

INTERIOR BOARD OF LAND APPEALS

Colorado Environmental Coalition

125 IBLA 210 (February 5, 1993)

Title page added by:
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COLORADO ENVIRONMENTAL COALITION

IBLA 89-547

Decided February 5, 1993

Appeal from a decision of the Colorado State Office, Bureau of Land Management, rejecting a protest to a proposed competitive offering of oil and gas leases. CO-234 and CO-236.

Affirmed.

1. Administrative Authority--Board of Land Appeals--Federal Onshore Oil and Gas Leasing Reform Act: Generally--Oil and Gas Leases: Generally--Oil and Gas Leases: Consent of Agency--Rules of Practice: Appeals

Under the provisions of 43 CFR 3101.7-3, a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the Forest Service, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the Forest Service with respect to its own internal operating procedures or with laws solely applicable to the Forest Service, the Board will not review such contentions where the Forest Service has provided its own appeal system for the resolution of such issues.

2. Environmental Quality: Environmental Statements--Federal Onshore Oil and Gas Leasing Reform Act: Generally--Oil and Gas Leases: Consent of Agency--Oil and Gas Leases: Stipulations

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and resource management plan adopted by the Forest Service were subject to revision upon site-specific examination and the Forest Service, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with no surface occupancy restrictions, objections to a decision by BLM to issue leases in reliance on the Forest Service recommendations will be rejected where the party objecting fails to show that the Forest Service site-specific analysis was, in any way, flawed.

APPEARANCES: Joy Goldbaum, Colorado Environmental Coalition, Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Colorado Environmental Coalition (CEC) has appealed from a decision of the Associate State Director, Colorado State Office, Bureau of Land Management (BLM), dated June 2, 1989, rejecting its protest to the listing of two parcels (CO-234 and CO-236) as available for leasing in a competitive oil and gas lease sale held on May 11, 1989. ^{1/} These two parcels encompass land within the San Juan National Forest in southwestern Colorado, which is under the surface management jurisdiction of the Forest Service, U.S. Department of Agriculture.

Pursuant to the provisions of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), Act of December 22, 1987, 101 Stat. 1330-256 to 1330-263, as amended, 30 U.S.C. § 226 (1988), ^{2/} the Forest Service consented to the issuance of leases for these two parcels subject to certain stipulations. BLM, thereafter, announced the availability of these two parcels for competitive bidding at the May 1989 lease sale, subject to the Forest Service stipulations. CEC protested this action on May 10, 1989, asserting that the lease stipulations provided by the Forest Service were not in accord with the relevant land management plans adopted by the Forest Service. Specifically, CEC alleged that the two parcels contained lands which should have been protected with a no surface occupancy (NSO) stipulation pursuant to the San Juan National Forest Land and Resource Management Plan (LRMP), but which were not so protected. Additionally, CEC argued that parcel CO-236 contained lands designated as unsuitable for mineral leasing in the LRMP. Accordingly, CEC requested that BLM suspend issuance of leases as to these parcels, pending compliance with the applicable laws.

By letter dated May 24, 1989, the Director, Watershed, Soils, and Minerals Area Management, Rocky Mountain Region, Forest Service, submitted to BLM a response to the CEC protest on behalf of the Forest Service. As a general matter, the Forest Service challenged CEC's actions in this case, noting that its protest was vague and generalized and appeared to be based "solely on interpretations of large-scale maps and general descriptions of

^{1/} Originally, CEC had protested the inclusion of five parcels in the May 1989 sale. Its appeal from the denial of its protest, however, was limited to four parcels. None of these parcels received competitive bids at the sale, though one parcel (CO-229), was the subject of a noncompetitive offer after the sale. In its statement of reasons, however, CEC informed the Board that it wished to limit its appeal to parcels CO-234 and CO-236. Accordingly, by order dated Sept. 8, 1989, the Board dismissed the appeal with respect to the other two parcels.

^{2/} FOOGLRA was adopted as part of Title V of the Omnibus Budget Reconciliation Act of 1987.

lands and resources contained in the [LRMP]" (Letter of May 24, 1989, at 1). The Director noted that while, consistent with the provisions of FOIGLRA, a 45-day comment period for public review had been provided, CEC had waited until the day prior to the sale to protest and had not earlier approached the Forest Service during the review period. The Director suggested that a protest initially made just one day before the lease sale was not consistent with the responsibility of parties to participate early in the process." Id.

In addition, the Forest Service submitted a detailed analysis of the parcels under protest. Insofar as parcel CO-234 was concerned, the Forest Service noted that, of the 1,920 acres involved, 520 acres (27 percent) contained slopes in excess of 60 percent and were, therefore, subject to NSO restrictions, and an additional 240 acres (12.5 percent) with slopes between 40 and 60 percent were subject to limited surface use restrictions. Based on an examination of the site, the Forest Service concluded that the remaining acreage (1,160 acres or 60 percent) with slopes less than 40 percent could be leased without restrictive stipulations. The Forest Service noted that appellant's generalized objections failed to identify any specific area in parcel CO-234 which should have been subject to more restrictive stipulations than those which were applied.

With respect to parcel CO-236, the Forest Service noted that 1,760 acres of the total acreage of 1,920 acres, or approximately 92 percent of the total, were subject to the NSO stipulation. An additional 120 acres (6 percent) were subject to a conditional NSO stipulation. Only 40 acres, or 2 percent, were not covered by restrictions on surface occupancy. The Forest Service pointed out that CEC was erroneous in its contention that any acreage in this parcel had been delineated as "unsuitable for mineral leasing" in the LRMP. Rather, the Forest Service explained, certain acreage had been identified as "unavailable for mineral leasing" because, given the steep slopes which would preclude surface occupancy, there did not appear to be any suitable site from which directional drilling could be conducted, given the map scale used during the Forest Planning process. However, upon site-specific examination, an old mining road was disclosed, as well as several small, 5- to 10-acre sites, accessible from this road, which could support a drilling rig. Accordingly, the Forest Service concluded that, even though 98 percent of the lease acreage would be covered by surface use restrictions, it was possible to make this parcel available for mineral leasing.

By decision dated June 2, 1989, the Associate State Director, BLM, rejected CEC's protest, including a copy of the Forest Service response and expressly noting BLM's concurrence therewith. CEC thereupon pursued the instant appeal to this Board.

In its statement of reasons for appeal (SOR), CEC argues that the Forest Service has, in effect, attempted to improperly amend the LRMP without going through the formal procedures called for by the provisions of 36 CFR 219.10(f). CEC contends further that, absent proper amendment of the LRMP, issuance of leases for the parcels would violate section 6(i) of the National Forest Management Act of 1976 (NFMA), 90 Stat. 2955, as

"instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." ^{3/}

In a similar vein, CEC contends that the Forest Service decision violated the provisions of the National Environmental Policy Act (NEPA), as amended, 42 U.S.C. §§ 4321-4370a (1988), because the land was identified in the Final Environmental Impact Statement (FEIS) for the San Juan LRMP either as requiring various NSO stipulations which were not included or as "unavailable" for leasing. CEC argues that "[t]he EIS process is rendered useless if the Forest Service alters its actions in a manner contrary to the LRMP without amending the LRMP, evaluating the impacts, and notifying the public" (SOR at 6).

In response, BLM declares that the Forest Service adequately considered the impacts of oil and gas leasing in the San Juan FEIS and LRMP, that BLM concurs in the conclusions reached therein, and that the site-specific examinations conducted prior to the Forest Service's consent to leasing provide a rational basis for the stipulations requested, which, BLM contends, are in conformance with the forest plan. Accordingly, BLM requests that the decision dismissing the protest be affirmed.

[1] For reasons which we will set forth below, we affirm the decision rejecting the protest. Initially, however, we wish to explore the questions of both the propriety and the appropriate scope of this Board's review of the matters raised herein. We believe that such an analysis is appropriate inasmuch as this represents the first appeal which the Board has considered relating to a protest filed with BLM based on a Forest Service decision consenting to lease public domain land within a National Forest since the adoption of FOOGLRA. ^{4/} It is necessary, therefore, to examine the impact which that statute properly has on our adjudications.

As a starting point, a brief recapitulation of our pre-FOOGLRA adjudicatory practice with respect to Forest Service lands may be useful. Prior to the adoption of FOOGLRA, the role of the Forest Service with respect to the issuance of oil and gas leases for public domain lands within the Forest Service System under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181-287 (1982), was clear. While the recommendation of the Forest Service with respect to whether or not a lease should issue and, if so, under

^{3/} The legislative history of the NFMA does make it clear that mineral leases are included within the ambit of the phrase "instruments for the use and occupancy of National Forest System lands." See, e.g., S. Rep. No. 893, 94th Cong., 2d Sess. 35 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 6662, 6694.

^{4/} The decision in Liberty Petroleum Corp., 118 IBLA 214 (1991), dealt with an objection by a prospective lessee to stipulations proposed by the Forest Service. Moreover, the lease offer in that case had been filed prior to the effective date of FOOGLRA and, therefore, under the provisions of section 5106(a) of FOOGLRA, it was processed under the provisions of the Mineral Leasing Act in effect prior to FOOGLRA.

what conditions, would be solicited and considered by BLM, the ultimate decision to lease and the terms under which leasing would be allowed were, under the provisions of the Mineral Leasing Act, within the sole discretion of BLM, not the Forest Service. See, e.g., Western Interstate Energy, Inc., 71 IBLA 19, 21 (1983); Natural Gas Corp. of California, 59 IBLA 348, 351 (1981). Thus, the decisions of the Board clearly required that BLM independently review any stipulations proposed by the Forest Service prior to requiring their inclusion in a lease. See Esdras K. Hartley, 54 IBLA 38, 44-45, 88 I.D. 437, 440-41 (1981); Chevron Oil Co., 24 IBLA 159, 163 (1976). ^{5/}

The situation which obtained under the Mineral Leasing Act of 1920 should be contrasted with that which existed (and still exists) with reference to the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. §§ 351-359 (1988). Section 3 of that Act, 30 U.S.C. § 352 (1988), which authorized leasing of minerals in lands acquired by the United States, expressly provides, inter alia, that:

No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department * * * having jurisdiction over the lands containing such deposit * * * and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered * * *.

Pursuant to this provision, the Board consistently held that, absent the approval of the surface administering agency, no lease could issue for acquired lands. See, e.g., Joe E. Shelton, 73 IBLA 250 (1983); Amoco Production Co., 69 IBLA 279 (1982). Similarly, the Board held that, where the surface administering agency had preconditioned its consent to leasing on the acceptance of stipulations by the prospective lessee, the Department lacked any authority to either waive the stipulation or alter its terms. See, e.g., James M. Chudnow, 91 IBLA 143 (1986); Thomas Connell, 46 IBLA 331 (1980).

In adopting FOOGLRA, Congress essentially granted the Forest Service the same authority over the leasing of public domain lands under the Mineral Leasing Act of 1920 that it had exercised over the leasing of acquired lands under the Mineral Leasing Act for Acquired Lands. Thus, 30 U.S.C. § 226(h) (1988) now provides that "[t]he Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture." Moreover, additional changes promulgated by FOOGLRA now require that, for Forest Service lands,

^{5/} This rule was applicable not merely to public domain land within the jurisdiction of the Forest Service but to public domain land within the jurisdiction of any agency other than the Department of the Interior. See, e.g., Petrovest, Inc., 76 IBLA 327 (1983) (Corps of Engineers).

the Secretary of Agriculture regulate all surface disturbing activities and further provide that no application for permit to drill (APD) may be approved without the prior analysis and approval of the Secretary of Agriculture where surface disturbing activities will occur on Forest Service lands. See 30 U.S.C. § 226(g) (1988). Thus, as has been noted, the effect of these provisions has been to replace a system in which BLM exercised the primary role in mineral activities on Forest Service lands with one in which BLM and the Forest Service are jointly responsible. See generally P. Clark, "The Federal Onshore Oil and Gas Leasing Reform Act of 1987: Christmas Present or Pandora's Box?" 34 Rocky Mtn. Min. Law Inst. 18-1, 18-20 to 18-32 (1988).

Pursuant to section 5107(a) of Title V of the Omnibus Budget Reconciliation Act of 1987, 101 Stat. 1330-259 (1987), the Department of the Interior promulgated regulations to implement the provisions of FOOGLRA. Of particular importance for the instant appeal are the regulations appearing at 43 CFR 3101.7, relating to the leasing of Federal lands administered by an agency outside the Department of the Interior. These regulations, in essence, establish a bifurcated approach to leasing, differentiating between those situations, generally relating to public domain lands, in which the surface managing agency may merely recommend terms for leasing and those situations (which includes all acquired lands and those public domain lands within the National Forest System) in which the surface managing agency may require the inclusion of stipulations. In the former situation, BLM consults with the surface managing agency (43 CFR 3101.7-1(b)) and reviews all recommendations to determine which ones it will accept (43 CFR 3101.7-2(c)). With respect to the latter situation, leasing will not occur without the consent of any surface managing agency with respect to acquired lands (43 CFR 3101.7-1(a)) and the Forest Service with respect to all lands in the National Forest System whether acquired or reserved from the public domain (43 CFR 3101.7-1(c)). Furthermore, the regulations clearly provide that BLM shall include all stipulations which the surface managing agencies request with respect to this latter category of leasing.

Notwithstanding the foregoing, however, it is clear that even with respect to acquired lands and lands within the National Forest System, BLM retains its own authority to determine the propriety of lease issuance. Thus, 43 CFR 3101.7-2(a) expressly notes that "[w]here the surface managing agency has consented to leasing with required stipulations and the Secretary decides to issue a lease, the authorized officer shall incorporate the stipulations into any lease which it may issue." (Emphasis supplied.) Not only do the regulations clearly repose ultimate authority to lease or not to lease in the Secretary of the Interior, even where the approval of the surface managing agency to lease has been obtained, the regulations further explicitly state that "[t]he authorized officer may add additional stipulations" in such circumstances. Id. Thus, while the Forest Service, in effect, exercises a veto power over leasing and can require the inclusion of such stipulations as it deems appropriate, the Interior Department, acting through BLM, has independent authority not only to condition leasing on

any additional stipulations which it deems desirable but also to refuse to lease even where the Forest Service has consented to leasing. ^{6/}

Specific appeal regulations were also adopted with reference to the leasing of lands under the surface management jurisdiction of other agencies. Analysis of these regulations, however, discloses a regulatory hiatus. Thus, 43 CFR 3101.7-3(a) provides that "[t]he decision of the authorized officer to reject an offer to lease or to issue a lease with stipulations recommended by the surface managing agency may be appealed to the Interior Board of Land Appeals under part 4 of this title." This regulation must be contrasted with 43 CFR 3101.7-3(b), which declares:

Where, as provided by statute, the surface managing agency has required that certain stipulations be included in a lease or has consented, or objected or refused to consent to leasing, any appeal by an affected lease offeror shall be pursuant to the administrative remedies provided by the particular surface managing agency.

The first provision clearly relates to leasing of public domain lands where the surface managing agency may merely "recommend" and may not "require" inclusion of stipulations and, in this instance, appeals are clearly brought to the Board. The second provision relates to those situations, such as those involving National Forest System lands, where surface managing agency consent is a pre-condition to lease issuance. In these cases, "an affected lease offeror" must pursue the administrative remedies provided by the surface managing agency. ^{7/} The problem arises in that neither provision deals with the situation, as in the appeal presently before the Board, in which a third-party objects to issuance of a lease where the required agency consent has been obtained.

Nor does anything in the regulatory history of these provisions eradicate this obvious lacuna. In explaining its purpose in proposing to amend 43 CFR 3101.7, BLM merely noted that the proposed changes would "clarify the coordination, review, consultation, consent and appeals provision for lands under consideration for leasing, the surface of which is administered by a surface managing agency other than the Bureau of Land Management." 54 FR 9214 (Mar. 21, 1988). As proposed, 43 CFR 3101.7-3(a) was a verbatim replication of the language as ultimately adopted, and the only difference between 43 CFR 3101.7-3(b) as proposed and as adopted was that, as proposed, the adjective "certain" did not appear before "stipulations" nor did the phrase "or has consented" appear before the phrase "or objected or refused to consent."

^{6/} Indeed, 43 CFR 3101.7-2(b) expressly declares that, except where the surface managing agency refuses its consent to leasing, "the Secretary [of the Interior] has the final authority and discretion to decide to issue a lease."

^{7/} With respect to lands in the National Forest System, the administrative remedies are set forth at 36 CFR Part 217.

Moreover, in adopting the regulation in its present form, the Department did little to clarify the situation. Thus, in discussing the various comments which BLM had received with reference to proposed 43 CFR 3101.7-3, the Assistant Secretary noted:

Several of the comments received on this section of the proposed rulemaking supported the process of appealing decisions of the surface managing agency directly to that agency (particularly with respect to the U.S. Forest Service) for decisions made by that agency objecting to leasing, refusing to lease, or consenting to leasing only with stipulations. However, some comments expressed the view that appeals should be handled cooperatively between the Department of the Interior and the Forest Service, or that only one agency should be designated to handle appeals to avoid dual appeal processes or the "stacking" of appeals first to the Forest Service and then to the Interior Board of Land Appeals. One comment suggested that the final rulemaking clarify which appeals are required to be made to the Forest Service. After consideration of all of the comments, the section is amended in the final rulemaking to clarify those instances when appeals are properly made to the surface managing agency.

53 FR 22816-17 (June 17, 1988). The foregoing does nothing to dissipate the difficulties in interpreting the status of third-party objections to leasing where the Forest Service has consented to issuance of the lease subject to various stipulations, since it merely identifies areas of conflict between commentators but does not purport to explain how these conflicts have been resolved in the rule adopted.

The Board is forced, therefore, to apply its own analysis to the language of the regulations. In our view, 43 CFR 3101.7-3(a) is merely declarative of the situation which would have existed in the absence of any specific regulation, since, under 43 CFR 4.410, any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management may appeal to this Board, subject to various exceptions, none of which would be generally applicable. Since, under 43 CFR 3101.7-2(b), the decision to lease in such instances is clearly that of BLM, any party adversely affected by such a decision would have standing to appeal to this Board under 43 CFR 4.410.

The regulation set forth at 43 CFR 3101.7-3(b), on the other hand, must be read as a limitation of the right to appeal which would otherwise exist. This regulation, in effect, carves out an exception to the right to appeal afforded by 43 CFR 4.410. Thus, where the surface managing agency has required that certain stipulations be included in a lease or has consented or refused to consent to leasing, any appeal by an affected lease offeror is required to be pursuant to the administrative remedies provided by the surface managing agency. This limitation cannot, however, be fairly

read to embrace third-party objections. Accordingly, we must conclude that a third-party objecting to a leasing decision may appeal to this Board. ^{8/}

This does not end our analysis, however, because the instant appeal gives rise not only to questions of the jurisdiction of the Board to hear this case, but also to questions as to the proper scope of both BLM and this Board's consideration of objections raised by a third-party. For reasons which we will explain, we conclude that objections raised with respect to the conformity of the Forest Service's actions either with its own internal operating procedures or with laws solely applicable to the Forest Service are not properly considered either by BLM or this Board.

As noted above, appellant has challenged the actions of the Forest Service in consenting to issuance of leases for the two parcels as violative of both 36 CFR 219.10(f) and section 6(i) of the NFMA, 16 U.S.C. § 1604(i) (1988). In our view, neither challenge should generally be subject to review by BLM or this Board. Two factors impel us to this conclusion. First, both the cited regulation and statute involve obligations and responsibilities which are within the legal purview of the Department of Agriculture and, more specifically, the Forest Service. Neither grants independent or collateral authority to BLM or the Department of the Interior. Fundamental considerations of comity between Executive Departments should generally dictate that, in the absence of at least some statutory indication to the contrary, one Department not pass on the consistency of another Department's actions with the latter Department's statutory and regulatory mandates, when those mandates do not directly impact upon the first Department's own delegated authority. ^{9/} Where, as here, no such contrary intent is manifested and no such impact can be discerned, we should be very reluctant to second-guess the judgment of another Executive Department. This reluctance is fortified by our recognition that the Forest Service has established its own appeal system which would provide an appellant with a more appropriate forum in which to raise such issues.

^{8/} Similarly, where BLM adds conditions to those required by the surface managing agency or refuses to lease even though the surface managing agency has given its consent, appeals, even by affected lease offerors, are properly brought before this Board.

^{9/} An example of an exception to this rule of comity can be seen in section 28(c)(2) of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185(c)(2) (1988), which clearly provides that, where the surface of Federal lands crossed by a proposed pipeline is under the jurisdiction of two or more Federal agencies, the Secretary of the Interior is authorized to grant or renew the right-of-way. This is true even where none of the land involved is under the jurisdiction of the Department of the Interior. In such cases, the Department of the Interior has the express statutory obligation to review actions of other agencies taken with respect to the approval of the right-of-way. See, e.g., Hoosier Environmental Council, 109 IBLA 160 (1989).

Under regulations adopted on March 21, 1990, 55 FR 10444, the Forest Service established rules relating to the environmental review of the leasing of oil and gas resources located on National Forest System lands and management of subsequent oil and gas operations, pursuant to the statutory mandate of FOOGLRA. In addition to providing for both area and Forest-wide leasing analyses, these regulations also note that "[a]t such time as specific lands are being considered for leasing, the Regional Forester shall review the area or Forest-wide leasing decision and shall authorize the Bureau of Land Management to offer specific lands for lease" subject to various requirements including a determination that oil and gas leasing has been adequately addressed in a NEPA document and that leasing is consistent with the applicable Forest LRMP (36 CFR 228.102(e)(1)). These regulations further expressly provide that "[t]he authorized Forest officer shall promptly notify the Bureau of Land Management if appeals of either an area or Forest-wide leasing decision or a leasing decision for specific lands are filed during the periods provided under 36 CFR part 217" (36 CFR 228.103).

The regulations in 36 CFR Part 217 were, themselves, adopted in 1989 in a revision of the former Forest Service appeal regulations which had appeared at 36 CFR 211.18 (1988). See 54 FR 3342-3362 (Jan. 23, 1989).

It seems reasonably clear that, under the previous regulations, decisions relating to pre-FOOGLRA recommendations of the Forest Service concerning the leasing of public domain lands would not have been subject to review, since 36 CFR 211.18(b)(3) expressly excluded "decisions to provide advisory, non-binding recommendations to other agencies which have the final authority to implement the recommendations in question." ^{10/} This language was amended in 1989 to except from review "[d]ecisions for which the jurisdiction of another Government agency or the Comptroller General supersedes that of the Department of Agriculture." 36 CFR 217.4(a)(3). While this language could raise some question as to the right to seek review where a post-FOOGLRA decision to consent to leasing with or without stipulations

was involved, we believe that any doubts on this score were effectively erased by the 1990 amendments to 36 CFR Part 228, set forth above. It is, in our view, clear that under the regulatory scheme adopted in 1990 appellant herein could appeal a Forest Service decision to consent to leasing and could raise the issues of conformity of that action with both NEPA and the Forest planning process.

We must admit, however, that it is doubtful that appellant could have obtained review within the Forest Service of its contentions concerning alleged violations of 36 CFR 219.10(f) and the NFMA at the time when this appeal arose in May 1989. Therefore, for this appeal only, we will consider the allegations made by appellant with reference to those issues.

^{10/} Indeed, it could be argued that, even post-FOOGLRA, decisions to consent to lease would not have been appealable under this regulation since the provisions of 43 CFR 3101.7-2(b) expressly noted the Secretary of the Interior's final authority and discretion to determine whether or not any lease would issue, save for the situation in which Forest Service refused its consent to leasing.

In the future, however, where a party wishes to raise issues concerning Forest Service actions under its statutory and regulatory directives which do not impinge upon the Department of the Interior's own responsibilities, it is the Board's view that comity requires that the Board defer to the judgment of that agency and require that an appellant pursue any remedies in the forum which the Forest Service has provided. 11/

On the other hand, to the extent that appellant assails issuance of a lease as violative of NEPA, such question is properly considered both by BLM and this Board since it implicates responsibilities which BLM is independently charged with carrying out. Moreover, to the extent that BLM is relying on environmental analyses carried out by the Forest Service in establishing compliance with NEPA mandates, allegations concerning inadequacies of those analyses or asserting the inconsistency of the proposed action with the conclusions reached by Forest Service in its NEPA process must inevitably be subject to review by BLM and, on appeal, this Board, since they serve as the predicate for a determination that BLM is fulfilling its NEPA responsibilities. That BLM did, in fact, rely on the Forest Service environmental analysis in the instant case is clear, since the BLM Colorado State Director concurred in the recommendation to adopt the Forest Service FEIS as BLM's own "NEPA compliance document for oil and gas leasing within the San Juan National Forest." See Memorandum from the Leader, NEPA Review Team for Forest Service Land Use Plans/Environmental Impact Statements, to State Director, dated Nov. 14, 1988, at 2. Therefore, questions of NEPA compliance are properly within the scope of review of BLM and this Board.

[2] Turning to the substantive matters under review, appellant's assertions that the proposed actions violated section 6(i) of the NFMA

11/ We are well aware that the Forest Service had proposed regulations earlier this year the effect of which would have been to limit the right to appeal to only Forest-plan decisions. See generally 57 FR 10444-49 (Mar. 26, 1992). The adoption of such regulations would have clearly deprived appellant of any administrative review within the Forest Service of its contentions, including its assertions that the proposed action was inconsistent with the Forest plan. Under such procedures, it is likely the Board would be forced to conclude that the objections raised by appellant must be considered by BLM and this Board since that would be the only avenue of administrative relief available to them. However, we note that Congress subsequently enacted section 322 of the Department of the Interior's Appropriations Act for Fiscal Year 1993, 102d Cong., 2d Sess., 106 Stat. 1419, which expressly mandated a notice and comment and appeals system for proposed actions concerning projects and activities under the NFMA. Since this legislation expressly establishes the right of appeal within the Forest Service for review of appellant's contentions with respect to the consistency of the proposed action with the NFMA, this action by Congress strengthens our conclusions that the Department of the Interior should defer to the Forest Service on questions relating to the conformity of Forest Service's actions with the NFMA and the regulations adopted pursuant thereto.

and 36 CFR 219.10(f), or that lease issuance would violate NEPA cannot be sustained. The gravamen of appellant's complaint is that the consent of the Forest Service to lease the two parcels is inconsistent with the LRMP which showed these two parcels as either unavailable for leasing or as requiring an NSO stipulation. We do not agree.

The adoption of the LRMP followed an extensive environmental review of alternate management plans by the Forest Service, pursuant to section 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1988), culminating in the San Juan National Forest FEIS. Alternative H, the preferred alternative, provided that 17 percent of the total acreage within the national forest, including land within designated wilderness and wilderness study areas, should not be leased for minerals and further provided that an additional 14 percent would be leased only with an NSO restriction. These areas were depicted on a map attached to the FEIS (Alternative H - Preferred). See FEIS, Vol. 2, Map H. By Record of Decision dated September 29, 1983, the Regional Forester, Rocky Mountain Region, adopted Alternative H, which thus became the LRMP.

It is true, as contended by appellant, that Map H indicates that parts of secs. 20 and 32, T. 40 N., R. 12 W., New Mexico Principal Meridian, included in Parcel CO-234, were shown as available for leasing under NSO restrictions, while parts of secs. 9, 12 and 13, T. 40 N., R. 12 W., New Mexico Principal Meridian, included in Parcel CO-236, were shown either as available for leasing under NSO restrictions or as unavailable for leasing at all. 12/ Where appellant errs, however, is in its implicit assumption that the status of the land as depicted on the Alternative H map is definitively and irrevocably fixed until such time as either the LRMP or FEIS is amended. This is simply not the case.

The FEIS, itself, clearly provides that the identification of the land as either suitable for leasing without restriction, or suitable for leasing subject to NSO restrictions, or unavailable for leasing was subject to modification upon site-specific examinations. Thus, the FEIS noted:

A "lease" recommendation does not imply that there are no environmentally sensitive conditions within an area. Areas recommended as available for leasing with surface use may contain conditions which in a site-specific study will be found to fulfill the criteria requiring a "no lease" recommendation. An operating plan which provides for protection for or avoidance of such conditions will be required before any surface use of the lease may

12/ An examination of the map, however, does lend some credence to the Forest Service's criticism of CEC's apparent reliance solely on the FEIS documents, as the scale to which the map is drawn necessarily renders the exact boundary line between the various areas a matter of significant speculation.

occur. Similarly, a recommendation of "no lease" or "lease with no surface occupancy" indicates that environmentally sensitive conditions are so abundant or severe within the area that recovery following mineral operations is extremely unlikely or impossible, but does not imply that no portions of the area may be suitable for mineral leasing, only that the dominant character of the area is not suitable. Any mineral leasing recommendation may be changed on a site-specific basis. [Emphasis supplied.]

FEIS at IV-114 to IV-115. Since the FEIS clearly contemplates that LRMP designations as to the suitability of general areas to mineral development are subject to modification based on site-specific study, there is no basis for appellant's assertion that the actual modification of such designation is contrary to either the FEIS or the LRMP. 13/

It would, of course, be possible to argue that the site-specific analysis does not support the decision to make the two parcels available for leasing. Appellant, however, has eschewed any effort to challenge the recommendation on a factual, site-related basis, choosing instead to rely solely on its assertion that any modification in the status of lands as reflected on the Alternative H map required formal modification of the FEIS and LRMP. Indeed, appellant has failed to challenge any of the factual predicates of the Forest Service analysis and there is nothing in the record which would indicate that this analysis was flawed. Our independent review of the record fails to establish any basis for concluding that either the Forest Service or BLM failed to adequately consider the environmental consequences of leasing the parcels under the proposed restrictions and, accordingly, CEC's appeal from BLM's decision rejecting its protest is properly rejected.

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

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

13/ Indeed, the logic of appellant's position would require the amendment of the LRMP and the issuance of a supplemental EIS whenever site-specific analysis indicated that lands which had been designated in the FEIS and LRMP as generally suitable for leasing without restrictions should either be leased with NSO restrictions or not leased at all.