellants have legally cognizable interests which have been adversely affected by the appealed decisions. See Salmon River Concerned Citizens, 114 IBLA 344, 348 (1990); Colorado Open Space Council, *supra*. Specifically, appellants must demonstrate that they have suffered an injury in fact as a result of the contested BLM decision. Salmon River Concerned Citizens, *supra*; Colorado Open Space Council, *supra*; see also Oregon Natural Resources Council, *supra* at 125-26. A party has no standing to appeal a BLM decision which, by itself, has no consequences, actual or threatened, as far as the environment or any member of the public is concerned because that decision does not adversely affect the party. Colorado Environmental Coalition, 125 IBLA 287, 289-90 (1993); Salmon River Concerned Citizens, *supra*.

Although PAW alleges that it and its members are adversely affected by BLM's decision not to authorize new road or other facility construction or allow improvement or maintenance of existing roads on public lands within the ACEC (ROD/FONSI at 6) because access is critical to their development of their leases, that decision in and of itself has no consequences for PAW and its members. The HMP decision does not finally reject any specific road construction, improvement, or maintenance request submitted by any of PAW's members. Any BLM decision specifically denying a proposed access road sought by one of PAW's members would be appealable at that time, and the reasonableness of BLM's decision in that definite factual context, including the adequacy of the environmental analysis underlying the decision, would then be ripe for review. See Colorado Environmental Coalition, supra at 288-89 n.2. 4/

Similarly, the year-round NSO restrictions which the HMP proposes for oil and gas leasing in the ACEC and areas adjacent to other bald eagle roosts, nests, and feeding areas do not adversely affect PAW or its members. The ROD/FONSI and HMP specify that the NSO stipulation, unless currently a lease condition, does not apply to the maintenance and operation of existing oil and gas leases, the development of which will be considered on a case-by-case basis. See ROD/FONSI at 13, HMP at 191. And, to the extent that existing leases already contain an NSO stipulation (see Fortune Oil Co., 68 IBLA 288 (1982)), those lessees have necessarily already consented to imposition of the restriction by the acceptance of the lease and can clearly not be adversely affected by the HMP. Additionally, should BLM, in accordance with the approved HMP, offer lands within the area for competitive oil and gas leasing subject to the year-round no surface occupancy stipulation, PAW or its members would have the opportunity to protest the inclusion of the stipulation, and any adverse BLM decision on the protest would then be appealable to the Board. See, e.g., ROD/FONSI at 11, 13, and 18 (Appendix C). Thus, since PAW and its members have not yet been adversely affected by the HMP, its appeal is premature and must be dismissed. See Colorado Environmental Coalition, supra at 290.

The HMP decisions challenged by the Murie Audubon Society, Eagle Ridge Ranch, and Malvin and Susan Cole, likewise, in and of themselves, do not adversely affect any of appellants. The approved HMP decision to pursue an exchange to acquire all State of Wyoming lands within or adjacent to the ACEC for public lands outside the boundary of the ACEC, while identifying some of both the State and public lands to be exchanged, acknowledges that additional lands still must be selected by the State. See ROD/FONSI at 7, HMP at 112. The ROD/FONSI also delineates the additional BLM actions

4/ In any event, we note that issuance of a Federal oil and gas lease does not guarantee subsequent issuance of access rights thereto. Southern Utah Wilderness Alliance, 127 IBLA 331, 371, 100 I.D. 370, 392 (1993).

necessary to implement any specific exchange proposal, such as the publication of a NORA in the Federal Register, the opportunity for the public to comment and protest any proposed exchange, and the right to appeal an adverse BLM decision on a protest to the Board. All aspects of a protested exchange proposal, including the adequacy of the HMP, EA, and any additional site-specific environmental analysis to support both the selection of the public lands to be exchanged and the sufficiency of the conditions to be imposed on the use of those lands to protect bald eagles, will be subject to review on appeal at that time.

Although the HMP recommends that the boundary of the ACEC be adjusted by enlarging it only approximately 1/4 mile to the south and that public lands outside the revised boundary be made available for the extraction of salable minerals such as limestone without seasonal or occupancy restrictions and subject only to access and blasting restrictions from November 1 through March 31 (see ROD/FONSI at 9), these decisions, by themselves, have no immediate effect on the ACEC boundary or the uses permitted on the public lands. Rather, modification of the ACEC boundary and allowable land use first requires amendment of the PRRA RMP. See ROD/FONSI at 10. Any proposal to amend the RMP must comport with the requirements of 43 CFR Part 1600 and will be subject to public comment and protest by adversely affected parties in accordance with 43 CFR 1610.5-2. ^{5/} Furthermore, proposed mineral extraction on public land outside the ACEC boundary could be protested by adversely affected parties (see 43 CFR 4.450-2), and a BLM decision denying a protest would then be appealable to the Board. To the extent BLM relies on the analysis contained in the approved HMP and associated EA as grounds for denying a protest of proposed mineral activity, the adequacy of that examination would then be ripe for review.

In sum, we find these appeals premature because there has been no final BLM action adversely affecting appellants. When and if specific implementation decisions are made, adversely affected parties will have the opportunity to challenge those decisions either before this Board or before the Director, BLM, and the adequacy of the environmental analysis underpinning those final implementation decisions, including the sufficiency of the EA and HMP to the extent BLM relies on those documents as justification for its decisions, will then be reviewable. Since appellants have not yet been adversely affected by the challenged BLM decisions, they lack standing and their appeals must be dismissed. See Colorado Environmental Coalition, *supra* at 290.

^{5/} With respect to the proposed changes in the ACEC boundary, we noted in In re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983), that "questions relating to designation of ACEC's are not properly subject to review by this Board, either directly or collaterally." *Id.* at 317 n.44, 90 I.D. at 220 n.44. This necessarily includes questions relating to the inclusion or exclusion of any particular parcel of land in an ACEC.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

James L. Burski
Administrative Judge

I concur.

John H. Kelly
Administrative Judge