

INTERIOR BOARD OF LAND APPEALS

Las Vegas Valley Action Committee, et al.

156 IBLA 110 (December 19, 2001)

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LAS VEGAS VALLEY ACTION COMMITTEE ET AL.

IBLA 2000-351 et al.

Decided December 19, 2001

Appeals from decisions of the State Director, Nevada State Office, Bureau of Land Management, denying protests against approval of airport lease N-57230.

Affirmed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Land-Use Planning--National Environmental Policy Act of 1969: Environmental Statements

A BLM decision approving a land use authorization on the basis of an EA and FONSI will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging a BLM decision must show that it was premised on an error of law or fact or that the analysis failed to consider a material environmental question. Unsupported differences of opinion provide no basis for reversal.

2. Appeals: Generally--Practice Before the Department: Persons Qualified to Practice--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

Under 43 CFR 4.410(a), "[a]ny party to a case who is adversely affected by a [BLM] decision * * * shall have a right of appeal to the Board." An appeal brought by an organization is properly dismissed where the organization fails to identify any members who had been adversely affected by BLM's decision or where the person representing the organization does not, in response to a challenge, produce evidence independent from his own declaration that he has authority to do so. However, where the individual who filed both the protest

and the appeal as a purported officer of the organization has been personally adversely affected by BLM's decision, that individual may be recognized as having filed an appeal on his or her own behalf.

3. Airports--Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Standing to Appeal

Departmental regulation 43 CFR 4.410 provides a right of appeal to the Board to any party adversely affected by a decision of an officer of the Bureau of Land Management but not the agencies of other Departments. When BLM issues a decision approving issuance of an airport lease to enable the operator of an airport to extend runways from land owned by the airport onto public land based in part on an environmental assessment approved by the Federal Aviation Administration, and the party appealing BLM's decision alleges injury arising from airport operations, that party will be deemed to have been adversely affected by the FAA decision rather than that of BLM. On appeal, the Board will only consider those adverse effects and issues which the appellant has identified that have a nexus to BLM's decision that is distinct from the issues decided by the FAA.

APPEARANCES: Gary L. Freeman, pro se and Chairman, Las Vegas Valley Action Committee, Henderson, Nevada; John E. Dawson, Esq., Henderson, Nevada, pro se; Paul Rippens, Henderson, Nevada, pro se; William P. Horn, Esq., and Douglas S. Burdin, Esq., Washington, D.C., for the Clark County Department of Aviation; Emily Roosevelt, Esq., Office of the Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Gary Freeman, purportedly representing the Las Vegas Valley Action Committee (LVVAC), has appealed from a July 19, 2000, decision of the State Director, Nevada State Office, Bureau of Land Management (BLM), denying a protest against the approval of a 140-acre airport lease, N-57230, to be issued to the Clark County Department of Aviation (CCDOA). ^{1/} John E. Dawson and Paul Rippens have also filed appeals from separate July 19

^{1/} Freeman's appeal has been assigned docket number 2000-351. We note that on Oct. 4, 1999, BLM received a protest from LVVAC signed by Gary Freeman as Chairman that was also signed by "Robert W. Hall as an individual and for the Nevada Environmental Coalition" (NEC). Hall filed no separate appeal and the appeal Freeman filed on behalf of LVVAC does not

decisions dismissing their protests. ^{2/} Noting that BLM failed to list it as an adverse party in the decisions being appealed, despite the fact that it would be disadvantaged if appellants were to prevail before the Board, CCDOA has moved to intervene in the appeals. See Beard Oil Co., 105 IBLA 285, 287 (1988). In accordance with the practice of the Board to grant intervention to a person having an interest that would be adversely affected if the Board overturned BLM's action, CCDOA's motion to intervene is granted. See Nez Perce Tribal Executive Committee, 120 IBLA 34 (1991); Owen Severance, 118 IBLA 381 (1991); Beard Oil Co., *supra*; Elberta M. Taylor, 102 IBLA 372 (1988).

Henderson Executive Airport (HEA) is located in Clark County, Nevada, 11 miles west/southwest of the city of Henderson. The airport was privately owned and operated until it was purchased by Clark County in 1996. CCDOA owns the 427 acres comprising Henderson Executive Airport in fee. (HEA Master Plan Report at 1-3.) The lease of the 140-acre parcel of public land adjacent to the south of the airport will enable CCDOA to carry out plans approved by the Federal Aviation Administration (FAA) in 1998 to expand operations at HEA by: (1) reconstructing the existing runway with a new alignment to a length of 6,500 feet, a width of 100 feet, and strength to accommodate most general aviation aircraft over 12,500 pounds gross takeoff weight; (2) construction of a 5,000-foot-long and 75-foot-wide parallel runway; and (3) construction of a parallel taxiway to the west of the main runway, among other improvements. See Final Environmental Assessment, Master Plan Report Recommendations, Henderson Executive Airport NV-053-99-038 (hereinafter referred to as FAA EA), 5-6. Although most of the length of the runways will be on CCDOA property, a lease from BLM is needed to complete them to the length approved by the FAA in 1998.

Appellants are residents of the new Seven Hills Subdivision, a 1300-acre development immediately to the east of the portion of the airport that CCDOA owns. We note that an aerial photograph shows that about one half of the lots in Seven Hills were still undeveloped when the FAA approved CCDOA's proposal in 1998. (CCDOA Answer, Attachment B.3.) Upon completion, Seven Hills will have about 2,500 residential units.

Although appellants voice a number of concerns, their principal ones arise from the effects of noise associated with airport operations which appellants believe would increase as a result of the runway improvements approved by the FAA in 1998 and which are facilitated by the addition of the BLM lands to be leased. Appellants' concerns are based on their

fn. 1 (continued)

purport to be on Hall's behalf or on behalf of NEC. Thus, neither Hall nor NEC are parties to this appeal, although we note that Freeman and Hall signed a pleading filed June 4, 2001.

^{2/} Dawson's appeal was assigned docket number 2000-352 and Rippens' appeal was assigned docket number 2001-14. We also note that LVVAC and Dawson petitioned for a stay of BLM's decision, which the Board did not grant, and BLM's decisions went into effect. A lease was issued to CCDOA on June 22, 2001.

observations of the noise from operations at the existing airport and planes flying over their homes.

Background

Although we will refer to appellants' specific issues later in this opinion, it is important at the outset to bear several things in mind. First, the operations at HEA about which appellants complain are expected to increase by 2016, regardless of whether the runway proposal is carried out or not, with only somewhat fewer operations anticipated if the proposal is not carried out. See FAA EA, Appendix B, Tables B-4, B-5, B-6, and B-7. ^{3/} Second, many of the overflights of which appellants complain result from the current orientation of the runway, so that the proposed realignment of the runway would make it less likely that planes taking off or landing at HEA will fly directly over homes in Seven Hills. See BLM EA NV-053-99-039 at 11. ^{4/} Third, the realignment will place both runways at a greater distance from Seven Hills than the northern portion of the current runway. See FAA EA, Figures 18 and 19. Fourth, the land leased from BLM is at the southern edge of the airport and is not directly adjacent to Seven Hills as is the portion of the airport owned by CCDOA. Thus, CCDOA's ability to extend runways onto BLM land means that planes approaching from the south will be less likely to touch down on the portion of the runway adjacent to Seven Hills and that planes taking off to the north will be more likely to begin their takeoffs on that portion away from Seven Hills. Therefore, issuance of the lease and completion of the improvements that it authorizes will make it more likely that future airport operations will be more in conformity with residential use in Seven Hills than would be the case if the lease were not issued. See FAA EA at 16, quoted infra.

Prior to its acquisition by CCDOA in 1996, HEA was a privately owned airport named Sky Harbor Airport and the existing runway was paved in 1971. (FAA EA at 3.) The record shows interest in public acquisition and expansion of the airport at least as early as 1988, when the Sky Harbor Airport Master Plan was developed. (HEA Master Plan Report at 1-10.) In September

^{3/} In its 1998 environmental analysis comparing the effects of the proposal with that of the no action alternative, the FAA assumed that the first year of operation under the proposal would be 2000. The FAA compared the expected impacts of the proposal on the basis of estimated operations in the years 2000 and 2016 with the expected impacts of operations at the airport for those years if the proposal were not adopted, taking into account the differences in the type of aircraft using the airport if the proposal were or were not implemented.

^{4/} The BLM EA states:

"The current alignment of Runway 18-36 at Henderson Executive Airport is such that aircraft arriving to the south on Runway 18, as well as aircraft departing to the north on Runway 36, would likely directly overfly northern portions of the Seven Hills Subdivision and residential areas north of Lake Mead Drive northeast of the Airport. The realignment of the runways to a more north-south orientation and shifting the northern runway threshold to the south would reduce the likelihood of the residential areas closest to the Airport to receive direct aircraft overflights."

1994, the FAA and CCDOA completed the Las Vegas McCarran International Airport Capacity Enhancement Plan, concluding that, if general aviation aircraft operations were to occur at reliever airports elsewhere in Clark County, significant annual delay savings could be achieved at McCarran.

Although CCDOA did not acquire Sky Harbor Airport until 1996, it filed an application with BLM to lease land south of the existing runway in secs. 10 and 11, T. 23 S., R. 61 E., on April 19, 1993. In a letter accompanying that application, CCDOA noted that, while a prior airport lease for the land had expired, it was important that the land be kept empty of structures and that the airport operator maintain significant control over the property because the land was in the runway protection zone. The letter also stated that the land to be leased would be a "preferred site for a runway extension which may be necessary in the future as demand increases." The letter further referred to the need to relocate general aviation traffic to smaller airports as traffic at McCarran International Airport increased. Subsequently, the land description was modified over the years to embrace the 140 acres ultimately leased.

When CCDOA purchased the airport in February 1996, the airport was not in compliance with FAA airport design standards. (FAA Finding of No Significant Impact (FONSI) at § 3.) A Federal grant was issued in June 1996 to upgrade the facilities. (FAA EA at 3.) The HEA Master Plan was developed in April 1997 to examine facility needs over a 20-year period. (HEA Master Plan Report, Summary-1.) McCarran International Airport is the region's primary air carrier airport and HEA, together with North Las Vegas Airport, serves as a "reliever" airport. "In this role, the Airport is intended to accommodate general aviation operations that would otherwise occur at McCarran International Airport, thereby reducing delays and airfield congestion at the region's primary airport." (FAA EA at 3.) HEA provides a base for Grand Canyon air tour operators, "currently * * * the busiest segment of aviation activity at the airport" involving 100,000 passengers at HEA in 1996. (FAA EA at 3.) HEA also provides a base for general aviation aircraft, a location for aviation-related businesses and flight training, and a point of access for visitors to Las Vegas. (FAA EA at 4.)

The existing runway and taxiway run in a southwest to northeast direction. On July 6, 1998, the FAA approved a FONSI with respect to the proposal to de-commission the existing runway and construct two new runways and a parallel taxiway that would run from north to south in a direction 14 degrees counterclockwise from the existing runway. Two parallel runways were needed "to separate high-performance general aviation aircraft and commercial air tour operators from other general aviation uses * * * particularly during peak demand periods." (FAA EA at 7, 13-16.) As noted earlier, the realignment of the runway was designed to lessen the noise impacts that residents of Seven Hills would experience if the alignment was unchanged:

On the basis of aircraft noise analyses conducted for the Master Plan Report, annual aircraft operations in 1995 with the runway in its existing alignment resulted in aircraft

noise exposure of day-night average sound level (DNL) 60 adjacent to the Seven Hills Subdivision. While this level of aircraft noise exposure is not considered "significant" according to Federal Aviation Regulations (FAR) Part 150, Airport Noise Compatibility Planning [9], given the anticipated growth in aircraft operations, residents in the Seven Hills Subdivision may be exposed to higher levels of aircraft noise in the future with the runway's existing alignment. Therefore, realignment of the Airport's primary runway is intended to ensure future land use compatibility with Airport operations, considering the newly developed and planned residential land uses in the Airport environs.

(FAA EA at 16, footnote omitted.) The FAA's regulations at 14 CFR 150.7 define the term "compatible land use" by reference to Appendix A (Table 1) of Part 150, which indicates that DNL below 65 is compatible with residential use.

The FAA EA described several alternatives eliminated from consideration. Building a single 6,500-foot runway and parallel taxiway at HEA was rejected because HEA could not serve as a reliever airport without a second parallel runway. (FAA EA at 45-47.) Extending the existing runway without realigning it was rejected because it would "preclude reductions in potential aircraft noise exposure for existing and planned residential uses in the airport environs," and because of significant land acquisition costs for a parallel runway should one be desired in the future. (FAA EA at 47.) Extending runways at North Las Vegas Airport was not considered because of significant problems of land acquisition, road relocation, and residential relocation. Unlike HEA, "which is currently surrounded on three sides by open space or industrial development, North Las Vegas Airport is in an urban environment that includes low- and high-density residential developments." (FAA EA at 48-49.) Extending the runway at Jean Airport, 30 miles south of Las Vegas, was rejected because its distance would make its use by air tour operators and itinerant general aviation operators unlikely. (FAA EA at 49.) Other airports and other modes of transportation were rejected as unsuitable. (FAA EA at 49-50.)

The only alternative to the proposal retained for further analysis was the no action alternative in which the runway would remain in its present length, width, strength, and alignment, but there would be other improvements in the facilities as recommended in the HEA Master Plan. (FAA EA at 39.) Traffic would increase but HEA would not be able to accommodate or attract the type of aircraft that would enable it to serve as a reliever airport for McCarran. (FAA EA at 41.)

In considering compatibility of the proposal and the no action alternative with existing and future land uses, the FAA EA stated:

Although no portions of the Seven Hills Subdivision are expected to be exposed to aircraft noise of DNL 65 or higher in 2000 or 2016 under either alternative 1 [the proposal] or 2 [no

action], the subdivision could be affected by aircraft noise exposure below DNL 65 in the future, especially by single-event aircraft overflights because of the subdivision's location near the Airport.

(FAA EA at 106.) The Airport Noise Analysis is set forth in Appendix B of the FAA EA. Figures for the year 2000 were developed to compare the impacts of the no action alternative with the impacts of operation of the airport in the first year after completion of the runways. Figures for 2016 are based on estimates intended to compare the impacts of the alternatives over the longer term. Tables in Appendix B set forth various assumptions underlying these comparisons, including the number of airport operations under the two alternatives for 2000 and 2016 and the types of aircraft involved in those operations.

Even under the no action alternative, air traffic at HEA would be expected to increase, and the FAA EA compared predicted Aircraft Noise Exposure for 2016 under the proposal with that of the no action alternative. (FAA EA at 95-96.) Figures 18 and 19 show that if the runway were not realigned, the DNL 65 contour would come much closer to the border of Seven Hills than would be the case if the runway was realigned as proposed. (FAA EA at 97-98.)

In addressing effects of the proposal on air quality, the FAA EA noted that Clark County had been designated a serious nonattainment area for carbon monoxide (CO) and suspended particulate matter (PM-10). (FAA EA at 119.) In comparing the effects of the proposal (Alternative 1) with the no action alternative (Alternative 2) in 2000 and 2016, the FAA EA concluded that air engine emissions of CO would be higher under the no action alternative than under the proposal as a result of the difference in the mix of planes that would be using the airport:

As discussed in Chapter 2, it was assumed that the Airport would not be able to accommodate most general aviation aircraft greater than 12,500 pounds gross takeoff weight under Alternative 2, given the Airport's existing runway length of 5,040 feet, regional elevation, and average temperature during the hottest month of the year. General aviation jet and multiengine turboprop aircraft that weigh more than 12,500 pounds are typically operated with greater frequency than other general aviation aircraft. Therefore, although there would be fewer total annual general aviation aircraft operations under Alternative 2 compared with Alternative 1, Alternative 2 would result in a larger number of piston-engine aircraft operations. Piston-engine aircraft typically have higher CO emissions factors than turboprop and jet aircraft. Therefore, emissions of CO resulting from aircraft operations are expected to be greater under Alternative 2 than under Alternative 1.

(FAA EA at 120-21.) As for PM-10 emissions, emissions from aircraft were judged to be minimal and emissions resulting from construction would not

exceed the de minimis threshold set by the Environmental Protection Agency. (BLM FONSI at 5, BLM EA at 23, FAA EA at 123.)

On July 6, 1998, the FAA approved the FONSI based on the FAA EA. BLM continued processing CCDOA's lease application and a draft EA NV-053-99-039 was prepared in July 1999. On August 20, 1999, BLM published a Notice of Realty Action for the airport lease, opening a 45-day comment period. See 64 FR 45562-63 (Aug. 20, 1999). On June 22, 2000, BLM's Acting Las Vegas Field Manager approved a Decision Record/Finding of No Significant Impact (DR/FONSI) to authorize the lease on the basis of environmental assessments NV-053-99-038 (the FAA EA) and NV-053-99-039 (the BLM EA). The BLM EA also incorporated the HEA Master Plan Report. (BLM EA at 1.) On July 19, 2000, BLM issued its decisions denying various protests that had been received during the comment period, including those filed by appellants herein.

We note that the lease which issued to CCDOA on June 22, 2001, contains a number of stipulations that not only relate to the construction and maintenance of the runways on the land to be leased from BLM but also concern aviation operations involving the entire airport. In particular, the lease includes a number of noise mitigation stipulations. One stipulation requires adoption of touch-and-go flight tracks to ensure that all aircraft will operate to the west side of the airport. A second stipulation requires coordination for development of noise abatement procedures to mitigate impacts that may result from touch and go training flights affecting the Seven Hills subdivision. A third stipulation requires CCDOA to restrict operations on the parallel runway (closer to Seven Hills) to the hours between 7 a.m. and 10 p.m. unless the primary runway is closed or otherwise unavailable. A fourth stipulation addresses the noise from engine maintenance runups by requiring that they be located as far as possible from existing homes near the airport and consideration of acoustical barriers to minimize noise from ground run-ups. A fifth stipulation addresses measurement of noise levels by reference to FAA requirements. See Public Airport Lease, N-57230, Exh. A at 4-5.

LVVAC/Freeman Appeal

[1] In cases challenging BLM's approval of land use authorizations on the basis of an EA and FONSI, we have stated that the BLM decision will be affirmed on appeal if the decision is based on consideration of all relevant factors and is supported by the record which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. E.g. Southern Utah Wilderness Alliance, 152 IBLA 216, 220 (2000) (approval of expansion and commercial use of airstrip on public land). A challenge to that determination must show that it was premised on an error of law or fact, or that the environmental analysis failed to consider a substantial environmental issue of material significance to the proposed action. Id.; see, e.g., Owen Severance, 141 IBLA 48, 51 (1997); Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994); Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992), and cases cited therein. Differences of opinion, unsupported

by any real objective proof, are insufficient to overcome a BLM decision for which there is abundant support in the record. Id.

[2] We will first discuss the appeal putatively brought on LVVAC's behalf by Freeman, which is docketed as IBLA 2000-351. CCDOA has moved to dismiss the appeal Freeman filed on behalf of LVVAC on several grounds. First, CCDOA contends, LVVAC lacks standing to appeal because the organization has not identified how its purpose or its members have been adversely affected by BLM's decision within the meaning of 43 CFR 4.410. (CCDOA's Answer at 6-7.) Under 43 CFR 4.410(a), "[a]ny party to a case who is adversely affected by a [BLM] decision * * * shall have a right of appeal to the Board." 43 CFR 4.410(a). In Legal and Safety Employer Research, Inc., 154 IBLA 168, 173 (2001), we dismissed the appeal of an organization that failed to identify any members who had been adversely affected by BLM's decision.

CCDOA also challenges Freeman's qualification to appear on behalf of LVVAC. Departmental regulation 43 CFR 1.3(b) authorizes practice before the Department by attorneys at law. A person who is not an attorney at law may practice before the Department in a matter in which he represents himself, a member of his family, a partnership of which he is a member, or a corporation, business trust, or association of which he is an officer or a full-time employee. An appeal brought by an individual who does not fall within the foregoing categories is subject to dismissal. See, e.g., The Friends and Residents of Log Creek, 150 IBLA 44, 47-48 (1999); Building and Construction Trades Council, 139 IBLA 115, 116 (1997); Southern Utah Wilderness Alliance, 108 IBLA 318, 321 (1989); Leonard J. Olheiser, 100 IBLA 214, 215 (1988).

Freeman signed the notice of appeal as "chairman" of LVVAC and, under 43 CFR 1.5, Freeman's signature constitutes a certification that he is authorized and qualified to represent LVVAC. Lanny Perry, 131 IBLA 1, 2-3 n.3 (1994). That certification, however, does not immunize an appearance from challenge. If a party moving to dismiss the appeal comes forward "with affirmative allegations, which if true, would demonstrate that the individual is not authorized to practice before the Department:"

The burden then shifts to the appellant to respond with sufficient evidence to show that the person is qualified to practice before the Department, in accordance with Resource Associates of Alaska, [114 IBLA 216, 219 (1990)]; The Wilderness Society, [109 IBLA 175, 176 (1989)]; Lee Roy Newsom, [117 IBLA 386, 387 n.2 (1991)], and like cases.

Klamath Siskiyou Wildlands Center, 155 IBLA 347, 351 (2001). In Klamath, we held that the burden was satisfied when a director of the organization provided a declaration that the person appearing on behalf of the organization was a full-time employee. There was no question that the director making this declaration had the capacity to do so on behalf of the organization because the Board had independent evidence of his status. See Klamath, supra at 352 n.6.

In response to CCDOA's challenge, Freeman filed an "addendum" to his statement of reasons, reiterating the statement on page 14 of the September 30, 1999, protest he filed on LVVAC's behalf that LVVAC "is an ad hoc unincorporated community service committee [that] cooperates with and supports the efforts of the Nevada Environmental Coalition." Nevertheless, Freeman did not identify any other members of LVVAC who were adversely affected by BLM's decision nor did he file any evidence beyond his own declaration that he was an officer at the time the notice of appeal was filed.

On November 13, 2000, CCDOA filed an "objection" to Freeman's "addendum." CCDOA correctly points out that Freeman filed separate protests as an individual and as Chairman of LVVAC, and contends that having proceeded as separate entities, Freeman was required to file a separate appeal as an individual from the appeal he filed on behalf of LVVAC. Because Freeman filed an appeal as Chairman of LVVAC but not as an individual, CCDOA asserts that he has waived his right to appeal as an individual. (CCDOA Objection at 4-5.) CCDOA then challenges Freeman's representation of LVVAC:

Freeman's vague definition of the LVVAC as an ad hoc association strongly indicates that he may not be authorized to represent it. Moreover, if it is not an association, his appeal must be dismissed because no provision under the rules permits an individual to represent other individual landowners.

(CCDOA Objection at 6.)

CCDOA's objection is not without merit. An individual who is not authorized to practice under 43 CFR 1.3 cannot circumvent the limitations established by this regulation simply by placing the name of an organization on a letterhead, declaring himself "chairman," and claiming as "members" those whom he is not authorized under the regulation to represent. A person who claims to be an officer of an organization is ordinarily able to supply a copy of the governing instrument or bylaws of the organization designating him as an officer or a copy of the minutes of the meeting at which he was elected or appointed. Indeed, Freeman's failure to produce evidence other than his own declaration raises an issue as to whether LVVAC is a cognizable legal entity.

It was not until June 4, 2001, that Freeman filed a pleading stating:

LVVAC as used before the IBLA means the Las Vegas Valley Action Committee, an ad hoc, unincorporated community group, that includes Gary Freeman, Cynthia Freeman, the Nevada Environmental Coalition [NEC], Robert W. Hall, and others. Anyone who supports the LVVAC or who works as a volunteer for the LVVAC is automatically a "member" of the community group.

* * * * *

LVVAC has not tried to add appellants. The appellants they [sic] were never deleted. Gary Freeman is the chairman and its spokesperson.

As a point of information, at the time of the petition, the NEC was not incorporated. It is now incorporated and all pleadings since the incorporation that are signed by Hall have noted that fact.

* * * * *

* * * In addition to LVVAC being a supporting organization of the Nevada Environmental Coalition, LVVAC is a "member" of the NEC and vice versa. Hall also became a member of the LVVAC before the submission of the original petition by his work and assistance on behalf of the unincorporated group.

In this response, Freeman identifies two other "members" besides himself who may have been adversely affected, but as evidence of his own capacity, this response is simply a reiteration of his prior declarations; he offers no independent evidence of his status as an officer at the time the notice of appeal was filed. We find that these belated assertions fall short of satisfying Freeman's burden of supplying evidence sufficient to rebut CCDOA's challenge.

But even if we were to hold that no appeal could be brought on behalf of LVVAC because it was not a cognizable entity, or because Freeman had failed to establish that he was qualified to represent it, or because it lacked standing under Legal and Safety Employer Research, Inc., 154 IBLA 168, 173 (2001), we would not foreclose Freeman from appealing on his own behalf. In The Friends and Residents of Log Creek, 150 IBLA 44 (1999), we considered appeals filed by two organizations. One was not a party to the case and its appeal was dismissed. Id. at 47. The other organization was represented by an individual named Hewitt. In its decision, the Board noted:

The record indicates that Hewitt is one of several people who united as The Friends and Residents of Log Creek to voice their mutual concerns, but does not indicate a relationship between Hewitt and the others which qualifies her to represent them before the Department. However, she is entitled to appeal on her own behalf and her appeal is accepted.

Id. at 48.

Even if Freeman had not identified any member of the organization other than himself who was adversely affected by BLM's decision, Freeman personally signed the protest that was filed on behalf of LVVAC. Just as we found in the Log Creek case that Hewitt was entitled to appeal on her own behalf even though her appearance was on behalf of a collection of people similarly situated, we likewise conclude that Gary Freeman may

appear on his own behalf regardless of his failure to establish standing for LVVAC to appeal in its own right.

CCDOA seeks to limit our consideration in the instant cases to those issues which the appellants, including Freeman, raised in the particular protests from which the appeals were taken. Moreover, at the outset of its Answer, CCDOA raises a more fundamental issue concerning the scope of these appeals:

Despite appellant's desire to expand the issues, this appeal, properly framed, involves the limited issue of the BLM's decision to enter into this airport lease. Because the BLM relied on the expertise and decision of the Federal Aviation Administration ("FAA") in regard to aviation issues, and the FAA's decision is now beyond review (particularly by the Board), the Board's review of the aviation issues, should be limited and narrow. Appellants * * * had an opportunity to raise their concerns in the FAA proceeding; they are not entitled to the second bite of the apple they seek here.

(Answer at 1-2).

We note at the outset that the authorization of a project by another Federal agency does not diminish the scope of the Secretary's discretionary authority in considering an application for whatever land use authorization is necessary to enable the project to proceed. In Wyoming Independent Producers Association (WIPA), 133 IBLA 65, 72 (1995), for example, we specifically rejected an argument by a pipeline company that the issuance of a certificate of convenience and necessity by the Federal Energy and Regulatory Commission (FERC) preempted the authority of the Secretary (and this Board) to review a decision on a right-of-way (ROW) necessary for building the pipeline, even though FERC's decision was under judicial review and a statute specifically precluded collateral attacks on the FERC decision. CCDOA makes no such argument that the FAA action preempts our review here, but CCDOA urges deference to the FAA's expertise in deciding aviation issues and also objects to any relitigation of those issues in the context of these appeals.

The gravamen of CCDOA's argument is that this Board should not provide a forum to relitigate issues already decided by the FAA concerning the effects of airport operations. Our decisions in WIPA and Hoosier Environmental Council, 109 IBLA 160 (1989) (Hoosier), provide support for CCDOA's position.

In Hoosier, we considered an appeal from a BLM decision approving a ROW of less than 20 miles across public land for segments of a 140-mile pipeline for which FERC prepared an EA as lead agency. In that appeal, the appellant's contentions related to whether the EA prepared by FERC adequately analyzed the anticipated impacts from and possible alternatives to the proposed pipeline project. In delineating the scope of our review authority, we noted that the issue properly before us was far more focused:

BLM did not purport to approve the pipeline project; FERC approved that. BLM merely approved issuance of the right-of-way across various parcels of Federal land. Thus, the sole question before this Board is whether or not the FERC EA adequately addressed the impacts engendered by those segments of the pipeline crossing Federal lands.

Admittedly, it must be shown that, consistent with this Department's obligations under NEPA, the FERC EA provides an adequate basis both for an assessment of those impacts, as well as an informed consideration of stratagems to mitigate any adverse effects. But, to the extent that appellant seeks to challenge the EA's consideration of impacts generated by other segments of the pipeline, such a challenge is beyond the purview of this Board's jurisdiction. ^{7/}

^{7/} This is, of course, not to say that the question of the adequacy of the FERC EA as it relates to the entire pipeline project is immune from scrutiny. What we are saying is simply that this Board is not the proper forum in which to raise such a challenge. [Emphasis added.]

Id. at 166. In Hoosier, the Board considered only the issues relating to effects from the 20-mile segment on Federal lands.

In WIPA, we considered an appeal from a decision approving a ROW for a 620-mile pipeline to transport natural gas from Canada, 208 miles of which would cross public land. As the agency with authority to issue the certificate of convenience and necessity for construction of the pipeline, FERC was designated the "lead agency" for preparing an environmental impact statement (EIS). BLM subsequently approved a right-of-way to cross the public lands. Numerous parties appealed to the Board. Included among the parties were two associations of energy producers. The associations contended that the EIS prepared by FERC upon which BLM relied was inadequate because it considered the socioeconomic effects of construction of the pipeline, but not of its operation. They asserted that their members would be harmed by the importation of gas that would lead to shutting down marginal domestic wells, some of which were on public lands, and that otherwise recoverable reserves would be left in the ground. The associations alleged other economic losses as well. They asserted that the authority of BLM to issue rights-of-way under the Mineral Leasing Act, 30 U.S.C. § 185 (1994), obligated BLM to ensure that FERC's EIS was adequate before BLM could base its own decisions on it.

Although it was indisputable that the adverse effects of which the associations complained could not occur unless a ROW was issued across public land somewhere, we rejected their appeal and granted the pipeline company's motion to dismiss:

Departmental regulation 43 CFR 4.410 provides in relevant part: "Any 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." We find the Hoosier case controlling with respect to the appeals filed by the Associations. When we review the adverse effects of which the Associations complain, we find that it is the FERC decision that adversely affects them rather than that of BLM. Our holding in Hoosier is applicable. Accordingly, the motions to dismiss the appeals filed by the Associations * * * are granted.

WIPA, supra at 70-71. Thus, even though a lease from BLM might be needed to carry out the improvements approved by FAA, our holding in WIPA suggests that these appeals may be dismissed if it is FAA's decision that adversely affects appellants rather than that of BLM.

[3] In WIPA, however, we did not dismiss appeals filed by other appellants where the appeals addressed the right-of-way route approved by BLM and did not entail a challenge to either the FERC certificate of convenience and necessity for the pipeline or the authority of the applicant to construct a pipeline. The adverse effects of which those parties complained involved their use and enjoyment of the public lands that would be burdened with the ROW, so their standing to appeal was directly based on adverse effects with a distinct nexus to BLM's decision rather than the decision of FERC. Similarly, we limited our review in Hoosier to those issues involving adverse effects from the portion of the pipeline approved by BLM, stating that "this Board is not the proper forum in which to raise such a challenge" involving other issues. Hoosier, supra at 166 n.7. Thus, the scope of this appeal is properly limited to those issues that have a nexus to BLM's decision that is distinct from the issues finally decided by FAA's 1998 EA and FONSI that arise from the exercise of that agency's statutory authority.

Even though BLM's lease includes special stipulations relating to airport noise, Congress has made the FAA, not BLM, the primary agency for the resolution of airport noise issues. Pursuant to 49 U.S.C. § 47502 (1994), the Secretary of Transportation is required to "establish a single system for measuring noise" and to "identify land uses normally compatible with various exposures of individuals to noise," and the FAA has addressed these concerns with regulations at 14 CFR Part 150. These regulations establish specific criteria, methods, and mathematical formulae airport operators must use in measuring noise, and, as noted earlier in this opinion, they define the term "compatible land use" at 14 CFR 150.7 by reference to Appendix A (Table 1) of Part 150, which indicates that DNL below 65 is compatible with residential use. In this case, FAA issued a FONSI and an EA containing findings on airport noise issues which BLM incorporated in making its own EA and FONSI on CCDOA's lease application.

In his Statement of Reasons (SOR), Freeman contends it is misleading to call HEA an "executive airport" instead of an "enhanced reliever airport," and characterizes the EA as having been prepared in a "deceptive manner" that "was so misleading that the neighbors * * * would never under-

stand the nature and scope of the project." (SOR at 1.) CCDOA rebuts these arguments, contending that "[i]n the six years since [1994], the public has had numerous opportunities to be informed and provide input into this process," a process that CCDOA chronicles in Attachment A to its Answer. (CCDOA Answer at 4.)

Freeman does not identify any departure from the norm in BLM's development of its EA that can be described as "deceptive" or "misleading." The EA was made available to the public in the normal manner, and anyone who chose to read it would understand the scope and nature of the project.

Although Freeman criticizes CCDOA, the Clark County Board of Commissioners, and the City of Henderson for allowing the development of Seven Hills in an area destined to become part of the airport environs, his criticism of local authorities fails to identify any error on BLM's part that would be subject to our review. Indeed, Freeman provides no evidence that the development of the subdivision is incompatible with the airport under criteria published in 14 CFR Part 150. Nevertheless, Freeman contends that BLM's decision does not adequately respond to the issue raised in his protest concerning the failure of the EA to address the adverse effects of locating the HEA next to residential areas. He faults BLM for referring to temporary construction impacts but not to the effect of airport construction or development. He states that the concerns raised in the protest about "increased traffic, noise pollution, larger and noisier aircraft, potential property effects," and other matters are "problems relating to the completed enhanced reliever airport's proximity to so many homes and residential uses," and that BLM has never adequately addressed this issue. (SOR at 2.) In response, CCDOA refutes these arguments by citing the various pages of BLM's EA where these issues are discussed.

Freeman offers no convincing explanation why this discussion is inadequate, and his mere expression of a difference of opinion affords no basis for reversing BLM. See Southern Utah Wilderness Alliance, 152 IBLA 216, 220 (2000). In any event, this argument has no identifiable nexus to BLM's decision that is distinct from the issues decided by FAA's 1998 EA and FONSI and thus raises an issue that is beyond the scope of this appeal.

Freeman contends that BLM's response to the concern raised by the protest concerning the effect of HEA on property values is inadequate because it does not take into account the effect on future home prices of a greater volume of air traffic involving larger and louder planes. (SOR at 2-3.) He cites instances involving other airports that illustrate these adverse effects and argues that it was error for BLM to claim there was no "documented evidence to support this issue of our protest." (SOR at 4.) CCDOA responds by noting that Seven Hills was built next to an already existing airport, and that planning for the proposed action predates most of the purchases in the development. The prices paid by such purchasers, CCDOA contends, "should have reflected this point." (CCDOA Answer at 15.)

We note that any consideration of the proposal's effects on property values necessarily would entail comparison with the effects of

the no action alternative under which flights would still increase without the beneficial effects to Freeman's neighborhood that would result from realignment of the runway. In the absence of evidence that would be relevant to this particular situation, we can only find that Freeman has expressed a difference of opinion with BLM that affords no basis for reversal of the decision.

In WIPA, we found that the economic effects of which appellants complained arose from the decision of the agency approving pipeline operations rather than from BLM's approval of the ROW. In this case, Freeman's concerns are similarly attributable to the decision of the FAA rather than of BLM. In fact, the FAA EA would indicate that it is the licensing of the airport itself, a decision in which BLM clearly played no part, rather than the proposed expansion, which is the source of his complaint. In raising these concerns about property values, Freeman has identified no nexus to BLM's decision that is distinct from the issues decided by FAA's 1998 EA and FONSI.

Freeman refers to current complaints about noise voiced by residents who already live beyond the 65 DNL contour in support of his claim that the airport is incompatible with residential use and asserts that these complaints demonstrate the "unreliability of these EA studies in the real world." (SOR at 4-5.) He also attacks BLM's reliance on day-night average noise level (DNL) testing, contending that the levels measured do not represent the aircraft depicted in Appendix C of BLM's EA and that the noise levels must be based on the larger aircraft that the runways are designed to accommodate. (SOR, 5-6.)

CCDOA responds that the methods used for measurement are those required by the FAA and that CCDOA conducted further monitoring at BLM's request

to validate and calibrate the application of the FAA noise model to HEA. This established that the fleet mix, flight tracks, and temporal distribution of operations assumed in the model gave noise estimates consistent with what is being experienced in the field. This exercise also established the basis for the assumptions used to generate the future noise contours around the airport. The largest aircraft at an airport is not always the noisiest. In selecting aircraft to include in the model, the intent is to select a representative aircraft that has a fairly high proportion of the anticipated annual operations. There will be single events where higher noise levels will be experienced due to an operation by a specific aircraft. The day-night average sound level metric ("[D]NL") used to establish the impact of aircraft-related noise is an annual average exposure level which lessens the contribution of loud single events but weights heavily (adds a penalty for) any noise occurring between 10:00 p.m. and 7:00 a.m.

(CCDOA Answer at 17.)

We note that Appendix B of the FAA EA explains noise analysis and the use of computer models in developing the noise contour lines used in the FAA EA, consistent with the requirements of FAA regulations in 14 CFR Part 150. Existing complaints by residents as to noise go directly to the effects of FAA's approval of the proposal for the entire airport, not BLM's approval of the lease onto which the ends of the runway would extend. Clearly, this Board is not the proper forum for considering Freeman's complaints on this issue or the other series of arguments Freeman raises concerning noise, airport operations, and land use compatibility. (SOR at 6-8).

Freeman criticizes BLM's noise stipulations as "vague" and "full of loopholes," and questions how BLM can assure compliance with the stipulation requiring adoption of touch-and-go flight tracks to ensure that all aircraft will operate to the west side of the airport. (SOR at 7, 8.) CCDOA responds by noting that the new flight patterns cannot take effect until the new runways are built, but acknowledges that "BLM and CCDOA have little control over flight pattern issues [because] navigable airspace is the sole domain of the FAA [which] establishes the rules" and that "[p]ilot compliance with the FAA rules limits the actions the CCDOA can take." (CCDOA Answer at 21.)

Although Freeman's argument might impel one to conclude that the stipulation should be deleted, we do not see how he is adversely affected by including it. He has not established that BLM would have authority to impose a stronger stipulation.

Freeman objects that the stipulation requiring coordination for development of noise abatement procedures to mitigate impacts that may result from touch and go training flights affecting the Seven Hills subdivision fails to specify the procedures or who will decide whether they are necessary. CCDOA persuasively responds the provisions are intended to address problems that may arise in the future and that procedures to abate those problems need not now be identified.

Freeman also objects to the stipulation that addresses the noise from engine maintenance run-ups by requiring that they be located as far as possible from existing homes near the airport and that consideration be given to the siting of acoustical barriers to minimize noise from ground run-ups. Freeman believes that the stipulation gives too much discretion to CCDOA. CCDOA responds with measures it intends to undertake to implement this stipulation. We note that the activity over which Freeman believes CCDOA would have too much discretion occurs on airport property owned by CCDOA, not on land leased from BLM. The fact that a lease may be needed for the extension of runways does not give BLM unlimited authority to use that lease to exercise control over operations on the airport that are not on BLM land, particularly where such operations are subject to regulation by the FAA, see 14 CFR Part 150. This Board is not an appropriate forum for resolving those issues.

Freeman also notes that Clark County has been designated a serious nonattainment area for carbon monoxide (CO) and suspended particulate

matter (PM-10), a fact that we observed earlier in this opinion in our discussion of the FAA EA. See FAA EA at 119. Freeman then provides a lengthy exposition of his dissatisfaction with Clark County's efforts to seek a further extension in submitting an implementation plan for compliance with the Clean Air Act, contending that the airport should not be approved until an acceptable implementation plan is adopted. However, as we explained earlier in this opinion, the CO and PM-10 emissions are below the threshold for a conformity determination. See generally Robert W. Hall, 149 IBLA 130, 133 (1994). Appellant's complaints about Clark County's compliance with the Clean Air Act provide no basis for reversing BLM's decision.

In view of the foregoing, the decision rejecting Freeman's protest is hereby affirmed.

Dawson's Appeal

We turn next to the appeal filed by John E. Dawson, docketed as IBLA 2000-352. In a memorandum in support of the stay request that accompanied his notice of appeal, Dawson merely contended that there were "numerous inaccuracies and incorrect findings of fact" and complained that he had "not been given his due process rights" because he had not been afforded an opportunity to rebut BLM's conclusions. See Memorandum in Support of Stay at 1. Clearly, such arguments and conclusory allegations are insufficient to establish error in the decision below and could be summarily rejected. However, Dawson subsequently filed a memorandum of points and authorities in which he has explained his disagreement with BLM's response to the issues he raised in his protest.

In his protest, Dawson had expressed concern that land would be given to the airport in a land exchange. In response, BLM explained that the land would not be exchanged but rather would be leased, that the airport monitored for compliance with its terms and conditions, and that title to the land would not be transferred from the Federal Government. We note that, although the land had, at one time, been segregated for a proposed exchange, that segregation was terminated by the Notice of Realty Action for the airport lease. See 64 FR 45562-63 (Aug. 20, 1999). In his present appeal, Dawson contends that a 20-year lease would still cause the damage of which he complained.

Dawson also contended in his protest that traffic patterns had been changed so that planes fly directly over Seven Hills, creating "noise and nuisance." In its decision, BLM noted that existing flight tracks do not impact Seven Hills though it acknowledged reports about planes flying over the community. BLM pointed out that the airport provides a handout for pilots containing recommendations about flight tracks and noise abatement over residential areas.

On appeal, Dawson asserts that there are "numerous small or medium size aircraft * * * flying East over the residential areas." He also complains that curfew hours outlined in the handout are not observed. In its decision, however, BLM explained that the future flight tracks are

identified in the EA and that arrivals and departures will not fly over residential areas east of the airport. We note that the realignment of the runway which will be facilitated by the issuance of the lease diminishes the likelihood that flights will occur over Seven Hills.

In response to a claim by Dawson that the airport expansion would affect the price of his home and his ability to sell it, BLM stated, as it did in response to Freeman, that there was no evidence that the airport has had any effect on property values. In his appeal, Dawson contends that BLM's response fails to take into account the effect of the future expansion of the airport on those values. But, as we noted earlier in this opinion, any consideration of the proposal's effects on future property values necessarily would entail comparison with the effects of the no action alternative under which flights would still increase without the beneficial effects to Dawson's neighborhood that would result from realignment of the runway.

In response to a concern expressed about mid-air collisions, BLM in its decision had referred generally to airspace restrictions around the airport and the discussion of safety in Chapter 5 of the HEA Master Plan Report. BLM also stated that one reason for leasing the land is to ensure that runway safety areas and protection zones are within the airport boundary. Characterizing BLM's response as "esoteric," appellant states that he does not understand why HEA must be expanded instead of accommodating the additional flights at McCarran. In making this observation, however, Dawson ignores the whole purpose of the expansion at HEA, which, as set forth in the EA, is intended to relieve congestion at McCarran. The concerns Dawson expresses are more properly attributable to FAA's approval of the runway project than to BLM's approval of a lease.

Dawson concludes by stating that he has not had an opportunity to appear and to present witnesses as to the type of activity that is currently taking place at HEA and that his due process rights have been violated, asserting that BLM and CCDOA are "taking" his property without an opportunity to be heard and to present evidence. Dawson requests a hearing. In its Answer, BLM notes that the activity currently taking place at HEA is not the subject of this appeal.

Dawson fails to explain how BLM's issuance of a lease of BLM land to CCDOA constitutes the "taking" of his property. In any event, insofar as Dawson's request for a hearing is concerned, we note that in LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964), the Court held that the Department was not required to conduct an evidentiary hearing at the request of those who protested an exchange. Dawson has cited no authority that such a hearing is required at the request of someone protesting issuance of an airport lease. Although the Board has discretionary authority to order a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. The issues on which it appears that Dawson seeks a hearing are more properly attributable to the FAA's approval of CCDOA's expansion proposal than to BLM's decision to issue the lease and

are therefore beyond the scope of this appeal. We note that after CCDOA prepared its draft EA in accordance with FAA requirements, the Board of County Commissioners for Clark County conducted a public hearing to accept oral and written comments on April 7, 1998. Dawson did not avail himself of the opportunity to present his evidence at that time.

Rippens' Appeal

Last, we turn to the appeal filed by Paul Rippens which is docketed as IBLA 2001-14. In his notice of appeal, Rippens asserted his belief that "not including an environmental impact statement is shortsighted and a potential danger to the surrounding area." Under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994), BLM would have been required to prepare an environmental impact statement if issuance of the lease constituted a major Federal action significantly affecting the quality of the human environment.

Notwithstanding Rippens' allegations, extensive analyses contained in the EA's prepared by BLM and FAA led both agencies to conclude that there would be no significant environmental impact from the proposal. Rippens has not shown that these findings were premised on an error of law or fact or that the analyses failed to consider a material environmental question. His unsupported expression of a different view provides no basis for reversal of the decision being appealed. See Southern Utah Wilderness Alliance, 152 IBLA 216, 220 (2000).

Rippens refers to current area noise levels that will become "a bigger problem" with an expanded runway but he fails to appreciate how realignment of the runway will mitigate this problem. Rippens also refers to the lack of consideration of the "many thousands of gallons of fuel that will be stored on the site" that "could be ruinous if a leak or explosion happened." There is no indication that fuel will be stored on the land leased from BLM and the final EA approved by the FAA referred only to existing underground storage tanks on land that CCDOA now owns. (FAA EA, p. 170.) The BLM EA noted that:

Five underground storage tanks (USTs) were present at HEA. CCDOA had them removed and has replaced them with above-ground storage tanks. * * *

On February 15, 1999, a Level I Contaminant Survey was conducted on the 140 acres of federal land and no evidence was found that any hazardous substances have been stored or released on the site in the past year (Airport EA, pp. 162-163, 168-172; BLM EA, pg. 27).

The HEA lease contains stipulations regarding the use, storage or release of hazardous substances on federal land (Exhibit A).

BLM DR/FONSI at 8.

Rippens' reference to the current flight pattern of small planes over an area that will become an elementary school as "a disaster in the

making" overlooks the fact that the runways will be reoriented so that current flight patterns will change. In any event, we find that the adverse effects of which he complains would arise from the decision of the FAA rather than that of BLM, and that this Board is not the appropriate forum to consider those issues. See WIPA, supra; Hoosier, supra.

Conclusion

At the outset of this opinion, we observed that appellants' principal concerns arise from the effects of noise that would be generated by airport operations that appellants believe would increase as a result of the runway improvements approved by the FAA in 1998 which would extend onto the parcel of land leased from BLM. We have explained that the decision under review is neither the initial authorization of airport use nor FAA's decision approving airport expansion and other changes but only BLM's decision to issue a lease for land onto which only a portion of those runways would extend. This Board is not a proper forum for seeking redress of the adverse effects of the FAA's basic decision, and we find that appellants have not identified adverse effects and issues that have a nexus to BLM's decision that is distinct from issues necessarily decided by the FAA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge