

INTERIOR BOARD OF LAND APPEALS

John L. Falen

149 IBLA 347 (July 21, 1999)

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JOHN L. FALEN

IBLA 98-11R

Decided July 21, 1999

Petition for Reconsideration of an Order dismissing a grazing appeal in which Appellant challenged a BLM decision to assign fence maintenance responsibilities when he had not been given opportunity to consult concerning fence location or maintenance requirements. N2-93-7 and N2-94-1.

Petition for Reconsideration granted, July 28, 1998, Order set aside, appeal dismissed in part (N2-94-1) and reinstated (N2-93-7) in part, BLM decision (N2-93-7) set aside, and case remanded.

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

Where an appellant is a successor-in-interest by assignment to a predecessor who has been both adversely affected and who is a party to a case, standing has been satisfied.

2. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Appeals

A decision of an Area Manager to assign fence maintenance responsibilities to a grazing permittee will be set aside and remanded on appeal where the permittee establishes that the assignment was arbitrary and capricious because no coordination or consultation was effected with the permittee concerning the fence location or maintenance costs and the location selected by BLM will be inordinately difficult and expensive to maintain.

APPEARANCES: Franklin J. Falen, Esq., Cheyenne, Wyoming, for Appellant; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

John L. Falen (Appellant or Falen) has filed a Petition for Reconsideration of our July 28, 1998, Order dismissing the appeal of Harry L. Bettis (Bettis), who alleged in his Statement of Reasons (SOR) that he

acquired Falen's permit in December 1996 and was therefore adversely affected by the decision before us on review as to the maintenance requirement of the Washburn fence.

In our July 28, 1998, Order (Order), we held:

The record shows that Bettis was not a party to the case in the Decision here under review: In 1993, when the underlying decision issued, he had no interest in the matter, nor did he acquire an interest in the fenced land until 1996 when he accepted, without qualification, a grazing permit from BLM [Bureau of Land Management] that included the fenced land. Nothing in the record before us indicates that BLM issued a permit to Bettis that reserved an objection to fence maintenance raised by Falen on the permitted lands. Because Bettis is not a party to the case, he lacks standing under the appeals regulations and his SOR cannot be accepted for filing.

(Order at 2.)

In the prior proceeding before the Board, Bettis had argued that, as successor-in-interest to Falen's grazing permits, he was sufficiently affected by the decision requiring maintenance of the remaining fence in dispute so as to maintain Falen's appeal, even though, in 1993 when the underlying BLM decision was issued, he had no interest of any kind in the grazing allotment where the fence was found. (Order at 1.)

It was urged by BLM in that proceeding that Bettis, at the time he accepted his grazing permit, accepted the permit without qualification and could not then be heard to complain about the permit requirement to maintain the one remaining fence in issue. Since no modifications of the permit offered to Bettis were approved, BLM claimed, Bettis was estopped from attempting to continue Falen's appeal concerning the fence maintenance matter. Further, according to BLM, Bettis had divested himself of the permit he acquired in 1996, and no longer had any interest in the fence. (Order at 1.)

In his Petition for Reconsideration (Petition), Falen offers significant information in addition to that presented in the original appeal. Falen states that the factual predicate underlying the Board's July 28, 1998, Order finding that Bettis was not a party to the original fence maintenance decision, thereby lacking standing to appeal, is incorrect. (Petition at 8.) Falen claims that he and Bettis have been involved in a joint venture arrangement since the mid-1980's. The nature of the Bettis-Falen venture was that Falen supplied the ranching operation's management and labor, while Bettis supplied the cattle. (Petition at 9.)

Falen claims that in 1995, when BLM enacted a new range reform regulation assessing a surcharge on the grazing of livestock owned by persons other than the permittee (see 43 C.F.R. § 4130.8-1(d)), Falen transferred

the grazing lease to Bettis while keeping the operating arrangement the same. (Petition at 9.) Based on BLM's regulations regarding ownership of the base property (see 43 C.F.R. § 4110.2-1), Bettis applied for the grazing permit on June 20, 1996, and BLM issued a proposed decision to transfer the permit to Bettis on December 3, 1996. (Petition at 10.) The proposed decision stated that grazing use would be in accordance with the June 19, 1995, Notice of Final Full Force and Effect Decision-Jordan Meadows Allotment (Settlement Agreement). See Exhibit (Exh.) 9 to Petition. The 1995 decision stated "you may be assigned maintenance [of the Washburn fence] by final resolution of Appeals N2-93-7 and N2-94-1." See Exh. 10 to Petition. Thus, Falen claims that since Bettis had never agreed to maintain the Washburn Creek fence, Falen as Bettis' predecessor-in-interest cannot be bound to maintain the fence. (Petition at 10.) Subsequently, Falen was one of a group of buyers of the base property to which the permit applied, and thus the requirement for the transfer of the lease permit to Bettis no longer existed, as the surcharge would no longer be applicable. (Petition at 12.) Falen explains that he continues, as he has for 20 years, to be the party responsible for day-to-day maintenance of the Jordan Meadows allotment. (Petition at 20.)

Falen also argues that he and Bettis are parties to the case based upon their respective status as successors-in-interest to a permit subject to an existing appeal. (Petition at 16.) Appellant claims that since the terms and conditions of Bettis' permit expressly provide that the grazing use will be governed by the terms and conditions of the 1995 Settlement Agreement, which provides that the final determination of Washburn Creek fence maintenance is pending final resolution, Bettis qualifies as a party to the case since he is the object of the decision to maintain the Washburn Creek fence. (Petition at 17.) Moreover, Appellant claims, without the opportunity to appeal the Washburn Creek fence maintenance decision, Bettis is subject to terms and conditions for which he did not bargain during the permit transfer. (Petition at 18.)

[1] In order to have standing to appeal a BLM decision, a person must be both a "party to [the] case" and "adversely affected" by the decision, as required by 43 C.F.R. § 4.410(a). See Missouri Coalition for the Environment, 124 IBLA 211, 216 (1992); Storm Master Owners, 103 IBLA 162, 177 (1988). In our prior Order dismissing the Appellant's appeal, we ruled Bettis was not a "party to the case" because we were not aware of the provision within the 1995 Settlement Agreement incorporated within Bettis' permit which left the requirement to maintain the Washburn Creek fence unresolved. As such, the BLM determination requiring the permit holder to maintain the fence clearly made Bettis, who was in the same position as his predecessor Falen in this regard, a party to the case since he was the object of the BLM decision in that the responsibility to maintain the fence became his. See Missouri Coalition for the Environment, *supra* at 216. As such, he is both adversely affected and a party to the case as Falen's successor-in-interest. See Stanley Energy, Inc., 122 IBLA 118, 120 (1992), and cases there cited. As we have held many times, where an Appellant is a successor-in-interest to a predecessor who has been both

adversely affected and who is a party to a case, as in this case because of the provision within the Bettis permit relating to the 1995 Settlement Agreement, standing has been satisfied. See St. James Village, Inc., 139 IBLA 1, 2 n.1 (1997); Wilogene Simpson, 110 IBLA 271, 276 (1989); Alfredo R. Maez, 67 IBLA 89, 93-94 (1982). We therefore set aside our Order of July 28, 1998, and reinstate Appellant's appeal.

In addressing the merits of the case, Appellant first notes that Bettis, Falen's successor-in-interest, withdrew the appeal to the assignment of maintenance of the Crowley Creek fence (N2-94-1) on January 30, 1998, in light of BLM's agreement to coordinate the location of that fence with Appellant. As the issues related to the Crowley Creek fence are no longer before the Board, that case is dismissed.

With respect to the fence maintenance of Washburn Creek (N2-93-7), Appellant states his concern is with the "extreme difficulty in maintaining the Washburn Creek Riparian Protection Fence." (Petition at 5.) Appellant states that the permittee, his expert range specialist Robert Schweigert, contractors who built the fence, and BLM employee David Boyles admitted that portions of this fence "would be almost impossible to maintain." Id., citing Transcript (Tr.) at 55, 68, 80, 85, 90-91. Specifically, Appellant claims, his concern is with the "design and location of this fence." (Petition at 5.) Appellant states that because of the location of the Washburn Creek fence on steep, north facing talus slopes, "portions of the fence cannot be maintained but will have to be rebuilt every year because of heavy snowfall." Id., citing Tr. at 56, 80, 90. Further, Appellant states,

the Washburn Creek fence was constructed along the length of the creek, while the Crowley Creek fence was constructed at the mouth of the steep, narrow canyon in which Crowley Creek lies. Both fences exclude livestock from the streams; the design of the Washburn Creek fence could have mirrored the Crowley Creek fence. However, because the BLM refused to consult with the permittee on the location of the Washburn Creek fence, it was built in a location making it impossible to maintain. * * * In this case, the permittee maintains over 100 miles of fence, 10 to 12 miles of pipeline, 15 to 20 springs, 8 to nine cattle guards and eight to 12 reservoirs or dirt tanks.

(Petition at 6-7, citing Tr. at 22, 65.) Appellant relates that the permittee testified that "he had no objection to these fences had they been put in another location." (Petition at 8, citing Exh. 3 at 167. Additionally, Appellant claims, "Mr. Schweigert extensively testified as to alternate locations for these fences; alternate locations which would have been far easier to maintain and would have accomplished the same purposes." (Petition at 8, citing Exh. 4 at 607-612, Exh. 3 at 103-109.) Appellant states that "the permittee was never given the chance to review and offer input into the location of the Washburn Creek fence, nor has he ever had the opportunity to appeal a final decision regarding the location

of those fences." (Petition at 8, citing Tr. at 39-40.) Moreover, Appellant claims, he was not the primary beneficiary of the fence. Rather, he claims, wildlife, and especially LCT protected by BLM, was the principal beneficiary. (Petition at 4-5; SOR at 6-7.)

In response, BLM argues:

ALJ [Administrative Law Judge] Child properly found that the fact that the maintenance of the fences might be difficult and costly is not relevant to who the primary beneficiary of the fences is, because that cost and difficulty of maintenance is the same whether they are maintained by the allottee or the BLM. Decision at 10. Economic injury to a grazer does not invalidate a BLM decision. Calvin Yardley, 123 IBLA 80 (May 11, 1992). Further, Mr. Bettis' claim that the fence will be "almost impossible to maintain" (page 6-7 of SOR) is an exaggeration. As the fact finder, ALJ Child noted that "Boyles considered the maintenance of the fence where he laid them out and admitted the maintenance could be a problem in heavy winters; however, he saw no alternative location which would accomplish the purpose for which the fences were built." (Decision, page 5).

(Answer at 8-9.) Moreover, BLM claims, the location of the fences was not the subject of the BLM decision appealed from. (Answer at 9.) BLM states: "As ALJ properly found: 'The location of the fences is simply not an issue in this proceeding.'" (Answer at 9, quoting Decision at 13.)

We disagree. The issue raised by this appeal is whether the decision of the District Manager, as affirmed by ALJ Child, regarding range fence maintenance responsibilities was arbitrary and capricious.

The regulations in effect at the time of the Washburn Creek fence construction provided that:

Any person may enter into a cooperative agreement with the Bureau of Land Management for the installation, use, maintenance and/or modification of range improvements needed to achieve management objectives. The cooperative agreement shall specify the division of costs or labor, or both, between the United States and the cooperator(s).

43 C.F.R. § 4120.3-2 (1993). Moreover, 43 C.F.R. § 4120.3-4 (1993) provided that: "Range improvement * * * cooperative agreements shall specify the standards, design, construction and maintenance criteria for the range improvements and other additional conditions and stipulations or modifications deemed necessary by the authorized officer." Finally, 43 C.F.R. § 4130.6-3 (1993) provided: "Following careful and considered consultation, cooperation and coordination with the lessees, permittees, and other affected interests, the authorized officer may modify terms and conditions of the permit or lease if monitoring data show that present grazing use is not meeting the land use plan or management objectives."

BLM defines "consultation, cooperation and coordination" as

an interactive process for seeking advice, agreement, or interchange of opinions on issues, plans, or management actions from other agencies and affected permittee(s) or lessee(s), landowners involved, the district grazing advisory boards where established, any State having lands within the area to be covered by an allotment management plan and other affected interests.

43 C.F.R. § 4100.0-5 (1993).

Initially, the Board finds that the April 19, 1993, decision of the Resource Area Manager allocating responsibility for maintenance of the Washburn Creek fence is a decision affecting grazing rights. In John J. Casey, 66 IBLA 332, 333 (1982) and Bert N. Smith, Paul W. Smith v. BLM, 36 IBLA 47, 50 (1978), the Board applied the regulation at 43 C.F.R. § 4.478(b), to grazing decisions assigning fence maintenance responsibilities. We also find, as did the ALJ and BLM, that the grazer is the primary beneficiary of the fence. The record supports the BLM finding that the grazer is the beneficiary as livestock use of riparian habitat is the reason for the fence and grazing would have to be reduced or eliminated if the fence was not built and maintained.

[2] Section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (1994), authorizes the Secretary, with respect to grazing districts on public lands, to "make such rules and regulations" and to "do any and all things necessary to * * * insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." Title IV of the Federal Land Policy and Management Act of 1976, amending the Taylor Grazing Act, reiterates the Federal commitment to protecting and improving Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1994); see also Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1994).

Implementation of the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (1994), is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. Kelly v. BLM, 131 IBLA 146, 151 (1994); Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein. BLM enjoys broad discretion in determining how to manage and adjudicate grazing preferences. Riddle Ranches, Inc. v. BLM, 138 IBLA 82, 84 (1997); Yardley v. BLM, 123 IBLA at 90. Under 43 C.F.R. § 4.478(b), BLM's adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an ALJ and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis. Riddle Ranches, Inc. v. BLM, 138 IBLA

at 84. Although unusual, this scope of review recognizes the highly discretionary nature of the Secretary's responsibility for Federal range lands. Id.; Kelly v. BLM, supra; Claridge v. BLM, 71 IBLA 46, 50 (1983).

The standard of proof to be applied in weighing evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of the evidence test. Riddle Ranches, Inc. v. BLM, supra; Kelly v. BLM, supra; Eason v. BLM, 127 IBLA 259, 262-63 (1993). If a decision determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper. Kelly v. BLM, supra.

Appellant has met his burden of proof in this case. Falen has presented testimony, and the ALJ has acknowledged, that the fence at Washburn Creek, which the permittee has been required to maintain under the 1993 decision pending appeal, is an obligation which has been imposed without either coordination or consultation with Appellant, despite the provisions of 43 C.F.R. §§ 4120.3-2, 4120.3-4, or 4130.6-3, set forth above. Appellant has presented unrebutted testimony that in other cases, such as in the case of the Crowley Creek fence, it has willingly undertaken fence maintenance requirements after its input on location and design was secured. More significantly, the record reflects the Appellant currently maintains an extensive network of fencing within the allotments in which it is a permittee, and thus is no stranger to these requirements.

There has been no showing that circumstances precluded consultation and coordination, before construction, with the permittee concerning the Washburn Creek fence, when, in other cases such as the Crowley Creek fence, that coordination was effected with the permittee. This is especially true in light of the fact that BLM consulted and coordinated with the U.S. Fish and Wildlife Service, Nevada Department of Wildlife, and various members of the BLM resource area and district staffs, but not with the permittee, in the case of the Washburn Creek fence. See Tr. Exh. A-5 and A-6. Indeed, Appellant's willingness to accept the responsibilities of maintenance of the Crowley Creek fence after consultation is a clear indication of the reasonableness of that process. Testimony on behalf of Appellant at the hearing established that maintenance of the Washburn Creek fence assigned to Appellant would have been acceptable if constructed in the same manner as the Crowley Creek fence, in which input was provided. We thus determine that the Resource Area Manager's assignment of responsibility, without consultation or coordination with Appellant, and the 1996 decision of the Administrative Law Judge affirming that assignment, was improper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Petition for Reconsideration is granted, our Order of July 28, 1998, is vacated, the appeal of N2-94-1 is dismissed per the request of Appellant, the appeal of

N2-93-7 is reinstated, the decision of ALJ Child with respect to N2-93-7 is set aside, and the case is remanded to BLM for consideration of the proper placement and design of the Washburn Creek fence after consultation with Appellant.

James P. Terry
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE FRAZIER CONCURRING IN PART AND DISSENTING IN PART:

Falen filed his notice of appeal from a February 21, 1996, decision of Administrative Law Judge Child which affirmed the decisions of the Area Manager Paradise-Denio Resource Area which affirmed the "Notice of Area Manager's Proposed Decision" (Proposed Decision) dated March 23, 1993, holding Falen liable for maintenance responsibilities of the Washburn fence constructed in accordance with a Notice of Full Force and Effect Final Multiple Use Decision for the Jordan Meadows grazing allotment issued on May 30, 1991.

In response to his request for an extension of time to file his statement of reasons (SOR), the Board advised in its Order dated March 28, 1996, that the appeal had not been docketed because the official file had not been received from the Bureau of Land Management (BLM). Falen was informed that he would be notified when the appeal was docketed, and that he would have 30 days from receipt of that notice to file an SOR.

On October 10, 1997, the Board advised Falen that his appeal had been docketed. Pursuant to our Order of March 28, 1996, his SOR was due to be filed within 30 days of receipt of that notice. None was received. On November 14, 1997, the Board issued an Order requiring the filing of an SOR no later than December 15, 1997. This order was received by Falen's counsel on November 24, 1997. However, he did not file an SOR and did not provide an explanation for his failure to so file.

On December 9, 1997, Bettis appeared through counsel and advised that he had purchased the base property in 1996, and was the permittee of record for the allotments which are the subject of the appeal. Therein, counsel advised that "prior to December 2, 1997, he [Bettis] had no knowledge of the preceding BLM actions, the subsequent appeal filed by Mr. Falen, the decision of Administrative Law Judge Child, and Falen's subsequent notice of appeal of Judge Child's decision." On December 11, the Board issued an Order extending the time to file an SOR to February 2, 1998. Counsel for Bettis and Counsel for Falen were served with the Order. Bettis sold the base property to JG&H (in which Bettis maintained a principle interest) on January 1, 1997. Bettis filed his SOR on February 2, 1998, but Falen did not file an SOR or provide any explanation for his failure to so file. On March 23, 1998, Falen and others purchased the base property from JG&H.

Based on these facts, the Board issued its Order of July 28, 1998, in which we dismissed Falen for failing to file an SOR within the time provided pursuant to 43 C.F.R. § 4.412(c). Also, we dismissed Bettis finding that he was not a party to the case with respect to the initial decision under review, in that "he had no interest in the matter, nor did he acquire an interest in the fenced land until 1996 when he accepted, without qualification, a grazing permit from BLM that included the fenced land."

On September 28, 1998, Falen filed a petition for reconsideration of Bettis' dismissal. A petition for reconsideration may be granted pursuant to 43 C.F.R. § 4.403 "in extraordinary circumstances for sufficient reason."

The majority Decision finds that such circumstances exist:

In order to have standing to appeal a BLM decision, a person must be both a "party to [the] case and adversely affected" by the decision, as required by 43 C.F.R. § 4.410(a). See Missouri Coalition for the Environment, 124 IBLA 211, 216 (1992); Storm Master Owners, 103 IBLA 162, 177 (1988). In our prior Order dismissing the Appellant's appeal, we ruled Bettis was not a "party to the case" because we were not aware of the provision of the 1995 Settlement Agreement incorporated within Bettis' permit which left the requirement to maintain the Washburn Creek fence unresolved. As such, the BLM determination requiring the permit holder to maintain the fence clearly made Bettis, who was in the same position as his predecessor Falen in this regard, a party to the case since he was the object of the BLM decision in that the responsibility to maintain the fence became his. See Missouri Coalition for the Environment, *supra* at 216. As such, he is both adversely affected and a party to the case as Falen's successor-in-interest. See Stanley Energy, Inc., 122 IBLA 118, 120 (1992) and cases there cited. As we have held many times, where an Appellant is a successor-in-interest to a predecessor who has been both adversely affected and who is a party to a case, as in this case because of the provision within the Bettis permit relating to the 1995 Settlement Agreement, standing has been satisfied. See St. James Village, Inc., 139 IBLA 1, 2 n.1 (1997); Wilogene Simpson, 110 IBLA 271, 276 (1989); Alfredo R. Maez, 67 IBLA 89, 93-94 (1982). We therefore set aside our Order of July 28, 1998, and reinstate Appellant's appeal.

(Decision at 349-350.) I would grant reconsideration of our July 28, 1998, Order which concluded that Bettis: "had no interest in the matter, nor did he acquire an interest in the fenced land until 1996 when he accepted, without qualification a grazing permit from BLM that included fenced land." On reconsideration, I would affirm and modify our Order of July 28, 1998, to recognize that Bettis had an interest in the fenced land prior to 1996.

Under 43 C.F.R. § 4110.2-3(a)(2), transfer of a grazing preference based on transfer of base property "shall evidence assignment of interest and obligation in range improvements authorized * * * under § 4120.3 and maintained in conjunction with the transferred preference * * *." Further, the transferee, is required to "accept the terms and conditions of the terminating grazing permit * * * with such modification as he may request which are approved by the authorized officer or with such modification as may be required * * *." 43 C.F.R. § 4110.2-3(a)(3). Thus, when Bettis filed for transfer of Falen's grazing preference and filed an application for a grazing permit, his interest in the fenced lands related back to Falen's interest in the 1993 decision and Falen's challenge to the proposed terms and conditions.

The regulation at 43 C.F.R. § 4130.2(a) provides that "[g]razing permits * * * shall be issued to qualified applicants to authorize use on the public lands" and "[t]hese grazing permits * * * shall also specify terms

and conditions pursuant to §§ 4130.3, 4130.3-1, and 4130.3-2." Bettis applied for a transfer of grazing preference and a grazing permit pursuant to 43 C.F.R. § 4110.2-3 on June 20, 1996. In a December 3, 1996, Proposed Decision BLM offered Bettis grazing permits which if accepted would result in approval of the transfer of grazing preference. (SOR, Exhibit 9 at 1.) One of the itemized terms and conditions of the permits provided that "[g]razing use will be in accordance with the June 19, 1995 Notice of Final Full Force and Effect Decision - Jordan Meadows Allotment, All Terms and Conditions stated in the Decision apply." The June 19, 1995, Notice provided that "maintenance of the Washburn Riparian Protection fence * * * discussed here is pending the outcome of Appeals N2-93-7 and N2-94-1." (SOR, Exhibit 10 at 5.)

The Proposed Decision further notified Bettis that he could "file an appeal and petition for a stay of the decision * * * under 43 C.F.R. 4160.4, 4.21 and 4.470 * * * 30 days after the date the proposed decision becomes final." The time limits for protesting a proposed decision under 43 C.F.R. § 4160.2 and for filing an appeal of a final decision under 43 C.F.R. §§ 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days. William J. Thoman v. BLM, 125 IBLA 100 (1993). Bettis did not file a protest to the inclusion of the terms and conditions within the time provided and when the decision became final he did not file an appeal. In failing to timely protest or appeal, Bettis' responsibility to maintain the Washburn fence would be determined by the outcome of Falen's pending appeals.

Because Bettis failed to protest and or appeal the December 3, 1996, Proposed Decision his interest in the case terminated. Thus, his subsequent attempt in 1997 to be heard in Falen's appeal was untimely as he could no longer be considered a party to the case.

As I would grant Falen's request for reconsideration and affirm as modified our dismissal of Bettis, I respectfully dissent in part from the majority Decision.

Gail M. Frazier
Administrative Judge