

§ 4.410(d)—“has caused, or will cause, injury” to a legally cognizable interest—does not reflect the holding in *San Juan Coal Co.*, *supra*, and other decisions that a “substantial likelihood” of causing injury is sufficient. We have modified the language in the final § 4.410(d) to provide “and the decision on appeal has caused or is substantially likely to cause injury to that interest.”

Some comments requested clarification of the statement in the preamble to the proposed rule that a person who uses land in trespass, without claim or color of right, would not have a legally cognizable interest. That statement is illustrated by IBLA’s decision in *Fred J. Schikora*, 89 IBLA 251 (1985), which held that the interest of a trespasser who made improvements upon land in Alaska, without color or claim of right, was not a legally cognizable interest for a right to appeal a BLM decision that granted a conflicting Native allotment application for the land. The statement was not intended to imply that a member of the public who accesses public lands from private lands or uses public lands for recreational or other purposes would be in trespass and would not have a right of appeal from a decision involving the public lands, assuming he or she were a party to the case and had a legally cognizable interest that would be adversely affected by the decision.

A comment from a state governor was “concerned with the apparent lack of standing for states and local governments under the proposed changes. The amendments to this section of regulations are silent as to whether or not states and local governments will have standing based on their sovereignty alone.” Similar comments came from associations of counties and a county board of supervisors. For example: “It is important that local government be recognized as an entity that does have standing to appeal. It is becoming more and more common for county government to become involved in those federal land planning decisions that affect their citizens, tax [rolls], or the local economy.” We are codifying IBLA’s decisions on who has a right of appeal. IBLA’s decisions have not granted standing to state or county governments when they have not been adversely affected but have sought to represent their citizens in a *parens patriae* role. *Blaine County Board of Commissioners*, 93 IBLA 155, 157–158 (1986); *The Klamath Tribes*, 135 IBLA 192, 194 (1996); *State of Missouri Department of Natural Resources*, 142 IBLA 201, 207 (1998). Therefore, we do not accept the suggestion that we

provide standing to state or local governments based on their sovereignty alone. Of course, if a state or local government demonstrates that it was a party to a case and was adversely affected, it would have a right of appeal.

Some comments were concerned that proposed § 4.410(c) would limit a party’s ability to raise on appeal issues that could not have been raised during the party’s participation in BLM’s decisionmaking process. For example, the comments suggested, BLM might include information in a decision that was not available during the comment period on the draft decision, the decision might differ from the alternatives considered during that period, or the circumstances on the ground may have changed during the decisionmaking or after the decision is issued. We agree that a party should be able to raise additional issues in such circumstances, and in the final rule we have amended § 4.410(c) accordingly.

Some comments expressed concern that limiting a party to presenting only those issues on appeal that it had raised before the agency would force every party to raise every issue it could conceive of and that this could “not possibly save the agency any time in the appeals process. The agency would have already considered the comments initially and the appellant would certainly not be raising a completely new issue if it had been raised by someone else, it would be something the agency had already considered (and rejected). This provision will likely increase the number, length, and volume of comments, since no one would be able to rely on the comments of others.”

We believe this concern is more hypothetical than real. Under existing precedent, IBLA will not adjudicate issues raised for the first time on appeal, except in extraordinary circumstances. *See Henry A. Alker*, 62 IBLA 211 (1982). Since a party cannot assume that IBLA will find extraordinary circumstances in any given appeal, the party has every incentive to raise with BLM any issues it deems significant. Nor can a party assume that someone else will raise the party’s issues on its behalf, unless two or more parties coordinate their comments, which they are free to do. Parties may submit joint comments or may incorporate others’ comments by reference. If an issue was not important enough to a party to raise with BLM, IBLA should not be obligated to consider it on appeal.

In summary, § 4.410(b) is adopted as proposed and §§ 4.410(c) and (d) are adopted as amended. Also, we have amended the cross-reference in

§ 4.410(a)(4) to reflect the changes made in this section.

#### *B. Effectiveness of BLM Wildfire Management Decisions*

BLM proposed to add two provisions, in 43 CFR 4190.1 and 5003.1, that would make its wildfire management decisions affecting rangelands and forests effective immediately, that is, when issued. The proposal defined “wildfire management” as including but not limited to (1) fuel reduction or fuel treatment such as prescribed burns and mechanical, chemical, and biological thinning methods and (2) projects to stabilize and rehabilitate lands affected by wildfire.

In the following paragraphs, we will discuss the substantive comments that addressed the BLM portion of the proposed rule, that is, the proposed addition of 43 CFR 4190.1 and the proposed revision of 43 CFR 5003.1. These comments addressed four principal topics:

- Placing BLM wildfire management decisions in full force and effect pending appeals;
- How BLM defines wildfire management decisions;
- Where and to what lands the new regulations should apply; and
- How the changes BLM proposed in these areas relate to the regulations of the Office of Hearings and Appeals and the proposed changes to those regulations.

Accordingly, we will discuss the comments under headings based on these topics.

#### *1. How Should BLM Put Fire Management Decisions Into Effect?*

Many of the substantive comments supported the proposed rule placing BLM fire management decisions in full force and effect pending appeal. These comments, from logging interests, grazing interests, forestry associations, and local government organizations, basically agreed with the preamble statement in the proposed rule that the faster BLM is able to take action to reduce future threats of wildland fires, the more likely BLM can safeguard public and firefighter health and safety, protect property, and improve environmental baseline conditions in the wildland-urban interface and other priority areas. They agreed that wildfire management decisions are by their nature urgent, both to prevent or reduce catastrophic wildfires in upcoming dry seasons, and to speed recovery from past fires and thereby prevent erosion, water pollution, and other harmful legacies that they have caused.