

UTAH CHAPTER SIERRA CLUB

IBLA 90-277

Decided April 20, 1990

Appeal from a decision of the Area Manager, San Juan Resource Area, Bureau of Land Management, approving a Record of Decision and Finding of No Significant Impact prepared for six applications for permits to drill in San Juan County, Utah. U-51619, et al.

Appeal dismissed; remanded to State Director.

1. Administrative Practice--Appeals: Generally--Appeals: Jurisdiction--Board of Land Appeals--Bureau of Land Management--Minerals Management Service: Generally-- Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within ten business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

2. Appeals: Generally--Appeals: Jurisdiction--Board of Land Appeals--Bureau of Land Management--Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Drilling

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR Part 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

APPEARANCES: Christine Osborne, Public Lands Resource Specialist, for Utah Chapter Sierra Club.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On December 21, 1989, Ampolex (Texas), Inc., filed six applications for permits to drill (APD's) wildcat oil wells in the White Canyon area of San Juan County, Utah. The District Manager, Moab District, Bureau of Land Management (BLM), informed the applicant by letter dated December 28, 1989, that it must submit a self-certification of the operator for each proposed well to complete the applications. The applicant filed the required forms on January 4, 1990.

A Confirmation/Report of Telephone Conversation in the file dated January 11, 1990, states: "DM [District Manager] asked for an EA [environmental assessment] & public review period. APD approval will be delayed until after review period. Should be sometime in early Feb. '90."

Accordingly, on January 11, 1990, the Area Manager, San Juan Resource Area, BLM, ordered publication of public notice of the applications in the San Juan Record and in the Salt Lake Tribune. The requisitions specified publication "in the January 24, 1990 edition." The notice read:

NOTICE OF INTENT TO DRILL
WILDCAT OIL/GAS WELLS

Ampolex (Texas), Inc., has applied to the Bureau of Land Management to drill six (6) wildcat oil/gas wells. The locations are Sec. 5 & 9, T. 34 S., R. 15 E., Sec. 12 & 24, T. 34 S., R. 14 E., Sec. 26, T. 35 S., R. 15 E., and Sec. 12, T. 36 S., R. 15 E., SLB&M [Salt Lake Base & Meridian].

"Comments can be sent to Area Manager, Bureau of Land Management, San Juan Resource Area Office, Box 7, Monticello, Utah 84535, until February 9, 1990."

Signed 1/12/90

s/ Edward R. Scherick, Area Manager

On Friday, February 9, 1990, Robert D. Larsen, the BLM Range Conservationist who prepared the EA for all resources, signed the EA cover sheet for EA Log No. UT-069-90-14. The EA addressed "only the exploration drilling operations that are proposed in the [six] APD's" (EA at 1; emphasis in original).

On Monday, February 12, 1990, Edward R. Scherick, BLM Area Manager, signed a Record of Decision and Finding of No Significant Impact (FONSI). The decision "[c]oncur[red] with the approval of the Applications for Permit to Drill (APD)," and incorporated by reference "the attached stipulations * * * developed to mitigate adverse environmental impacts which may result from the action permitted by this decision." Under "FONSI" was the

statement that it "[d]oes not apply to categorical exclusions," followed by the statement: "Based on the analysis of potential environmental impacts contained in the accompanying environmental assessment, referenced above, I have determined that impacts are not expected to be significant. Therefore an environmental impact statement is not required."

On February 13, 1990, the APD's were checked and prepared for signature. On February 15, 1990, they were signed by the BLM Assistant District Manager, Minerals Division, in Moab, and mailed to the applicant.

On February 22, 1990, the Utah Chapter Sierra Club filed a notice of appeal of the February 12, 1990, decision with the BLM Area Manager "in accordance with the provisions contained in 43 CFR section [sic] 4." Appellant stated in its notice of appeal that its filing "shall stay the captioned action until the Interior Board of Land Appeals renders a decision," in accordance with 43 CFR 4.21(a).

Appellant filed a statement of reasons and a request for expedited review with the Board on March 23, 1990. Appellant complains:

The findings of the EA in either draft or final form were not provided to the appellants until after a FONSI was decided. Upon inspection, the Utah Chapter found that the EA was inadequate in both its scope and analysis and failed to meet criteria required by NEPA regulations. It is on the (a) violation and evasion of public comment procedure outlined in 40 CFR 1500.1(b) and 40 CFR 1506.6 and the (b) failure of the environmental assessment to properly identify and examine environmental impacts of the proposed project that the Utah Chapter appeals this decision.

(Statement of Reasons at 1).

We have granted expedited review because the appeal to the Board is premature, as explained below.

BLM did not file the case record with the Board until April 6, 1990, although the notice of appeal had been filed on February 22, 1990. In Harriett B. Ravenscroft, 105 IBLA 324, 330 (1988), Administrative Judge Hughes stated in his concurring opinion:

The filing of a notice of appeal removes BLM's authority to take further formal action on the matter under appeal and vests exclusive authority over the matter with the Board of Land Appeals, and BLM's authority is not restored until the Board takes action disposing of the appeal. AA Minerals Corp., 27 IBLA 1 (1976). In keeping with the principle that BLM's jurisdiction over the case is transferred to the Board of Land Appeals when the notice of appeal is filed, BLM is expected to promptly forward the complete, original case file to [the] Board within 5 days of receipt of the notice of appeal, in order to allow the Board to exercise its authority over the matter. BLM has no discretion as to whether the case file should be submitted to the Board for review. A case

file may not be withheld while BLM reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons.

We note that, after the decision in Ravenscroft, BLM revised the applicable portion of the BLM Manual to read:

If an appeal is filed against a Bureau decision, the office in which the appeal is filed (usually the District Office) will forward the official case file to the Board within 10 business days of receipt of the appeal, using Bureau Form 1842-1 as a cover memorandum. The official case file must be reviewed for completeness, and whether associated reports, files, etc., (e.g., the resource management plan or the master appraisal) are included or otherwise appropriately referenced. It is recommended that a dummy file be created and retained for interim use and as assistance to the field solicitor. All files are sent certified mail, return receipt requested to ensure delivery and notify the sender of the delivery date. The Board will docket the case, inform the State Office of the docket number, and then adjudicate the case. The Board is the sole determinant as to whether or not it will hear an appeal. See James C. Mackey, [96 IBLA 356, 94 I.D. 132 (1987)] and 43 CFR 4.400-4.414. Extra care must be taken in the processing and handling of the official record concerning the appeal, as disciplinary action will be taken against Departmental employees who tamper with the official record. See 43 CFR Subpart B § 4.27.

BLM Manual 1841.15 A., Release 1-1571, December 4, 1989.

[1] Although these procedures technically apply to BLM only, we commend them to all agencies whose decisions are subject to appeal to the Board. In light of the recommendation to prepare a dummy file, we have no objection to ten business days rather than the five days stated in Ravenscroft. However, it is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board -- currently the Bureau of Land Management, the Minerals Management Service, and the Office of Surface Mining Reclamation and Enforcement -- forward the complete, original administrative record to the Board within ten business days of receipt of a notice of appeal. See Save Our Cumberland Mountains, Inc., 108 IBLA 70, 84-86, 96 I.D. 139, 147-48 (1989); Dugan Production Corp., 103 IBLA 362 (1988). If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter. Melvin N. Barry, 97 IBLA 359, 361 (1987).

When an authorized officer receives an application for a permit to drill on Federal lands, he is to post specified information for public inspection for at least 30 days before he may act to approve the application. 43 CFR 3162.3-1(g). The authorized officer is to consult with the appropriate Federal surface management agency and with other interested

parties as appropriate and shall, not later than 5 working days after the 30-day notice period, either approve the application, return the application with an explanation of the reasons for disapproval, or advise the applicant why final action will be delayed and when final action may be expected. 43 CFR 3162.3-1(h). Before approving an APD, the authorized officer "shall prepare an environmental record of review or an environmental assessment, as appropriate. These environmental documents will be used in determining whether or not an environmental impact statement is required and in determining any appropriate terms and conditions of approval of the submitted plan." 43 CFR 3162.5-1(a).

[2] In San Juan Citizens Alliance, 104 IBLA 288 (1988), we pointed out that 43 CFR 3165.3 and 3165.4, which used to provide for either a technical and procedural review by the State Director or an appeal to this Board from instructions, orders, or decisions under 43 CFR Part 3160 (see 43 CFR 3165.3, 3165.4 (1986)), were amended effective April 21, 1987, and now provide that an adversely affected party wishing to contest "a notice of violation or assessment or an instruction, order, or decision of the authorized officer issued under the regulations in this part" may first request administrative review by the State Director, see 43 CFR 3165.3(b). See Han-San, Inc., 113 IBLA 361 (1990). If adversely affected by the State Director's decision, the party may then appeal to the Interior Board of Land Appeals, see 43 CFR 3165.4(a).

San Juan involved a decision approving an application for a permit to drill rather than, as here, a Record of Decision and FONSI based on an environmental assessment that was prepared in response to the filing of an APD. Because an environmental record of review or an environmental assessment is a prerequisite to approval of an APD under 43 CFR 3162.5-1(a), however, we believe that a decision based on such an environmental review should, like a decision to approve the APD, first be subject to administrative review by a State Director in accordance with 43 CFR 3165.3(b). See Colorado Environmental Coalition, 108 IBLA 10, 13 (1989). Accordingly, we will treat appellant's notice of appeal as a request for administrative review and remand the matter to the Utah State Director, BLM. San Juan Citizens Alliance, supra.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed, and the matter is remanded to the State Director for administrative review in accordance with 43 CFR 3165.3(b).

Will A. Irwin
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge