

INTERIOR BOARD OF LAND APPEALS

San Juan Citizens Alliance, et al.

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SAN JUAN CITIZENS ALLIANCE ET AL.

IBLA 93-54, 93-74

Decided March 14, 1994

Appeals from a decision of the Associate State Director, Colorado, Bureau of Land Management, approving an application for 160-acre spacing for coalbed methane gas wells and from a decision of the Acting Area Manager, San Juan Resource Area, Colorado, Bureau of Land Management, approving applications for permits to drill wells.

Motions to dismiss denied, decisions affirmed in part and set aside in part, and case remanded to BLM.

1. Bureau of Land Management--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Oil and Gas Leases: Drilling

BLM properly overruled an order of the Colorado Oil and Gas Commission refusing to reduce spacing requirements for coalbed methane gas wells in a formation on tribal-owned lands within an Indian reservation where such action was shown to be reasonable and was supported by the record.

2. Indians: Mineral Resources: Oil and Gas: Tribal Lands--Oil and Gas Leases: Drainage--Oil and Gas Leases: Drilling

When reducing spacing requirements for coalbed methane gas wells in a formation on tribal lands within an Indian reservation, BLM could protect offsetting operators from drainage by restricting production to one-half the estimated ultimate recovery of gas from each well when there was no evidence such action would not be adequate to protect offsetting wells.

3. Environmental Quality: Environmental Statements--Indians: Mineral Resources: Oil and Gas: Tribal Lands--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Drilling

BLM properly confined review of the environmental consequences of allowing a limited number of coalbed methane gas wells to be drilled on tribal lands within an Indian reservation to the impact of such activity where there was no evidence that approval of the project would necessarily lead to additional drilling throughout a larger oil and gas field.

4. Environmental Quality: Environmental Statements--Indians: Mineral Resources: Oil and Gas: Tribal Lands--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Drilling

BLM was not required by sec. 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1988), to prepare an environmental impact statement assessing the impact of drilling coalbed methane gas wells and related activity on tribal lands within an Indian reservation when it had taken a hard look at the environmental consequences of such activity, taking into account all relevant matters of environmental concern, and made a convincing case either that no significant impact would result or that any potentially significant impact would be reduced to insignificance by mitigating measures.

APPEARANCES: James M. Grizzard, Esq., and Matthew Kenna, Esq., Durango, Colorado, for the San Juan Citizens Alliance and Western Colorado Congress; Marla J. Williams, Esq., and D. Brett Woods, Esq., Denver, Colorado, for Meridian Oil Inc.; Randy Allen, Esq., T. R. Rice, Esq., and Lance Astrella, Esq., Denver, Colorado, for the Emerald Gas Operating Company; Thomas H. Shipps, Esq., and Patricia A. Hall, Esq., Durango, Colorado, for the Southern Ute Indian Tribe; John F. Kunz, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

The San Juan Citizens Alliance and its parent organization, the Western Colorado Congress (hereinafter San Juan), have appealed from an October 21, 1992, decision of the Associate State Director, Colorado, Bureau of Land Management (BLM), that approved an application by the Emerald Gas Operating Company, successor-in-interest to the Bowen Exploration Company (hereinafter Emerald), to permit 160-acre spacing for drilling coalbed methane gas wells in the Fruitland Formation on lands owned by the Southern Ute Indian Tribe (Tribe) within the Southern Ute Indian Reservation (Reservation) in southwestern Colorado. San Juan also appealed a subsequent October 30, 1992, decision of the Acting Area Manager, San Juan Resource Area, Colorado, BLM, approving Emerald's applications for permits to drill (APD's) three gas wells in that area. 1/

1/ Both Emerald and the Tribe seek to intervene in the present case. We grant the requests to intervene since both Emerald and the Tribe could have independently maintained an appeal from the decisions at issue here. See Sierra Club - Rocky Mountain Chapter, 75 IBLA 220, 221 n.2 (1983). They are parties to the case who would be adversely affected by a decision of the Board overturning either the Associate State Director's October 1992 decision or the Acting Area Manager's approval of drilling by Emerald.

The appeal is docketed as IBLA No. 93-54. Meridian Oil Incorporated (Meridian) has also taken an appeal from the October 21, 1992, decision. That appeal is docketed as IBLA No. 93-74. Because they concern the same underlying facts and present related legal issues, the appeals are consolidated for decision by the Interior Board of Land Appeals (Board).

On January 14, 1988, the Secretary of the Interior, pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1988), approved a December 15, 1987, "Mineral Exploration and Development Agreement" (No. 750-88-1007) between the Tribe and Emerald's predecessor-in-interest. That agreement, as modified July 12, 1990, provided that the Tribe might approve drilling of coalbed methane gas wells in the Fruitland Formation on tribal lands within the Indian Reservation, using 160-acre (rather than 320-acre) spacing upon a showing that greater gas reserves might thereby be recovered in a more economic and efficient manner. The agreement would permit, in certain circumstances, drilling four wells on each section in the Fruitland Formation.

On August 7, 1990, Emerald proposed drilling 14 oil and gas wells per section in four different geologic formations on tribal lands within the Indian Reservation, according to existing spacing requirements. Two wells would be drilled in every section in the Fruitland Formation, in accordance with 320-acre spacing. In addition, four wells would be drilled in every section in the Pictured Cliffs, Dakota, and Mesaverde formations, in accordance with 160-acre spacing. On September 28, 1990, the Bureau of Indian Affairs (BIA) prepared an environmental assessment (EA) to consider environmental consequences of increased oil and gas development within the Reservation and alternatives thereto. The Superintendent, Southern Ute Agency, BIA, approved the EA and a Finding of No Significant Impact (FONSI) on November 20, 1990, concluding that no significant environmental impact would result from approval of the proposed development and finding that no environmental impact statement (EIS) was required. The Area Director, Albuquerque Area, BIA, then issued a Decision Notice on January 25, 1991, concurring in the FONSI and approving the proposed drilling.

On July 23, 1992, Emerald filed an application with the Colorado Oil and Gas Commission (COGCC) (Cause No. 112, Docket No. 9-8-28) seeking to change the existing spacing (from 320- to 160-acre spacing) for coalbed methane gas wells drilled in the Fruitland Formation on certain tribal-owned lands within the Indian Reservation. The affected area is part of the Ignacio-Blanco Field and lies within a 3-square mile area in portions of secs. 20, 29, 31, and 32, T. 33 N., R. 11 W., New Mexico Principal Meridian, La Plata County, Colorado, in the Valencia Canyon Area of the northern San Juan Basin. Emerald sought "downspacing" of the spacing requirement in order to permit what is called "infilling," being an allowance of an additional well within a 320-acre spacing unit. Emerald ultimately sought to drill four new coalbed methane gas wells in the Fruitland Formation in the area and to convert two existing water wells to that purpose, in what was termed the "Emerald Project." The result would be a total of four wells each in secs. 29 and 32 and the two converted wells in secs. 20 and 31. BLM supported this application in an August 11, 1992, letter to COGCC.

A hearing was held before COGCC on September 21 and 22, 1992. Emerald's application was denied at the conclusion of the hearing. See Transcript of Sept. 22, 1992, Hearing before COGCC (Volume II) at 333-34. Thereafter, COGCC issued an order (No. 112-104) on October 16, 1992 (effective September 21, 1992), formally denying Emerald's application.

On October 21, 1992, after reviewing the evidence presented before COGCC, the Associate State Director, finding that BLM exercised primary authority to set spacing on Indian lands, issued a decision approving Emerald's downspacing application. She concluded that, in addition to producing information concerning geology and reservoir mechanics, infill drilling would result in faster and more complete extraction of gas from the Fruitland Formation, and would diminish impacts to the environment while increasing ultimate economic return to the Tribe. She stated that a decision whether to approve specific APD's would be made by the Area Manager, in conjunction with BIA, after review of the APD's and in conformity to the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321-4361 (1988).

Emerald filed APD's for four coalbed methane gas wells (Nos. 29-3, 29-4, 32-3, and 32-4) in the Fruitland Formation on August 7, 1992. Approval for conversion of two water wells to gas (Nos. 20-3 and 31-3) was later sought on December 29, 1992. Emerald thereby took advantage of 160-acre spacing allowed within the 3-square mile area affected by the October 21, 1992, decision. According to Emerald, the Indian Reservation contains 1,080 square miles and the entire Basin contains 5,900 square miles of area that could be drilled for coalbed methane gas. See Response to the Motion for Stay at 7, 19.

BLM thereafter assessed environmental consequences of the Emerald proposal by preparing an EA on October 30, 1992. The purpose of the EA was to determine, as required by section 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1988), whether drilling and related activity was a major Federal action that "might significantly affect the quality of the human environment," and so require preparation of an EIS. Id. The EA was tiered to the September 1990 EA earlier prepared by BIA. On October 30, 1992, the Acting Area Manager issued a FONSI/Decision Record, concluding that no significant environmental impact would result from the proposed action and deciding to go forward with the action, subject to mitigating measures designed to protect the environment. The Acting Area Manager approved three of the APD's for new wells (Nos. 29-3, 29-4, and 32-3) on the same date. An APD for the fourth new well (No. 32-4) was approved by the Area Manager on November 10, 1992. No appeal was taken from that decision. No approval has yet been given to the conversion of the existing wells. See BLM Answer at 4 n.6. The Board declined to stay approval of the initial three APD's in an order dated November 18, 1992.

Emerald stated in November 1992 that it had drilled or was drilling the four wells and that all of the attendant surface activity, including the construction of roads, was undertaken or completed. See Response to

the Motion for Stay at 8-9. Such drilling and related activity has evidently concluded. See Emerald Answer at 11. It is not known whether the wells are now being used for the production of coalbed methane gas. To the extent that they can still be used for that purpose, we conclude that neither of the appeals is moot since the Board is still in a position to afford effective relief by shutting down the wells should we determine that BLM improperly decreased the spacing requirement for drilling in the Fruitland Formation or approved the APD's. See San Juan Citizens Alliance, 114 IBLA 366, 371 (1990).

Before we address the substantive issues raised by the instant appeals, several procedural matters must be dealt with. The Tribe contends that the Board lacks jurisdiction to decide San Juan's appeal since it has no authority to review BLM decisions involving oil and gas operations on Indian lands. Nonetheless, Departmental regulations give BLM authority to regulate oil and gas operations (including spacing) on Indian lands, and provide for a right to appeal decisions by the State Director to the Board. See 43 CFR 3160.0-1, 3160.0-2, 3162.3-1(a), and 3165.4(a). The Indian Mineral Leasing Act of 1982 is cited by 43 CFR 3160.0-3 as one of the statutes authorizing promulgation of onshore oil and gas regulations. The Board has long asserted jurisdiction in cases arising from BLM decisions involving Indian lands. See, e.g., Jerome P. McHugh & Associates, 113 IBLA 341 (1990); Everett Hall, 101 IBLA 362 (1988); William Perlman, 91 IBLA 208, 93 I.D. 159 (1986). Therefore, we hold that the Board has jurisdiction over the instant appeal. See Assiniboine & Sioux Tribes, 85 IBLA 39, 41 (1985). The Tribe's motion to dismiss is denied.

It is also contended that San Juan's appeal from the Acting Area Manager's October 1992 decision approving the APD's is not properly before the Board since 43 CFR 3165.3(b) provides that administrative review of such a decision must first be sought before the State Director and that, since the time limit for seeking review has elapsed, the Board has no authority to decide the appeal or even to remand it to the State Director. In San Juan Citizens Alliance, 104 IBLA 288 (1988), we dismissed an appeal from an Area Manager's approval of an APD where San Juan had not first taken an appeal to the State Director. Id. at 290. We did, however, remand the case to the State Director though the time period for seeking his review had passed. We would therefore remand the instant case in any event. But here, the Associate State Director had already reviewed the APD's in the course of deciding whether to permit downspacing and drilling of additional wells. To implement her decision, all that remained to be done was to select appropriate well locations, action that took place 9 days after her decision. There is no suggestion that the State Director disapproved of those locations. See Memorandum to the Board from the Deputy State Director, Mineral Resources, dated Nov. 17, 1992. We find, therefore, that BLM found approval of the APD's was proper, thereby giving rise to the subsequent right to appeal to the Board under 43 CFR 3165.3(b). No purpose would be served by remanding this case for further review by the State Director.

Emerald, the Tribe, and BLM also argue that San Juan lacks standing to appeal the decisions here under review because San Juan has not shown that

it is adversely affected by either decision. Under 43 CFR 4.410(a), only a party to the case who is "adversely affected" by the decision has standing to appeal. San Juan counters that it is adversely affected by both decisions since the ultimate consequence of the decisions will be drilling that may affect the quality of the air and groundwater of those members who live in the immediate vicinity of the proposed drilling (San Juan Reply to Intervenors and BLM at 3). Even though it may finally be shown that there will be no such impact on air and groundwater quality, such a potential adverse affect is sufficient to afford the members of San Juan (and thereby San Juan) standing to challenge the BLM decisions. Powder River Basin Resource Council, 124 IBLA 83, 88, 89 (1992). Since an appeal is usually taken before a decision is implemented, it is not required that an appellant demonstrate at the time it takes an appeal that it is immediately affected by a BLM decision, but it suffices that an adverse affect is very likely. Donald K. Majors, 123 IBLA 142, 143, 144 (1992). Further, San Juan is a "party to [the] case," as required by 43 CFR 4.410(a), where the record indicates that it has been generally involved in BLM decisionmaking with respect to coalbed methane gas development and is recognized as an interested party by BLM (see "List" attached to Associate State Director's Oct. 21, 1992, Decision). Stanley Energy, Inc., 122 IBLA 118, 120 (1992). The motions to dismiss for lack of standing are denied.

Finally, San Juan has moved to "quash" the answer filed by BLM and the Tribe as untimely. The motion is denied. We find the answers were timely filed; even if they were not, the Board can consider them in order to make a complete and adequate review. See 43 CFR 4.414. For similar reasons, the motion to strike the reply filed by San Juan is also denied.

Meridian's appeal is confined to the question of the propriety of the October 21, 1992, decision approving 160-acre spacing. In its statement of reasons for appeal (SOR), Meridian contests BLM's authority to overrule COGCC's October 1992 order refusing to permit downspacing.

[1] Departmental regulation 43 CFR 3162.3-1(a), which applies to Indian land leases (see 43 CFR 3160.0-1), provides that an oil and gas well shall be drilled "in conformity with an acceptable well-spacing program." The regulation further provides in relevant part that such a program is either "one which conforms with a spacing order or field rule issued by a State Commission or Board and accepted by the authorized officer" or "any other program established by the authorized officer." Id. (emphasis added). In keeping with that regulation, BLM makes the final pronouncement on the spacing of oil and gas wells on Indian lands. As we indicated in Assiniboine & Sioux Tribes, supra at 42-43, it is BLM, not a state oil and gas commission, that has jurisdiction to set spacing requirements on Indian lands. It is undisputed by Meridian that, as BLM concluded, "[since] the [Tribe] is a sovereign nation, BLM's trust responsibility to the tribe gives the BLM jurisdiction for spacing matters on tribal lands" (Associate State Director's Decision, dated Oct. 21, 1992, at 2). See also Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of State of Montana, 792 F.2d 782, 794-96 (9th Cir. 1986). We therefore find that BLM had jurisdiction to overrule COGCC's October 1992 spacing order.

Meridian points to no statute, regulation, or case law to support a contrary finding. Meridian does rely, however, on an August 22, 1991, memorandum of understanding (MOU) between BLM and COGCC, wherein BLM reserved the right to request COGCC to rescind or modify an existing spacing order regarding Indian lands and COGCC agreed to either abide by a BLM protest to a requested change in spacing requirements involving Indian lands or else relinquish jurisdiction to BLM. See MOU at 3. This memorandum indicates that BLM has primary jurisdiction over well spacing in the case of Indian lands since, in case there is a BLM objection which COGCC will not concede, COGCC must relinquish jurisdiction to BLM. In addition, the MOU provides that, in the case of Indian lands, BLM must affirmatively notify COGCC of agreement with a spacing order prior to a COGCC hearing and decision or else such action will be postponed until concurrence is obtained. See id. It is therefore apparent that the MOU recognizes COGCC will act in most instances to set spacing requirements involving Indian lands (unless BLM objects), but subject to concurrence by BLM. See also Transcript of Sept. 22, 1992, Hearing before COGCC (Volume II) at 327-28. BLM's agreement is in turn contingent on Tribal agreement. See MOU, dated Aug. 22, 1991, at 3, 4. Here, COGCC was put on notice by BLM letter dated August 11, 1992, that BLM would not concur in rejection of Emerald's downspacing request. It was again so informed at the conclusion of the September 22, 1992, hearing. See Transcript of Sept. 22, 1992, Hearing before COGCC (Volume II) at 334. Under these circumstances, COGCC should have postponed action, in accordance with the MOU. Nonetheless, after COGCC acted, nothing in the MOU prevented BLM from taking independent action pursuant to 43 CFR 3162.3-1(a) to overrule the COGCC order that was inconsistent with BLM's stated position. See Assiniboine & Sioux Tribes, supra at 42, 43 ("[BLM's] independent review authority" retained under similar MOU). Indeed, the MOU is made subject to existing law, including that regulation. See MOU at 1. Nor are we persuaded that BLM lacks such authority simply because it did not object to an earlier June 17, 1988, COGCC order (No. 112-60) that established 320-acre spacing. It was the October 1992 order that was (and is) at issue in the instant case. Meridian also forecasts dire consequences if BLM is allowed unilaterally to alter COGCC spacing requirements on Indian lands. We are not persuaded. No reason has been shown to lead one to assume that exceptions granted by BLM will foster large-scale discrepancies in spacing requirements among Federal, Indian, and adjacent private and state lands. Further, there is an adequate remedy for situations where downspacing on Indian lands results in drainage of gas from adjacent lands.

Meridian also argues that there were no compelling reasons for the decision to overrule COGCC's October 1992 order. To the contrary, we find the decision to be adequately explained and supported. Downspacing will increase knowledge of the underlying deposits of coalbed methane gas in the Fruitland Formation within the Reservation (and perhaps other parts of the San Juan Basin) and the ability to extract such gas. It may answer a primary question about whether gas is found in homogeneous, connected strata or heterogeneous, lenticular beds, and thereby provide an indication concerning which spacing should be used. In any case, it will permit the greater and faster recovery of such gas in the subject area. Meridian has not demonstrated otherwise. Such an explanation is plainly not arbitrary and capricious.

[2] Finally, Meridian contends that BLM has not provided adequate protection for correlative rights to coalbed methane gas underlying adjacent land leased by the Tribe to Meridian. Meridian correctly states that BLM recognizes a potential for drainage by Emerald wells. See Associate State Director's Decision, dated Oct. 21, 1992, at 3. BLM's solution to the problem was to restrict production to a total of 3 billion cubic feet (Bcf) from each Emerald well, which was estimated to be about half of the anticipated ultimate recovery of the wells. See id. Once that production was reached, Emerald would be required to prove to BLM that no well was damaging any other offsetting operator's wells before additional production could take place. See id. Meridian asserts that this solution is inadequate since it is based on an assumed (and inaccurate) ultimate recovery for Emerald's wells. Meridian contends that it either should be permitted to drill protective wells according to 160-acre spacing or that Emerald production from the permitted wells should be limited to 50 percent of actual daily gas production from each well.

Meridian has not established that the solution arrived at by BLM is inadequate to protect correlative rights. It is, in fact, an approach endorsed by COGCC. See Letter to BLM from Tribe, dated Oct. 13, 1992, at 4-5. Nor has Meridian shown that limiting Emerald's initial recovery would not prevent drainage from the wells of Meridian and other offsetting operators. We therefore find that Meridian has not shown BLM's solution to the problem to be inadequate. Meridian is, of course, still free to seek downspacing so that it can drill additional protective wells. Should drainage occur, it also has remedies at law. Therefore, we are not persuaded to overturn the BLM decision on this issue.

Nonetheless, Meridian has shown that the record does not support a conclusion that 3 Bcf is a reasonable estimate of half the gas that can be recovered from each well. The exhibits prepared by Jack McCartney, Emerald's expert petroleum engineer, and introduced at the September 21, 1992, COGCC hearing, show estimated recoverable gas reserves for each 320-acre space in secs. 29 and 32, T. 33 N., R. 11 W., New Mexico Principal Meridian, La Plata County, Colorado, based on production from two existing wells in each section. The reserves are 6.7 and 4.8 Bcf (sec. 29) and 7.7 and 6.8 Bcf (sec. 32). See Transcript of Sept. 21, 1992, Hearing before COGCC (Volume I) at 87-89; Emerald's Exhs. 18-B, 18-C, 18-E, and 18-F submitted at Sept. 21, 1992, Hearing. Those are the sections that would be subject to drilling to achieve one well in each 160-acre spacing unit. The four wells would have reserves of 3.4 and 2.4 Bcf (sec. 29) and 3.9 and 3.4 Bcf (sec. 32). Half of those reserves is not 3 Bcf. Accordingly, we must set aside this finding of the October 21, 1992, decision and remand the case to BLM for reconsideration of an appropriate estimate of half the recovery expected from each infilled well in secs. 29 and 32. Any subsequent decision altering the estimate should show the basis for the determination and be supported by the record. BLM is not precluded on remand from adopting Meridian's proposed solution for protecting correlative rights by limiting recovery.

[3] San Juan contends that BLM was required to prepare an EIS encompassing drilling within the entire San Juan Basin prior to the Acting Area Manager's October 30, 1992, decision approving the three APD's. San Juan therefore challenges the overall scope of BLM's EA. BLM focused on the drilling of the four proposed wells and the conversion of two other wells, as well as related activity, within a portion of the Indian Reservation, by tiering the EA to BIA's assessment of the impact of increased drilling within the Reservation that would permit 14 wells in each section of land under existing spacing requirements.

San Juan has not established that BIA did not properly assess the environmental impact of drilling 14 wells in each section. Further, while the BIA assessment did not address the impact of two more wells to each section in the Fruitland Formation caused by decreased 160-acre spacing, such impact was subsumed in consideration of the impact of 14 wells within each section in various formations. By so doing, BIA considered the impact of drilling two more wells in the Fruitland Formation in each section of the Reservation. It is true that neither BIA nor BLM considered the impact of such drilling basin-wide.

BLM nevertheless was not required to consider the impact of downspacing and consequent drilling of an additional two wells in each section in the Fruitland Formation throughout the Reservation or San Juan Basin since the October 1992 BLM decisions allowed increased drilling in a limited area within the Reservation. There is no evidence that the drilling of four wells and the conversion of two other wells would necessarily lead to drilling additional wells in other parts of the Reservation or the Basin. Future drilling on the Reservation or throughout the Basin has not been shown to be a "[c]onnected action" within the scope of BLM's EA, under 40 CFR 1508.25(a)(1). See Southern Utah Wilderness Alliance, 122 IBLA 165, 168-69 (1992). San Juan has also failed to demonstrate that possible additional drilling constitutes a "[c]umulative action" that will have significant impacts in conjunction with current and other proposed actions, under 40 CFR 1508.25(a)(2). See Southern Utah Wilderness Alliance, *supra* at 169-70. Finally, San Juan has failed to show that possible additional drilling constitutes a "[s]imilar action," that requires inclusion in BLM's EA under 40 CFR 1508.25(a)(3). See Southern Utah Wilderness Alliance, *supra* at 170.

San Juan contends that BLM was required by section 102(2)(C) of NEPA to prepare an EIS assessing environmental impacts of an anticipated increase in the number of coalbed methane gas wells drilled in the Fruitland Formation in the Southern Ute Indian Reservation and the San Juan Basin that will result from the decision to permit 160-acre spacing in the subject area. San Juan argues that the effect of such action is to authorize full-field development that requires preparation of an EIS under the Secretary's holding in his June 25, 1991, decision in Michael Gold (On Review). San Juan asserts that the EIS must analyze significant cumulative impacts of the six proposed wells and other public and private wells in the area, both past, present, and reasonably foreseeable.

[4] The Board will affirm a decision not to prepare an EIS if BLM has taken a hard look at environmental consequences of the proposed action, taking into account all relevant matters of environmental concern, and made a convincing case either that no significant environmental impact will result or that any potentially significant impact has been reduced to insignificance by mitigating measures. Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991). Obviously, if BLM intended to authorize large-scale exploration and drilling on a large segment of Federal or Indian lands that had potential for significantly affecting the quality of the human environment, it should first prepare an EIS under section 102(2)(C) of NEPA. But given the tentative nature of exploration and drilling and uncertainty inherent in location of oil and gas at depth, a proposal may initially be presented to BLM, as here, for a small-scale program which may or may not be expanded. At some time there may be a decision to expand the program, provided favorable results are obtained from initial exploration and drilling activity. The question then becomes when, rather than whether, an EIS should be prepared. Clearly, an EIS should be prepared when BLM is about to approve activity that has potential for significantly affecting the quality of the human environment. That was the Secretary's holding in Michael Gold (On Review), at 7, 9, 11, reversing in part Michael Gold (On Reconsideration), 115 IBLA 218 (1990). The Secretary, however, refused to establish a general rule defining when an EIS should be prepared, but instead required that an ad hoc review be made in each case. Id. at 10-11. The question remains therefore whether, assuming BLM retains authority to stop drilling at any time, an EIS should be prepared when BLM is about to approve the first infill wells proposed in an area, knowing that such approval may prompt proposals for further drilling. In order to answer this question, it is important to recognize that if the project is segmented, while each segment may not separately have potential for affecting the environment, that those segments proposed and those already completed or foreseeable may have a significant cumulative impact on the quality of the human environment so as to require preparation of an EIS. BLM must therefore look not only at the impact of the proposed activity but must consider it in conjunction with impacts of all past, present, and reasonably foreseeable activities.

Concerning such impacts, Emerald states that "the results of the drilling program w[ill] be utilized in evaluating whether additional \* \* \* drilling might be warranted" (Response to the Motion for Stay at 8). See also BLM EA at 1. According to the Tribe, the critical question to be answered turns on the nature of the coalbeds containing methane gas and the best means for recovering gas from them. See Preliminary Statement in Opposition to Request for Immediate Stay at 3. If 160-acre spacing proves to be the best means for recovery of this resource, BLM may be persuaded to make other land in the Reservation and throughout the Basin subject to such spacing and to permit additional wells to be drilled. By approving the initial APD's, BLM has committed itself to allowing a few wells in what may eventually turn out to be a full-scale development of the Reservation and the Basin. BLM has not, however, committed itself to approval of additional wells. Rather, it retains authority to prohibit further drilling even if the results obtained by the initial wells prove favorable and strong pressure is exerted for further drilling. BLM has not, therefore, irretrievably

committed any resources other than those immediately affected by the drilling of the three approved wells. Further, the possibility of full-scale development within the Reservation or the Basin as a result of the current pilot project is speculative at best, depending as it does on a myriad of factors including data obtained from the infill wells, the future economic climate, and the interest of oil and gas companies. Therefore, we conclude that the impact of such possible future development was properly not considered by BLM. See Trout Unlimited v. Morton, 509 F.2d 1276, 1283-84 (9th Cir. 1974).

When BLM considered the likely environmental impact of the three proposed wells and related activity, it also considered the potential for a significant cumulative environmental impact by the proposed activity in conjunction with that of other past, present, and reasonably foreseeable activities. See BLM EA at 6; BIA EA at 48-49. San Juan has not shown that any cumulative impact would result from the proposed project in conjunction with other past, present, or reasonably foreseeable drilling and related activity inside or outside the Reservation that was not considered by BLM's EA, as required by 40 CFR 1508.25. Nor has San Juan demonstrated that any such impact would be significant. Indeed, San Juan has not pointed to any specific projects (either past, present, or reasonably foreseeable) that, together with the proposed drilling and related activity, might have a significant cumulative impact on some aspect of the environment. The burden was upon San Juan to demonstrate the possibility of a particular cumulative impact that BLM failed to consider and to establish that such impact would be significant. See Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140 (1992), appeal filed, Pardee Construction Company of Nevada v. Lujan, No. S-92-978-LDG-RLH (D. Nev. Nov. 20, 1992). It has failed to do so.

San Juan also contends that BLM's EA was inadequate in certain respects. It is argued that BLM failed to properly assess the impact of drilling and producing coalbed methane gas from the six proposed wells and other public and private wells in the area on groundwater in the San Juan Basin. San Juan contends that BLM has not demonstrated that gas will not, as a result of drilling and production, invade aquifers in the area. It points to evidence that gas will in fact invade aquifers since this has occurred elsewhere in the San Juan Basin. This evidence consists of the detection of gas in certain water wells and a draft water-resources investigations report prepared by Geological Survey. See San Juan SOR at 9; Reply at 1-3.

San Juan has offered no credible evidence that methane gas from the Fruitland Formation will contaminate aquifers in the area as a result of the proposed drilling. The evidence offered by San Juan was addressed in a July 27, 1989, study entitled "Problems and Considerations Associated with Water Injection and Coal-Bed Methane Development as They Relate to Groundwater in the Northern San Juan Basin, Colorado," incorporated by reference in BIA's EA. See App. E attached to BIA EA. As a result of this study BLM incorporated proposed drilling measures designed to either prevent or mitigate to the point of insignificance any impact from the upward migration of gas from the Fruitland Formation into any aquifer. To that end, BLM has

provided for cementing all well casings from the bottom of any drillhole to the surface and for periodically testing for abnormal pressures on all casings in order to ensure their integrity. See FONSI Decision Record at 2; BLM EA at 4, 6; Exh. B ("Drilling Program") attached to APD's; BIA EA at 41, 53; Exh. E attached to BIA's EA at 3. The potential impact to groundwater, given these measures, was fully addressed in both the BLM and BIA EA's. See BLM EA at 4; BIA EA at 22-23, 40-42. This included the cumulative impact of such drilling in conjunction with increased drilling generally in the Indian Reservation. See BLM EA at 6; BIA EA at 48-49. There is no evidence that groundwater in the San Juan Basin will be adversely affected by the addition of the proposed drilling to any past, present, or reasonably foreseeable drilling generally in the Basin. BLM is not required to consider such speculative impacts. See Trout Unlimited v. Morton, supra at 1283-84. It was concluded that, given the required mitigating measures, no significant impact to groundwater would result. San Juan has not demonstrated otherwise. We therefore find that BLM complied with NEPA. See Powder River Basin Resource Council, 120 IBLA 47, 56, 60 (1991).

To the extent that BLM purportedly lacks adequate information regarding the impact to groundwater, San Juan contends that BLM was required to prepare an analysis in accordance with 40 CFR 1502.22 and, since it did not do so, that it violated the regulation. The regulation provides that, when information concerning reasonably foreseeable significant adverse environmental impacts is "incomplete or unavailable," an EIS shall include a "summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment" and an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." We do not find this regulation applicable here since it only applies if BLM is required to prepare an EIS because of a possibly significant environmental impact. See 51 FR 15625 (Apr. 25, 1986). When the EA was prepared, the information available to BLM regarding the impact to the groundwater from the proposed drilling was complete enough to permit BLM to conclude that any potential impact would be insignificant, and therefore no EIS was required.

San Juan also argues that BLM failed to properly assess the impact of the proposed project on air quality in the San Juan Basin and the nearby Weminuche Wilderness Area, which has Class I air quality. The impact on air quality from the proposed drilling and related activity was considered in the BLM EA. See BLM EA at 4 (incorporating BIA EA at 44-45). BLM considered the cumulative impact of such drilling and related activity in conjunction with increased drilling and related activity generally in the Indian Reservation by tiering its EA to that of BIA. See BIA EA at 26, 44-45. San Juan has not demonstrated that air quality in the San Juan Basin will be adversely affected by the addition of the proposed drilling and related activity to any past, present, or reasonably foreseeable drilling and related activity generally in the Basin. So far as the wilderness area is concerned, San Juan does not dispute BLM's assertion that no impact from drilling and related activity in connection with the Emerald Project

is likely since the wilderness area is about 30 miles north of the project area and the prevailing wind direction in that area is west-northwest. See BLM Answer at 38. BLM is not required to consider such speculative impacts. See Trout Unlimited v. Morton, *supra* at 1283-84.

San Juan further contends that BLM failed to properly assess the impact of drilling and producing coalbed methane gas from the project and other wells on endangered species in the Indian Reservation. San Juan states that BLM does not know what threatened and endangered species are present in the Reservation. The presence of such species in the Reservation was determined, however, with the aid of the U.S. Fish and Wildlife Service (FWS), when the BIA EA was prepared. See BIA EA at 29-30, 46. Further, BLM also inventoried the land subject to the APD's for threatened and endangered species and assessed the specific impact of the proposed drilling on such species, concluding that no impact was anticipated. See BLM EA at 5. San Juan has provided no evidence to the contrary. See also Tribe's Answer at 26. San Juan also alleges that BLM was required to consult with FWS prior to approving the 160-acre spacing of coalbed methane gas wells in the Fruitland Formation and the three initial wells. This argument is not correct. Consultation with FWS under section 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1988), is only required where a proposed action may affect a threatened or endangered species. See Southern Utah Wilderness Alliance, *supra* at 173. BLM determined by tiering to the BIA EA that the proposed action would not affect a threatened or endangered species. See BLM EA at 5; BIA EA at 30. Formal consultation with FWS was therefore not required.

San Juan also charges that BLM failed to properly assess the impact of additional wells and associated activity in the San Juan Basin on sites included or eligible for inclusion in the National Register of Historic Places, as required by section 106 of the National Historic Preservation Act (NHPA), as amended, 16 U.S.C. § 470f (1988). That section requires Federal agencies to "take into account the effect of [a Federal] undertaking on any \* \* \* site \* \* \* that is included in or eligible for inclusion in the National Register." BLM was not required to assess the impact of increased drilling throughout the Basin since that question went beyond the scope of BLM's EA. The impact on archaeological resources of in the area subject to Emerald's APD's was addressed, however, in both EA's. See BIA EA at 31-32, 46-47; BLM EA at 5. Proposed and alternate well and pipeline locations were surveyed for sites included or eligible for inclusion in the National Register of Historic Places and a location that would not affect such sites was recommended by BIA, with the concurrence of the Colorado State Historic Preservation Officer, and selected by BLM. See Letters to BLM from BIA, dated Oct. 19, 1992; BIA EA at 49, 57-58; BLM EA at 5; FONSI Decision Record at 2. In addition, BLM provided for identification and protection of archaeological resources during drilling. See BLM EA, Appendix C ("General Well Site Stipulations"). We therefore find no violation of section 102(2)(C) of NEPA or section 106 of NHPA.

Finally, we must conclude that BLM has taken a hard look at the likely environmental consequences of drilling the proposed wells and related activity in the Indian Reservation, taking into account all relevant matters of

environmental concern, and made a convincing case that any potential impacts will be either insignificant or reduced to insignificance by virtue of the mitigating measures incorporated in the project. That San Juan has a differing opinion about BLM's evaluation of the information derived through the NEPA process and the decision to proceed with drilling and related activity has not shown that BLM's environmental analysis and FONSI were contrary to NEPA. See Sabine River Authority v. U.S. Department of Interior, 745 F. Supp. 388, 402 (E.D. Tex. 1990), aff'd, 951 F.2d 669 (5th Cir. 1992); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985).

We therefore hold that the EA was adequate and that BLM properly concluded that no EIS was required. BLM has satisfied its obligations under section 102(2)(C) of NEPA.

We therefore conclude that, except for the limitation placed on production to protect correlative rights, the Associate State Director, in her October 1992 decision, properly approved downspacing tribal-owned land within the Southern Ute Indian Reservation for purposes of drilling coalbed methane gas wells in the Fruitland Formation and also that the Acting Area Manager, in his October 1992 decision, properly approved APD's with respect to that land.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motions to dismiss San Juan's appeal are denied and the BLM decisions appealed from are affirmed in part and set aside in part, and the case is remanded to BLM for further action consistent herewith.

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Franklin D. Arness  
Administrative Judge

I concur:

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Kathryn A. Lynn  
Administrative Judge  
Alternate Member