

INTERIOR BOARD OF LAND APPEALS

Southern Utah Wilderness Alliance, et al.

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SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

IBLA 97-558, 97-587, 98-1

Decided October 31, 1997

Appeal from a Decision of the Utah State Director, Bureau of Land Management, approving an Application for Permit to Drill an oil and gas well in the Grand Staircase-Escalante National Monument. UT-048-97-016.

Decision affirmed; stay denied.

1. National Park Service: Land: Use—Oil and Gas Leases: Drilling

The BLM is not precluded from approving an Application for Permit to Drill an oil and gas well in the Grand Staircase-Escalante National Monument by the fact that a plan for managing the entire Monument is in preparation.

2. 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

An approval of an Application for Permit to Drill an oil and gas well in the Grand Staircase-Escalante National Monument, without preparation of an environmental impact statement, will be affirmed when, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994), BLM has taken a hard look at the environmental consequences, identified all relevant areas of concern, and made a convincing case that no significant impact will result therefrom.

APPEARANCES: Scott Groene, Esq., Southern Utah Wilderness Alliance, Salt Lake City, Utah, for Appellants Southern Utah Wilderness Alliance, *et al.*; Dan Spomer, General Managing Partner, SPS Enterprises, Inc., Bluff, Utah, for Appellant SPS Enterprises, Inc.; Wayne G. Petty, Esq., Salt Lake City, Utah, and William J. Lockhart, Esq., Salt Lake City, Utah, for Appellant Sierra Club, Utah Chapter; Carleton L. Ekberg, Esq., Denver, Colorado, and Craig R. Carver, Esq., Denver, Colorado, for Intervenor Conoco, Inc.; A. Scott Loveless, Esq., and John W. Steiger, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, and Joel M. Yudson, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, DC, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Southern Utah Wilderness Alliance, Natural Resources Defense Council, U.S. Public Interest Research Group, Wilderness Society, and Wild Utah Forest Campaign (collectively, SUWA), SPS Enterprises, Inc. (SPS), and the Sierra Club, Utah Chapter (Sierra Club), have appealed from a September 8, 1997, approval by the Utah State Director, Bureau of Land Management (BLM), of an Application for Permit to Drill (APD), authorizing Conoco, Inc. (Conoco), to drill an oil and gas well, known as the Reese Canyon Federal No. 2 Well, on the Kaiparowits Plateau in south-central Utah in the newly-created Grand Staircase-Escalante National Monument (Monument). The Decision Record relied upon by BLM included a Finding of No Significant Impact (FONSI), in which the State Director concluded, based on an August 20, 1997, Environmental Assessment (EA) No. UT-048-97-016, that no significant impact would result from approval of the APD and resulting road construction, well drilling, and oil and gas production. The State Director found that BLM was not required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), to prepare an environmental impact statement (EIS).

Owing to the similarity of factual and legal issues involved in these appeals, they are consolidated. All three Appellants have petitioned for a stay of the effect of the State Director's September 1997 Decision Record/ FONSI. Both BLM and Conoco have filed responses to SUWA's Petition for Stay, opposing any stay. Conoco also objects to SPS's Petition for Stay, and SUWA has filed a Request for Expedited Review, which we grant. Because Conoco is the lessee whose APD is at issue, Conoco is joined as a proper party to this appeal. Because we reject Appellants' arguments on their merits, the requests for stay are denied.

The Monument was established by Proclamation No. 6920 of the President on September 18, 1996, for the purpose of protecting the archaeological, paleontological, geological, biological, and other natural and historical values of 1.7 million acres of Federal land. 61 Fed. Reg. 50223 (Sept. 24, 1996). While the Proclamation closed the affected Federal lands to future

oil and gas leasing, it did not preclude oil and gas drilling or other activities under existing leases, but protected "valid existing rights." *Id.* at 50225. The Secretary of the Interior was directed to "manage the [M]onument through the Bureau of Land Management, pursuant to applicable legal authorities," and to "prepare, within 3 years of [September 18, 1996], a management plan for this [M]onument." *Id.* The BLM published notice of planning in the Federal Register on July 8, 1997. *See* 62 Fed. Reg. 36570, 36571 (July 8, 1997).

The well at issue is proposed in the SE¹/₄SE¹/₄ sec. 5, T. 40 S., R. 5 E., Salt Lake Meridian, Kane County, Utah, within an existing Federal oil and gas lease, UTU-62275, issued effective November 1, 1987, for a term of 10 years, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1994). The lease grants the "exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas (except helium) [in the described lands] together with the right to build and maintain necessary improvements thereupon for the [10-year] term." (Offer to Lease and Lease for Oil and Gas (Form 3100-11 (March 1984)), dated Oct. 6, 1987.)

Drilling of the well is expected to begin following the completion of Conoco's State No. 2 Well in the SW¹/₄SW¹/₄ sec. 32, T. 39 S., R. 5 E., Salt Lake Meridian, Kane County, Utah, 1 mile almost directly north of the well site. *See* EA at 1; SUWA Petition for Stay at 5. The well site will consist of a drill pad and reserve and flare pits, to be constructed over 15 working days, four or five trailers for housing employees, a drill platform and rig, a fuel tank, two pump houses, and a generator house. Drilling will be done 24 hours a day for 90 days, to a total depth of 14,500 feet. In addition, 50 miles of existing road will be improved, by blading and resurfacing, as needed, and a 0.1-mile-long spur road from the existing road to the well site will be constructed. The total surface disturbance will be 2.5 acres, of which 2 acres was previously disturbed by oil and gas drilling in 1954 and coal exploration drilling in 1963. Should oil be discovered, it will be trucked from the well site by 4,200-gallon tanker trucks, with from one to five round-trips per day, depending on the amount of production. No activity will occur on weekends and holidays, during peak visitation periods, or under certain adverse road conditions. There will be a daily round-trip by a pickup for routine monitoring and maintenance, and two annual round-trips by a completion rig for well maintenance.

Conoco also seeks to drill four wells in the Smoky Mountain area of the Monument, 8 to 10 miles southwest of the Reese Canyon site. However, BLM has decided to delay processing of the APDs for these wells until the results of drilling the Federal No. 2 Well become known. No other drilling is presently proposed in the Monument.

The SUWA, joined by the Sierra Club, contends that the State Director violated specific instructions of the Secretary of the Interior and the

Director, BLM, by approving the APD before a management plan for the Monument is complete. This contention rests on statements made by the Secretary in delegating to the BLM Director the duty to prepare a management plan for the Monument, and on statements made by the Director of BLM when he delegated that duty to the State Director. Arguing that approval of the APD raises questions regarding conflicts with Monument purposes, SUWA concludes that the State Director was required to delay any decision on the APD until after completion of the management plan, and failed to do so. Further, it is suggested that such a delay would allow BLM to gather more detailed information regarding the resources found within the Monument and thus achieve a greater understanding of how to protect those resources should oil and gas exploration and development ultimately go forward. Finally, SUWA notes that Conoco's valid existing rights can be fully protected during the intervening period by suspending its lease for a like time.

The Sierra Club also argues that BLM failed to consider, in its EA, the extent to which approval of the APD and subsequent road improvement and maintenance and oil and gas drilling and development may compromise planning options that BLM could otherwise consider during development of the management plan, including preserving the remoteness and solitude of the affected area by exchanging the instant lease for a lease outside or along the periphery of the Monument. (Sierra Club Petition for Stay at 5, 10.) The SPS petition generally supports delay of any action on the APD until after completion of the management plan.

[1] We conclude that approval of Conoco's APD is not precluded by the Proclamation since nothing therein forbids oil and gas drilling and related activity under existing leases within the Monument. (Memorandum from the Secretary to the Director, dated Nov. 6, 1996, at 2.) Rather, it preserves "valid existing rights," including the right to drill and produce oil and gas under an existing lease. The approval does not conflict with the established purposes of the Monument, since there is no showing that the approved activity, including improvement of the access road, construction of the spur road, and an increase in industrial traffic, will adversely affect any of the particular natural, historical, or other resources that the Monument is designed to preserve or protect. Id. The record supports a conclusion that there will be no such adverse impact and Appellants have not presented any evidence to the contrary, nor has any issue regarding an adverse impact been identified so that we can say that approval of the APD raises questions about consistency with Monument purposes. See Memorandum from the Director to the State Director, dated Nov. 8, 1996, at 2.

We are not persuaded that the State Director is required to delay approval of the APD in the exercise of his discretionary authority in order that BLM may undertake more fact-gathering and analysis regarding resources within the Monument, the impact of drilling and associated activity on these resources, and proper measures to eliminate or mitigate any adverse effects from such activity. It is clear from the record that

BLM, relying on its own resource specialists, has adequate information in that regard, since it has already prepared an EA focused on such matters, and there is no evidence that a delay will result in a change in any information relevant to the decision whether to approve the APD.

No evidence is offered by the Sierra Club that permitting road improvement and maintenance, oil and gas drilling and even oil and gas development to go forward in the case of this single well will foreclose, or even compromise, any of BLM's options for managing the overall Monument. The record does not support the conclusion that BLM has, at this early stage of oil and gas exploration, committed itself to a "course of mineral development" in the Monument. (Motion for Interim Stay at 4.) We reject the contention by the Sierra Club that approval of the APD before completion of the management plan violates the directive in 40 C.F.R. § 1506.1(a) that no action concerning a proposed Federal action occur while the proposal is under consideration in an EIS. (Petition for Stay at 6.) The proposed Federal action to be considered in an EIS is the overall management of the Monument, not the approval of the Conoco APD, and BLM may approve the APD without violating the directive of 40 C.F.R. § 1506.1(a).

[2] Appellants contend that the EA does not satisfy NEPA section 102(2)(C) since BLM failed to adequately consider the potential environmental impacts of approving the APD. The SUWA and the Sierra Club assert that BLM completely failed to consider the potential impact to wildlife and other biotic resources from road improvement, maintenance, and increased traffic, both industrial and recreational, on the existing dirt and gravel road and from the introduction of structures, lights, and noise into an area largely unaffected by human activity, all of which is associated with drilling and potential production over 30 years. They argue that such disturbance has the potential, as advanced by the Fish and Wildlife Service (FWS), U.S. Department of the Interior, to introduce undesirable nonnative plant species, disrupt wildlife behavior and travel corridors, and increase predation and other detrimental effects of habitat fragmentation, none of which was considered by BLM. (SUWA Petition for Stay at 14.) From this, it is concluded that BLM failed to consider a substantial environmental question of material significance.

The June 1997 FWS memorandum, upon which SUWA relies for this argument, states that drilling two exploratory wells on Federal and State lands in the Reese Canyon area "will have minimal direct impacts to vegetation * * * and wildlife." (Memorandum to BLM, dated June 23, 1997, at 2.) This coincides with BLM's analysis. See EA at 35-36, 42. The FWS then expresses concern about the impact to plants and wildlife if simultaneous production occurs but does not identify any specific adverse impact that is likely to occur. (Memorandum to BLM, dated June 23, 1997, at 3.) Appellants have not identified any such impact. The FWS was concerned that the discovery of oil at the two sites might lead to full field development. Id. It is in this context that FWS states that oil and

gas activity might adversely affect plants and wildlife, as a result of introducing nonnative plant species and causing a large-scale disruption of wildlife populations and fragmentation of wildlife habitat. We are not, therefore, persuaded that BLM failed to consider a substantial environmental question of material significance.

It is also alleged that BLM failed to consider the potential impact of APD approval on unique values within the Monument. The SUWA first points to the acknowledged value of the Monument for the scientific study of the relationship between plants, soils, and other biotic and abiotic components of the environment. No evidence is presented, however, tending to show that drilling will adversely affect such scientific study or that BLM failed to consider such impact. The EA concludes that "[n]one of the outstanding geological, paleontological, archeological, or historical values identified [in] the * * * [P]roclamation would be affected because none are near the proposed well site or new spur road." (EA at 38; see id. at 7-8, 28.) This finding has not been shown to be in error.

As to indirect impacts to resources from increased traffic on the access road, BLM concluded that these impacts would occur even without such approval. Id. at 38-39. It appears that BLM was looking at whether there would be an increase in recreational traffic and concluded that, since the road already existed and was used, approval of the APD would not cause an increase in such traffic. See id. at 9, 59-60, 60-61. In this situation, BLM properly did not analyze the impact to such resources from increased erosion and vandalism due to an increase in recreational traffic, since the proposed action would have no effect on such use. See 40 C.F.R. § 1508.8(b).

An argument that BLM failed to consider the potential impact of approval of the APD on Areas of Critical Environmental Concern (ACEC) is also without merit. The SUWA admits that BLM correctly stated in the EA, on page 6, that there are no ACEC's in the vicinity of the proposed well site and access road. It is contended nonetheless that this is true only because BLM has neglected needed planning for the area.

Section 202(c)(3) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712(c)(3) (1994), enacted on October 21, 1976, requires the Secretary, in developing land-use plans, to "give priority to the designation and protection of areas of critical environmental concern." Such areas are generally defined as those "where special management attention is required (when such areas are developed or used or where no development is required)" in order to prevent irreparable damage to important natural or historical resources. 43 U.S.C. § 1702(a) (1994). Neither section 202 nor any other part of FLPMA requires the Secretary to designate an ACEC, and no violation of FLPMA is shown by the fact that BLM has not designated an ACEC in the area of the proposed well.

Similarly, without merit is the contention by SPS that BLM failed to adequately consider the potential impact to surface water in the Monument from traffic accidents on the access road that result in spills of oil. The EA recognized the "potential for pollution from accidental spillage" as a result of hauling oil by tanker truck from the proposed well site along and adjacent to surface water, especially a 4-mile stretch of Alvey Wash. (EA at 34.) The BLM expected that there would be one to two spills over the 30-year life of the subject well, given the experience in another oil and gas field (Upper Valley Field). The SPS offers no evidence that there is likely to be a higher occurrence of spills over the life of the well or that any spill is likely to have a greater adverse impact to surface water than posited by BLM. The record before us does not indicate that BLM failed to properly consider the potential impact to surface water in the Monument from traffic accidents resulting in oil spills.

The EA, contrary to a contention by SPS, considers the potential impact to public safety in the Monument from traffic accidents on the access road. The BLM recognized that the increased industrial traffic on the access road, as a result of APD approval, "would increase the risk of traffic accidents and related injuries and fatalities." (EA at 41.) Nonetheless, BLM concluded that the risk would "be slight because the trucks would be slow moving on the dirt and gravel surfaces of the roads, much of the route is wide enough to allow two vehicles to pass." *Id.* The BLM further stated that no accidents had occurred in connection with ongoing drilling operations at Conoco's nearby State No. 2 Well and that, based on the experience involving similar roads in the nearby Dixie National Forest, the risk of accidents is very small. *Id.* at 41-42. There is no indication in the record that the risk of accidents between tanker trucks and recreational vehicles is likely to be higher than stated by BLM, and this argument must also, therefore, be rejected.

We reject, also, a contention by SUWA that BLM failed to consider potential cumulative impacts to the environment in the Monument from approval of the instant APD, together with Conoco's State well, in the Reese Canyon area and the reasonably foreseeable approval of four other APD's by Conoco for well sites in the Smoky Mountain area, which is situated 8 to 10 miles from the Reese Canyon sites within the Monument. The EA considers the potential cumulative impacts of approval of all six wells, concluding that there would be little cumulative impact because

they are on separate leases, they would test separate geologic structures and they are topographically separated by about 1,100 feet of elevation and the Last Chance Creek drainage system including large canyons such as Dry Wash and Reese Canyon. They are geographically separated by 8 to 10 * * * air miles and about 25 road miles. They would be staged from different communities and accessed from different roads (Alvey Wash and Smoky Mountain roads). Additionally, they would likely be drilled sequentially

rather than at the same time which would eliminate any air, water or other impacts including impacts on [Monument] values that could occur with simultaneous drilling at several locations.

Even if the State and Reese Canyon wells were to produce along with the proposed Smoky Mountain wells, there would not be a cumulative increase in oil tanker trucks on any section of road from the two locations.

(EA at 43; see id. at 49; Decision Record/FONSI at 1.)

The SUWA objects to BLM's conclusion that the Reese Canyon and Smoky Mountain wells would use different access roads, contending that all six wells would utilize the northern route since the National Park Service (NPS) is "unlikely" to grant permission to use the southern route because it crosses the Glen Canyon National Recreation Area, which NPS administers. (Petition for Stay at 31.) There is no evidence that NPS would, or even could, prohibit such traffic through the Recreation Area. See EA at 29 (Kane and Garfield counties have asserted R.S. § 2477 rights-of-way over Smoky Mountain Road). Appellants have not shown that the Smoky Mountain wells would add to the potential cumulative impact of traffic on the access road that would be used in connection with the two Reese Canyon wells. We find that the EA sufficiently analyzed cumulative impacts from increased traffic owing to drilling and other activities in connection with the two Reese Canyon sites. See EA at 42-43.

The SUWA does not present any evidence to challenge BLM's conclusion that there will be no significant cumulative impacts, but points to letters from the Environmental Protection Agency (EPA) and FWS commenting on BLM's proposal to approve the subject APD. It is noted that EPA expects there will be such an impact from an "expanded drilling program in the Monument." (Petition for Stay at 29 (quoting from letter to BLM from EPA, dated Sept. 3, 1997 (Ex. 14 attached to Petition for Stay), at 2).) While it is unclear what the EPA letter meant by an "expanded drilling program," it did not say that there is likely to be a significant cumulative impact from approval of the instant APD. An argument by SUWA, seconded by the Sierra Club, that BLM failed to consider cumulative impacts on plant communities and wildlife implied by bringing both wells into production falls short of establishing that there may be a cumulative impact that BLM should have considered or that any such impact may be significant.

The SUWA asserts that the State Director failed to address the "degree to which the effects on the quality of the human environment are likely to be highly controversial," pointing to the fact that both EPA and FWS have raised questions regarding the effects of APD approval on the environment. 40 C.F.R. § 1508.27(b)(4). A proposed action is "highly controversial" where "a substantial dispute exists as to the size, nature or effect of the * * * action." Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973). While

EPA and FWS have raised questions regarding BLM's analysis of the likely impacts of APD approval, they have presented no evidence that those impacts give rise to a substantial dispute about the effect of approval on the environment. See, e.g., Sierra Club v. U.S. Forest Service, 843 F.2d 1190, 1193-94 (9th Cir. 1988).

Although SUWA would have it otherwise, we find no basis for holding that APD approval here sets a precedent with respect to this or other national monuments, especially since drilling has already been permitted in other units of the National Park system. (EA at 48.) Further, there is no reason not to expect that future decisions regarding whether to approve APD's in this or other monuments will be other than independent determinations, based on a full consideration of the specific potential environmental impacts of drilling and related activity.

The Sierra Club seeks to make an issue of the State Director's finding that there are not likely to be significant adverse impacts to air quality from natural gas flaring, to surface water from accidental spills at the well site, to ground water quality from the introduction of drilling fluids at the well site, to cryptobiotic soils and associated plant communities, to visual resources, and to recreational opportunities, any or all of which require preparation of an EIS. The EA considered all these impacts, and found they were unlikely to occur. (EA at 32 (air), 33-34 (surface and ground water), 35 (cryptobiotic soils), 36 (visual resources), 36-37 (recreational opportunities).) The State Director concluded, based on the analysis in the EA, that none of these impacts is likely to be significant. (Decision Record/FONSI at 1.) The Sierra Club has provided no evidence to the contrary.

Finally, the Sierra Club urges that BLM failed to consider reasonable alternatives to approval of the APD, including suspending operations and production under the subject lease, thereby preserving it while BLM developed its management plan and considered whether to exchange the lease for another lease outside or along the periphery of the Monument or simply whether to impose "more rigorous stipulations" for the protection of Monument values. (Petition for Stay at 19.) The BLM is required by section 102(2)(C) of NEPA to consider reasonable alternatives to a proposed action, which will accomplish its intended purpose and yet have a lesser or no impact. See 40 C.F.R. §§ 1501.2, 1502.14, and 1508.9; Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd, Keck v. Hastey, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). The fact that an appellant would prefer that BLM undertake another course of action does not demonstrate a violation of the procedural requirements of section 102(2)(C) of NEPA. See San Juan Citizens Alliance, 129 IBLA 1, 14 (1994). In order to ensure that a BLM decisionmaker has a true choice of alternatives, BLM is only required to consider lesser alternatives which, because of their distinguishing nature and extent, have different impacts on the environment. Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180 (9th Cir. 1990); In Re Blackeye Again Timber Sale,

98 IBLA 108, 111-12 (1987). As the court stated in Headwaters: "NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." 914 F.2d at 1181. We conclude that BLM adequately addressed reasonable alternatives to the proposed action.

We conclude that BLM is not precluded from approving Conoco's APD to drill in the Monument by the fact that BLM is undertaking, at the President's direction, preparation of a plan for managing the entire Monument. We also conclude that, in approving the APD without preparation of an EIS, the record shows that BLM complied with section 102(2)(C) of NEPA by taking a hard look at the environmental consequences, identifying all relevant areas of concern, and making a convincing case that no significant impact will result from the proposed action or that mitigation measures will reduce such impact to a minimum. See Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991). The record also shows that Appellants have failed to carry their burden to show that BLM did not consider a substantial environmental problem of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. See Red Thunder, Inc., 117 IBLA 167, 175 (1990).

To the extent Appellants have raised arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed, and the Petitions for Stay are denied.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Amess
Administrative Judge