

DEPARTMENT OF THE INTERIOR**Office of the Secretary****43 CFR Part 4****Bureau of Land Management****43 CFR Parts 4100 and 5000**

RIN 1090-AA83

Special Rules Applicable to Public Land Hearings and Appeals; Grazing Administration—Exclusive of Alaska, Administrative Remedies; Grazing Administration—Effect of Wildfire Management Decisions; Administration of Forest Management Decisions**AGENCY:** Office of Hearings and Appeals; Bureau of Land Management, Interior.**ACTION:** Final rule.

SUMMARY: The Office of Hearings and Appeals (OHA) is amending its existing regulations governing hearings and appeals to codify who has a right of appeal, to expedite its review of wildfire management decisions, and to simplify proof of service. The Bureau of Land Management (BLM) is adding regulations allowing BLM to make its wildfire management decisions effective immediately when BLM determines that vegetation, soil, or other resources on the public lands are at substantial risk of wildfire due to drought, fuels buildup, or other reasons, or at immediate risk of erosion or other damage due to wildfire, and to expedite review of those decisions. The amendments to both the OHA and BLM regulations are needed to clarify and expedite administrative review procedures.

EFFECTIVE DATE: July 7, 2003.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203, Phone: 703-235-3750, or Michael H. Schwartz, Group Manager, Regulatory Affairs, Bureau of Land Management, U.S. Department of the Interior, 1849 C Street, NW., Room 401 LS, Washington, DC 20240, Phone: 202-452-5198. Persons who use a telecommunications device for the deaf (TDD) may contact either individual by calling the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

On December 16, 2002, the Office of Hearings and Appeals (OHA) and the

Bureau of Land Management (BLM) jointly proposed rules that would make BLM wildfire management decisions effective immediately and would expedite OHA decisions on appeals from such BLM decisions. 67 FR 77011 (Dec. 16, 2002). OHA also proposed to amend its existing rules governing the right to appeal and proof of service.

The Department received approximately 9,000 comments on the proposed rule. Of these, the great majority were divided between nearly identical form communications expressing general support for the proposal and nearly identical form communications expressing general opposition to the proposal. The remainder were specific and substantive comments from trade and governmental associations, commercial public land users, environmental interest groups, local and tribal governmental entities, and individuals. We have summarized and paraphrased the comments in order to keep this final rulemaking document manageable and comprehensible.

We have organized our discussion of topics in the order they were presented in the preamble to the proposed rule, *i.e.*, (A) standing to appeal, (B) effectiveness of BLM wildfire management decisions, (C) expedited OHA review of appeals from those decisions, and (D) proof of service. *See* 67 FR 77011, 77012-13 (Dec. 16, 2002).

A. Standing to Appeal

OHA proposed to codify decisions of the Interior Board of Land Appeals (IBLA) that have determined whether a person had a right to appeal a BLM decision. OHA proposed to define the phrases “party to a case” and “adversely affected,” both of which appear in the existing regulation governing who may appeal, 43 CFR 4.410(a). “Party to a case” was defined in proposed § 4.410(b) to mean “one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, *e.g.*, by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action.” “Adversely affected” was defined in proposed § 4.410(d) to mean that “a party has a legally cognizable interest, and the decision on appeal has caused, or will cause, injury to that interest.” OHA also proposed to reflect in § 4.410(c) the limitation found in IBLA decisions that a party may only raise on appeal to IBLA issues it previously presented to BLM.

Some comments stated that only persons who can show direct economic

damage should have a right of appeal, while others suggested that the scope of “legally cognizable interest” should be broadened. While many comments approved of the proposals, several expressed a concern that the proposals would do away with or limit public participation in BLM’s decisionmaking or restrict access to the appeals process.

We emphasize that the proposed rules were—and these final rules are—intended to codify existing IBLA precedents, not to either restrict or expand who has a right to appeal. We therefore decline either to limit or extend that right in this rulemaking.

If in the circumstances of a particular appeal, a person or organization can demonstrate that a BLM decision has caused or has a substantial likelihood of causing injury to a “legally cognizable interest” as IBLA has interpreted and applied that phrase in numerous decisions, then that person or organization is adversely affected under § 4.410(d). If a person or organization with an adversely affected legally cognizable interest has also been a party to the case, as defined in § 4.410(b), then that person or organization has a right of appeal. *See, e.g., San Juan Coal Co.*, 155 IBLA 389, 393 (2001); *Legal and Safety Employer Research, Inc.*, 154 IBLA 167, 171-72 (2001); *Powder River Basin Resource Council*, 124 IBLA 83, 89 (1992); and cases cited. The definition of “party to a case” in § 4.410(b) does not affect a person’s ability to participate in BLM’s decisionmaking; rather, it defines one of the two requirements for standing to appeal a BLM decision to IBLA.

Some comments expressed concern that the selection of the three IBLA decisions cited above implied that other decisions in which appellants were found to have a right of appeal, *e.g., National Wildlife Federation v. Bureau of Land Management*, 129 IBLA 124 (1994); *Donald K. Majors*, 123 IBLA 142 (1992); and *High Desert Multiple-Use Coalition*, 116 IBLA 47 (1990), were now discredited. No such implication was intended. The three decisions were cited in the preamble to the proposed rule to illustrate circumstances that IBLA has encountered in determining whether a particular appellant did or did not have a right to appeal. Other IBLA decisions are also relevant in making such determinations, including those holding that an organization may have a right of appeal on behalf of its members and that not only an interest in the land but also an interest in resources affected by a decision may be legally cognizable.

Some comments correctly pointed out that the language in proposed