

UTAH CHAPTER OF THE SIERRA CLUB
SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 91-330

Decided October 4, 1991

Appeal from a decision of the Deputy State Director, Utah State Office, Bureau of Land Management, affirming a Record of Decision and Finding of No Significant Impact issued by the Area Manager, San Juan Resource Area, approving six Applications for Permits to Drill. U-51619 et al.

BLM decision suspended pursuant to 43 CFR 4.21(a) pending decision on appeal.

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

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Animal Protection Institute of America, 79 IBLA 94, 91 I.D. 115 (1984); Utah Wilderness Association, 91 IBLA 124 (1986); Southern Utah Wilderness Alliance, 100 IBLA 63 (1987), overruled to the extent inconsistent.

APPEARANCES: Scott Groene, Esq., Moab, Utah, for Southern Utah Wilderness Alliance; Christine Osborne, Salt Lake City, Utah, for Utah Chapter of The Sierra Club; A. Scott Loveless, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Southern Utah Wilderness Alliance and the Utah Chapter of the Sierra Club have appealed the May 23, 1991, decision of the Deputy State Director, Mineral Resources, Utah State Office, Bureau of Land Management (BLM), affirming the April 4, 1991, Decision Record and Finding of No Significant Impact issued by the Area Manager, San Juan Resource Area, approving six Applications for Permits to Drill (APD's) exploratory wells in the White Canyon area of San Juan County, Utah.

On June 6, 1991, appellants filed a request for a stay of the April 4, 1991, decision. 1/ In their request for a stay appellants argue that a stay of BLM's decision pending our review "will protect the status quo." Appellants continue:

This is not a matter where an oil and gas operator requests the suspension of a compliance order so that a company can proceed with drilling activity. No ground disturbance will occur if

1/ In their notice of appeal of the February 1990 decision of the San Juan Resource Area Manager appellants stated 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). Utah Chapter Sierra Club, 114 IBLA 172, 174 (1990).

this decision is suspended. None of the resources which the BLM is mandated by FLPMA to protect, such as watershed, wildlife and fish, natural scenic, scientific and historical values[,] will be damaged if this decision is suspended. The BLM's ability to manage these lands for oil and gas development will not be affected should the San Juan Resource Area Manager's decision upon review ultimately be found to be in accordance with law. There will be no irretrievable commitment of resources should the decision be suspended.

Rather, Appellants seek a delay in the [BLM's] ability to implement a decision which will damage natural resources. This delay merely preserves the status quo for a modest amount of time, until the matter can be heard more fully by this Board.

Suspending this decision will not be detrimental to the interest of BLM. Rather, suspension of the decision will ensure that interests the agency is required to protect under the FLPMA and the NEPA will be protected until this Board has made a determination on Appellants' appeal.

(Request for Expedited Review and Stay at 4).

In our August 12, 1991, order granting BLM's request for an extension of time to file its answer, we noted that 43 CFR 3165.4(c) provides that the filing of an appeal "shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the Interior Board of Land Appeals determines that suspension of the order or decision will not be detrimental to the interests of the lessor." We directed BLM to include in its answer a response to appellants' request for a stay, including any criteria BLM believes should be considered in determining whether granting a stay would be detrimental to the interests of the lessor. Cf. Marathon Oil Co., 90 IBLA 236, 244-47, 93 I.D. 6, 11-13 (1986).

BLM filed its answer on August 30, 1991, and Errata on September 3, 1991. It included a response to appellants' request for a stay. It argues:

In Utah Chapter Sierra Club, 114 IBLA 172, issued April 20, 1990, the Board held that the State Director review provided for in 43 C.F.R. § 3165.3(b) is mandatory before an appeal may be taken to the Board under 43 C.F.R. § 3165.4(a), whereas BLM had previously considered the two routes as alternative in nature, as the previous iteration of this regulation was under the former 43 C.F.R. §§ 3165.3 and 3165.4. The regulations at 43 C.F.R. § 3165.4(c) only deal with the effect of an appeal on compliance requirements, i.e. orders by the authorized officer enforcing or specifying conditions that must be met by an operator, etc. The present appeal is not an appeal of compliance requirements, and the BLM accordingly submits that § 3165.4(c) is not the appropriate authority under which to consider whether the proposed action should be stayed. Should the Board deem otherwise, the BLM submits the its (lessor's) interests are fully protected by the stipulations in the leases and APDs and that no stay is needed. 4/

* * * * *

BLM therefore submits that the appropriate criteria for considering a stay would be the same as for a preliminary injunction in Federal District Court: likelihood of success on the merits, relative harm to the parties, and public interest issues. * * *

These criteria would allow for an immediate summary review of the NEPA compliance record, the likely effects on both parties and likely effects on the public interest. BLM suggests that the Board adopt this standard now, by decision, and then implement it more formally by promulgating regulations.

4/ The language of the regulation emphasize[s] that § 3165.4(c) was written in anticipation of a Lessee appealing the propriety of given lease stipulations. It is illogical for a third party to cite this regulation as authority to stay action, purporting to protect the interests of its opponent in the appeal. It does make sense for BLM to seek a stay, in a challenge by a lessee to lease stipulations, because the stipulations were presumably imposed to protect other of the resources BLM is obligated to protect. [2/]

(Answer at 22).

2/ Of course, if the lessee or operator appeals the denial of an APD or the imposition of conditions on an approval he believes are too stringent, 43 CFR 4.21(a) does not mean he may proceed to drill or to ignore the conditions; rather, the APD remains pending until a decision on the denial or conditions is rendered. BLM would therefore not be required to seek a stay in these circumstances, as it suggests.

On September 20, 1991, appellants filed a reply, stating in part:

Appellants do agree with the BLM it is illogical for the provisions of 43 CFR 3165.4(c) to be applied to Appellants' appeal at all. As BLM points out, that regulation appears to apply only where compliance orders are challenged by a lessee. The stay provisions of 43 CFR 4.21(a) should accordingly control the effect of decisions to approve APDs.

(Reply at 13).

The parties' pleadings have caused us to reexamine the regulations dealing with appeals of orders and decisions under the oil and gas operations regulations and our decisions applying those provisions.

The Oil and Gas Operating Regulations Applicable to Lands of the United States and to All Restricted Tribal and Allotted Indian Land (Except Osage Indian Reservation), effective November 1, 1936, authorized a supervisor of the Geological Survey (GS)

to require compliance with lease terms, with these regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil and gas with minimum waste.

56 I.D. 415, 416-17 (1936). A supervisor was authorized to "[r]equire, by written notice or otherwise, immediate suspension of any operation or practice contrary to the requirements of these regulations or to the writ-ten orders of the supervisor," and to "[r]eceive and transmit promptly for review all appeals from his written orders, together with his report."

Section 1(k), (l), id. at 418-19. Section 6 gave the lessee a right of appeal to the Secretary "after complying with any order intended to carry out the terms and spirit of these regulations." Id. at 436 (emphasis added).

The 1936 regulations were superseded by the oil and gas operating regulations adopted effective June 1, 1942. Those regulations also authorized a GS supervisor "to require compliance with lease terms, with the regulations in this part, and with all other applicable regulations," 30 CFR 221.4 (1949), as well as the responsibility to "enforce these oil and gas operating regulations, and his orders issued pursuant thereto by action provided for in Secs. [30 CFR] 221.53 and 221.54." 30 CFR 221.16 (1949). 30 CFR 221.66 (1949) contained the original language from which the current regulation -- 43 CFR 3165.4(c) -- was derived:

Appeals. An appeal from any order issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. Compliance with any such order shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, or the Secretary (dependent upon the officer with whom the appeal is pending), and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. [Emphasis supplied.]

In 1973, the Department added 30 CFR Part 290 consolidating procedures for appeals to the Director of GS. GS explained:

The former regulations in title 30 provided for appeals to the Director, Geological Survey, and the Commissioner of Indian Affairs only from decisions or orders of Oil and Gas Supervisors

and Mining Supervisors. New part 290 expands the right of appeal also to include appeals from decisions or orders which may be issued by other officials of the Conservation Division under the revised organization of that Division. * * * A change effected by part 290 is to enlarge the time for taking an appeal from an order or decision of an Oil and Gas Supervisor from 20 days to 30 days from receipt of the order or decision. This change is made to obtain uniformity with other appeals procedures in the Department applicable to public lands cases generally.

38 FR 10000 (Apr. 23, 1973). "Order" in 30 CFR 221.66 was expanded to "orders or decisions" in order to make this rule consistent with the language of the regulations providing for appeals from decisions or orders of mining supervisors. See, e.g., 25 CFR 177.11 (1972), 43 CFR 23.12(a) (1972). Before this change in 1973, the only mention of a "decision" by a supervisor in the oil and gas operating regulations referred to decisions "presented for reconsideration pursuant to § 221.66." 30 CFR 221.17 (1972). The language of § 221.66 about "regulations in this part" and "compliance * * * shall not be suspended" remained unchanged.

38 FR 10002 (Apr. 23, 1973). As a result of the 1973 amendment, 30 CFR 221.66 provided:

Orders or decisions issued under the regulations in this part may be appealed from as provided in part 290 of this chapter. Compliance with any such order or decision shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director or the Board of Land Appeals (depending upon the official before whom the appeal is pending) and then only upon a determination that such suspension will not be detrimental to the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

Under the 1942 regulations, a lessee intending to commence drilling gave notice in advance and could not begin before approval by the GS Supervisor. 30 CFR 221.58 (1972). The notice was to be provided "in ample time

for proper consideration and action" by submitting a Form 9-331A or 9-331B in triplicate; in an emergency it could be given "orally or by wire." Id. If approval was obtained in an emergency, the "transaction [was to] be confirmed in writing as a matter of record." Id. Under normal circumstances, approval was granted when the Supervisor returned a signed copy of Form 9-331A to the lessee; no order or decision was issued.

In 1975, as a result of the enactment of the National Environmental Policy Act of 1969, GS proposed NTL-6, Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases, "to formalize its procedures for approval of all applications for permits to conduct operational or construction activities on onshore Federal and Indian oil and gas leases." 40 FR 52637 (Nov. 11, 1975). Before adopting NTL-6, GS added provisions "to guarantee U.S. Geological Survey action prior to lease expiration or within 30 days, whichever occurs first, or otherwise to advise lessees and operators concerning the delay." 41 FR 18116 (Apr. 30, 1976). The NTL established the requirement for filing an APD on Form 9-331C, with specified information, for approval by the GS District Engineer prior to the commencement of drilling operations. Approval was granted when the lessee or operator was provided an "approved copy of the permit and surface use plan." 41 FR 18117 (Apr. 30, 1976). No order or decision was issued.

In 1981, GS undertook to "revise and modernize the regulations in 30 CFR Part 221." 46 FR 56564 (Nov. 17, 1981). As adopted in 1982, the revised Part 221 included the NTL-6 requirement for an APD, modified what the APD must include, and required initiation of the permitting process

"at least 30 days before commencement of operations is anticipated." 30 CFR 221.23(d), 47 FR 47769 (Oct. 27, 1982). In response to the suggestion that "all operations be approved or rejected within a certain time frame," 46 FR 56564 (Nov. 17, 1981), GS committed to approve the application (with or without modifications or stipulations), return it with a statement of the reasons for disapproval, or advise the operator why a decision would be delayed beyond 30 days and when it could be expected. 30 CFR 221.23(f), 47 FR 47769 (Oct. 27, 1982). Reasons for delay and expected date of decision were to be in writing. Id. "Orders and notices" were employed to provide "other information" and implement the regulations. 30 CFR 221.2 (definition of "Notice to Lessees and Operators"); 30 CFR 221.23(e), 47 FR 47769 (Oct. 27, 1982); 47 FR 47762 ("Details concerning the actual items which must be provided in the [drilling] plan are included in applicable orders and notices."); 46 FR 56565 (Nov. 17, 1981). In October 1983 BLM adopted Onshore Oil and Gas Order No. 1, "Approval of Operations on Onshore Federal and Indian Oil and Gas Leases," a revision of NTL-6 designed "to redefine and to describe more clearly the requirements for filing and processing applications for permits to drill (APD)." 48 FR 48916 (Oct. 21, 1983).

In the 1982 revision of the regulations, the "orders or decisions" language of the appeals provision was expanded to "[i]nstructions, orders or decisions," thus including a reference to the Supervisor's authority to issue "written orders or instructions" in the event of an act of noncompliance. See 30 CFR 221.50, 47 FR 47771 (Oct. 27, 1982). The "regulations

in this part" language remained unchanged. The language about compliance was revised to read: "An appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken * * *." 30 CFR 221.73, 47 FR 47773, (Oct. 27, 1982), redesignated as 43 CFR 3165.4, 48 FR 36586 (Aug. 12, 1983). The comment on this revision stated: "Only one comment expressed concern that the filing of an appeal does not automatically stop the action being appealed. The section * * * does provide for this concern, and no change has been made." 47 FR 47765 (Oct. 27, 1982).

The 1982 revisions also added a "technical and procedural review" in response to suggestions that 30 CFR "§§ 221.17 and 221.61 [sic] [be modified] "to provide for the prompt correction of erroneous or unreasonable decisions." 46 FR 56565 (Nov. 17, 1981). GS explained:

If a lessee or operator exercises this review option, a decision will be given by the appropriate GS official within 10 working days. This procedure is not considered to be an appeal and will not affect the lessee or operator's rights to formally appeal to the Director. It will provide the lessee a method of obtaining review and a prompt decision from any decisions or requirements he considered incorrect pertaining to technical and procedural requirements. Legal issues will not be addressed by this review.

Id. As adopted, this new regulation provided that a request for technical and procedural review also would not result in a suspension of the instruction or order unless the reviewing official so determined. 30 CFR 221.72, 47 FR 47773 (Oct. 27, 1982), redesignated as 43 CFR 3165.3, 48 FR 36586 (Aug. 12, 1983). When this regulation was redesignated in 1983 it provided

that the technical and procedural review would be conducted by the appropriate BLM State Director. Id.

Our first decision after this new regulatory procedure was adopted was Animal Protection Institute of America, 79 IBLA 94, 91 I.D. 115 (1984). In that decision we declined to grant BLM's motion to dismiss an appeal from its decision giving overall approval to the drilling of 16 oil and gas wells and the construction of approximately 18 miles of associated roads and pipelines in the Little Book Cliffs Wilderness Study Area. The basis for this holding was that review of the cumulative effects of the proposed wells would be difficult if at some later date we were to attempt to assess the cumulative effects in the context of appeals from several grants of separate APD's. In a footnote we stated:

Decisions of BLM concerning rights-of-way and applications for permits to drill are not stayed pending appeal. See 43 CFR 2804.1(b); 43 CFR 3165.4, 48 FR 36586 (Aug. 12, 1983) (formerly 30 CFR 221.66). Such decisions are final for purposes of the Administrative Procedure Act and, thus, subject to direct judicial review. See 43 CFR 4.21(b).

79 IBLA at 102 n.3, 91 I.D. at 120 n.3. We noted in our decision that BLM sought to have us place the decision on appeal in full force and effect if we did not grant its motion to dismiss. 79 IBLA at 95, 91 I.D. at 116.

Utah Wilderness Association, 91 IBLA 124 (1986), appears to be the first case in which a party appealing a BLM decision to approve an APD filed a motion to stay the decision pending the outcome on appeal. We said:

Appellant contends that * * * operations under [the] permits should be suspended pending a determination whether approval of the APD's was proper. 4/

4/ On May 21, 1984, appellant specifically filed a motion to stay the effect of the BLM decisions approving the APD's involved, either under 43 CFR 4.21(a) or 43 CFR 3165.4. The regulation at 43 CFR 4.21(a) provides that a decision will be stayed during the time an adversely affected person may appeal and during the pendency of any appeal except where relevant regulations provide otherwise. However, 43 CFR 3165.4 provides that appeals from "[i]nstructions, orders or decisions issued under the regulations in [43 CFR Part 3160 (Onshore Oil and Gas Operations)] * * * shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken," unless the Board invokes a suspension. In Animal Protection Institute of America, 79 IBLA 94, 102 n.33, 91 I.D. 115, 120 n.3 (1984), we held that BLM decisions "concerning" APD's are not stayed pending appeal, citing 43 CFR 3165.4. Thus, the decision to approve an APD is not subject to the automatic stay provision of 43 CFR 4.21(a).

91 IBLA at 127 n.4.

In Mark S. Altman, 93 IBLA 265 (1986), we dismissed an appeal from a decision to approve an APD because the appellant was not a party to the case. We stated, however:

Because of our disposition of the case, we need not discuss the standards applicable in determining whether or not to suspend a BLM decision to approve an APD. We note only that 43 CFR 3165.4 requires a determination that suspending the BLM decision will not be detrimental to the interests of the lessor (the United States) or an acceptance of a bond to adequately indemnify the lessor. Although of course relevant, we do not regard the factors considered by Federal courts in granting preliminary injunctions as binding on our determinations whether to suspend BLM orders or decisions under 43 CFR Part 3160.

93 IBLA at 265 n.1.

In Southern Utah Wilderness Alliance, 100 IBLA 63 (1987), we held that under the 1982 language of 43 CFR 3165.4 ^{3/} the effect of a BLM decision granting an APD was not suspended by an appeal to this Board. Appellant argued that "approval of an APD is not a decision requiring compliance" and urged that Animal Protection Institute of America, *supra*, and Utah Wilderness Association, *supra*, be overruled to the extent they hold to the contrary. 100 IBLA at 66 (emphasis in original). It also argued that the "regulations at 43 CFR Subpart 3165 relate to relief from operating or producing requirements of a lease and are not applicable to decisions approving APD's." *Id.* We responded that an APD is granted or denied pursuant to 43 CFR 3162.3-1, that this regulation "is found within 43 CFR Part 3160," and that therefore "the rules regarding the effect of decisions pending appeal set forth at 43 CFR 3165.4 (1986) applied to all appeals of decisions regarding onshore oil and gas operations issued pursuant to the regulations at 43 CFR Subpart 3160." *Id.* at 67-68. ^{4/} However, we noted that in

the recently revised [February 1987] regulations provid[ing] for an intermediate appeal to the State Director with further right of appeal to the Board * * * the broad reference to all appeals of

^{3/} 43 CFR 3165.4 (1986) provided:

"Instructions, orders or decisions issued under the regulations in this part [Part 3160] may be appealed in accordance with the provisions of Part 4 of this title if Federal lands are involved * * *. An appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the official to whom the appeal is made determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage."

^{4/} In addition to Animal Protection Institute of America, *supra*, and Utah Wilderness Association, *supra*, the Board relied on Park County (Wyoming)

decisions regarding oil and gas operations pursuant to the regulations at 43 CFR Part 3160, which was contained in 43 CFR 3165.4 (1986), has been omitted,

and reserved judgment on whether the amended regulation would call for "a different result on the question of the stay of a decision approving an APD." Id. at 68 n.5.

These February 1987 amendments to the regulations were revisions of the regulations adopted in 1984 implementing section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (1988). See 49 FR 37356 (Sept. 21, 1984). The 1984 regulations had provided that a person charged with a violation of the Mineral Leasing Act or FOGRMA

fn. 4 (continued)

Resource Council v. United States Bureau of Land Management, 638 F. Supp. 842 (D. WY 1986), in which the court denied a motion for a temporary restraining order to prevent the commencement of road work pursuant to an approved APD. The appellant had alleged that "BLM had violated its own regulations, (43 CFR § 4.21(a)), by not staying its own decision to allow drilling until such time as the IBLA had rendered a decision on the appeal." 638 F. Supp. at 844. The court held that 43 CFR 4.21(a)

"must be read in conjunction with all other pertinent laws and regulations. The language of 43 C.F.R. § 4.21(a) states that:

"Except as otherwise provided by law or pertinent regulation, a decision will not be effective during the time in which a person * * * may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal * * *." (Emphasis added)

"43 C.F.R. § 3165.4[,] which applies to onshore oil and gas operations[,] provides an applicable exception. It states in relevant part:

"* * * an appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the official to whom the appeal is made determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor."

"Accordingly, it appears that the BLM has not acted contrary to its own regulations."
638 F. Supp. at 845-46.

and served with a notice of a civil penalty "may request a technical and procedural review under 43 CFR 3165.3," the procedure added by GS in 1982 and assigned to the BLM State Directors in 1983. 43 CFR 3163.4-1(a)(4), 43 CFR 3163.4-1(b)(7)(ii), 49 FR 37365-66 (Sept. 21, 1984). The 1987 amendments to 43 CFR 3165.3 provided that any adversely affected party that contests "a notice of violation or assessment or an instruction, order, or decision of the authorized officer issued under the regulations in this part, may request an administrative review, before the State Director * * *." 43 CFR 3165.3(b), 52 FR 5395 (Feb. 20, 1987). An adversely affected party wishing to contest "a notice of proposed penalty shall request an administrative review before the State Director under the procedures set out in paragraph (b) * * *." 43 CFR 3165.3(c), 52 FR 5395 (Feb. 20, 1987). Section 3165.3(b) provided that a party adversely affected by the State Director's decision may appeal to IBLA "as provided in § 3165.4." Because section 109(e) of FOGRMA provides that no penalty may be imposed before a person is afforded an opportunity for a hearing, however, section 3165.3(c) gave a party adversely affected by the State Director's decision on a proposed penalty a choice between requesting a hearing before an Administrative Law Judge or appealing to IBLA "as provided in § 3165.4(b)(2)." Following a hearing, any party is authorized to appeal to IBLA.

Under 43 CFR 3165.3(e)(1), a request for State Director review (which was to be completed within 10 business days) would not result in a suspension of the requirement for compliance with either a notice of violation or a proposed penalty or stop the daily accumulation of penalties unless the

State Director so determined. A request for a hearing before an Administrative Law Judge would not result in the suspension of the requirement for compliance with the decision, unless the Judge so determined; however, it would stop the accumulation of daily penalties, subject to their reinstatement by the Director of BLM. 43 CFR 3165.3(e)(2), 52 FR 5395 (Feb. 20, 1987).

In its comments BLM stated that the "intent of this [State Director review] provision * * * was to provide an operator with an opportunity for quick review but not to cut off any rights." 52 FR 5389 (Feb. 20, 1987). It explained the difference in the provisions suspending the accumulation of penalties during Administrative Law Judge and IBLA review but not suspending the requirement for compliance with a decision involved on the basis of the different practices of BLM and MMS:

The comments on § 3165.3(d) of the proposed rulemaking stated that the accumulation of assessments or penalties should be automatically suspended during hearing on the record regarding a proposed penalty or during any appeal to the Interior Board of Land Appeals. Due to the length of time involved in the hearing and appeal process, it is agreed that the clock should be stopped on the accumulation either of penalties during a hearing on the record or of assessments or penalties during the period the lessee exercises the right to appeal the decision to the Interior Board of Land Appeals. The final rulemaking has adopted the recommended changes subject to a determination by the Director, Bureau of Land Management, to reinstate the daily accumulation of penalties in the case of those major violations that are considered serious. This procedure differs from that provided in the proposed rulemaking and followed by the Minerals Management Service in cases related to royalty. In those royalty cases where there is no harm to the lessor, the lessee may, if permitted by the Service, post a bond for the disputed amount in lieu of immediate payment and thereby satisfy the order to abate the violation.

Generally, a similar interim compliance procedure is not

available for violations of the Bureau's operations procedures. Because of the difference in the way the Service and the Bureau handle the abatement of violations, this final rulemaking will provide for a continuation of the suspension of the daily accumulation of penalties and assessments unless the Director specifically decides to reinstate them. The effectiveness of the decision requiring that a violation be corrected will not, however, be suspended during the hearing or appeal. [Emphasis added.]

52 FR 5389 (Feb. 20, 1987). The preamble concluded with the statement that "[s]ections 3165.3 and 3165.4 have been revised to consolidate the appeals provisions in one section." Id. The revised 43 CFR 3165.4 provided:

(a) Appeal of decision of State Director. Any party adversely affected by the decision of the State Director after State Director review, under § 3165.3(b) of this title, of a notice of violation or assessment or of an instruction, order, or decision may appeal that decision to the Interior Board of Land Appeals pursuant to the regulations set out in Part 4 of this title.

(b) Appeal from decision on a proposed penalty after a hearing on the record.
(1) Any party adversely affected by the decision of an Administrative Law Judge on a proposed penalty after a hearing on the record under § 3165.3(c) of this title may appeal that decision to the Interior Board of Land Appeals pursuant to the regulations in Part 4 of this title.

(2) In lieu of a hearing on the record under § 3165.3(c) of this title, any party adversely affected by the decision of the State Director on a proposed penalty may waive the opportunity for such a hearing on the record by appealing directly to the Interior Board of Land Appeals under Part 4 of this title. However, if the right to a hearing on the record is waived, further appeal to the District Court under section 109(j) of the Federal Oil and Gas Royalty Management Act is precluded.

(c) Effect of appeal on compliance requirements. Except as provided in paragraph (d) of this section, an appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the Interior Board of Land Appeals determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or

damage.

(d) Effect of appeal on assessments and penalties. (1) Except as provided in subparagraph (3) of this paragraph, an appeal filed pursuant to paragraph (a) of this section shall suspend the accumulation of additional daily assessments. However, the pendency of an appeal shall not bar the authorized officer from assessing civil penalties under § 3163.3 of this title in the event the lessee has failed to abate the violation which resulted in the assessment. The Board of Land Appeals may issue appropriate orders to coordinate the pending appeal and the pending civil penalty proceeding.

(2) Except as provided in subparagraph (3) of this paragraph, an appeal filed pursuant to paragraph (b) of this section shall suspend the accumulation of additional daily civil penalties.

52 FR 5395 (Feb. 20, 1987).

In 1988 BLM again amended 43 CFR 3165.4(c). 53 FR 17365 (May 16, 1988). It explained:

The final rulemaking clarifies the language in § 3165.4(c) concerning the effect of an appeal on compliance requirements. This change is made to ensure that the provision in this regulation, which made the decision of the authorized officer effective pending an appeal, has the same effect and meaning as it did prior to its amendment on February 20, 1987 (52 FR 5384). The Department of the Interior Board of Land Appeals has suggested that the meaning and effect of this regulation may have been changed by the 1987 amendment (see Southern Utah Wilderness Alliance, 100 IBLA 63 (1987)). No change was ever intended by the amendment and this final rulemaking makes a technical correction to clarify this matter.

53 FR 17349-50 (May 16, 1988). As a result, 43 CFR 3165.4(c) now provides:

(c) Effect of appeal on compliance requirements. Except as provided in paragraph (d) of this section, any appeal filed pursuant to paragraphs (a) and (b) of this section shall not result in a suspension of the requirement for compliance with the order

or decision from which the appeal is taken unless the Interior Board of Land Appeals determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

[1] As stated above, BLM argues that "[t]he regulations at 43 C.F.R. § 3165.4(c) only deal with the effect of an appeal on compliance requirements, i.e. orders by the authorized officer enforcing or specifying conditions that must be met by an operator, etc." (Answer at 22).

We agree. For reasons set forth below, we believe 43 CFR 3165.4(c) does not cover appeals to this Board from decisions approving APD's. Rather, the effect of a decision approving an APD is suspended by the timely filing of an appeal, in accordance with 43 CFR 4.21(a). As an exception to 43 CFR 4.21(a), 43 CFR 3165.4(c) prevents the suspension on appeal of the requirement to comply with a "notice of violation or assessment or an instruction, order, or decision," 43 CFR 3165.3(b), 3165.4(a), or a "notice of proposed penalty," 43 CFR 3165.3(c), 3165.4(b).

First, the historical purpose of the regulation, from 1936 forward, is consistent: when a lessee or operator exercises its right of appeal from an action initiated by the agency to enforce the oil and gas operating regulations or the terms of an oil and gas lease, its affirmative obligation to comply with what is ordered by the agency is not "suspended." Only when the agency determines that suspending compliance with the requirements of what it has ordered would not damage the lessor's resources -- or the lessor is assured any eventual damage caused by the lessee proceeding during the

appeal would be compensated for by an adequate bond -- is the obligation to comply suspended.

Secondly, no change in the language of the regulation includes BLM approval of APD's and no preamble explaining any of those changes states that it was intended to include BLM approval of APD's. When "orders" was expanded to include "decisions" in 1973, GS did not issue either orders or decisions in response to notices of intent to drill. When GS first required APD's in 1976, and when it incorporated this requirement in its 1982 revision of the regulations, it did not indicate that it intended to include approval of APD's among the "instructions, orders, or decisions" that would be covered by 30 CFR 221.73 (later designated 43 CFR 3165.4). The 1982 preamble comment on the amendment of this regulation does not signal the inclusion of APD approval within its scope. The comment "expressed concern that the filing of an appeal does not automatically stop the action being appealed." Given the history of the regulation, it is likely that the commenter's concern was directed to whether the amendment might mean an appeal would automatically stop an enforcement action. From this perspective, the effect of GS' response -- that the regulation "provide[s] for this concern and no change has been made" -- is to reassure that commenter that, as in the past, enforcement actions would not be suspended. The language of the response is ambiguous, however. It is also possible to interpret the comment as indicating a concern that a decision authorizing an action, e.g., granting an APD, should not be automatically stopped by the filing of an appeal and BLM's response as indicating it would not be. We do not believe such a change was intended. The latter

interpretation does not conform to the historical scope and function of the regulation and there is no clear statement of the significant change that interpretation would represent.

For similar reasons, BLM's 1988 amendment of the regulation and the accompanying comment cannot be taken as a rejection of the suggestion in Southern Utah Wilderness Alliance, *supra* at 68 n.5, that decisions approving APD's might not fall within section 3165.4(c)'s exception to 43 CFR 4.21(a). Both the title of the amended regulation and the language of the amended regulation speak of the effect of an appeal on "the requirement for compliance." The comment speaks of clarifying the language "concerning the effect of an appeal on compliance requirements," the historical focus of the regulation, and states that "no change was ever intended by the [1987] amendment" to the regulation. If a change to include approvals of APD's were intended, based on the Board's footnotes in Animal Protection Institute and Utah Wilderness Association, and its decision in Southern Utah Wilderness Alliance, BLM would have used the occasion of this special amendment to specifically and clearly state its intent. To be sure, BLM is bound by Board decisions interpreting statutes and regulations ^{5/} and it is conceivable that BLM made its comment to acknowledge those decisions. In the preamble to the proposed rules for the 1988 rulemaking, however, BLM specifically rejected Board decisions interpreting another regulation.

See 52 FR 22594 (June 12, 1987). A comparison of the two preambles makes

^{5/} "[W]hen the appellate Boards of OHA interpret regulations, statutes and Departmental policies as requiring or prohibiting certain actions, such interpretation establishes Departmental policy which is fully binding upon the Bureau until such time as it is altered by competent authority." Milton D. Feinberg (On Reconsideration), 40 IBLA 222, 228, 86 I.D. 234, 237 (1979).

interpreting BLM's subsequent comment about Southern Utah Wilderness Alliance as acceptance of the basis for the Board's decisions referred to above dubious.

We do not lightly disregard our own decisions, and are aware that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 852 (D.C. Cir. 1981). We are also aware of Justice Frankfurter's counsel that stare decisis

embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Helvering v. Hallock, 309 U.S. 106 at 119 (1940).

The difficulties with the holding in Southern Utah Wilderness Alliance, supra, lie in its antecedents and in its analysis. Its original antecedent was the footnote in Animal Protection Institute of America, supra. That note was dictum which did not examine the background of the then recently adopted 43 CFR 3165.4. Further, although the note dealt with approvals of APD's, it was phrased in terms of "[d]ecisions of BLM concerning applications for permits to drill," and did not discuss the distinction

between approval and denial of APD's. ^{6/} Finally, the note also states that the effect of the regulation is that BLM's decisions on APD's "are final for purposes of the Administrative Procedure Act and, thus, subject to direct judicial review." The note cited 43 CFR 4.21(b), but that regulation only makes a decision placed in full force and effect by action of an Office of Hearings and Appeals Director or Appeals Board pursuant to 43 CFR 4.21(a) subject to judicial review.

The initial problem with Southern Utah Wilderness Alliance, *supra*, is that it treated the approval of an APD submitted by a lessee or operator as equivalent to an instruction, order, or decision issued by the agency because they were both "decisions issued under the regulations in [Part 3160]." 43 CFR 3165.4 (1986). Approval of a permit application is a response to action initiated by a lessee desiring to drill a well. However, enforcement of the regulations or the terms of a lease is an initiative by the agency directing the lessee to comply as ordered. The result-ing defect in the analysis in Southern Utah Wilderness Alliance is that it overlooked the fundamental purpose of 43 CFR 3165.4. A BLM instruction, order, or decision enforcing the requirements of 43 CFR Part 3160 or the terms of a lease is designed to carry out the Department's obligations to conserve oil and gas resources and to protect other resources. Thus, automatic suspension of an instruction, order, or decision under 43 CFR 4.21(a) is not appropriate. For the same reason, automatic suspension of a BLM

^{6/} See note 2, *supra*. Utah Wilderness Association, *supra*, apparently noted this overstatement in Animal Protection Institute of America, by setting off "concerning" in quotation marks, but overstated the importance of the footnote by reading it as a holding.

decision approving an APD is appropriate because the automatic suspension of a BLM decision approving an APD conserves and protects the same resources during administrative review. The reason for automatically suspending a decision approving an APD under 43 CFR 4.21(a) and the reason for not suspending an instruction, order, or decision requiring compliance with 43 CFR Part 3160 are identical. See 43 CFR 3161.2. Therefore, Southern Utah Wilderness Alliance, 100 IBLA 63 (1987), Utah Wilderness Association, 91 IBLA 124 (1986), and Animal Protection Institute of America, 79 IBLA 94, 91 I.D. 115 (1984), are overruled to the extent inconsistent.

We recognize, of course, that there is an important competing policy. An applicant for an APD should not be unduly delayed in obtaining a response to its application. BLM promotes this policy by providing a decision on an APD within 30 days unless an environmental review or other cause makes this goal unattainable. When legitimate questions are raised about BLM's decision approving an APD, the Department's statutory obligations to conserve renewable resources and protect nonrenewable resources properly take precedence over the policy of promptly responding to an APD. The downside risk of allowing exploration or exploitation to proceed while arguments are being considered on appeal is that if the arguments prove well-founded the resources may be irreparably damaged during the period of review. We have stated several times -- and we repeat -- if BLM is confident its decision is correct and appellants are merely attempting to delay and ultimately frustrate exploration or exploitation based on specious arguments, BLM or the lessee may petition to have its decision placed in full force and

effect. 43 CFR 4.21(a). In determining whether the public interest requires granting such a petition, we consider the factors suggested by BLM, i.e., whether it is likely to prevail on the merits, the relative harm to the respective parties from granting the petition, and whether the appellant "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Sierra Club, 108 IBLA 381, 384-85 (1989). If we grant such a petition, the appellant may then seek judicial review. 43 CFR 4.21(b).

Therefore, because BLM's May 23, 1991, decision affirming the approval of the APD's was suspended by appellants' appeal, we need not act on their subsequent request for a stay. Similarly, the State Director undertook a review of this case prior to appeal to the Board, and we do not find it necessary to address whether the State Director review provided for in 43 C.F.R. § 3165.3(b) is mandatory before an appeal may be taken to the Board under 43 C.F.R. § 3165.4(a). Because of this decision and the special circumstances of this case, we grant BLM's motion that we expedite our review of the merits.

Will A. Irwin
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge