

INTERIOR BOARD OF LAND APPEALS

Center for Native Ecosystems and Forest Guardians

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CENTER FOR NATIVE ECOSYSTEMS
FOREST GUARDIANS

IBLA 2004-284

Decided September 7, 2004

Appeal from and petition for stay of the June 18, 2004, decision of the Colorado State Office, Bureau of Land Management, denying a protest to the offering of parcels at the February 12, 2004, competitive oil and gas lease sale. COC67346, et al.

Appeals dismissed in part; petition for stay denied.

1. Administrative Procedure: Standing--Appeals: Standing--Oil and Gas Leases: Competitive Leases--Rules of Practice: Standing to Appeal

Under 43 CFR 4.410(a), in order to have standing to appeal a BLM decision dismissing a protest to the offering of multiple parcels at a competitive oil and gas lease sale, the appellant must be a party to the case and be adversely affected by the dismissal decision. Dismissal of the protest establishes that the appellant is a party to the case; however, the appellant may appeal the dismissal only as to those parcels for which it can establish that it is adversely affected.

2. Administrative Procedure: Standing--Appeals: Standing--Oil and Gas Leases: Competitive Leases--Rules of Practice: Standing to Appeal

The regulations at 43 CFR 4.410(d) provide that “[a] party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” While use of the land in question may constitute such a legally cognizable interest, a legally

cognizable interest must exist as of the time of issuance of the decision being appealed in order to have standing to appeal under 43 CFR 4.410(a). Thus, when an appellant asserts use of the land in question in support of its standing to appeal, the asserted use must have taken place on or before the date of issuance of the decision being appealed.

APPEARANCES: Erin Robertson, Staff Biologist, Center for Native Ecosystems, Denver, Colorado, for the Center for Native Ecosystems; Nicole Rosmarino, Conservation Director, Forest Guardians, Santa Fe, New Mexico, for Forest Guardians; Laura Lindley, Esq., and Robert C. Mathes, Esq., Denver, Colorado, for Assent Energy, LLC, Contex Energy Company, and Julander Energy Company.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Center for Native Ecosystems (CNE) and Forest Guardians (collectively, appellants) have appealed from and petitioned for a stay of the June 18, 2004, decision of the Colorado State Office, Bureau of Land Management (BLM), denying their protest to the offering by BLM of each parcel of land offered at the February 12, 2004, competitive oil and gas lease sale. On appeal, they limit the parcels to which they object to 36.^{1/} Assent Energy, LLC (Assent), the high bidder for 12 of the parcels included in this appeal,^{2/} Contex Energy Company (Contex), the high bidder for three parcels (COC67371, COC67372, and COC67374), and Julander Energy Company (Julander), the high bidder for one (COC67396), have each filed a motion to dismiss the appeal as to their parcels and an opposition to the petition for stay.

[1] We turn first to the motions to dismiss. Under the Department's regulations, only a party to a case who is adversely affected by the June 18, 2004, decision can maintain an appeal of that decision. See 43 CFR 4.410(a). While denial of their protest makes appellants "a party to a case," to be adversely affected one must have a legally cognizable interest in the land at issue in order to be adversely affected. Such an interest need not be an economic or a property interest and use of the land will suffice. However, the mere concern of a group or individual opposing a

^{1/} These 36 parcels are COC67346-49, COC67350-52, COC67354, COC67358, COC67359, COC67362-64, COC67367, COC67370-75, COC67396, COC67399, COC67400-08, COC67411, and COC67421-24.

^{2/} The 12 parcels are COC67348-52, COC67354, COC67358, COC67359, COC67362-64, and COC67367.

BLM action does not constitute a cognizable legal interest. Wyoming Outdoor Council, 153 IBLA 379, 382-83 (2000); Craig M. Weaver, 141 IBLA 276, 281 (1997).

We have held in similar circumstances involving a challenge to a competitive oil and gas lease sale that because “each parcel in an oil and gas lease sale is not essential to the sale” and because “[e]ach individual parcel has its own characteristics and is offered separate from every other parcel,” dismissal of a protest to the offering of multiple parcels in a sale does not guarantee the right to appeal the dismissal decision as to all parcels. Dismissal of the protest of the individual or group establishes “party to a case” status under 43 CFR 4.410(a). However, in order to maintain an appeal one must also show that he or she is adversely affected by the decision being appealed. Wyoming Outdoor Council, 153 IBLA at 384. Standing to appeal must be demonstrated as to “each particular parcel to which the appeal relates.” Id. An organization may establish that it is adversely affected within the meaning of 43 CFR 4.410(a) by showing that one or more of its members uses the public land in question.

In support of their appeal, appellants have filed the July 22, 2004, declaration of one member of Forest Guardians (John C. Horning) and four affidavits, each dated July 22, 2004, from employees and members of CNE (Diana Fischetti, Pete Kolbenschlag, Jacob Smith, and Erin Robertson) alleging use of one or more of all 36 appealed parcels. John C. Horning, the only member of Forest Guardians to offer a declaration in support of standing for that group, asserts that he uses and recreates on lands in and around seven parcels: COC67371 through COC67375, COC67346, and COC67347. He states that twice in 1990 “and on one other occasion” he visited parcels COC67371 through COC67375 and in the late 1980’s he visited “for the first time” public and private lands that are included in parcels COC67346 and COC67347. He states that he fully intends to revisit these areas. (Horning Declaration at 3, ¶10, ¶12.)

Fischetti alleges use and enjoyment of one parcel (COC67367), “having visited this area on the afternoon of July 19, 2004.” (Fischetti Affidavit at 2, ¶5.) Kolbenschlag asserts he engaged in recreational activities on lands within parcel COC67370 several times, including “in June 2001” and that he intends to revisit those areas. (Kolbenschlag Affidavit at 2, ¶4, ¶6.) Smith and Robertson each state that they recreate on BLM-managed lands and they provide details of a trip they took together on July 17 and 18, 2004, to the remaining 27 parcels involved in this appeal.

Assent requests dismissal of the appeal of Forest Guardians as it relates to its 12 parcels because Horning does not assert any use by him as to those parcels. In addition, Assent asserts that, even though the affidavits of Fischetti, Smith, and

Robertson, all employees and members of CNE, describe use of one or more of the 12 parcels, that use did not occur until July 19, 2004 (in the case of Fischetti) or July 17 and 18, 2004 (in the case of Smith and Robertson). Assent argues that those three affidavits do not support standing to appeal because they represent an attempt to “manufacture” standing after the issuance of the June 18, 2004, decision sought to be appealed. Assent claims that use designed solely to support standing does not constitute a legally cognizable interest in the land at issue.

Contex argues that none of the affidavits provided by employees and members of CNE relate to the three parcels (COC67371, COC67372, and COC67374) of concern to it. It requests dismissal of the appeal by CNE as to those three parcels. Contex also challenges Horning’s declaration asserting that its three parcels are comprised of scattered, mostly isolated, tracts of public land intermingled with and surrounding private lands. In support of that assertion, it provides copies of BLM Master Title Plats. (Contex Motion to Dismiss, Exs. D-1, D-2, and E.) It contends that Forest Guardians must show that Horning had legal access to the lands in question. It also questions whether Horning’s alleged use made 14 years ago can be considered anything more than a generalized concern with the matter. Accordingly, it also requests dismissal of Forest Guardians as to the three parcels.

Julander moves to dismiss the appeal as it relates to COC67396 because neither Forest Guardians nor CNE has shown standing to appeal as to that parcel. Horning’s declaration is insufficient to support standing for Forest Guardians, it claims, because that declaration makes no mention of COC67396. It argues that the Smith and Robertson affidavits do not support standing to appeal for CNE, articulating the same reasons offered by Assent.

In their statement of reasons (SOR), appellants respond to the motions to dismiss asserting that they “have expended considerable resources in terms of staff time and direct costs to research the status of the species that are directly affected by the leasing of these parcels; to produce listing petitions, ACEC [Areas of Critical Environmental Concern] nominations, comments on project proposals and management plans affecting these species, and the protest that this appeal is tied to; to work with agency staff toward conservation measures; to analyze spatial data to determine which lease will compromise these efforts; to map the parcel locations; and to travel to these areas that are important to species recovery.” (SOR at 9.) While appellants’ general concern for wildlife and the environment is unquestioned, the issue for the Board is not whether appellants have devoted considerable time and resources to address issues surrounding oil and gas leasing of the lands in question, it is whether or not appellants have shown that they are adversely affected by the decision for which they seek review. Only if they have may the Board entertain their appeal in this case.

Assent and Julander argue that the three affidavits provided by CNE (Fischetti, Smith, and Robertson), relating to the parcels of concern to them, fail to establish standing because they represent, in essence, an attempt to manufacture standing following issuance of the challenged decision because the specific use alleged in each case followed the issuance of BLM's decision.

[2] The regulations state at 43 CFR 4.410(d) that “[a] party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” As we have held, use of the land in question may constitute such a legally cognizable interest. Wyoming Outdoor Council, 153 IBLA at 382-83.

A legally cognizable interest must exist as of the time of issuance of the decision being appealed in order to have standing to appeal under 43 CFR 4.410(a). Thus, when an appellant asserts use of the land in question in support of its standing to appeal, the asserted use must have taken place on or before the date of issuance of the decision being appealed. Evidence of use taking place after that date does not support a claim of standing to appeal that decision. None of the three affidavits (Fischetti, Smith, and Robertson) supports CNE's standing to appeal the 28 parcels to which they relate, including the 12 challenged parcels for which Assent is the high bidder and the 1 for which Julander is the high bidder, because the only specific allegation of use relates to activities occurring after June 18, 2004, the date of the decision being appealed.^{3/}

Forest Guardians' evidence in support of standing to appeal the decision as it relates to the 36 parcels at issue addresses only seven parcels. Horning claims to have recreated on lands within five of the parcels on two occasions in 1990 and “on one other occasion” and on the other two parcels “for the first time” in the late 1980's. While Contex has cast some doubt on what kind of use could have been made on the lands in three of the parcels due to the isolated and scattered nature of tracts included therein, we find Horning's affidavit sufficient to establish Forest Guardian's standing to appeal as to seven parcels: COC67371 through COC67375,

^{3/} Although appellants assert in their SOR at 10 that “we have not conceded that our members and staff have not previously used the parcels in this appeal,” they have not offered any evidence of such use.

COC67346, and COC67347.^{4/} Its appeal as to all other parcels is dismissed for lack of standing.

CNE, through its four affidavits, has alleged standing to appeal the decision as it relates to 29 of the 36 parcels at issue. Only the affidavit of Kolbenschlag supports CNE's standing to appeal and that affidavit relates to only one parcel: COC67370. He alleges that he engaged in recreational activities on lands contained therein in June 2001. The other three affidavits provide evidence of use of lands with respect to 28 parcels. However, in each case the specific use occurred after the issuance of the decision in question. As stated above, such use does not support standing to appeal to this Board. CNE has, therefore, failed to substantiate its standing, under 43 CFR 4.410(a), to appeal the 28 parcels addressed in the Fischetti, Smith, and Robertson affidavits. It did not offer any evidence of use for seven other parcels. Therefore, its appeal as to those 35 parcels is dismissed. See Wyoming Outdoor Council, 153 IBLA at 384.

To summarize, Forest Guardians has established standing to appeal the June 18, 2004, decision for seven parcels: COC67371 through COC67375, COC67346, and COC67347. CNE has established standing to appeal as to one: COC67370. The appeal is dismissed as to all other parcels for the reasons set forth herein.

We now turn to the petition for stay as it relates to these eight parcels. 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 of the criteria specified in the rule. 43 CFR 4.21(b)(2); Wyoming Outdoor Council, 156 IBLA 377, 383 (2002).

Based on a preliminary review of the record and the pleadings, we conclude that appellants have failed to satisfy their burden of showing that a stay is warranted in this case. They have failed to show a likelihood of success on the merits of their appeal. Appellants charge that BLM violated both section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), and section 7 of the Endangered Species Act of 1973 (ESA), as amended,

^{4/} In their SOR, appellants state at page 6 that at the competitive sale all the parcels were leased by competitive bid except for three, one of which is involved in this appeal: COC67347. However, a subsequent noncompetitive lease issued, effective July 1, 2004, for a portion of the lands in COC67347. That lease is designated as COC67530.

16 U.S.C. § 1536 (2000), in leasing the parcels in question. In their statement of reasons, they particularize their objections to certain parcels stating that COC67370 “includes a portion of the Grand Hogback Citizens’ Wilderness Proposed Wilderness;” COC67371 through COC67374 “contain habitat for greater sage grouse, but do not include adequate protective stipulations to protect this species;” and COC67375 contains habitat for the BLM Sensitive plant Piceance bladderpod (*Lesquerella parviflora*) but does not include stipulations that are adequate to protect this species. (SOR at 3-4.) Forest Guardians makes no specific allegation regarding parcels COC67346 and COC67347.

The fact that parcel COC67370 includes a portion of the Grand Hogback Citizens’ Proposed Wilderness does not establish a violation of NEPA or ESA or preclude leasing for oil and gas. See Colorado Environmental Coalition, 162 IBLA 293, 301-02 (2004). As we stated in Colorado Environmental Coalition, 149 IBLA 154, 156 (1999), “we know of no legal mandate that requires BLM to manage those areas on the basis that they might, at some future time, be designated as protected wilderness areas.” (Citation omitted.)^{5/} The arguments presented on appeal in support of alleged violations of NEPA and ESA, as they relate to the other parcels under appeal, fail to provide a basis for concluding that there is a likelihood of success on the merits of those arguments.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Assent’s motion to dismiss is granted. Contex’s motion to dismiss is granted in part and denied in part. Julander’s motion to dismiss is granted. Standing has been established by Forest Guardians for seven parcels and by CNE for one. The appeal as it relates to all other parcels is dismissed, as described herein. The petition for stay is denied.

Bruce R. Harris
Deputy Chief Administrative Judge

^{5/} Moreover, we note that BLM’s December 19, 2003, “Notice of Competitive Lease Sale Oil and Gas,” (Notice) shows all or part of the lands within COC67370 were offered with 14 separate protective stipulations, including “CO-34 [Endangered Species Act Section 7 Consultation Stipulation] to alert lessee of potential habitat for threatened, endangered, candidate, or other special status plant or animal.” The Notice also shows that all six other parcels under appeal were offered with the CO-34 stipulation.

I concur:

H. Barry Holt
Chief Administrative Judge