



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203



WYOMING OUTDOOR COUNCIL,
BIODIVERSITY CONSERVATION ALLIANCE

172 IBLA 289

Decided September 20, 2007



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IBLA 2004-314

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Appeal from a decision issued by the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management, dismissing a protest to a competitive oil and gas lease sale. WY-0312-046; -061; -063; -065 through -067; -076 through -080; -086; and -088 through -092.

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Evidence: Generally--Evidence: Burden of Proof--Oil and Gas Leases: Burden of Proof--Rules of Practice: Generally--Rules of Practice: Burden of Proof

When, during the pendency of an appeal, the arguments raised by an appellant have been addressed in other Board decisions, or by Federal courts, whether or not the appellant was a party thereto, or in other Board adjudication to which it was a party, and the appellant fails to show that those arguments remain viable, the Board may dispose of such arguments in summary fashion.

APPEARANCES: Bruce M. Pendery, Esq., Logan, Utah, 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 ADMINISTRATIVE JUDGE PRICE

Wyoming Outdoor Council (WOC) and Biodiversity Conservation Alliance (BCA) have appealed a decision issued by the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), denying appellants' protest against the leasing of certain parcels in the competitive oil and gas

lease sale held by the Wyoming State Office on December 2, 2003.¹ In their protest, appellants argued that the lease sale violated the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (2000), because BLM failed to consult with the U.S. Fish and Wildlife Service (FWS) regarding potential effects on certain listed “Platte River species”² before offering the parcels for lease sale, and violated both the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (2000), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (2000), because BLM failed to adequately analyze the environmental impacts of coalbed methane (CBM) development, an activity that, according to appellants, does not conform to applicable land use planning decisions.³ In his 20-page decision dismissing WOC’s and BCA’s protest, the Deputy State Director responded to each allegation at length.

This Board recently considered virtually the same ESA, NEPA and FLPMA arguments and BLM’s responses to those arguments in another appeal filed by WOC and BCA in *Wyoming Outdoor Council*, IBLA 2004-84. In an order dated April 18, 2007, we affirmed BLM’s decision to offer parcels for sale. We examined the evidence submitted by the parties and took official notice of related records and documents pertaining to BLM’s compliance with the ESA as it related to the Platte River species and oil and gas lease sales. We concluded that the

¹ Appellants’ protest and appeal initially pertained to 50 parcels. On Aug. 17, 2004, appellants eliminated a number of parcels from their appeal, in turn eliminating certain adversely affected parties. The parcels that remain at issue are WY-0312-046; -061; -063; -065 through -067; -076 through -080; -086; and -088 through -092. The parties who remain are Carpenter & Sons, Inc; Donald B. Anderson, Ltd.; Double Eagle Petroleum Co.; Hanson & Strahn, Inc.; Baseline Minerals, Inc.; Marshall & Winston, Inc.; Noonan Land Services, Inc.; Craig Settle; and Richardson Production Co.

² Appellants use the phrase “Platte River species” in this case specifically to refer to the endangered whooping crane, interior least tern, and pallid sturgeon, as well as the threatened piping plover, and designated critical habitat for the whooping crane in central Nebraska. However, there are other listed species that depend on the Platte River system.

³ Appellants refer to the challenged parcels as the “ESA Parcels” and the “CBM Parcels.” The “ESA Parcels” are Parcels 46, 63, 78 through 80, and 92. The lands contained in the ESA Parcels are administered by the Casper (Parcel 46), Rawlins (Parcel 63), and Lander (Parcels 78 through 80, and 92) Field Offices. The “CBM Parcels” are Parcels 61, 65 through 67, 76 and 77, and 86, in Carbon and Sweetwater Counties, and are within the jurisdiction of the Rawlins Field Office. No parcel presents both ESA and CBM issues.

record of collaborative activity on the part of the Secretary, the Governors of Wyoming, Colorado, and Nebraska, BLM, and FWS forcefully suggests that an allegation that BLM has not consulted regarding the Platte River species is not sustainable, and on that basis we find that appellants have failed to demonstrate that BLM failed to consult with FWS so as to require consultation before the October 2003 lease sale could be held.

Apr. 18, 2007, Order at 17-18.

With respect to CBM and the assertion that CBM generates unique environmental impacts that were never considered in the environmental impact statement (EIS) prepared to support the Great Divide Resource Management Plan (RMP) and the conclusion that CBM development does not conform to the RMP, we noted that we had addressed this line of argument in a series of cases involving WOC and/or BCA in which we affirmed BLM's decision to lease. In the April 18 Order, we again stated:

As a fluid mineral, CBM is a subset of oil and gas and, as such, is subject to the land use planning decisions applicable to such minerals, regardless of whether it is identified by name or not. *National Wildlife Federation*, 169 IBLA 146, 153 (2006). Therefore, a decision to lease lands for their CBM resource is a conforming use. Accordingly, appellants' contention that CBM extraction and development presents impacts "beyond those resulting from conventional oil and gas activity, hence rendering them 'unique' impacts or impacts never addressed in the EIS," is properly addressed under NEPA, not FLPMA. 169 IBLA at 154.

Id. at 19.

Once the question of the impacts associated with CBM development was couched in NEPA terms, we reiterated the applicable standard of proof:

In *Wyoming Outdoor Council*, 170 IBLA 130, 154-55 (2006) (A.J. Price concurring specially), we clarified that such an argument requires an appellant to provide some objective indication that a lease parcel potentially contains CBM, and if it does, to demonstrate with objective evidence that the nature and extent of CBM-related impacts are different from or in magnitude exceed the impacts of conventional oil and gas leasing projected for, and analyzed in, the RMP/EIS. *Id.*

What is called for is more than a catalogue of all the ways that CBM-related impacts could be different from or exceed the oil and gas impacts analyzed in an RMP/EIS; instead, an appellant must be able to articulate reasons, supported by some objective indication or evidence, why the particular parcel presents conditions that favor the kinds of impacts alleged. The Board will not simply assume a “worst-case” view of CBM activity without considering the particular facts and circumstances of the individual parcel. See *Wyoming Outdoor Council*, 164 IBLA 84, 104 (2004); *Southern Utah Wilderness Alliance*, 166 IBLA at 289.

Id. at 19-20.

We noted that BLM would be issuing the Rawlins RMP to replace the Great Divide RMP and further stated:

With respect to fluid minerals, BLM acknowledged that development was approaching the limits of the reasonably foreseeable development (RFD) scenarios on which the RMP/EIS analysis was predicated. (Rawlins draft EIS at 1-7.) [Footnote omitted.] The current status of an RFD scenario is relevant to determining the continuing validity of planning assumptions and analysis, of course, but it appears that in October 2003 the modest CBM activity in the Rawlins Field Office was within the fluid minerals RFD for the Great Divide Resource Area. *Wyoming Outdoor Council*, 170 IBLA at 159.

Id. at 21.

With regard to appellants’ assertion that the issuance of leases without stipulations limiting CBM development was “tantamount to approving full-scale CBM development in the future,” we observed that, “[a]part from the difficulty of fairly hypothesizing a ‘full-scale development’ scenario in the abstract and the matter of whether the October 2003 lease sale exceeds the RFD for oil and gas leasing in the Rawlins Resource Area,” appellants had neither acknowledged nor addressed “the effect of project design features and best management practices or compliance with relevant Federal and State law on the nature and magnitude of potential environmental effects.” *Id.* at 21-22. In short, we clearly identified the specific instances in which appellants’ arguments and proof had failed, concluded they had not carried their burden and, accordingly, affirmed BLM’s decision authorizing the October 2003 lease sale. After we decided *Wyoming Outdoor Council*, IBLA 2004-84, we postponed action on the instant appeal to afford appellants an opportunity to file

supplemental briefing to address the questions and conclusions set forth in the April 18 Order. They filed nothing further.

Recently, in *Biodiversity Conservation Alliance*, 171 IBLA 313, 319 (2007), the Board explicitly stated that the decision in *Wyoming Outdoor Council*, 170 IBLA 130, had marked the end of arguments predicated on a series of Board decisions involving WOC, BCA, and others that precipitated litigation in Federal court, or were issued after the Board had been reversed by a Federal District Court and before the District Court's decision had been reversed by the 10th Circuit.⁴ The Board noted that appellants in that case, like those in this and other appeals before this Board, continue to "seek a ruling from the Board regarding the state of the law on the need for BLM to issue further NEPA or FLPMA documents regarding CBM development." *Biodiversity Conservation Alliance*, 171 IBLA at 320. We noted examples of post-*Pennaco* era decisions that had fully addressed and disposed of appellants' contentions regarding CBM development and cautioned that they

should give appellants guidance as to the burden of showing a violation of NEPA in future cases. It is simply not enough to continue to pull at the threads of the *WOC I-IV* and *Pennaco I-II* decisions in an effort to unravel subsequent Board and Federal court precedent affirming that the question of whether additional environmental analysis is required in any case depends on whether it can be shown that existing NEPA documents failed to analyze the likely effects of the action at hand. Appellants' assertions that an "RMP level" document, with associated NEPA analysis, is required before BLM can issue a lease which may be subject to CBM development are not enough for them to prevail.

Biodiversity Conservation Alliance, 171 IBLA at 322.

In *National Wildlife Federation*, 170 IBLA 240 (2006), and *National Wildlife Federation*, 169 IBLA 146 (2006), *National Wildlife Federation*, WOC, and BCA

⁴ Those decisions are *Wyoming Outdoor Council (WOC I)*, 156 IBLA 347 (2002); *Wyoming Outdoor Council (On Reconsideration) (WOC II)*, 157 IBLA 259 (2002); *Wyoming Outdoor Council (WOC III)*, 158 IBLA 384 (2004); *Wyoming Outdoor Council (WOC IV)*, 160 IBLA 387 (2004); *Pennaco Energy, Inc. v. U.S. Department of the Interior (Pennaco I)*, 266 F. Supp.2d 1323 (D.Wyo. 2003); and *Pennaco Energy v. U.S. Department of the Interior (Pennaco II)*, 377 F.3d 1147 (10th Cir. 2004). BCA joined in the appeal of *WOC III*.

challenged BLM decisions to authorize exploratory pods in the Atlantic Rim CBM Project Area. In 169 IBLA 146, the Board analyzed appellants' arguments at length, including the FLPMA and NEPA arguments repeated here, and affirmed BLM's decision. In the second appeal, 170 IBLA 240, we pointed out that National Wildlife Federation, WOC, and BCA were advancing the same arguments that had been considered and rejected in the earlier appeal and dispensed with an extended recitation of their arguments and our rulings thereon:

We could continue in this vein, but we think it unnecessary to do so because our review of the EAs convinces us that BLM has taken the requisite hard look at the impacts of these Pod activities. If there are any particular facts or circumstances about the Brown Cow, Red Rim, or Jolly Roger projects that compel different reasoning or a different outcome than that reached in *National Wildlife Federation*, NWF has not filed supplemental briefing to address the impact of that decision. It did not do so, presumably because there are no such distinguishing facts or circumstances regarding these Pod activities. We therefore decline to shoulder the burden of a more exhaustive discussion of these EAs when, with one possible exception, NWF has not shown why the arguments expressly considered and rejected in the previous decision remain viable in these cases.

National Wildlife Federation, 170 IBLA at 248-49. See also *Biodiversity Conservation Alliance*, 171 IBLA at 322.

[1] While we understand and appreciate appellants' commitment to their cause and view, they cannot continue to raise the same unsuccessful arguments as if the Board and Federal courts had never considered and ruled on them and expect to prevail. More than once, we have warned that "the right of review provided by this Board is not intended to be a circular promenade in which the parties simply repeat their steps." *Thelbert Watts v. United States*, 148 IBLA 213, 217 (1999); *In Re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 362 (1991); accord *Shell Offshore, Inc.*, 116 IBLA 246, 250 (1990). When, during the pendency of an appeal, the arguments raised by an appellant have been addressed in other Board decisions, or by Federal courts, whether or not the appellant was a party thereto, or in other Board adjudication to which it was a party, and the appellant fails to show that those arguments remain viable, the Board may dispose of such arguments in summary fashion.

As appellants' arguments have been decided in recent Board and judicial decisions that post-date the *WOC I-IV* and *Pennaco I-II* era (to which they have both

been parties), and as they have failed to demonstrate why the contentions expressly considered and rejected in our April 18, 2007, dispositive order remain viable in this appeal, BLM's decision is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge