

INTERIOR BOARD OF LAND APPEALS

Southern Utah Wilderness Alliance, et al.

164 IBLA 118 (November 30, 2004)

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SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

IBLA 2003-24

Decided November 30, 2004

Appeal from a decision issued by the Utah State Office, Bureau of Land Management, granting in part and denying in part a protest of the offering of parcels in a competitive oil and gas lease sale. UT-924.

Dismissed in part; reversed and remanded in part.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons

An appeal by a party who failed to file a statement of reasons or provide any explanation for the failure to file one is properly dismissed.

2. Rules of Practice: Appeals: Dismissal

An appeal from a decision denying a protest of the inclusion of parcels in an oil and gas lease sale will be dismissed as moot if the leases issued for those parcels have terminated.

3. Environmental Policy Act--Environmental Quality: Environmental Statements

When BLM has denied a protest of the inclusion of parcels in an oil and gas lease sale, asserting that it has complied with the National Environmental Policy Act by preparing a pre-leasing environmental impact statement to which its action can be tiered, but there is no pre-leasing EIS that addresses the parcels in question, the Bureau of Land Management's decision will be reversed.

APPEARANCES: Johanna H. Wald, Esq., San Francisco, California, and Stephen H. M. Bloch, Esq., Salt Lake City, Utah, for appellants; Emily Roosevelt, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On August 5, 2002, the Southern Utah Wilderness Alliance (SUWA), the Natural Resources Defense Council (NRDC), the Wilderness Society (WS), and the National Trust for Historic Preservation (NTHP) filed a protest, objecting to the listing of 28 parcels of land in an August 20, 2002, oil and gas lease sale conducted by the Utah State Office, Bureau of Land Management (BLM). By decision dated September 17, 2002, BLM withdrew two of the parcels from the lease sale and denied the protest with respect to the other 26 parcels. The protestants appealed that decision. SUWA and NRDC subsequently limited their appeal to 14 of the 26 parcels. (Statement of Reasons (SOR) at 2.)^{1/}

[1] The notice of appeal identifies the appellants as the entities that had filed the protest. However, the SOR was filed only on behalf of SUWA and NRDC, and fails to mention either WS or NTHP.^{2/} BLM has moved to dismiss the appeal in part as it relates to WS and NTHP. In support of its motion, BLM cites 43 CFR 4.412(a) which requires an appellant to file a SOR within 30 days after a notice of appeal was filed and 43 CFR 4.402(a) and 4.412(c) which provide that failure to file a SOR subjects an appeal to summary dismissal. BLM refers to cases in which the Board has dismissed appeals by parties who failed to file an SOR or offer any explanation for the failure to file one. Burton A. and Mary H. McGregor, 119 IBLA 95, 97 (1991); Colleen Garland, 111 IBLA 364, 366 (1989); Robert L. True, 101 IBLA 320, 324 (1988). SUWA and NRDC do not oppose BLM's motion. (July 24, 2003, Response, 2.) Nothing has been filed on behalf of WS or NTHP in response to the motion. Accordingly, BLM's motion to dismiss the appeal with respect to WS and NTHP is granted. The remaining appellants in this appeal are SUWA and NRDC (Appellants).

[2] BLM received no qualifying competitive bids for the 14 parcels subject to this appeal. However, it did subsequently issue noncompetitive leases for all 14 parcels. (See Motion to Partially Dismiss/Answer (Answer), Ex. 1.) In a pleading filed on July 23, 2004, BLM states that the leases for parcels UT 002, UT 003, UT 004, UT 005, UT 010, UT 013, and UT 039 have terminated, and moved to dismiss the appeal as moot with respect to these parcels. Any decision to offer the parcels in the future would be subject to appeal. Accordingly, BLM's motion to dismiss the appeal is granted with respect to parcels UT 002, UT 003, UT 004, UT 005, UT 010, UT 013, and UT 039. The appeal filed by SUWA and NRDC now embraces seven parcels: UT 007, UT 014, and UT 016, which are administered by

^{1/} The parcels identified in the SOR as remaining in this appeal are UT 002, UT 003, UT 004, UT 005, UT 007, UT 010, UT 013, UT 014, UT 016, UT 017, UT 019, UT 020, UT 021, and UT 039.

^{2/} The SOR erroneously identifies the Sierra Club as a party.

the Salt Lake Field Office, and UT 017, UT 019, UT 020, and UT 021, which are administered by the Kanab Field Office.

On appeal, Appellants raise two broad issues. First, they assert that BLM was required to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000), because the leases for the parcels did not contain a no-surface occupancy stipulation. (SOR, 9-12.) Second, Appellants assert that BLM violated section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000), by arbitrarily and capriciously determining that leasing the tracts would have no effect on sites eligible for inclusion in the National Register of Historic Places and failing to consult with the State Historic Preservation Officer or seek Native American and public input prior to the sale. (SOR, 25-31.)^{3/} We turn first to Appellants' NEPA objections.

Under section 102(2)(C) of NEPA, a Federal agency must consider the potential environmental impacts of a proposed action in an EIS when that action is deemed to be a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2000). Appellants correctly note that the listing of the parcels published by BLM did not state that the leases that would be issued to successful bidders would contain "no surface occupancy" (NSO) stipulations. They contend that NEPA "unequivocally requires an EIS for proposed non-NSO oil and gas leases as they represent a full and irretrievable commitment of resources," SOR at 10, citing, *inter alia*, Conner v. Burford, 848 F.2d 1441, 1448-51 (9th Cir. 1988). In Conner, the court held that protective stipulations for non-NSO leases "do not * * * preclude the lessees from engaging in surface disturbing activities altogether, and characterized the issue of whether the sale of non-NSO leases without an EIS violates NEPA as "whether the government's right to regulate, rather than preclude, surface-disturbing activities protects the forest environment from significant adverse effects, obviating the need for an EIS at the lease sale stage." 848 F.2d at 1448-49. The court dismissed concerns that, because of the speculative nature of oil and gas exploration, the preparation of an EIS is untenable until there is a site-specific proposal for development. 848 F.2d at 1450. Quoting from Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983), the court stated:

^{3/} Appellants also contend that BLM failed to give reasoned consideration to a proposed wilderness unit, when it failed to comply with the terms of its Wilderness Inventory and Study Procedures Handbook. (SOR, 21-24.) In a "Joint Stipulated Motion to Dismiss," filed on June 28, 2004, Appellants and BLM moved to dismiss that portion of the appeal concerning the handbook. The handbook had been rescinded pursuant to a court-approved settlement agreement in Utah v. Norton, No. 96-C-870 B (D. Utah Apr. 14, 2003). The only parcel to which this issue appeared relevant was UT 039. As noted above, BLM leased that parcel and that lease has terminated.

If . . . the Department is in fact concerned that it cannot foresee and evaluate the environmental consequences of leasing without site-specific proposals, then it may delay preparation of an EIS provided that it reserves both the authority to preclude all activities pending submission of site-specific proposals and the authority to prevent proposed activities if the environmental consequences are unacceptable. If the Department chooses not to retain the authority to preclude all surface disturbing activities, then an EIS assessing the full environmental consequences of leasing must be prepared at the point of commitment--when the leases are issued.

848 F.2d at 1451.

In its decision, BLM referred to Park County Resource Council, Inc. v. U.S. Department of Agriculture (Park County), 817 F.2d 609 (10th Cir. 1987), to support its rejection of Appellants' argument that an EIS was required in this case. At page 623 of the Park County decision, the court observed that exploration activities are conducted on only about one tenth of the leases issued and that development activities are conducted on only about one tenth of the federal leases on which exploration activities have been conducted. The court held that "developmental plans [are] not concrete enough at the leasing stage to require such an inquiry." Id.

Appellants assert that BLM improperly relies on Park County rather than Conner. In support of this assertion they cite Wyoming Outdoor Council, 156 IBLA 347, 357 (2002), appealed sub nom. Pennaco Energy, Inc. v U.S. Department of the Interior, Civ. NO. 02CV-116D (D. Wyo., 2002), rev'd by order, 266 F.Supp.2d 1323 (2003), rev'd (Board upheld), 377 F.3d 1147 (10th Cir., 2004), petition for rehearing denied by order dated Oct. 12, 2004. (SOR, 9.) BLM does not take the position that no pre-leasing EIS is required in this case. Rather, it specifically asserts that it "prepared an appropriate pre-leasing EIS" at the land use planning stage. (Answer, 10.) BLM concludes that "regardless of whether Conner v. Burford applies here * * *, BLM has complied with NEPA by preparing a pre-leasing NEPA document, namely, those EISs and their corresponding programmatic EAs [Environmental Assessments] that support the applicable land use plans." Id. at 11. In Colorado Environmental Coalition, 161 IBLA 386, 397 (2004), we rejected arguments challenging the adequacy of an EA prepared for a lease sale and found that the EA was tiered to an EIS that was prepared for the applicable Resource Management Plan (RMP) as well as a statewide oil and gas EIS.

BLM asserts that it "has implemented its statutory and regulatory mandates for oil and gas leasing in compliance with NEPA, through tiered decision making and appropriate documentation of NEPA adequacy." (Answer, 8.) However, in the case

now before us, BLM did not prepare an EA ^{4/} or an EIS for the sale. It relied on the “Interim Documentation of Land Use Plan Conformance and NEPA Adequacy” worksheets (DNAs), which had been prepared by each of the field offices to determine whether listing of the various parcels would conform to existing land use plans and whether existing EAs and EISs were adequate to support the proposed leasing of the parcels. The Salt Lake Field Office proposed three of the parcels involved in this appeal in DNA UT-020-2002-080, and the Kanab Field Office proposed the other four parcels in DNA UT-110-02-016.

A Council on Environmental Quality regulation found at 40 CFR 1508.28 provides:

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. ^{5/}

In a recent decision, we referred to Kern v. U.S. Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002), in which the Ninth Circuit Court of Appeals concluded that a NEPA document may only be tiered under the CEQ regulations to a document

^{4/} Unless an agency has established a procedure under which a proposed action is categorically excluded from the requirement to prepare an EIS or EA pursuant to 40 CFR 1507.3(b)(2), it must prepare an EA. An EA serves to “(1) [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact[;] (2) [a]id an agency’s compliance with [NEPA] when no [EIS] is necessary[; and] (3) [f]acilitate preparation of a statement when one is necessary.” 40 CFR 1508.9.

^{5/} That regulation further provides:

“Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplemental (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.”

which has itself been issued as a document under NEPA. In re Stratton Hog Timber Sale, 160 IBLA 329, 331 (2004). In Pennaco, 377 F.3d at 1162, the court noted that “DNAs, unlike EAs and FONSI, are not mentioned in the NEPA or in the regulations implementing the NEPA,”^{6/} but recognized that “agencies may use non-NEPA procedures to determine whether new NEPA documentation is required.” Thus, DNAs are not themselves documents that may be tiered to NEPA documents, but are used to determine the sufficiency of previously issued NEPA documents. See id.

As stated earlier, BLM contends that it has satisfied NEPA by having “prepared an appropriate pre-leasing EIS” at the land use planning stage. (Answer at 10.) BLM’s statement that its decision is supported by a pre-leasing EIS prepared in connection with an RMP may have been true for some of the parcels in the August 2002 sale, but the record before us does not support a conclusion that it is correct with respect to the remaining seven parcels that are subject to this appeal. No EIS cited in DNA UT-020-2002-0080 pertains to the lands in parcels UT 007, UT 014, or UT 015.^{7/} Similarly, DNA UT-110-02-016, prepared by the Kanab District, makes no reference to any EIS applicable to the land described in parcels UT 017, UT 019, UT 020, and UT 021.^{8/} All seven parcels appear to be in areas that are not governed by any RMP for which an EIS was prepared. Management framework plans (MFPs) were issued for those areas. However, no EIS or EA was prepared for those plans. We are unable to find that the DNAs or the file before us an applicable EA or EIS in the record or that the DNAs disclose any EA, EIS, or RMP that would apply to oil and gas leasing in any of the seven parcels in question.

[3] Under 43 CFR 1610.8(a)(1), an MFP may serve as the basis for decision-making until it is superseded by an RMP, provided the MFP is consistent with the principles of multiple use and sustained yield, and was developed with public participation and Government coordination. The land use planning

^{6/} The court referred to 40 CFR 1508.10 which defines the term “environmental document” as including EAs, EISs, Findings of No Significant Impact (FONSI), and notices of intent.

^{7/} The only NEPA and land use plan documentation cited in DNA UT-020-2002-0080 pertaining to these parcels is the Randolph Management Framework Plan (MFP) and a June 1975 Environmental Analysis Record (EAR) for the Salt Lake District. The May 26, 1994, EA UT-020-91-32 for a Plan Amendment for Oil and Gas Leasing under the Randolph and Park City MFPs does not appear to pertain to these parcels.

^{8/} The only NEPA and land use plan documentation cited in the Kanab DNA UT-110-02-016 consists of the April 22, 1981, Vermillion MFP, the 1976 EAR for the Oil and Gas Leasing Program in the Kanab District. The December 20, 1988, Supplemental EA UT-040-88-69 for Oil and Gas Leasing in the Cedar City District does not appear to pertain to these parcels.

regulations that BLM published approximately 23 years before preparing the DNAs in this case contemplated that the MFPs would guide BLM actions only for a “transition period” until the MFPs were superseded by RMPs. See 43 CFR 1601.8(b) (1979). When BLM revised its regulations in 1983, BLM sought to dispel concerns that existing MFPs “would be retained rather than going forward with the completion of” RMPs. 48 FR 20367 (May 5, 1983). In issuing the regulations, the Department stated: “The final rulemaking makes clear the intention of the Bureau of Land Management to complete resource management plans under its jurisdiction as rapidly as possible, on a priority basis, within fiscal and manpower constraints.” Id. BLM’s regulations make it clear that, with respect to NEPA compliance, the environmental documents prepared in connection with RMP’s and MFP’s are not functional equivalents. Unlike the approval of an MFP, the approval of an RMP is considered a major Federal action significantly affecting the quality of the human environment, (see 43 CFR 1601.0-6), and an EIS is prepared as a step in the process of preparing the RMP. In this case, the approval of the MFPs was not deemed a major federal action significantly affecting the quality of the human environment and did not result in the preparation of an EIS that would qualify as a “pre-leasing” EIS.

We recognize that in the Park County case there was no underlying EIS and the court sustained the issuance of leases on the basis of an EA, but the programmatic EA’s issued in this case do not appear to be analogous to the EA sustained by the court in Park County. In Pennaco, the Circuit Court explained its Park County decision in a way that does not favor BLM’s reliance on it with respect to this appeal, even though in Pennaco (but unlike this case), there had been an EIS prepared in connection with a RMP:

Moreover, in Park County, we relied in part on the fact that BLM issued a FONSI after having prepared an “extensive” EA that addressed the potential environmental impacts of issuing the leases and considered the option of not issuing leases. In comparison, in this case, the BLM did not prepare such an EA, did not issue a FONSI, and did not prepare any environmental analysis that considered not issuing the leases in question. Instead, the BLM determined, after filling out DNA worksheets, that previously issued NEPA documents were sufficient to satisfy the “hard look” standard.

Pennaco Energy, Inc., v. U. S. Dept. of the Interior, 377 F.3d at 1162.

Given the fact that BLM’s position on appeal is based on its erroneous view that its action is supported by pre-leasing EISs, we find it appropriate to reverse BLM’s decision and remand the case. Having found it necessary to reverse BLM’s

decision on this basis, it is not necessary for us to consider Appellants' NHPA claims or the specific objections that pertain to the individual parcels.^{2/}

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed with respect to WS and NTHP, dismissed as moot with respect to parcels UT 002, UT 003, UT 004, UT 005, UT 010, UT 013, and UT 039, and the decision appealed from is reversed and the case remanded for further action consistent with this opinion as to the seven parcels at issue.

R.W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

^{2/} As to the NHPA, see Southern Utah Wilderness Alliance, 164 IBLA 1, 21-28 (2004).