

INTERIOR BOARD OF LAND APPEALS

Colorado Environmental Coalition

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COLORADO ENVIRONMENTAL COALITION

IBLA 96-211

Decided June 5, 1996

Appeal from a decision of the Deputy State Director, Colorado State Office, Bureau of Land Management, affirming a record of decision and finding of no significant impact approving applications for permits to drill two natural gas wells on lease COC 10075. SDR-CO-96-1.

Stay denied; decision affirmed.

1. Administrative Authority—Federal Land Policy and Management Act of 1976:
Wilderness—Oil and Gas Leases: Suspensions

A proposal to drill two developmental wells on a pre-FLPMA lease within a wilderness study area that is supported by an environmental assessment considering a suspension of operations, among other alternative courses of action, is properly approved by BLM.

2. Application for Permit to Drill—Environmental Policy Act—Environmental Quality:
Environmental Statements—National Environmental Policy Act of 1969:
Environmental Statements—National Environmental Policy Act of 1969: Finding of
No Significant Impact—Oil and Gas Leases: Drilling

A finding that a proposal to drill two natural gas wells in a wilderness study area on a pre-FLPMA oil and gas lease would not have a significant impact on the quality of the human environment is properly affirmed when the record shows an environmental assessment properly identifies and evaluates relevant areas of environmental concern and the final decision is reasonable.

APPEARANCES: Robert Wiygul, Esq., and Debra Asimus, Esq., Denver, Colorado, for appellant Colorado Environmental Coalition; Mary V. Laitos, Esq., and Barbara J. B. Green, Esq., Denver, Colorado, for Intervenor National Fuel Corporation; Lyle K. Rising, Esq., Office of the Regional Solicitor, Rocky Mountain Region, Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Colorado Environmental Coalition (CEC) has appealed from a January 23, 1996, decision by the Deputy State Director, Colorado State Office, Bureau of Land Management (BLM), affirming a finding of no significant impact (FONSI) and record of decision, based on environmental assessment (EA) CO-076-5-03, and issued by the Grand Junction Resource Area Manager, BLM, on November 20, 1995. The November 1995 FONSI was issued preliminary to approval of applications by National Fuel Corporation (National Fuel) to directionally drill two developmental oil and gas wells and construct an access road thereto within the Demaree Wilderness Study Area (WSA) on Federal oil and gas lease COC 10075. CEC has filed a request for stay of the Deputy State Director's decision affirming the FONSI, together with a notice of appeal and statement of reasons in support of appeal (SOR).

National Fuel has petitioned to intervene as a party to this appeal for the reason that, as the lease holder whose drilling proposal is at issue, National Fuel is an essential party to this appeal. The petition to intervene is granted; a brief opposing stay issuance offered for filing by National Fuel is accepted and has been considered herein, as has an answer filed in response to the SOR provided by CEC.

In support of the request for stay, CEC contends that BLM's decisionmaking fails to comply with section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1994), and section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1994). Arguing that development of the Federal lease would cause immediate and irreparable environmental harm, CEC cites Departmental regulations 43 CFR 4.21(b) and 3165.4(c) in support of a contention that all Departmental standards for stay issuance are satisfied by the record on appeal in this case.

Because this appeal involves review of a State Director decision authorizing BLM to allow oil and gas well drilling operations on a Federal lease, the stay request by CEC is controlled by a specific regulation governing such appeals at 43 CFR 3165.4, rather than the general stay regulation provided at 43 CFR 4.21. See Texaco Trading & Transportation Inc., 128 IBLA 239, 240 (1994). Under 43 CFR 3165.4, decisions by the State Director are effective pending appeal unless otherwise ordered. 43 CFR 3165.4(c). On January 17, 1996, the Deputy State Director ordered a cessation of all field operations by National Fuel; he stayed further lease development "until a final decision is issued by this office and an opportunity provided for subsequent appeal as specified by 43 CFR 3165.4 (Interim Order dated Jan. 17, 1996, at 1). As a result of our action on this appeal, which is expedited in connection with our action on the stay request, BLM may proceed to implement its decision. See 43 CFR 3165.4(c).

A stay may be issued by this Board upon a showing that a stay is in the public interest, and there is a likelihood the party seeking a stay will prevail on the merits, after consideration has been given to the potential relative harm to the parties of stay issuance or denial. *Id.* As in all cases where a stay is sought, the burden to show there is a reason for a stay to issue rests with the party seeking the stay. 43 CFR 4.21(b)(1). To determine if CEC can meet these requirements in this appeal, we first consider arguments directed by CEC to a perceived violation of FLPMA in BLM's decisionmaking, as approved by the Deputy State Director.

BLM's FONSI approved a proposal by National Fuel to develop oil and gas lease COC 10075 by building an access road to a single elevated drill site for oil and gas wells #34-26 and #42-26. The project would disturb 6.4 acres of leased public land in the WSA. It was determined that, subject to required mitigation measures (referred to by EA at 11), the proposal would have no significant impact on the human environment.

Oil and gas lease COC 10075 was issued prior to enactment of FLPMA; it contains a gas well, #26-13, that has been producing since 1977. The producing well is served by a road that runs from a county road to well #26-13 about a half-mile across BLM administered public land before it enters the lease. This existing service road was excluded from the WSA, or "cherry-stemmed," so that the access road and well pad (which is the terminus of the road) are excluded from the WSA.

The EA recites that the presently proposed road construction will begin at the producing well, where the road will enter the WSA along an existing track to be improved to handle wheeled vehicles, and proceeds for 0.4 mile to an ephemeral drainage where 0.4 mile of entirely new construction will be needed to carry the road to its terminus inside the drainage. There, a pad for two directionally drilled oil and gas wells is proposed to be built. The wells are developmental wells designed to offset existing production. The drill pad will rest on a foundation of fill laid on the floor of the drainage. This structure will act as a dam across the drainage, around which a diversion channel will be constructed to handle runoff. Portions of the drilling site will be fenced and the new road construction will be barred by a gate under BLM-imposed mitigation measures. All new construction will be entirely within the leased area and also entirely within the WSA. Depending upon variables not presently known, as many as five more wells in addition to the two presently proposed may be built, causing additional disturbance of 22 acres within the WSA.

The anticipated effect of lease development on the WSA by National Fuel is described by BLM as follows:

The proposed alternative would take place entirely within the Demaree Wilderness Study Area and would severely impair the area's naturalness and outstanding opportunities for solitude. The landform of the v-shaped canyon walls would be highly

modified and the natural drainage course would be dammed and encroached upon. Vegetation in the disturbed area would be lost. Solitude in the area would be impaired by sights and sounds from road and pad construction, motorized vehicle use and from sounds associated with oil and gas production. A one-quarter mile sights and sounds influence zone extending away from the road and pad is projected. Outstanding opportunities for solitude would be degraded for the life of the project on 280 acres where sights and sounds from development and operation would influence this part of the WSA. This same opportunity for natural solitude would be irreversibly degraded after well abandonment to a lesser degree as reclamation is not expected to return the disturbed area to its current pristine state.

(EA at 8, 9).

CEC advances two related arguments that are based on an analysis of FLPMA requirements: First, that BLM failed to analyze, as it was required to do by FLPMA section 603(c), whether the National Fuel lease should be suspended pending final Congressional action on the WSA recommendation made by BLM, and second, that BLM may not allow National Fuel to extend the existing road leading to the producing well on the lease in order to reach the proposed drill pad, because to do so will permit National Fuel to use Federal lands not included in the lease in order to degrade the WSA.

CEC concedes that holders of mineral leases that were in existence when FLPMA was enacted are exempt from a standard imposed by section 603(c) that areas under study for inclusion in a wilderness be managed so as not to impair their suitability for preservation as wilderness. See SOR at 6. Nonetheless, citing Southern Utah Wilderness Alliance (SUWA), 127 IBLA 331, 100 I.D. 370 (1993), CEC argues that it would be improper for BLM to allow National Fuel to extend the existing service road to the proposed wells because the road begins on Federal land not included in lease COC 10075. CEC reasons that "while a lessee such as National Fuel Corporation may have a limited right to develop a pre-FLPMA lease in a WSA, BLM may not issue an off-lease right-of-way that will result in degradation of the WSA. * * * BLM is limited to allowing degrading activities on the lease itself" (SOR at 17, 18 (emphasis in original)).

[1] As the Deputy State Director found, however, the SUWA case did not deal with a lease served by an existing access road; therein, it was proposed to construct a road into a WSA to provide access for oil and gas drilling operations on a lease that was committed to an approved unit agreement, but upon which lease itself there was no actual production. In the instant case, unlike the SUWA situation, there is a producing well on lease COC 10075 that is presently served by an access road, no part of which crosses a WSA. It is an existing right-of-way that was in operation before the producing well was completed. The instant case does not, therefore, involve "construction of wilderness-impairing access to the lease across WSA lands beyond the original lease boundaries." See SUWA

at 127 IBLA 373. The Deputy State Director correctly distinguished the SUWA case on its facts when he rejected CEC's argument against use of the existing service road in the manner proposed by National Fuel, basing his conclusion on a finding that "new road construction begins on and remains on lease COC 10075 for its entire route[;] * * * the new construction is all on-lease" (Deputy Director's Decision at 2). To find otherwise would amount to a denial that National Fuel was entitled to develop its pre-FLPMA lease as a reasonable exercise of a valid existing right under any circumstances whatever, given the nature of the principal right-of-way providing access to the lease. Cf. Sierra Club v. Hodel, 848 F.2d 1068, 1086 n.16 (10th Cir. 1988) (impairment of the WSA through reasonable exercise of valid existing rights in a county road allowed).

As CEC points out, however, a pre-FLPMA lessee such as National Fuel may not degrade a WSA unnecessarily or unduly under limitations imposed by section 6 of FLPMA. See Sierra Club v. Hodel, supra. Guidelines provided by the Department to determine whether development of private interests illegally impinge upon WSA's state, pertinent to this question, that:

Valid existing rights limit the nonimpairment standard. Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be restricted to the point where the restriction unreasonably interferes with enjoyment of the benefit of the right. Resolution of specific cases will depend upon the nature of the rights conveyed and the site-specific conditions involved. When it is determined that the rights conveyed can be exercised only through activities that will impair wilderness suitability, the activities will be regulated to prevent unnecessary or undue degradation. Nevertheless, even if such activities impair the areas wilderness suitability, they will be allowed to proceed.

Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 48 FR 31854-55 (July 12, 1983), amending the IMP, 44 FR 72027 (Dec. 12, 1979). BLM must conform to requirements imposed by the IMP. See Oregon Natural Resources Council, 114 IBLA 163, 167 (1990), and cases cited therein.

In the instant appeal, CEC has not shown that it was unreasonable for BLM to continue to allow National Fuel to continue to use the existing access road serving the producing well on lease COC 10075 in order to more fully develop the lease within the WSA. The Deputy State Director resolved this question in favor of allowing National Fuel to continue development of lease COC 10075 when he found that BLM's EA had adequately analyzed alternatives to continued lease development, including suspension of operations, directional drilling, or use of helicopters to reach the proposed drill site. He found that suspension of operations, the choice favored by CEC, was properly rejected by BLM after consideration of all relevant factors, including consideration of the economic impact upon National Fuel, the State of Colorado, and the United States. Included

in this consideration was an analysis of the effect that development would have on the WSA (Deputy Director's Decision at 3). Suspension of operations was considered and rejected on page 10 of the EA, it being concluded that continued development in order to promote resource conservation was to be favored in this case. While CEC argues (SOR at 19) that economic considerations should not outweigh all others, there is no suggestion in BLM's planning documents or the decision by the Deputy State Director that the premise implied in this argument accurately reflects the BLM position in this case. Suspension of operations was considered as an alternative among several courses of possible action: nonetheless, it was not the action chosen. The Deputy State Director correctly found, however, that a range of alternative actions, including suspension of operations, was considered before BLM issued the FONSI (Deputy State Director's Decision at 3). His finding on this question is supported by the record.

The Deputy State Director then found that the approved action would not unnecessarily or unduly degrade the WSA, because mitigation measures were required by BLM that "represent the minimum [disturbance] necessary to perform natural gas recovery in a responsible manner" (Deputy State Director's Decision at 4). While CEC complains that "BLM has failed to explore and require the use of the latest available technology and least degrading alternatives" (SOR at 7), it has not explained what technology BLM omitted from the 5-page list of mitigation measures that are required of National Fuel if development is to proceed. The Deputy State Director found that those required measures are designed to regulate the operations by National Fuel within the WSA so as to meet current standards imposed upon similar oil and gas operations, and that environmental impacts resulting therefrom will not be "undue" (Deputy State Director's Decision at 4). CEC has not shown that his findings in this regard are incorrect, nor has it been shown that the required mitigation measures are inadequate. It is concluded that the Deputy State Director's decision on this question was reasonable, and that CEC has failed to show any likelihood that a contrary position, such as is now urged by CEC, can prevail on appeal.

[2] Turning to the NEPA arguments raised on appeal, CEC alleges that the National Fuel development wells constitute a major Federal action significantly affecting the human environment so as to require preparation of an environmental impact statement (EIS) under 42 U.S.C. § 4332 (1994) (SOR at 8, 9). CEC argues that BLM's FONSI is mistaken because the EA does not show that unavoidable significant impacts will be mitigated (SOR at 11). It is contended that the EA fails to adequately address reasonably foreseeable indirect and cumulative impacts or impacts to wilderness, air, and wildlife. It is further contended that an attempt by the Deputy State Director to incorporate by reference parts of the Grand Junction Resource Area Management Plan dealing with such impacts is ineffective because that plan did not consider cumulative impacts of oil and gas leasing.

The Deputy State Director found that the EA identified and considered relevant matters of environmental concern; therein, indirect and cumulative impacts of road and well pad construction were considered in detail (EA at 10). The EA also incorporated by reference a 1989 Grand Junction Wilderness EIS, which contains an analysis of the environmental consequences of oil and gas management actions upon the Demaree WSA (EIS at 2-3, 2-11, 2-13, 3-3, 4-1 through 4-4). This sort of incorporation by reference (tiering) of relevant portions of an EIS by an EA is encouraged by regulations implementing NEPA. See 40 CFR 1508.28. Evaluating the environmental consequences of oil and gas development in the WSA, the EIS describes the effects upon the WSA of 15 leases, in addition to the National Fuel lease, that were issued prior to enactment of FLPMA; the EIS evaluates the effect of such lease development generally upon wildlife (EIS at 4-4) and wilderness (EIS at 2-13, 2-13, 3-3, 4-1) in the WSA. The EA deals more specifically with the National Fuel proposal, and considers the impact of the proposed two-well development upon wildlife (EA at 5, 8) water and air (EA at 6, 9) and wilderness (EA at 8, 9), among other matters not now being argued by CEC.

If an EA makes a careful review of relevant areas identified to be of environmental concern, and the resulting decision is reasonable, a FONSI based upon such analysis should be affirmed. Southern Utah Wilderness Alliance, 128 IBLA 52, 68 (1993). The record before us meets this test; it supports the Deputy State Director's decision to affirm BLM's finding that preparation of another EIS was not required for the proposed project. The NEPA arguments advanced by CEC, therefore, provide CEC no likelihood of success on appeal.

Nor has CEC met the remaining standards for stay issuance set by 43 CFR 3165.4. As the Deputy State Director found, and as National Fuel has argued on appeal, the harm to National Fuel if it is unable to continue development of lease COC 10075 is measurable and immediate. The potential harm complained of by CEC is, however, mitigated by measures adopted by BLM to protect the wilderness resource, to the extent that is possible given the present state of oil and gas development on pre-FLPMA leases in the vicinity of the WSA. Nor, on the record before us, can it be said that CEC has shown the relative harm to the wilderness interests espoused by CEC is greater than those harms to the resource foreseen by National Fuel in the event continued development of lease COC 10075 were to be arrested. National Fuel points out that, presently, only one well exists on the entire 1,100-acre leasehold. Designated well-spacing for the leasehold, however, is one well for every 160 acres of leased land (National Fuel Brief filed Apr. 19, 1996, at 4, 5). Arguing that it is unreasonable to restrict development of the 1,100-acre lease to a single well, National Fuel argues that the economic consequences of a refusal to allow development to proceed as proposed will seriously damage the company. It is argued that "National Fuel is a small company and will suffer severe economic damage because of delays associated with a stay. A stay would be tantamount to denying National Fuel access to its leasehold interest" (Request to Intervene at 4, 5).

Finally, as to whether the public interest is affected by the National Fuel proposal so as require issuance of a stay, the record on appeal demonstrates that the Deputy State Director followed guidelines provided by the IMP in reaching his decision to allow drilling operations in the WSA. His action in so doing demonstrated a regard for the public interest as declared by established agency policy embodied in the IMP. CEC has not, therefore, established that this final standard for stay issuance has been met in this case.

Coincident with reaching a decision on the request for stay, we have also decided this appeal on the merits. We conclude that the record before us supports the Deputy State Director's decision to approve the FONSI issued previously, no error having been shown in the findings announced by his decision. Under the circumstances, there is no point in delaying decision of this appeal, particularly since a denial of a stay will, in this case, have the effect of placing the Deputy State Director's decision into full force and effect, thereby rendering it ripe for judicial review. See 43 CFR 3165.4.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the request for stay is denied and the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur.

James L. Bymes
Chief Administrative Judge