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IBLA 2004-316

BLM/WY/PL-04/029+1310

BIODIVERSITY CONSERVATION
ALLIANCE, ET AL.

Natural Gas Development

Motions to Intervene Granted;
Petition for Stay Denied

ORDER

Biodiversity Conservation Alliance (BCA), Wyoming Outdoor Council, Center for Native Ecosystems, The Wilderness Society, and Wyoming Wilderness Association (collectively, appellants) have filed an appeal from and petitioned for a stay of the Record of Decision (ROD) of the Wyoming State Director, Bureau of Land Management (BLM), dated July 27, 2004, authorizing the "Desolation Flats Natural Gas Field Development Project" (Project) on Federally-leased lands situated in T8. 13-16 N., R8. 93-96 W., Sixth Principal Meridian, Sweetwater and Carbon Counties, Wyoming.

By order dated September 20, 2004, we granted the request to intervene filed by Cabot Oil & Gas Corporation (Cabot). Two other project proponents, or successors thereto, have also moved to intervene in this appeal, Samson Resources Company (Samson) and EOG Resources, Inc. (EOG). Those requests are granted.

In 1999 several operators submitted to BLM a proposal for an exploratory drilling and development project involving up to 592 gas wells to be drilled over a 20-year period in the Desolation Flats area of Wyoming. The operators later modified the proposal to reduce the number of potential gas wells to 385. The Project area encompasses approximately 233,542 acres, of which 224,434 acres are under Federal ownership (212,611 acres of Federal surface/mineral and 11,823 of Federal surface only), and is within the administrative jurisdiction of the BLM Rawlins and Rock Springs Field Offices.

On May 18, 2000, BLM issued a notice of intent to prepare an environmental impact statement (EIS) for the Project and, thereafter, prepared an April 2003

^{1/} Approximately 94 percent of the Project area is administered by the Rawlins Field Office under the guidance of the Great Divide Resource Management Plan (RMP).

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Draft EIS (DEIS) and a May 2004 Final EIS (FEIS), which it tiered to the EIS's prepared in connection with BLM's land use planning for the area (November 1990 Great Divide RMP and August 1997 Green River RMP). Under the proposed action, up to 385 gas wells would be drilled on 361 drill sites, along with the construction or improvement of 542 miles of roads, 361 miles of natural gas pipelines, four compressor stations, and one natural gas processing plant.

Departmental regulation 43 CFR 3165.4(c) provides that an appellant, who petitions for a stay of the effect of a BLM decision concerning onshore oil and gas operations, pending a determination by the Board of the merits of its appeal, bears the burden of demonstrating sufficient justification for the stay, based on the following four standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of irreparable harm to the appellant or resources if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

See Colorado Environmental Coalition, 135 IBLA 356, 357-58 (1996), aff'd, Colorado Environmental Coalition v. BLM, 932 F. Supp. 1247 (D. Colo. 1996).

Appellants seek to stay the effect of the ROD, and any proposed gas drilling in the Project area which has been or may be approved, pending the Board's resolution of their appeal. They assert that they are likely to succeed on the merits of the appeal and that they satisfy the other prerequisites for a stay. Intervenors and BLM oppose the granting of a stay.

Appellants challenge the ROD on the basis that BLM failed to comply with the environmental review requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), and the land use plan conformance requirement of section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2000). They assert that BLM did not adequately consider the significant individual and cumulative environmental impacts of full-field development in the Project area, because it deferred any site-specific environmental analysis until the Project proponents submit applications for permits to drill (APDs) for the approved wells and applications for rights-of-way (ROWs) for the approved roads, pipelines, and other facilities. They contend that the FEIS does not provide an adequate analysis of the impacts from actual development authorized by the disputed decision. They further assert that BLM did not consider all the cumulative impacts likely to result from the proposed development under the Project, in conjunction with several other existing

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or reasonably foreseeable "oil and gas projects pending in the Washakie Basin of the southern Red Desert."^{2/} (Petition for Stay at 29.)

Appellants also argue that BLM failed to address reasonable alternatives to the proposed development that, they assert, would minimize detrimental environmental impacts, particularly directional drilling, multiple wells per pad (cluster drilling), and closed loop or pitless drilling to protect resource values. They further argue that BLM failed to address reasonable alternatives that take into account environmentally protective management alternatives that BLM may be considering in conjunction with its ongoing revision of the Great Divide RMP. They assert that such management alternatives include a citizens' proposal to add approximately 50,000 acres to the Adobe Town Wilderness Study Area (WSA) and proposals by BCA and others to create Areas of Critical Environmental Concern (ACEC) to protect white-tailed prairie dog complexes, mountain plover concentrated nesting areas, and a large and important juniper scrub woodland.

Further, appellants contend that BLM's decision to approve the authorization of 385 wells does not conform to the current Great Divide RMP, since it exceeds the Reasonably Foreseeable Development (RFD) scenario approved in that plan. They assert that BLM must first consider exceeding the RFD scenario in a proposed revision of the RMP, analyze the environmental consequences of doing so in a supplemental EIS, and then approve a revised RMP, before natural gas development may exceed that adopted in the existing RMP. Appellants also contend that BLM should defer any approval of further natural gas development in the Project area until BLM completes its revision of the Great Divide RMP. Such a revision will, they contend, comprehensively address the development of energy resources and any restrictions or prohibitions on such development necessary to protect wilderness characteristics and other Federal-land resources. Approval of the Project prior to such revision, they argue, improperly limits and potentially forecloses decisions that can be considered and made in the revised RMP.

Based on a preliminary review of the record and pleadings submitted by appellants, BLM, and intervenors, we conclude that appellants have failed to satisfy their burden of demonstrating sufficient justification for the granting of a stay. They have not demonstrated a likelihood of succeeding on the merits of their appeal.

We find no basis for concluding that BLM was required by section 102(2)(C) of NEPA to address the site-specific impacts of the proposed natural gas development in the EIS for the Project. The EIS in question is a programmatic EIS and is tiered to

^{2/} In addition to the Project, appellants list a total of seven other gas projects involving the drilling and potential development of a total of 6,386 wells.

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the relevant land use planning EIS's. As such, BLM may address the overall environmental impacts of the Project, based on the general location of wells and associated facilities in the Project area. Consistent with its regulations, once APD's and other applications for ROWs, roads, or other facilities are submitted, BLM will conduct more site-specific analysis of potential environmental impacts, tiered to the Project-level EIS. See 43 CFR 3162.3-1(a) and 3162.5-1(a); Fred E. Payne, 159 IBLA 69, 81 (2003); DEIS at 2-4, 2-6 to 2-7; FEIS at 3-4 ("Site-specific impacts will be thoroughly reviewed under the NEPA regulations by tiering site specific environmental analysis to the Desolation Flats Record of Decision"), 5-38 to 5-41; ROD at 2 ("Prior to issuing any permit or authorization to implement these activities on the BLM-administered lands, the BLM must analyze each component of the Proposed Action on a site-specific basis and subject to NEPA").

Such a process permits BLM first to consider the impacts of an overall plan of development based on general expectations of the nature and extent of underlying natural gas reserves, but later to focus on more likely impacts, once the plan proceeds and actual development confirms or dispels such expectations. See DEIS at 2-1 ("The precise number of additional wells, locations of the wells, and timing of drilling associated with the proposed natural gas development project would be directed by the success of development drilling and production technology and economic considerations"); FEIS at 3-4 ("The number of wells, well locations, timing of drilling and construction is controlled in part by the location of gas and oil resources as they are found and developed"). Most importantly, under this process potential environmental impacts of specific surface-disturbing activities can be considered and mitigated "before actions are taken," as required by NEPA and its implementing regulations. See 40 CFR 1500.1(b). Appellants have failed to show a likelihood of success on this argument.^{3/}

Likewise, they have not shown a likelihood of success on their argument that BLM's cumulative impacts analysis was deficient because it failed to address the potential cumulative impacts of the proposed development under the Project, together with other present or reasonably foreseeable projects in the Washakie Basin of the southern Red Desert. In its "Cumulative Impacts Analysis" (DEIS, Chapter 5), BLM considered the likely cumulative impacts of the Project in conjunction with some, but not all, of the gas projects identified by appellants. See DEIS at 5-1 to 5-4.

^{3/} Appellants argue, in their statement of reasons for appeal at page 3, that BLM's subsequent processing of specific APD's confirms its assertion that "the analysis 'deferred' in the FEIS is not being conducted prior to issuance of Applications for Permits to Drill," and thus should have been addressed at the Project level. Neither BLM's decision to approve a specific APD nor the adequacy of its environmental analysis in support thereof is the subject of the present appeal.

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Although appellants assert that all these projects are likely to result in significant cumulative impacts affecting wildlife, water quality, air quality, and other aspect of the environment, the only evidence offered in support of such assertion is two maps (Ex. P attached to Petition for Stay), each titled "The Red Desert," one depicting only the relative location of the various projects and the other showing the locations of those same projects, as well as the corresponding locations for "Big Game Crucial Habitat and Birthing Grounds," "Big Game Migration Routes," and "Sage Grouse Leks." Such evidence is not sufficient, by itself, to establish that appellants have a likelihood of success on this argument. "[In order to demonstrate the deficiency of BLM's cumulative impacts analysis,] it is not sufficient merely to note the existence of other gas fields and gas development projects in Wyoming." National Wildlife Federation, 150 IBLA 385, 399 (1999); see, e.g., Wyoming Outdoor Council, 159 IBLA 388, 406-07 (2003); Wyoming Outdoor Council, 147 IBLA 105, 109 (1998).

Further, appellants have provided no basis for concluding that they have a likelihood of success on their argument that BLM was required in the EIS to address in detail various alternatives proposed by appellants. Two such alternatives, the expanded wilderness alternative for the Adobe Town WSA and directional drilling, were discussed in the DEIS at 2-42 through 2-44 and, for the reasons set forth therein, eliminated from detailed study. The reasons offered by BLM support such action.

Moreover, examination of the record shows multiple discussions by BLM relating to drilling methodologies for which appellants complain there was "insufficient analysis."^{4/} (Petition at 21.) While such discussions might be

^{4/} See DEIS at 2-12, 2-14 ("Some surface locations within the [Project area] may not be feasible to occupy, either for economical (e.g., high road construction costs), physical (e.g., steep terrain), or other environmental reasons (e.g., sage-grouse lek). A drilling method the Operators may use to access bottom-hole locations in these areas is directional drilling from a single-well pad (multi-well, directional drilling)."), 2-17, 2-43 ("[C]ircumstances [that might result in directional drilling] would arise at the APD stage, and economic evaluation for those particular instances would be conducted at that time to determine whether or not a directional well would be utilized"); FEIS at 5-82 to 5-83, 5-87 to 5-89; ROD at 6 ("The Proposed Action * * * provide[s] for directional drilling when practical * * *. There is no limit to the number of directional/multi-pad wells that may be drilled, but mandating that every well regardless of geologic or surface conditions must be drilled directionally is not reasonable"); BLM Response to Petition for Stay at 26 ("Further mitigative measures may be developed after considering site-specific conditions, and will be addressed in

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considered insufficient, if those methodologies should have been addressed, either collectively or individually, as reasonable alternatives to the proposed action. Appellants have not provided any persuasive evidence that they should have been. In fact, it is clear that those methodologies relate to possible future actions that might be authorized by BLM. Upon the filing of an APD, BLM has the authority to consider alternative means for drilling the particular wells, in connection with its site-specific environmental review. The citations to the record, noted above, clearly show BLM's intent to consider such methodologies at the APD approval stage.

At the APD approval stage, BLM may properly address changing the location of proposed drill sites, providing for directionally drilling multiple wells from a single pad, or making other adjustments in the timing or manner of drilling and related activity in order to protect sage grouse and sage grouse habitat, crucial big game winter range, other wildlife resources, wilderness characteristics, or other sensitive aspects of the environment. See, e.g., ROD at 3. Further, BLM could take into account any ACEC designations or other resource protective actions which have, at that time, been taken through promulgation of a revised RMP.

The fact that BLM is in the process of revising the Great Divide RMP does not require BLM to halt all resource management decisions pending the finalization of such a revision. Such a position has been rejected by the courts (ONRG Action v. Bureau of Land Management, 150 F.3d 1132, 1139-41 (9th Cir. 1998)) and this Board, most recently in Southern Utah Wilderness Alliance, 163 IBLA 14, 27-28 (2004), and cases cited therein.^{5/}

Appellants also have failed to show a likelihood of success on their assertion that BLM failed to abide by the land use plan conformance requirement of section 302(a) of FLPMA, because the proposed development would exceed that already considered and approved under the RFD scenario in the Great Divide RMP.

^{4/} (...continued)

the EA prepared to authorize subsequent APDs and ROWs and included as conditions of approval”).

^{5/} Intervenor's provide, as Ex. 4 to their opposition to appellants' petition for stay, a copy of BLM Instruction Memorandum (IM) No. 2004-100, dated Feb. 23, 2004, titled "Fluid Mineral Leasing and Related Planning and National Environmental Policy Act (NEPA) Processes," which states at page 2 that "nothing in the CEQ [Council on Environmental Quality] NEPA regulations requires postponing or denying a proposed action that is covered by the Environmental Impact Statement (EIS) for the existing land use plan to preserve alternatives during the course of preparing a new land use plan and EIS (see 40 CFR 1506.1(c)(2))."

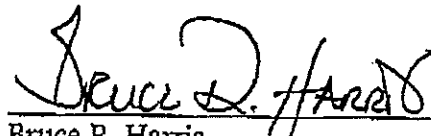
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The Board has endorsed BLM's conclusion that the RFD scenario is not a management prescription, but an assumption established as a reasonable estimate of activities for NEPA evaluation. Southern Utah Wilderness Alliance, 159 IBLA 220, 234 (2003). Thus, the RFD scenario cannot be considered to establish a limit on the number of oil and gas wells that can be drilled in a resource area. Rather, it is a reasonable estimate of drilling activity for environmental review purposes. Following issuance of the Board's decision, BLM issued IM No. 2004-089, dated January 16, 2004, titled "Policy for Reasonably Foreseeable Development (RFD) Scenario for Oil and Gas." Intervenor provided a copy of that IM to the Board as Ex. 9 to their opposition to the petition for stay. Therein, BLM stated in Attachment 1-1 that the RFD scenario is "neither a planning decision nor the 'No Action Alternative' in the NEPA document" and that it "provides the mechanism to analyze the effects that discretionary management decisions have on an oil and gas activity." BLM further explained at Attachment 1-2 that

[t]he fact that the total number of wells in an area may exceed the total number of wells projected in the selected alternative does not automatically mean that a supplement to the NEPA document or revision or amendment to the RMP is necessary. It is possible that exceeding the number of wells projected in the selected alternative may not result in exceeding the predicted level of environmental effects. Mitigation of environmental effects through successful reclamation, clustering wells on shared well locations, and minimizing pad and road construction can prevent the level of impacts from substantially exceeding the impacts analyzed in the original RMP/EIS or other NEPA documentation.

Moreover, to the extent that additional environmental analysis is required for the present proposed development, it is contained in the Project FEIS.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motions by Samson and EOG to intervene in the present proceeding are granted, and appellants' petition to stay the effect of the ROD is denied because they failed to demonstrate that they are likely to succeed on the merits of their appeal.



Bruce R. Harris
Deputy Chief Administrative Judge

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