INTERIOR BOARD OF LAND APPEALS

Wyoming Outdoor Council, Inc., et al. (On reconsideration)

157 IBLA 259 (October 15, 2002)

Title page added by:
ibiadecisions.com

WYOMING OUTDOOR COUNCIL, ET AL. (ON RECONSIDERATION)

IBLA 2000-241R Decided October 15, 2002

Petition for reconsideration of the Board's decision in Wyoming Outdoor Council, 156 IBLA 347 (2002).

Petition for reconsideration denied; motion to dismiss denied as moot.

1. 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: Competitive Leases--Rules of Practice: Appeals: Reconsideration

The Board of Land Appeals has the authority under 43 CFR 4.403 to grant a petition for reconsideration in extraordinary circumstances for sufficient reason. A petition for reconsideration filed by BLM seeking to have the Board reconsider its determination that the agency failed to take the requisite hard look at the environmental consequences of coalbed methane extraction and development and relevant leasing alternatives before deciding to offer three parcels of land for oil and gas leasing will be denied when BLM fails to satisfy the requirements of 43 CFR 4.403.

APPEARANCES: Fred E. Ferguson, Esq., and Dennis Daugherty, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management; Susan Daggett, Esq., Denver, Colorado, and Thomas F. Darin, Esq., Lander, Wyoming, for appellants; Charles L. Kaiser, Esq., and Charles A. Breer, Esq., Denver, Colorado, for intervener Pennaco Energy, Inc.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has petitioned for reconsideration of our decision in Wyoming Outdoor Council (WOC), 156 IBLA 347 (2002), appeal filed sub nom Pennaco Energy, Inc. v. U.S. Department of the

Interior, No. 02CV 116D (D.Wyo. June 20, 2002). 1/ In that decision, we reversed BLM's dismissal of a protest filed by Wyoming Outdoor Council and Powder River Basin Resource Council (the Councils) challenging the inclusion of various parcels in the February 2000 competitive oil and gas lease sale. 2/ The Councils have filed a response opposing the granting of BLM's petition for reconsideration. BLM has filed a reply to the Councils' response. 3/

[1] The Board has the authority under 43 CFR 4.403 to grant a petition for reconsideration in extraordinary circumstances for sufficient reason. BLM has failed to satisfy the requirements of that regulation. 4/ Therefore, for the following reasons, BLM's petition for reconsideration is denied.

1/ BLM also requested that the Board stay the decision pending a ruling on the petition for reconsideration. The Board denied that request by order dated July 12, 2002. BLM filed a renewed request for stay on Aug. 8, 2002. By order dated Aug. 13, 2002, the Board denied that renewed request. On Aug. 29, 2002, BLM requested that the Director of the Office of Hearings and Appeals exercise his authority under 43 CFR 4.5(b) to assume jurisdiction of the case and grant a stay of the Board's decision. In an order dated Sept. 10, 2002, the Director assumed jurisdiction, granted the request for stay, and remanded the matter to this Board for consideration of the petition for reconsideration.

2/ The Board's decision related to three parcels for which the Councils had established standing to appeal. Those three parcels were WY-0002-082, WY-0002-092, and WY-0002-093. Parcel WYO-002-082 includes 39.83 acres of land in sec. 7, T. 48 N, R. 75 W., 6th PM, Campbell County; parcel WY-0002-092 encompasses 1,092.92 acres of land in secs. 4, 5, 8, 9, 17, and 18, T. 57 N., R. 77 W., 6th PM, Sheridan County; and parcel WY-0002-093 embraces 1,513.1 acres of land in secs. 14, 15, 22, 26, 27, and 35, T. 57 N., R. 77 W., 6th PM, Sheridan County.

3/ Therein, BLM raises objections to two exhibits to the Councils' response. First, it moves to exclude Exhibit 10, which is a copy of a May 15, 2002, comment letter from the Environmental Protection Agency on BLM's January 2002 "Draft Environmental Impact Statement and Draft Planning Amendment for the Powder River Basin Oil and Gas Project" (PRB Draft EIS) as immaterial and irrelevant because it postdates the Board's decision. Second, it objects to Exhibit 1, which is a copy of various pages of the PBR Draft EIS. It states that "[i]f the Board wishes to consider post-decisional documents still in draft," it requests the opportunity to file the entire PRB Draft EIS. In the alternative, it requests exclusion of Exhibit 1. We find no reason to exclude Exhibits 1 and 10 as part of the record in this reconsideration request. BLM's motions to exclude are denied. The Board takes official notice of the entire PRB Draft EIS. See 43 CFR 4.24(b).

4/ By order dated July 12, 2002, we took under advisement the motion to dismiss the petition for reconsideration filed by intervenor Pennaco Energy, Inc. (Pennaco), based on BLM's failure to submit arguments in support of its petition at the time of filing. We need not comment on BLM's explanation

BLM claims that extraordinary circumstances exist because the decision, although directly affecting only three leases, "potentially calls into question the validity of thousands of oil and gas leases issued in recent years in the most productive oil and gas region managed by the BLM" with the same level of National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000), analysis as the affected leases. (Memorandum in Support of Petition for Reconsideration (Reconsideration Memorandum) at 2.) Our decision, however, as BLM acknowledges, directly impacts only three leases; it does not invalidate previously issued leases which were not timely challenged. While our decision could affect future competitive oil and gas lease sales, such a result is not an extraordinary circumstance justifying the granting of the petition and the overturning of our decision.

BLM also asserts that the United States is losing valuable coalbed methane (CBM) and related royalties each month through drainage caused by CBM wells on private and state tracts adjacent to Federal lands. However, the issue addressed by the Board in the decision for which BLM seeks reconsideration was a NEPA issue. The fact that lands may be subject to drainage does not negate BLM's responsibilities under NEPA. Thus, the potential for drainage is not an extraordinary circumstances warranting reconsideration of our decision.

Furthermore, even if the scope of our decision and the potential for drainage were extraordinary circumstances, none of BLM's attacks on the merits of our decision in WOC, for the reasons set forth below, is a sufficient reason to reconsider our decision.

BLM first argues that the Board erred in failing to decide whether Park County Resource Council, Inc. v. U.S. Department of Agriculture Park County), 817 F.2d 609 (10th Cir. 1987), or Connor v. Burford (Connor), 848 F.2d 1441 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989), controlled the decision, contending that our decision creates confusion as to the appropriate authority for BLM to follow. According to BLM this case is governed by the Tenth Circuit's holding in Park County that NEPA does not require BLM to analyze all of the impacts associated with full field development prior to issuing oil and gas leases, but, given the agency's retention of extensive authority to approve or disapprove surface disturbing activities on issued leases, allows it to defer that analysis until concrete site-specific proposals have been submitted.

BLM maintains that, since it has broad discretion to regulate activities on the three leases at issue, it properly applied the Tenth Circuit precedent on staged environmental compliance when it decided not to supplement the 1985 Buffalo Resource Management Plan/Environmental Impact Statement (RMP/EIS) and to rely instead on NEPA analysis of more concrete proposals at a later stage, as it did with the 1999 Wyodak Final EIS.

---

fn. 4 (continued)
for its failure to do so because our denial of the petition for reconsideration renders moot Pennaco's motion to dismiss, which is accordingly denied.

In WOC, we concluded that, since a pre-leasing EIS, i.e., the Buffalo RMP/EIS, had been prepared, we did not need to decide whether Connor or Park County controlled, pointing out, however, that, "even under Park County, the pre-leasing NEPA documentation, whether in the form of an EA [environmental assessment] or an EIS, must take a hard look at the environmental consequences of the proposed action. See Park County, 817 F.2d at 622." WOC, 156 IBLA at 357 n.5.

The issue in this case was not whether BLM was required to evaluate the impacts of full field development in an EIS before issuing the challenged leases; rather, the question was whether the existing NEPA documents were sufficient to provide the requisite pre-leasing NEPA analysis for the sale of the affected parcels in light of the probable use of the parcels for CBM development. We concluded that significant omissions in both the Buffalo RMP/EIS and the Wyodak EIS precluded BLM from relying solely on those documents to satisfy its NEPA obligations; that the "Interim Documentation of Land Use Conformance and NEPA Adequacy" worksheets (DNAs), prepared for the sales, failed to mention or independently address the relevant areas of environmental concern or reasonable alternatives, and thus did not satisfy BLM's NEPA obligations; and, therefore, that BLM was required to conduct further NEPA analysis before deciding whether to approve the sale of the parcels at issue. 5/ We did not hold that BLM was required to prepare an EIS addressing the impacts of full field development before deciding whether to lease the parcels. We therefore did not need to decide whether Park County or Conner applied. 6/

BLM next contends that the Board erred in holding that purported new circumstances associated with CBM production and transportation methods required additional NEPA analysis before lease issuance without considering whether BLM could adequately address and prevent those impacts, including those related to produced water and air quality, by exercising its broad regulatory authority after lease issuance. Citing 40 CFR 1502.9(c), BLM asserts that supplementation of the Buffalo RMP/EIS is not required in this case because the increased produced water and air emissions associated with CBM extraction and development relate to surface use approvals,

---

5/ It is clear from our decision that, to comply with NEPA, BLM was required to augment the existing NEPA documents by addressing the impacts of CBM extraction in the context of the alternatives available at the leasing stage, for example, whether, given those impacts, some lands should be closed to leasing or stipulations precluding CBM extraction should be attached to all or some leases. Nowhere in our decision did we condemn the appropriate utilization of staged environmental analysis and tiering.

6/ We note that, unlike the pre-leasing DNAs prepared here, the pre-leasing EA approved in Park County exceeded 100 pages, explored leasing alternatives (including issuance of leases without stipulations, issuance of leases with stipulations, and no leasing), and examined the potential effects of each of the alternatives on energy use and conservation, on national forest administration, and on the environment. Park County, 817 F.2d at 612. Thus, even a ruling that Park County does apply would not resuscitate the inadequate pre-leasing environmental analysis in this case.

not the act of leasing, and thus do not constitute significant new circumstances "bearing on the proposed action or its impacts." (Reconsideration Memorandum at 6.) 7/

BLM concedes that some NEPA analysis must occur prior to leasing and frames the issue here as the degree of specificity required in that analysis. BLM maintains that the Buffalo RMP/EIS generally evaluated the issuance of oil and gas leases and that the differences between using the leases for CBM activities and utilizing them for conventional oil and gas development concern the degree of impact, not the nature of the activity, and thus are issues for the development stage when the environmental impacts of specific proposed surface disturbing activities are examined. BLM submits that it retains ample authority to approve, disapprove, or condition approval of the activities potentially causing the identified impacts when site-specific development proposals are presented. Therefore, it asserts, the alleged new circumstances bear on the impacts of subsequent activities subject to independent approvals and conditions addressing those circumstances, rather than on the environmental effects of lease issuance.

BLM contends that a lessee is required, by the terms of the oil and gas lease, to obtain further approvals and to conduct operations in an environmentally prudent manner and must also comply with all other applicable laws, including the permit provisions of the Clean Water Act and the Clean Air Act.

According to BLM, while the purpose of pre-leasing NEPA analysis is to decide whether to lease an area and to determine appropriate protective stipulations based on information and circumstances known at the time of the land use planning, no stipulations are needed where statutes or regulations govern the matter. BLM argues that the Councils have not demonstrated that, given BLM's routine practice of conducting extensive post-leasing NEPA analyses and imposing conditions on approved surface disturbing activities to prevent unacceptable impacts, the impacts associated with CBM activities must be addressed prior to leasing in order to be mitigated. It also charges that the Councils have not shown how no surface occupancy (NSO) requirements would mitigate those impacts. Since any new circumstances bear on surface use approvals and not leasing decisions, BLM contends, its exhaustive analysis of the impacts of CBM development in the Wyodak EIS and other NEPA analyses satisfied its NEPA obligation to analyze that information.

____

7/ As discussed above, our decision did not direct BLM to prepare a supplemental EIS. However, the probable use of the leases for CBM activities, which was not a use contemplated in 1985 when the Buffalo RMP/EIS was prepared and therefore was not addressed in those documents, and the particular impacts associated with those activities could arguably constitute "significant new * * * information relevant to environmental concerns and bearing on the proposed action or its impacts" requiring supplementation of an EIS pursuant to 40 CFR 1502.9(c).

BLM misconstrues the function of pre-leasing NEPA analysis. The goal of NEPA is "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). In order to meet that goal, the NEPA analysis prepared for a leasing decision must take a hard look at the environmental consequences of the proposed leasing, considering all relevant matters of environmental concern. WOC, 156 IBLA at 357. Given the admittedly serious and unique impacts of CBM extraction and development, including water quantity and quality and air quality issues, the utilization of the proposed leases for CBM activities is a relevant matter of environmental concern which must be addressed in a pre-leasing analysis. Since the Buffalo RMP/EIS understandably did not address these impacts, BLM was obligated to perform additional NEPA evaluations before deciding whether to sell the leases at issue here. While the scope of the examination of those impacts in a pre-leasing NEPA document will necessarily differ from that required in a site-specific NEPA analysis prepared for a proposed development project, NEPA mandates that those impacts must nevertheless be acknowledged and appropriately considered before the leasing decision is made. BLM's retention of the authority to impose conditions and stipulations mitigating the significant impacts of CBM activities at a later stage does not negate BLM's duty at the leasing stage to consider whether those impacts warrant adopting alternatives not available at the post-leasing stages, such as no leasing or leasing with stipulations precluding or limiting CBM activities. None of BLM's arguments undermines this conclusion.

BLM further argues that the Board erred in failing to determine whether BLM's issuance of the leases had, in fact, limited its ability to prevent the alleged harms, and in ignoring BLM's authority to prevent such harms at post-leasing stages. BLM contends that the impacts identified by the Councils do not pertain to the leasing decision because they can be adequately mitigated after lease issuance. BLM asserts that section 17 of the Mineral Leasing Act, as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), 30 U.S.C. § 226(g) (2000), 8/ and BLM regulations and onshore oil and gas orders provide BLM with ample authority to prevent harm caused by water disposal and air emissions from gas production and transportation; that BLM has an extensive plan for water quality monitoring in place, including at locations adjacent to the parcels at issue; and that the Councils have not pointed to any needed mitigation measures that cannot be imposed after lease issuance.

8/ Amended 30 U.S.C. § 226(g) (2000) provides, in part:

"The Secretary of the Interior * * * shall regulate all surface disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources. No permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering the proposed surface disturbing activities within the lease area. * * *."

Citing Sierra Club v. Peterson (Peterson), 717 F.2d 1409, 1415 (D.C. Cir. 1983), 9/ BLM insists that it can properly defer further NEPA analysis until the site-specific permit stage because 30 U.S.C. § 226(g) (2000), as amended by FOOGLRA, precludes all surface disturbing activities pending submission of site-specific proposals and because BLM retains the authority under Federal law to prevent surface disturbing activities if site-specific NEPA analysis reveals environmental consequences constituting unnecessary or undue degradation of resources such as water and air. BLM construes FOOGLRA's statutory requirement for agency approval of surface disturbing activities as retaining in BLM the right to preclude environmentally destructive activities, thus satisfying the Peterson grounds for deferring NEPA analysis of development activities without a special stipulation in the lease. 10/ BLM submits that the Board cannot sustain a determination that the lease constituted an irretrievable and irreversible commitment to allow developmental activities to occur because the agency retained sufficient authority to mitigate the impacts of later stages of oil and gas development.

BLM's arguments reveal that it again misapprehends the function of a pre-leasing NEPA analysis, which is to ensure that BLM acknowledges and considers all the relevant environmental concerns, including in this case CBM-related issues, and available alternatives before it decides to adopt the appropriate alternative, given those concerns. The fact that BLM can arguably mitigate environmental impacts in post-leasing decisions does not negate BLM's NEPA obligation to consider them before deciding whether or not to issue the leases and what, if any, lease stipulations might be needed in light of those impacts. The Court's decision in Peterson, which addresses the appropriate time for preparation of an EIS, does not undercut this conclusion.

BLM's attempt to minimize the resource commitment involved in the issuance of onshore oil and gas leases is unpersuasive. Although BLM equates section 17 of the Mineral Leasing Act, as amended by FOOGLRA, 30 U.S.C. § 226(g) (2000), to section 25 of the OCSLA, 43 U.S.C. § 1351(h) (2000), which specifically delineates the Secretary's authority to disapprove all development activities on an OCS lease, we do not read

---

9/ In Peterson, the Court held that an agency may delay preparation of an EIS provided that it reserved the authority both to preclude all surface disturbing activities pending submission of site-specific proposals and to prevent proposed activities if the environmental consequences were unacceptable.

10/ BLM contends that FOOGLRA's amendment of section 17 of the Mineral Leasing Act provides a statutory basis for staged decisionmaking virtually identical to that provided in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1351 (2000), which, the courts have held, prevent the sale of an Outer Continental Shelf (OCS) lease from being an irretrievable and irreversible commitment to subsequent stages of development. See Reconsideration Memorandum at 8-9 n.8.

30 U.S.C. § 226(g) (2000) so broadly. 11/ See, e.g., National Wildlife Federation, 150 IBLA 385, 403 (1999). Nor are we aware that BLM has previously interpreted that statutory provision as granting it the authority to deny all development on an onshore lease issued without a NSO or other similarly restrictive lease stipulation.

In fact, both the Wyodak Draft EIS and Final EIS relied upon by BLM and the November 1999 Wyodak Coal Bed Methane Project EIS Record of Decision (Wyodak EIS ROD) explicitly state that "[n]one of the [lease] stipulations imposed would empower the Secretary of the Interior to deny all drilling activity because of environmental concerns where leases have been issued with surface occupancy rights." Wyodak Draft EIS at 2-25; Wyodak Final EIS at 2-26; November 1999 Wyodak EIS ROD at 27.

The January 2002 PRB Draft EIS succinctly summarizes BLM's official view of its authority with respect to development on issued onshore leases:

> The Department of the Interior's authority to implement a "No Action" alternative that precludes development * * * is limited. An oil and gas lease grants the lessee the "right and privilege to drill for, mine, extract, remove, and dispose of all oil and gas deposits" in the lease lands, "subject to the terms and conditions incorporated in the lease (Form 3110-2).
>
> Because the Secretary of the Interior has the authority and responsibility to protect the environment within Federal oil and gas leases, restrictions are imposed on the lease terms.
>
> On land leased without a [NSO] or similarly restrictive lease stipulation, the Department of the Interior cannot deny a permit to drill. Once the land is leased, the Department no longer has the authority to preclude surface disturbing activity, even if the environmental impact of such activity is significant. The Department can only impose mitigation measures upon a lessee who pursues surface disturbing activities. By issuing a lease, the Department has made an irrevocable commitment to allow some surface disturbances (Tenth Circuit Court of Appeals in Sierra Club vs. Peterson [717 F.2d 1409, 1983]).

(PRB Draft EIS at 2-50 through 2-51 (bracket in original).) The quoted language not only repudiates BLM's argument here but also reinforces the significance of the pre-leasing NEPA analysis.

11/ We note that, even before FOOGLRA's amendment of 30 U.S.C. § 226(g) (2000), the applicable regulations required a lessee to seek and receive BLM approval before undertaking surface disturbing activities on a Federal onshore lease. See, e.g., 43 CFR 3162.3-1, 3162.3-3 (1986).

Additionally, BLM contends that the Board erred in failing to give proper weight to the hard look BLM has given the effects of CBM development in numerous environmental documents, including the Wyodak EIS, which the agency considered in issuing the challenged leases. BLM asserts that the detailed information gathered in the course of post-leasing decisions was available to and used by BLM decisionmakers when they made the leasing decision and that the Board's discounting of that information because the Wyodak EIS did not explicitly address leasing alternatives "elevate[s] form over substance." (Reconsideration Memorandum at 12.) BLM contends that the numerous previous project-level NEPA analyses provided BLM decisionmakers with much more information on the impacts of development than is normally available at the time of leasing and asserts that BLM considered all of those documents when making the leasing decisions under review. BLM further notes that the Wyodak EIS did not identify any impacts that could not be satisfactorily mitigated through conditions imposed on permit approvals.

BLM fails to appreciate the importance of the analysis of the available leasing alternatives in the pre-leasing decionmaking process. While BLM characterizes our focus on the examination of leasing alternatives as elevating form over substance, NEPA's focus is on "form" rather than "substance." NEPA is in essence a procedural statute. It does not direct an agency to elevate environmental concerns above other considerations. Rather, it requires that the agency take a hard look at the environmental consequences of a proposed action and reasonable alternatives thereto before approving the action. Southwest Center for Biological Diversity, 154 IBLA 231, 236-37 (2001); Colorado Environmental Commission, 142 IBLA 49, 52 (1997), and cases cited. See also Park County, 817 F.2d at 620. Since neither the Wyodak Final EIS nor the DNAs, which relied on the Wyodak Draft EIS, addressed the relevant leasing alternatives in light of the unique impacts of CBM activities examined in the EIS, we must adhere to our conclusion that those documents were inadequate to constitute the requisite hard look for the challenged leasing decision.

Finally, BLM argues that the Wyodak EIS' consideration of the no action alternative of not approving additional drilling permits essentially analyzes the effect of not issuing additional leases. BLM further argues that no surface occupancy is not a reasonable alternative because the depth at which CBM is found renders off lease directional drilling technically impossible. Such a restriction, it asserts, would not meet the purpose and need of the proposed leasing which, according to BLM, is to allow for the orderly development of Powder River Basin CBM to meet the nation's energy needs. 12/ BLM submits that, since approximately 90 percent of the available land in the Buffalo Resource Area has already been leased

---

12/ This is the first time BLM has enunciated the purpose and need of the proposed leasing. BLM's acknowledgment that CBM development was the purpose of the leasing reinforces the importance of an adequate pre-leasing NEPA analysis of the impacts of CBM activities and appropriate leasing alternatives given those impacts.

for oil and gas, changing the leasing decision as to the three affected leases will not redress the harms alleged by the Councils. BLM contends that, in any event, these harms do not necessitate lease stipulations which, BLM proffers, are necessary only when statutory or regulatory requirements do not address the harms or when the required protections would be inconsistent with the rights granted by the lease. Such harms, BLM argues, will be appropriately examined when development activities are approved.

BLM's attempt to equate the no action alternative analyzed in the Wyodak EIS to the no leasing alternative fails. The EIS defines the no action alternative as the rejection of all applications for Federal wells not involving the potential drainage of Federally-owned CBM resources and explains that, since CBM development on state and private land would continue, the no action alternative, as analyzed for comparative purposes, consists of drilling, completing, and operating as many as 2,000 productive wells, 1,000 fewer wells than the proposed action, within the proposed project boundaries. Wyodak Draft EIS at 2-24 through 2-26; Wyodak Final EIS at 2-25 through 2-26. The impacts of drilling, completing, and operating 2,000 CBM wells clearly are not comparable to those of not issuing oil and gas leases in the first instance. BLM's justifications for not considering other leasing alternatives should have been presented in the requisite pre-leasing NEPA analysis, not as post hoc rationalizations in a petition for reconsideration, and, in any event, are unpersuasive.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's petition for reconsideration is denied, and Pennaco's motion to dismiss is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in full agreement with the lead opinion, a fact evidenced by my signature thereon, I write separately to more fully address two elements of the instant petition that I find particularly troubling. The first of these is the petition's interpretation of the Tenth Circuit Court of Appeals' decision in Park County Resource Council, Inc. v. U.S. Department of Agriculture, 817 F.2d 609 (1987) (Park County), as it relates to the question of whether any environmental analysis is necessary prior to issuance of an oil and gas lease. The second point is an outgrowth of the petition's efforts to justify its analysis of Park County, namely, the assertion that, since the adoption of § 5102(d)(1) of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), as amended, 30 U.S.C. § 226(g) (2000), the United States has reserved the authority to deny all development rights with respect to any oil and gas lease issued under the authority of the Mineral Leasing Act. In my view, the position advocated by BLM in its instant petition would, if merely followed to its logical conclusion, eviscerate NEPA as it relates to pre-leasing environmental analysis while, at the same time, it would enervate rights of oil and gas lessees which, at least until this petition, had been unquestioned. I believe both results are simply unsupportable under applicable law and the proper interpretation of judicial and administrative precedents.

The first "error" which the petition alleges in our prior decision is the failure of the Board to decide whether Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), or Park County "controlled" the case, arguing that it was reasonable for BLM "to follow the jurisprudence of the relevant federal circuit," i.e., the Park County decision. 1/ (Memorandum in Support of Petition for Reconsideration (Petition for Reconsideration) at 1-2.) The petition then presents its analysis of Park County. The crux of this analysis is set forth below:

> The Park County decision holds that NEPA does not require BLM, prior to leasing, to conduct an analysis of all of the

---

1/ While this formulation basically casts petitioner's argument as a "choice of law" theory of the case, the petition's subsequent analysis reflects an inherent contradiction in BLM's position. Thus, on the one hand, BLM argues that, given two conflicting precedents, it was right to choose the precedent handed down by the Court of Appeals whose jurisdiction extends to Wyoming. Yet, later in its petition, BLM argues that the adoption of FOOGLRA "effectively overrules Connor v. Burford." (Petition for Reconsideration at 8 n.8.) While the correctness of this latter assertion is discussed infra at note 6, it is nevertheless obvious that, to the extent BLM is arguing that Connor v. Burford, supra, has been statutorily overruled, it cannot also argue that the Board erred in failing in choosing between that decision and Park County, since, under BLM's view, the only valid precedent extent would be Park County. In any event, as both our original decision and our decision herein shows, there is no relevant contradiction between Connor v. Burford, supra, and Park County on any issue actually presented by this appeal.

> impacts associated with full field development. The Tenth Circuit found that since the BLM retains extensive authority to approve or disapprove surface disturbing activities at the time they are proposed, it will be better able at that time to anticipate impacts. Park County rejected the contention that leasing must be preceded by an analysis of all of the impacts of full field development, and recognized agency discretion in determining the appropriate time for analysis to occur where there is continuing federal supervision of future activities. The Park County court held in that case an EA [environmental assessment] constituted a sufficiently hard look at leasing because:
>
>> The oil and gas lease, by itself, does not cause a change in the physical environment. In order to work the lease the lessee must submit site-specific proposals to the Forest Service and BLM who can then modify those plans to address any number of environmental considerations. Each action is subject to continuing NEPA review. [817 F.2d at 622.]

Petition for Reconsideration at 3.

What is important to note is that, while the petition duly describes the issue discussed in Park County as "full field" development, the essential thrust of the argument made in the petition, based on the quotation from the decision in Park County set forth above, is that there is no need to analyze any development impacts prior to issuance of an individual oil and gas lease unless that impact flows from lease issuance, itself. In effect, the petition argues that no environmental analysis is needed.

The petition's theory works as a virtual tautology: (1) Park County holds that, under NEPA, only those impacts generated by the leasing decision itself must be analyzed prior to leasing; (2) issuance of an oil and gas lease does not, by itself, have any environmental impacts; (3) therefore, no environmental analysis is necessary prior to leasing. Presumably, all of the EA's which BLM has prepared and this Board has reviewed since the Park County decision issued have been purely the product of an excess of caution rather than the necessary result of requirements imposed by NEPA. In effect, the theory pressed upon us by the petition would create a new categorical exclusion covering issuance of all oil and gas leases. 2/

2/ There was, in the not too distant past, a partial categorical exclusion relating to the issuance of oil and gas leases. This categorical exclusion was first proposed in 1980 and, as proposed, covered the "issuance of individual upland oil and gas leases." Proposed 516 DM 6, Appendix 5.4D(4), 45 FR 82369 (Dec. 15, 1980). This proposed exclusion was subsequently modified to limit the exclusion to "individual non-competitive upland oil and gas leases," and as modified was adopted on January 19, 1981. Notification of this action was thereafter published in the Federal Register. See 46 FR 7495 (Jan. 23, 1981). In this notification, the

It seems to me that the petition's reliance on the Park County decision as supporting the broad principle the petition espouses herein is misplaced for a number of reasons. First, unlike the factual situation presented in Park County, where the Forest Service had prepared a 100-page EA for the lease of an isolated tract of land in a rank wildcat area, the instant leases are, in fact, part and parcel of an anticipated full-field development of the general lease area for coalbed methane production and were supported only by "Documentation of Land Use Conformance and NEPA Adequacy" (DNA) worksheets.

Second, it ignores the Park County Court's discussion of its prior decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1982), which had ordered the preparation of an EIS prior to issuance of a land lease. In Park County, the Court contrasted the situation before it with that in the

____

fn. 2 (continued)
Department responded to one commentor who had questioned the original complete exclusion of all oil and gas leases by observing that:

"We have revised the language to exclude only non-competitive leases because over the past ten years we have issued over 100,000 such leases and our tens of thousands of EAs have not even led to one EIS. We believe that our exceptions to the exclusions listed in 516 DM 2.3A(3) will capture those few non-competitive leases that may have some impact."

Id. at 7493.

Subsequently, an additional categorical exclusion was proposed for competitive leasing decisions. See Proposed 516 DM 6, Appendix 5.4D(19), 46 FR 60278 (Dec. 9, 1981). This proposal was not as all inclusive as the exclusion for noncompetitive leases since it only covered competitive leases "where the issuance of the lease is consistent with existing land uses or has been covered by an area wide environmental document." Id. (emphasis supplied). This addition to the list of categorical exclusions was adopted on October 29, 1982, with one important revision. As adopted, the new provision (renumbered as 516 DM 6, Appendix 5.4D(14)) excluded "[o]ffering and issuance of upland competitive oil and gas leases where the issuance of the lease is consistent with existing land uses and has been covered by an area wide environmental document." 47 FR 50372 (Nov. 5, 1982) (emphasis_supplied). In responding to commentors who had objected to the original proposal, the Department noted that "[t]he exclusion does not cover all competitive oil and gas leases. It is worded to make full use of the tiering concept in the CEQ regulations, the BLM planning process and the cases where oil and gas development is already taking place." Id. at 50369.

The complete exclusion of all noncompetitive leases and the selective exclusion (but see note 11, infra) of qualified competitive leases (always subject, of course, to possible exceptions to these exclusions delineated in 516 DM 2, Appendix 2) were recodified as 516 DM 6, Appendix 5.4D(2)(a) and 5.4D(2)(c), respectively in 1983. See 48 FR 43734 (Sept. 26, 1983). These provisions remained substantially unchanged until they were completely revised in 1992 in response to the adoption of FOOGLRA in 1987. The reasons for and the import of these revisions are discussed subsequently in the text of this opinion.

Davis case where "there were firm plans to develop the land subject to lease * * * [and] [t]he underlying project was well articulated--unlike the prototypical oil and gas lease." 817 F.2d at 622. 3/ Clearly, the instant leases cannot fairly be categorized as the "prototypical oil and gas leases" discussed by the Court in its Park County decision, where it was estimated that only one in 10 leases would be drilled and only one in 10 of the drilled leases would ever proceed to production. Id. at 623. Given the much greater likelihood of development in the instant case, it is difficult to credit BLM's contention that Park County would support issuance of the instant leases without any environmental analysis of the consequences likely to flow from production of coalbed methane from the lease, particularly in view of the Park County Court's subsequent observation that "[i]f oil or gas is found and development undertaken, an EIS is clearly required." Id. at 624 n.5.

But, what is most troubling about BLM's petition is that, despite an occasional nod in the direction of pre-leasing environmental analysis (see, e.g., Petition for Reconsideration at 7 n.6), the essential thrust of the petition's theory would inevitably lead to the abandonment of all environmental analysis prior to leasing. If, as the petition contends, all that need be analyzed prior to lease issuance is the impacts flowing from the issuance of the lease, there is never any need to do any environmental analysis since it is undisputed that the mere act of acceptance of a lease offer has no environmental consequence whatsoever. It is only the subsequent actions taken under the authority of the issued lease which actually impact the environment and, under the petition's approach, these impacts would not need to be studied until an application for a permit to drill (APD) is filed.

There is, however, a fundamental flaw in BLM's construct. NEPA requires any analysis to occur prior to an irretrievable commitment to proceed with a proposed Government action. See, e.g., Connor v. Burford, supra at 1531; Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983). If it is shown that the Government's issuance of a lease requires it to allow development of the lease, it is the issuance of the lease which constitutes the irretrievable commitment 4/ and BLM's analysis falls

---

3/ Admittedly, the Davis decision involved a 1300-acre lease of land for a planned development of a city of 15,000 people, actions far in excess of those involved herein.

4/ Under the Board's traditional analysis, when an APD is filed for an oil and gas lease which is not subject to a no surface occupancy stipulation, consideration of the APD merely determines the least environmentally destructive way to allow the development of the lease, which development is authorized upon its issuance (see discussion in text). In this regard, the petition's suggestion that the "unnecessary or undue degradation" standard might somehow be utilized to preclude all adverse environmental impacts on leases which are not subject to no surface occupancy stipulations (see Petition for Reconsideration at 11) misapprehends how that standard applies. That standard does not prevent all environmental depredations; rather, it merely prohibits

apart. 5/ Inasmuch as numerous prior decisions of the Board have held that issuance of a lease without a no surface occupancy stipulation is the point in time in which environmental impact analysis must occur because "leasing makes an irreversible and irretrievable commitment to permit surface-disturbing activities, in some form and to some extent" (Colorado Environmental Coalition, 149 IBLA 154, 156 (1999)), BLM's present analysis is flatly in conflict with well-established Board precedent.

In order to justify what is clearly a dramatic departure from past Departmental rulings, the petition relies upon a truly novel assertion. It essentially argues that FOOGLRA amended section 17 of the Mineral Leasing Act (MLA), 30 U.S.C. § 226(g) (2000), so as to make BLM's authority under the MLA comparable to the authority it retains with respect to post-1978 leases issued under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (2000). 6/ Just how radical a change this would effect with respect to rights acquired by post-FOOGLRA oil and gas lessees under the Mineral Leasing Act is made clear in the citations from Supreme Court decisions interpreting OCSLA which the petition provides.

Thus, in Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 120 S.Ct. 2423, 2436 (2000), the Court stated:

---

fn. 4 (continued)

"surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operation." 43 CFR 3809.0-5(k).

Indeed, this Board has expressly noted that "the fact that a proposed mine plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects that would require preparation of an environmental impact statement." Nez Perce Tribal Executive Committee, 120 IBLA 34, 36 (1991); see also Kendall's Concerned Area Residents, 129 IBLA 130, 138-39 (1993).

5/ The decision in Park County avoided this conundrum because what it actually held was that issuance of the lease did not commit the Government to allowing full field development and, therefore, cumulative impacts flowing from that possibility need not be considered prior to the issuance of the lease. 817 F.2d at 623. The Court did not hold that issuance of the lease did not represent an irretrievable commitment to the development of the lease, itself. On the contrary, the Court recognized that it did but clearly felt that the 100-page EA adequately analyzed those impacts. Id. at 624.

6/ While this aspect of the petition's argument is aptly characterized as "novel," the petition's subsequent claim that FOOGLRA also "effectively overrules Conner v. Burford" (Petition for Reconsideration at 8 n.8) can be rejected out of hand. Unless Congress in adopting FOOGLRA in 1987 is credited with amazing prescience, it could not possibly have intended to overrule the decision in Conner v. Burford, supra, if for no other reason than that decision did not even issue until the following year.

> We recognize that the lease contracts gave the companies more than rights to obtain approvals. They also gave the companies rights to explore for, and to develop, oil. [7/] But the need to obtain Government approvals so qualified the likely future enjoyment of the exploration and development rights that the contract, in practice, amounted primarily to an opportunity to try to obtain exploration and development rights in accordance with procedures and under the standards specified in the cross-referenced statutes and regulations. [Emphasis in original.]

To similar effect is the decision in Secretary of the Interior v. California, 464 U.S. 312, 339 (1984):

> Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production * * *; the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

And the petition, itself, concludes its argument on this point by flatly asserting that "[w]e submit that 30 U.S.C. § 226(g) itself serves to retain in BLM 'the right to preclude environmentally destructive activities.'" (Petition for Reconsideration at 12, citing Sierra Club, Inc., 126 IBLA 142, 154 (1993) (concurring opinion).) 8/

So far as I am aware, no party to any proceeding before the Board in the 15 years since FOOGLRA was adopted has ever suggested that it worked so radical a limitation on the rights acquired upon issuance of an upland oil and gas lease as to afford the lessee merely "a priority in submitting plans" to explore or develop the lease. On the contrary, the whole course of adjudications since the adoption of FOOGLRA totally undercuts any such assertion.

To be sure, the Board has remarked upon the fact that FOOGLRA essentially abolished noncompetitive leasing for oil and gas. See, e.g., North Dakota Rural Rehabilitation Corp., 105 IBLA 151 (1988). And it has also

---

7/ I note that this sentence was omitted in the quotation provided in BLM's petition. See Petition for Reconsideration at 5 n.3.

8/ This citation is puzzling since what the Sierra Club decision involved was a challenge to the proposed drilling of two exploratory wells on a geothermal lease which had been issued with an environmental analysis but without an EIS. What the full sentence actually states is: "However, where, as in this case, a lease is issued without preparation of an EIS, or the retention, in the lease itself, of the right to preclude environmentally destructive activities, a subsequent proposal to undertake activities on the lease does not necessarily trigger the requirement for an EIS." Id. Other than the fact that this opinion does, indeed, contain the phrase "right to preclude environmentally destructive activities," it in no way supports BLM's present assertion that oil and gas leases issued under the MLA convey no absolute rights to development or exploration.

had an obvious impact upon the Department's NEPA-related actions, though scarcely to the extent suggested by the instant petition.

Following FOOGLRA's adoption, the Department proposed revisions to its list of categorical exclusions. In addition to removing the general categorical exclusion then in effect for the issuance of noncompetitive oil and gas leases (see note 2, supra), which had been made unnecessary by the basic abolition of the noncompetitive system, the Department proposed a new exclusion for any oil and gas leases issued with a contingent right stipulation providing that no rights of development were necessarily conveyed thereby. See Proposed 516 DM 6, Appendix 5.4B(1), 54 FR 47834 (Nov. 17, 1989). Such a proposal would scarcely have been necessary if, as now contended before the Board, no absolute rights of development were granted in post-FOOGLRA leases in the first instance since all post-FOOGLRA leases would essentially be contingent right leases.

The proposed categorical exclusion for contingent right leases was deleted from the list that was finally adopted, effective March 31, 1992. See 516 DM 6, Appendix 5.4, 57 FR 10918 (Mar. 31, 1992). In explaining why this proposal was being dropped, the Department explained that "[i]t is BLM policy that contingent right stipulations are not to be used for fluid mineral leasing. This change is in response to both internal and external comments received." Id. at 10914. This action is also totally inconsistent with the interpretation now urged upon the Board.

It is clear from the foregoing that the public record of the Department's actions relating to the necessity of NEPA analysis on post-FOOGLRA oil and gas leases simply lends no support to the present assertion that FOOGLRA operated to drastically curtail the rights obtained by Federal lessees. And I think it fair to say that the thousands of entities which have acquired oil and gas leases since FOOGLRA's adoption would be shocked to hear that those leases merely afforded them a priority in submitting plans to develop those leases and nothing more. I find it impossible to believe that so radical a change in oil and gas leasing has been in effect for 15 years and has only just recently come to light. The petition's interpretation of FOOGLRA's effects must be rejected as completely inconsistent with the Department's pronouncements since that time as well as the actual language of the statute. 9/

9/ Even if one ignores the history of the Department's handling of post-FOOGLRA leasing questions, it is difficult to sustain BLM's assertion that the lease development rights obtained under FOOGLRA are as constricted as those granted in post-1978 OCSLA leases. A comparison of the very general language of FOOGLRA relied upon as granting this authority, i.e., "[t]he Secretary of the Interior * * * shall regulate all surface-disturbing activities conducted pursuant to any lease and * * * [n]o permit to drill on an oil and gas lease issued under this chapter shall be granted without the analysis and approval of the Secretary concerned," 30 U.S.C. § 226(g) (2000), with the incredibly specific and detailed language of OCSLA which the Supreme Court relied upon in making the statements quoted earlier in the

As finally adopted in 1992, there were no general categorical exclusions for issuance of upland oil and gas leases and none presently exists. 10/ Instead, what has developed has been use of the DNA worksheets, which allow BLM personnel to assess whether existing NEPA documents provide an adequate assessment for a proposed action (e.g., issuance of a competitive oil and gas lease) such that no new NEPA analysis is needed. 11/ This was the approach undertaken below in the instant case. The problem, however, is that, as the Board explained in its prior decision and reiterates herein, the existing environmental analysis on which BLM purported to rely as providing adequate environmental analysis is simply inadequate as it relates to coalbed methane. That was the essential holding of our prior opinion and nothing which has been submitted on reconsideration undermines that conclusion.

In short, this Board's prior decision was squarely within the traditional NEPA framework as delineated by established Departmental procedures and existing Board and Federal court precedents. In seeking to have this decision reversed on reconsideration, BLM advances theories which, on the one hand, will abolish traditional NEPA analysis at the leasing stage and, on the other hand, will create vast uncertainties as to just what rights oil and gas lessees acquire when they obtain a Federal oil and gas lease. Because I believe that neither change is warranted or is in accord with applicable legal principles, I fully concur in the denial of the instant petition.

James L. Burski
Administrative Judge

---

fn 9 (continued)
text (see Mobil Oil Exploration & Producing Southeast, Inc. v. United States, supra at 2430) evidences little, if any, similarity between the two statutes.

10/ There is a very limited categorical exclusion covering future interest leases under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 354 (2000), where the subject lands are already in production. See 516 DM 6, Appendix 5.4B(1).

11/ The DNA worksheet is an obvious remanifestation of the old selective categorical exclusion for certain competitive leases. See note 2, supra. It seems to me, however, that this never really functioned as a proper categorical exclusion, since it only excluded competitive leases for which adequate analysis already existed and, as such, required individual analysis each time it was invoked. In operation, it was essentially just a recognition of tiering in the NEPA context, something which the Board has long recognized. See, e.g., National Wildlife Federation, 150 IBLA 386, 400-401 (1999); Southern Utah Wilderness Alliance, 127 IBLA 331, 351, 100 I.D. 370, 381 (1993). Thus, use of DNA worksheets is totally consistent with the Department's traditional approach to NEPA compliance.