

INTERIOR BOARD OF LAND APPEALS

Wyoming Outdoor Council, et al.

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WYOMING OUTDOOR COUNCIL, ET AL.

IBLA 2002-126

Decided June 28, 2002

Appeal from a decision of the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management, dismissing a protest of the inclusion of 27 parcels in the Notice of Competitive Oil and Gas Lease Sale for the August 7, 2001, sale.

Appeal dismissed in part for lack of standing; motion to dismiss petition for stay for lack of jurisdiction denied; petition for stay denied; service required.

1. Oil and Gas Leases: Competitive Leases—Rules of Practice: Appeals: Standing to Appeal

Under 43 CFR 4.410(a), in order to have standing to appeal a BLM decision dismissing a protest to the inclusion of various parcels in a Notice of Competitive Oil and Gas Lease Sale, the appellant must be a party to the case and be adversely affected by the dismissal decision. A party may appeal the dismissal only as to those parcels for which it can establish that it is adversely affected. It cannot be adversely affected as to parcels deleted prior to the sale

2. Oil and Gas Leases: Competitive Leases—Rules of Practice: Appeals: Stay

One appealing a BLM decision dismissing, after completion of the sale, a protest of the inclusion of various parcels in a Notice of Competitive Oil and Gas Lease Sale may petition for a stay of that decision. In such circumstances, the applicable regulation governing that petition is 43 CFR 4.21, not 43 CFR 3165.4(c), which relates to oil and gas operations on existing Federal oil and gas leases, and not 43 CFR 3120.1-3, which addresses pre-sale actions involving competitive oil and gas lease sales.

3. Board of Land Appeals—Rules of Practice: Appeals: Stay

Under 43 CFR 4.21(b)(1), a petition for a stay must show sufficient justification based on the relative harm to

the parties if the stay is granted or denied; the likelihood of the appellant's success on the merits; the likelihood of immediate and irreparable harm if the stay is not granted; and whether the public interest favors the granting of the stay. The party requesting the stay has the burden of showing that a stay is warranted by satisfying each criteria specified in the rule. 43 CFR 4.21(b)(2).

APPEARANCES: Susan Daggett, Esq., Earthjustice, Denver, Colorado, and Thomas F. Darin, Esq., Wyoming Outdoor Council, Lander, Wyoming, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Wyoming Outdoor Council, Greater Yellowstone Coalition, and Wyoming Wildlife Federation (referred to collectively in the singular as WOC) have appealed from and petitioned for a stay of the October 12, 2001, decision of the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), dismissing their protest, received on August 3, 2001, to the inclusion of 27 parcels located in the Pinedale Resource Area in the Notice of Competitive Oil and Gas Lease Sale for the August 7, 2001, sale. ^{1/} WOC did not appeal the Deputy State Director's dismissal in the same decision of its separate protest to the inclusion of an additional 159 parcels in the same notice.

In its protest, WOC argued that inclusion of the parcels in the lease sale violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2) (1994), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732 (1994). Specifically, WOC contended that the leasing of the parcels could not legally occur until the amendment of the Pinedale Resource Management Plan (RMP) had been completed; that the leasing violated NEPA's prohibition against interim actions; that BLM's Land Use Planning Handbook required no new leasing; and that the leasing was improper because the Pinedale Reasonably Foreseeable Development (RFD) scenario had been surpassed. WOC further alleged that, in any event, allowing coalbed methane (CBM) development on the parcels independently violated both NEPA and FLPMA because none of the existing environmental documents addressed the severe and unique impacts of CBM development and because CBM development did not conform to the existing RMP.

^{1/} Those parcels are WY-0108-167, WY-0108-177, WY-0108-178, WY-0108-188, WY-0108-197, WY-0108-198, WY-0108-201, WY-0108-202, WY-0108-203, WY-0108-204, WY-0108-205, WY-0108-206, WY-0108-207, WY-0108-208, WY-0108-209, WY-0108-210, WY-0108-211, WY-0108-212, WY-0108-213, WY-0108-214, WY-0108-215, WY-0108-216, WY-0108-217, WY-0108-218, WY-0108-219, WY-0108-220, and WY-0108-221.

In an "Information Notice," dated August 6, 2001, BLM stated that WOC had filed a protest of the offering of the 27 parcels at the sale and that the Wyoming State Director had elected to delete 19 of those parcels from the sale, not because of the protest, but because the Pinedale Field Office (PFO) had advised the Wyoming State Office that it was actively processing three land use applications in the area where the land in those parcels was located. BLM added that the eight other parcels would be offered at the sale while the merits of the protest were being considered.

In his October 12, 2001, decision dismissing WOC's protest, the Deputy State Director concluded that Board precedent and BLM internal policies and guidance supported BLM's authority to offer the parcels for oil and gas leasing in conformance with the existing RMP while that plan was undergoing amendment. He further found that BLM's leasing determination did not violate NEPA's prohibition against interim actions because the necessary decisions authorizing leasing had previously been issued. He also noted that the RFD scenario had been updated through project-related environmental analyses.

BLM has moved for dismissal of the appeal, asserting that WOC has failed to provide any acceptable affidavits establishing its standing as to any of the "parcels sold" in the August 2001 lease sale. (Motion to Dismiss at 1.) In response, WOC has filed six affidavits from members of one or more of the appellants, attesting to their use of one or more of the 27 parcels included in its protest.

[1] Under 43 CFR 4.410, "[a]ny party to a case who is adversely affected" by a BLM decision has a right to appeal to this Board. The party seeking review must itself be among the injured, and an appellant must have a legally cognizable interest in the land at issue in order to be adversely affected. While that interest need not be an economic or a property interest and use of the land will suffice, the mere concern of a group or individual opposing a BLM action does not constitute a cognizable legal interest. Wyoming Outdoor Council, 153 IBLA 379, 282-83 (2000); Craig M. Weaver, 141 IBLA 276, 281 (1997); Kendall's Concerned Area Residents, 129 IBLA 130, 136-37 (1994), and cases cited. An organization may establish that it is adversely affected within the meaning of 43 CFR 4.410 by showing that one or more of its members uses the public land in question. Wyoming Outdoor Council, 153 IBLA at 383; National Wildlife Federation, 82 IBLA 303, 307-08 (1984). The affidavits submitted by WOC establish appellants' actual use of the eight parcels included in and sold at the August 7, 2001, sale. Accordingly, we deny BLM's motion to dismiss the appeal for lack of standing for those parcels: WY-0108-167, WY-0108-177, WY-0108-178, WY-0108-188, WY-0108-197, WY-0108-198, WY-0108-201, and WY-0108-202.

WOC has filed affidavits in support of standing for 15 of the other 19 parcels included in its protest, and it claims that its appeal should continue to cover those parcels because of the likelihood that they will be included in future sales. Such an argument must be rejected. WOC is not

adversely affected by the decision on its protest because BLM, in fact, excluded the parcels from the sale. WOC's appeal is dismissed for lack of standing as to those 19 parcels.

[2] BLM has also moved for dismissal of WOC's petition for stay for lack of jurisdiction. BLM contends that the stay petition is governed by 43 CFR 3120.1-3 which provides:

No action pursuant to the regulations in this subpart shall be suspended under § 4.21(a) of this title due to an appeal from a decision by the authorized officer to hold a lease sale. The authorized officer may suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.

Only the Assistant Secretary for Land and Minerals Management may suspend a lease sale for good and just cause after reviewing the reason(s) for an appeal.

BLM asserts that the awarding of leases to the highest bidders falls within the purview of this regulation, and that the Board therefore has no authority to stay a BLM decision to hold a competitive lease sale or the subsequent issuance of a lease following a competitive lease sale held pursuant to 43 CFR Subpart 3120. BLM further contends that WOC erroneously characterized its stay petition as arising under 43 CFR 3165.4(c), which applies to actual operations on existing leases, not to the sale and issuance of leases under 43 CFR Subpart 3120, and thus does not control in this case. BLM therefore maintains that the petition for stay must be dismissed for lack of jurisdiction.

In response, WOC argues that the Board has the authority to stay the sale of a mineral lease, citing Board decisions and orders exercising jurisdiction over petitions to stay lease sales and BLM decisions advising parties to file stay petitions with the Board. WOC further asserts that 43 CFR 3120.1-3 was not intended to limit the Board's authority to stay BLM leasing decisions but to exempt oil and gas appeals from the automatic stay provisions of 43 CFR 4.21(a) ^{2/} and to clarify who, as between BLM and the

^{2/} We note that in 1988, when 43 CFR 3120.1-3 was promulgated, 43 CFR 4.21(a) provided for the automatic stay of an appealed decision during the pendency of the appeal unless otherwise provided by law or pertinent regulation. See 43 CFR 4.21(a) (1988). This regulation was amended in 1993 and now provides that, except as otherwise provided by law or pertinent regulation, a decision is automatically stayed only during the time in which an adversely affected person may file a notice of appeal and will become effective on the day after the expiration of the time during which an appeal may be filed unless a petition for stay is filed together with a timely notice of appeal. See 43 CFR 4.21(a)(1), (2). If a petition for stay is timely filed, a decision or portion of a decision for which a stay is not

Assistant Secretary for Land and Minerals Management, has the authority to suspend the sale of particular lease parcels as opposed to entire lease sales. WOC further maintains that its reliance on 43 CFR 3165.4(c) does not warrant dismissal of the stay petition because the Board has previously granted stays of decisions denying protests of competitive oil and gas lease sales pursuant to that regulation, and because, even if 43 CFR 4.21(b)(1), rather than 43 CFR 3165.4(c) applies, the relevant provisions of the two regulations are virtually the same. WOC therefore insists that BLM's motion to dismiss the stay petition on the basis of lack of jurisdiction must be denied.

We conclude that neither 43 CFR 3120.1-3 nor 43 CFR 3165.4(c) is applicable in this case. BLM is correct that 43 CFR 3165.4(c) does not apply because by its terms it relates only to "decisions or approvals * * * under this part * * *." Part 3160 of 43 CFR governs onshore oil and gas operations on existing Federal oil and gas leases. This case does not involve operations on existing Federal oil and gas leases. Accordingly, 43 CFR 3165.4(c) does not apply. ^{3/} However, we disagree with BLM that 43 CFR 3120.1-3 controls herein. We find that the purpose of that regulation was to insure that competitive oil and gas lease sales were not delayed by the protest and appeal process. In this case, the August 7, 2001, sale proceeded following BLM's deletion of 19 parcels from the sale.

As the Board noted in Southern Utah Wilderness Alliance, 122 IBLA 17, 19 (1992), BLM promulgated 43 CFR 3120.1-3 to ensure that it met the time limits imposed by 30 U.S.C. § 226(b)(1) (1994), which requires BLM to conduct competitive oil and gas lease sales "at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary." The first sentence of the regulation was designed to minimize the possibility of interruptions in the lease sale schedule by creating an exception to the automatic suspension of the effect of an appealed decision during the pendency of the appeal provided by the then extant version of 43 CFR 4.21(a) (1988). Southern Utah Wilderness Alliance, 122 IBLA at 19-20; see note 2 supra.

granted becomes effective immediately when the stay petition is denied or partially denied or if action on the petition is not taken within 45 calendar days of the expiration of the time for filing a notice of appeal. 43 CFR 4.21(a)(3); 43 CFR 4.21(b)(4). ^{3/} Although we have indicated in other orders and decisions that 43 CFR 3165.4(c) is an exception to 43 CFR 4.21(a) for judging a petition to stay in a case involving circumstances similar to those in this case, *i.e.* challenges to inclusion of parcels in a competitive oil and gas lease sale, those orders and decisions were incorrect to that extent. *E.g.*, Wyoming Outdoor Council, 153 IBLA 379 (2000). That error, however, is essentially harmless because the stay criteria delineated in 43 CFR 3165.4(c) are substantially the same as those set forth in 43 CFR 4.21(b)(1).

It also allows in the second sentence for challenges to the inclusion of specific parcels in a sale by allowing the authorized officer to suspend the offering of a particular parcel while considering the objection. Such a procedure would allow the sale to proceed without the inclusion of the objectionable parcel. Finally, in the third sentence the regulation grants the authority to suspend an entire lease sale solely to the Assistant Secretary for Land and Minerals Management. See Southern Utah Wildemess Alliance, 122 IBLA at 20.

Thus, the regulation provides for three actions: (1) the superceding of 43 CFR 4.21(a) when an appeal is filed from a BLM decision “to hold a lease sale,” thereby allowing the sale to proceed; (2) suspension of the offering of a particular parcel by the authorized officer in order to consider a “protest or appeal,” and (3) suspension by the Assistant Secretary for Lands and Minerals Management of the entire lease sale in response to an “appeal.” In each case, the regulation contemplates a pre-sale adjudication with the sale to be completed, unless suspended in its entirety by the Assistant Secretary for Land and Minerals Management.

However, the language of 43 CFR 3120.1-3 is imprecise and creates confusion because it refers to the authorized officer considering “a protest or appeal” against the inclusion of a particular parcel in a notice of sale. The authorized officer could only consider a “protest” to such a notice. A protest is “any objection raised by any person to any action proposed to be taken in any proceeding before the [BLM] * * *.” 43 CFR 4.450-2. Thus, one challenging the inclusion of a particular parcel in a Notice of Competitive Oil and Gas Lease Sale would be filing a “protest,” regardless of how the objection were styled, because the action proposed to be taken, i.e. the sale, had not taken place. Likewise, if the objection were to all the parcels, it would still be a “protest” and only the Assistant Secretary for Land and Minerals Management could suspend the sale, after considering that “protest.”^{4/}

^{4/} Again, the regulation uses an improper term when it states that the Assistant Secretary may suspend a lease sale after reviewing the reasons for an “appeal.” “Protest” is the proper term because, absent action by BLM, there can be no appeal. See Mesa Sand and Rock, Inc., 124 IBLA 243, 245 (1994). BLM’s issuance of a Notice of Competitive Lease Sale would not be an appealable action. As we have stated, the purpose of providing notice is to allow interested parties to provide input to BLM regarding proposed action and to allow BLM to address those objections prior to consideration by this Board. California Association of Four-Wheel Drive Clubs, 38 IBLA 383, 385 (1977); see Notice of Competitive Oil and Gas Lease Sale, August 7, 2001, at vii. Denial by the authorized officer of a protest to the inclusion of a parcel or parcels in a sale notice would, as in this case, be a decision appealable to this Board. See Steinheimer Trust, 87 IBLA 308, 310 (1985); Sierra Club, 87 IBLA 1, 6 (1985). On the other hand, a decision by the Assistant Secretary to suspend a lease sale would not be appealable to this Board. See Cook Inlet Region, Inc., 132 IBLA 186, 188-89 (1995); Blue Star, Inc., 41 IBLA 333, 335 (1979).

In this case, however, WOC's protest of the August 7, 2001 sale, which it had filed with BLM on August 3, 2001, was not adjudicated until October 2001, long after the lease sale, which included the parcels at issue, had occurred. Thus, the action sought to be stayed by the filing of the petition in this case is not the inclusion of the challenged parcels in the August 2001 lease sale but the Deputy State Director's post-sale action of dismissal of its protest to the inclusion of various parcels in that sale. ^{5/} Accordingly, we deny BLM's motion to dismiss the stay petition for lack of jurisdiction.

[3] Because neither 43 CFR 3165.4(c) nor 43 CFR 3120.1-3 is an applicable exception to 43 CFR 4.21 under the facts of this case, 43 CFR 4.21 applies. Under 43 CFR 4.21(b)(1), a petition for a stay must show sufficient justification based on the relative harm to the parties if the stay is granted or denied; the likelihood of the appellant's success on the merits; the likelihood of immediate and irreparable harm if the stay is not granted; and whether the public interest favors the granting of the stay. The party requesting the stay has the burden of showing that a stay is warranted by satisfying each criteria specified in the rule. 43 CFR 4.21(b)(2).

In its petition for stay, WOC contends that all oil and gas development on the parcels must be stayed. It argues that it has a likelihood of success on the merits because the RFD scenario utilized in the Pinedale environmental impact statement (EIS) and RMP has been exceeded, thus rendering oil and gas development on the challenged parcels violative of both NEPA and FLPMA. WOC further contends that, since BLM has begun the process of amending the Pinedale RMP, the leasing of the parcels during the ongoing NEPA process violates NEPA's constraints on interim actions set forth in 40 CFR 1506.1(a), as well as BLM policy enunciated in its Handbook and in Instruction Memorandum (IM) No. 2001-146, issued on May 11, 2001 (NA/Stay Request, Ex. 27), which, it alleges, expressly prohibits leasing during RMP amendment processes undertaken to address oil and gas concerns. Although acknowledging that IM No. 2001-146 was replaced by IM No. 2001-191, issued on August 6, 2001 (NA/Stay Request, Ex. 29), which allows leasing during the amendment process, if BLM determines that leasing will not constrain the choice of reasonable alternatives under consideration, WOC maintains that BLM failed to make the requisite finding that oil and gas leasing would not limit the choice of reasonable alternatives.

^{5/} In its petition, WOC concludes that it has "established the requisite elements to obtain a stay of the State Director's Dismissal of the 27 lease parcel protest." (Notice of Appeal and Request for Stay (NA/Stay Request) at 32.) Of course, the practical effect of granting a stay would be to delay the process of lease issuance to the high bidder and/or subsequent development of the lease pending consideration of the merits of the appeal.

WOC then argues, in the alternative, that, even if it has not shown a likelihood of success on its arguments as they relate to all oil and gas leasing, it does have a likelihood of success on the merits as to CBM extraction and development. It charges that such extraction and development will violate both NEPA and FLPMA since they do not conform to the RMP and their unique environmental effects have never been adequately analyzed. For that reason, WOC contends, all CBM extraction and development on the parcels should be stayed.

WOC also contends that it will suffer irreparable harm if the stay is not granted, asserting that environmental injury by itself is irreparable, and, that, although production may not immediately occur, lease issuance represents a critical legal event that conveys the right to develop. WOC further asserts that all parties would benefit from the granting of the stay: WOC's use of the area would not be harmed; the lessees would not hold leases issued in violation of Federal law; and, despite the delay in its receipt of royalties and bonuses, BLM would benefit by not having sold leases in violation of the law. Finally, WOC argues that granting the stay is in the public interest because citizens and visitors in the Pinedale vicinity have an interest in ensuring that environmental impacts are thoroughly analyzed prior to development.

WOC has failed to demonstrate that a stay is warranted in this case. Although WOC raises the specter of CBM development as a reason to stay issuance of the leases, the April 13, 2001, environmental assessment (EA) prepared to analyze the environmental effects of offering the parcels at the August 2001 lease sale, EA WY100-EA2001-144, expressly states at unnumbered page 15 that "[c]oal bed methane development is not anticipated on PFO-August parcels" because, based on current subsurface geological information, the coal beds were too deep or the seams too thin. Thus, the serious issues relating to CBM extraction and development animating our issuance of stays in Wyoming Outdoor Council, 153 IBLA at 388-89, and related cases, are absent here.

In addition, our preliminary review of WOC's challenges to the offering of the parcels for conventional oil and gas leasing fails to convince us that WOC has shown a likelihood of success on the merits of its arguments. In Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140 (1992), the Board rejected the argument that BLM must suspend action in conformance with an existing land use plan when it decides to prepare a new plan. The Board has also held that 40 CFR 1506.1(c) does not apply where the proposed action is covered by an existing environmental statement, thus repudiating the contention that ongoing environmental studies bar BLM from acting until such studies have been completed. In Re Bryant Eagle Timber Sale, 133 IBLA 25, 29 (1995). This precedent undermines WOC's contention that BLM violated NEPA and FLPMA by offering the parcels for leasing during the amendment process for the existing RMP. See also ONRC Action v. Bureau of Land Management, 150 F.3d 1132, 1137-40 (9th Cir. 1998).

Additionally, neither the BLM Handbook nor IM No. 2001-191 preclude issuance of oil and gas leases while the underlying RMP is being amended. Rather, section H-1601-1.E of BLM's Land Use Planning Handbook states that

existing decisions remain in effect during the amendment process "unless it is determined that this would violate Federal law or regulation," and directs BLM to "review all proposed implementation actions through the NEPA process to determine whether approval of a proposed action would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined." Similarly IM No. 2001-191, which expressly replaced IM No. 2001-149's pronouncement that oil and gas leasing decisions should be withheld pending completion of RMP amendments precipitated by oil and gas issues, provides that

[L]ands which are open for leasing under an existing RMP may be leased during a revision or amendment process when BLM management determines that leasing will not constrain the reasonable choice of alternatives under consideration in the planning process. For documentation to be sufficient to support a leasing decision, management must have made a determination that there is adequate analysis of the impacts of the action detailed enough to identify types of stipulations that must be attached to leases so as to retain BLM's full authority to protect or mitigate effects on other resources.

In this case BLM prepared EA WY100-EA2001-144 prior to offering the parcels for leasing, identified required stipulations and mitigation measures, and issued a Finding of No Significant Impact/Decision Record (FONSI/DR), dated April 18, 2001, concluding that offering the parcels for leasing, with the required mitigation measures, would not have a significant impact on the quality of the human environment and conformed to the RMP. Such action by BLM appears on preliminary review to satisfy the requirements of the Handbook and the IM.

As to WOC's arguments based on the RFD scenario, we assume that BLM will address that concern at the appropriate time, *i.e.*, if and when development activities are proposed on the leases issued for the challenged parcels. Accordingly, we conclude that WOC has not shown a likelihood of success on the merits.

We further find that WOC has not met the other criteria for issuance of a stay. It has not shown any irreparable harm to itself or the environment if the stay is denied. It has not demonstrated that the balance of harms tips in its favor. Finally, it has not established that the public interest favors granting the stay. Because WOC has not met its burden of proving that a stay is justified, we deny its petition for a stay of the Deputy State Director's decision pending appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss for lack of standing is denied for the eight parcels sold at the August 7, 2001, sale; the appeal is dismissed in part for lack of standing; BLM's motion to dismiss the petition for stay for lack of jurisdiction is denied; and WOC's petition for stay is denied. BLM and WOC shall serve all previously-filed documents on the purchasers of the eight parcels subject to this appeal: WY-0108-167, WY-0108-177, WY-0108-178, WY-0108-188,

WY-0108-197, WY-0108-198, WY-0108-201, and WY-0108-202. The purchasers are granted 30 days from receipt of the last served of those documents to file any desired response with this Board.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge