SOUTHERN UTAH WILDERNESS ALLIANCE ET AL.

IBLA 92-149 Decided October 1, 1992

Appeal from a decision of the Grand Resource Area Office, Bureau of Land Management, to issue a right-of-way for a pipeline for oil and natural gas. U-67385.

Set aside and remanded.

1. National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Rights-of-Way: Oil and Gas Pipelines

   Analysis under NEPA of the impacts to the human environment of an oil and gas pipeline designed to serve certain existing and proposed oil and gas wells prop-erly considers the foreseeable cumulative impacts of the pipeline and the wells it is designed to serve.

2. National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   An environmental analysis of the impacts of a proposed action may properly be tiered to and incorporate by reference from an EIS for a larger plan of action where the program analyzed in the EIS is not so broad as to preclude analysis of the impacts of the specific proposal.

3. National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   On appeal from a FONSI based on an EA tiered to an EIS, the record must establish that BLM has taken a hard look at the proposed action, identified relevant areas of environmental concern, and that impacts of the proposed action not previously analyzed in the EIS are insignificant. Where the record shows a cumulative significant impact to cultural resources, a FONSI is inappropriate.

APPEARANCES: Scott Groene, Esq., Moab, Utah, for appellant; Phillip Wm. Lear, Esq., and Matthew F. McNulty, III, Esq., Salt Lake City, Utah, for intervenor.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by the Southern Utah Wilderness Alliance and others 1/ from a November 8, 1991, decision of the Area Manager, Grand Resource Area, Bureau of Land Management (BLM), to issue a right-of-way (UTU-67385) to Western Gas Resources, Inc., (Western) pursuant to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1988). The right-of-way was issued for a natural gas and oil trunk pipeline and gathering system 26.9 miles long crossing Federal lands in Grand County, Utah. The project was described in the environmental assessment (EA No. UT-068-91-079) as follows:

> The gathering/trunk line would connect the field/development area to a processing plant which is proposed for construc-tion on state lands adjacent to the Grand County Airport. This segment of the system would consist of one crude oil gathering line (7 inch ID), one natural gas and gas liquids gathering line (8 inch ID), a fuel gas return line (4 inch ID) and an electrical cable (15 KV). [2/]
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> The six (6) mile long sales line would connect the processing plant with Northwest Pipeline Co's (NWP) transportation system.

(EA at 2).

The decision to issue the right-of-way was based in part on EA No. UT-068-91-079 and the associated finding of no significant impact (FONSI) which would require preparation of an environmental impact state-ment (EIS). Although the FONSI signed by the Area Manager on September 25, 1991, was predicated on the EA as initially promulgated, the decision to approve the right-of-way expressly stated that it was also based on written comments subsequently submitted on the EA and the BLM response found in Appendix B to the EA.

1/ The other parties appealing this decision include the National Parks and Conservation Association, the Utah Chapter of the Sierra Club, and the Wilderness Society.

2/ The EA further explained that:

"The purpose of the return fuel gas line is to supply refined gas from the processing plant for operation of the booster/electrical stations. The 15KV cable would be the first link in a system which would be capable of supplying needed electrical power to individual well sites in the development area."
(EA at 2).

Appellants assert in their brief on appeal that BLM has erred in failing to consider in the EA the cumulative impacts of oil and gas operations within the "development area" to be served by the pipeline. Appellants argue it is foreseeable that, if the pipeline is built, oil and gas field development will follow including drilling of at least the nine wells listed in the right-of-way application at Table 1. Specifically, appellants con-tend that an EA must consider whether a proposed action is related to other actions with individually insignificant but cumulatively significant impacts and that the failure to do so is a violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1988). Further, appellants assert that the EA improperly failed to consider reasonable alternative routes for the pipeline right-of-way. Additionally, appellants contend the BLM decision is inconsistent with the Grand Resource Area Resource Management Plan (RMP) in that much of the pipeline right-of-way is outside of any designated utility corridor. Finally, appellants have requested the Board to stay the effect of the decision approving the right-of-way application pending review of this case on appeal. See 43 CFR 2884.1(b).

Western, the holder of the pipeline right-of-way, has filed a motion to intervene in this appeal as an adverse party on the ground that any decision regarding this right-of-way will directly affect the interests of Western. This motion was granted by order of the Board dated March 17, 1992. In that same order, the Board took the motion for stay under advisement. Western has subsequently filed a brief in answer to appellants' SOR and in opposition to the stay request. A motion for expedited consideration of this appeal has also been filed by Western citing the requirement that a portion of the pipeline must be constructed between October 1 and March 30. Western also notes that gas is being flared (wasted) pending construction of a pipeline.

Western argues that BLM has considered the cumulative impact of oil and gas development along the Kane Creek Trend 3/ in the EIS prepared in connection with the 1985 RMP and in the December 1988 supplemental EA (UT-060-89-025). Based on the analysis in the supplemental EA, Western contends BLM determined that as many as 10 wells could be drilled and developed in the Belt, along with associated pipeline activities, without the cumulative impact creating a significant environmental impact requiring a separate EIS. Western notes that the pipeline EA incorporated by reference the EIS completed for the RMP as well as the 1988 supplemental EA. Alternatively, Western asserts that the wells being drilled and pro-posed along the Kane Creek Trend are exploratory wells in that the existence of an economically viable oil and gas field is still very speculative, precluding the existence of a field-wide plan of development. The pipeline right-of-way, it is argued, has an independent utility in serving existing producing wells and does not necessarily trigger full-field development. Further, Western

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3/ Western refers to the Cane Creek Trend while BLM identifies the field by the name Kane Creek. Since the latter spelling is used on the published maps appearing in the file, we have adopted that spelling. Intervenor indicates in its brief that the Kane Creek Play area is included in the Paradox Fold and Fault Belt (Brief at 5).

points out that the EA included analysis of reasonable alternatives to the proposed right-of-way.

Review of the merits of this appeal has been delayed by the fact that the environmental documentation cited and relied upon in the EA for the pipeline right-of-way was not initially forwarded to the Board with the case record. By order dated July 23, 1992, the Board required that the record be supplemented by providing copies of the additional environmental documents relied upon. These documents were subsequently forwarded to the Board and have been examined with the rest of the record. No brief has been filed on behalf of BLM in this proceeding.

The EA for the pipeline notes that during the spring of 1991 a "wildcat" oil well (Kane Springs Federal 27-1) was drilled by Columbia Gas Development in the Big Flat/Bartlett Flat area about 12 miles west of Moab, Utah. As a consequence of the high rate of production encountered (900 BO and 300 MCF per day), Columbia filed a second application for permit to drill (APD) an oil and gas well in the area which was approved by BLM and seven additional applications are pending in this area (EA at unnumbered p. 1). Until a pipeline is constructed, it will be necessary for operators to transport produced oil from the well by truck and to obtain continued approval for flaring of natural gas or, alternatively, to shut in any producible well (EA at 1).

The EA for the pipeline right-of-way recited that the proposed action considered therein is consistent with the Grand Resource Management Plan (RMP, July 1985), the Environmental Analysis Record for Oil and Gas Leasing in the Grand Resource Area (1976), and the RMP Supplemental Environmental Assessment No. UT-060-89-025 (1988). In the discussion of cumulative impacts of the pipeline, EA No. UT-068-91-079 cited 10 other applications which have either been approved or are pending approval "for various types of oil and gas development activities" including oil and gas wells, applications for permits to drill oil and gas wells, and geophysical exploration projects related to the discovery at the Kane Spring Federal #27-1 well (EA at unnumbered p. 11). The EA expressly acknowledges that these activities will have cumulative impacts. Id. However, the EA did not endeavor to address these cumulative impacts itself, but rather relied upon the RMP:

> As the thresholds identified in the Grand Resource Management Plan (RMP, 1985) are approached the need will arise for additional analysis to address those [cumulative] impacts in light of reasonable foreseeable future development. Ongoing monitoring will help better determine when thresholds are reached, which may differ from 1985 RMP projections.

(EA at 11). In response to a comment on the pipeline EA questioning fail-ure to conduct an EIS to examine the cumulative impacts of full-field development in light of the magnitude of the existing and proposed development, BLM further explained the basis for its action. In Appendix B to the EA, BLM stated that the EA relied upon the 1988 Supplemental EA (UT-060-89-025)

tiered to the EIS for the RMP for the analysis of cumulative impacts (EA, Appendix B at p. 2). Thus BLM noted at Appendix B that:

> Based on the documents and process described above the BLM believes that there is adequate environmental documentation for the new development presently occurring in the Big Flat area. The EIS completed for the RMP and the Supplemental EA "analyz(ed) the potential impacts from leasing, exploration, and lease development." The BLM feels this analysis allows for the drilling of ten wells (exploration) and the necessary production including pipeline facilities (lease development). Individual proposals and/or applications will still be considered on a case by case basis with normal environmental review.
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> The BLM has no way in telling if the remaining nine wells will be producers. Neither does Western or Columbia. However, they are willing to take a "gamble" and are prepared to construct a system that would allow for development of ten wells equal to the 27-1. * * *. [B]ased on the impacts analyzed in the EA the BLM does not believe an EIS is required for this proposal when considered as a single project.

(Appendix B at 3). Thus, it appears from the EA, including Appendix B, that BLM based its FONSI in this case on the finding that there are no significant impacts of the proposed action, including the cumulative impacts of associated development of the oil and gas field, other than those analyzed in the EIS developed for the RMP. 4/

As a threshold matter, we must reject appellants' contention that the EA failed to consider reasonable alternatives to the pipeline right-of-way. The EA contains a discussion of alternatives ranging from "no action" to four alternative routes for the pipeline (EA at 4-5). Each of the alternatives was rejected based on a concise analysis of the reasons why they are undesirable. Further, we find that appellants have failed to meet the burden of showing that the pipeline is inconsistent with the RMP such as to require amendment of the RMP.

4/ The sequence of environmental decisions in this case leading to approval of the pipeline right-of-way is somewhat confused. The FONSI itself, concluding, based on the EA for the right-of-way, that there are no significant impacts requiring preparation of an EIS, is signed by the Area Manager and dated Sept. 25, 1991. This was right after initial completion of the EA which was signed by the Team Leader on Sept. 23, 1991. The decision record for the right-of-way, however, was signed by the Area Manager on Nov. 8, 1991, and reflects the response to comments on the EA set forth in Appendix B. Unlike the FONSI, the decision record concludes only that "no undue and/or unnecessary environmental degradation is expected to occur as a result of the proposed action."

[1] We note that although at the initial stage of oil and gas lease issuance preparation of an EIS analyzing the cumulative and foreseeable impacts of full-field development has been held premature and not required under NEPA, 5/ it is clear from the record in this case that any environmental analysis under NEPA must consider not only the impacts of construction of the pipeline itself, but also the foreseeable impacts of the wells it is designed to serve. See Colorado Environmental Coalition, 108 IBLA 10 (1989). In that case the Board held that approval of an APD within a resource protection zone requires consideration of the cumulative impact of the drilling and associated road improvements together with other existing and proposed drilling and production of wells and associated road improvements prior to establishment of a commercially productive field. "Cumulative impact" is defined as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 CFR 1508.7. Cumulative impacts are properly considered in determining whether a proposed action would have a significant impact on the human environment. 40 CFR 1508.27(b)(7). 6/ Indeed, the BLM itself appears to recognize in the EA that consideration of the cumulative impacts is required. 7/ As noted above in the quote from Appendix B to the EA, BLM relied upon the EIS prepared for the RMP as well as the 1988 supplemental EA for its analysis of cumulative impacts.

[2] It is well established that a subsequent environmental analysis need not duplicate relevant aspects of impact analysis from a prior EIS or EA, but rather may incorporate by reference while focussing on the specific impacts of the proposed action. This process, known as "tiering," is particularly appropriate when the sequence of analysis is from a programmatic EIS to an analysis for a proposal of smaller scope. See 40 CFR 1508.28. The practice of tiering an EA which analyzes the specific impacts of a proposed action which is part of a larger plan of action to an analysis in a programmatic EIS of the broader and cumulative impacts of the program has

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5/ See Park County Resource Council v. United States Department of Agriculture, 817 F.2d 609, 623 (10th Cir. 1987). The Park County court noted that "to require a cumulative EIS contemplating full field development at the leasing stage" would be of limited utility in view of the speculative possibility and nature of any potential development. Id. However, the court also noted that at some point as a "regional pattern or plan evolves, the region-wide ramifications of development will need to be considered." Id.

6/ A part of the regulation guiding evaluation of whether the impacts of a proposed action are significant provides for analysis of: "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.
40 CFR 1508.27(b)(7).

7/ Although some of the wording in the EA quoted above might suggest that the pipeline was treated as a separate proposal without consideration of cumulative impacts of field development, a careful reading of the record rebuts this inference.

been held to be appropriate. Ventling v. Bergland, 479 F. Supp. 174, 180 (D.S.D.), aff'd mem., 615 F.2d 1365 (8th Cir. 1979); see Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1323 n.29 (8th Cir. 1974); Southern Utah Wilderness Alliance, 122 IBLA 6 (1991) (APD's for six oil and gas wells tiered to the EIS for the relevant RMP); Yuma Audubon Society, 91 IBLA 309 (1986) (annual permit for motorcycle race which was the subject of an EIS); In Re Humpy Mountain Timber Sale, 88 IBLA 7 (1985) (timber sale which is part of a larger timber management program).

In this case the Draft EIS (DEIS) for the Grand Resource Area RMP published in March 1983 8/ considered the impact to various resources on the public lands for several management alternatives, including alternative C (limited protection), the alternative later adopted in the RMP issued in 1985 (RMP at 26-27). The management alternatives considered were broad in scope and dealt with virtually all the natural resources administered by BLM on the public lands (e.g., grazing, wilderness, mineral leasing, mining, recreation, etc.). With respect to oil and gas leasing, this alternative (C-25) provides for adoption of an oil and gas leasing category system "to protect critical wildlife habitat, watersheds, and recreational use along the Colorado River" (DEIS at 2-13). Public lands in the area are placed in categories ranging from 1 to 4 with lands in category 1 subject to leasing with less restrictive stipulations while lands in category 4 are closed to mineral leasing (DEIS, Appendix R). 9/ Oil and gas leases for lands within category 1 are subject to special stipulations requiring the lessee to obtain approval, a process entailing an environmental analysis of the impacts of the proposed operation on the natural resources, prior to commencement of any surface disturbing operations (DEIS at A-75, Appendix R). Further, such lease lands are subject to a stipulation authorizing BLM to require a site-specific cultural resources inventory prior to any surface-disturbing activity where this course is indicated (DEIS at A-75-76, Appendix R).

Although the extremely broad scope of the DEIS for the RMP limited the depth of discussion, cumulative impacts were addressed. The DEIS acknowledged that on the "66 percent (32,920 acres) of bighorn sheep habitat that would be designated as Category 1, bighorn sheep losses through stress and displacement could occur" (DEIS at 4-49). The DEIS also noted that activities associated with oil and gas leasing do "impact recreational opportunities" as they "cause changes in landscapes" (DEIS at 2-56). The DEIS further examined the effects of alternative C on 22 specific scenic recreational opportunities, finding that all but one would be protected by special stipulations in categories 2 and 3 or by category 4 (DEIS at 2-60, Table 2-9). The other specific recreational opportunity noted would be protected

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8/ The final EIS for the RMP was published in December 1983. Since the final EIS was published in an abbreviated format and was designed to be used in conjunction with the DEIS, the references in this discussion are generally to the DEIS.

9/ Lands within category 1 include the lands embraced in the proposed pipeline right-of-way and the associated Big Flat/Bartlett Flat oil and gas development (DEIS at 2-52 (Fig. 2-21); RMP at 26 (Fig. 10)).

by the standard stipulations applicable to category 1 lands. Id. A programmatic EIS may be insufficient to support site-specific proposals where the EIS is not sufficiently detailed to analyze the impacts of the specific proposal or the program analyzed in the EIS is so broad as to preclude analysis of the impacts of the specific proposal. Ventling v. Bergland, supra at 180. Notwithstanding the broad scope of the DEIS for the RMP, we find the analysis of cumulative impacts therein relevant to the proposal at issue in this case.

In this case the EA for the pipeline right-of-way was tiered to the December 1988 RMP Oil and Gas Supplemental EA (SEA), as well as to the EIS prepared for the RMP. The SEA took a further look at the foreseeable impacts of oil and gas development. After noting that the 22 areas identified in the DEIS as having "exceptional scenic recreational opportuni-ties" are protected by oil and gas lease stipulations, the supplemental EA acknowledged the potential for conflict in high recreational use areas "northeast of Dead Horse Point State Park and Canyonlands National Park" (SEA at unnumbered p. 8). With respect to cultural resources, 10/ the SEA found that although direct impacts would be minimal, as a consequence of the requirement to perform a cultural resource inventory prior to surface- disturbing activities, increased access could cause a cumulatively significant impact:

> The likelihood that significant cultural resources would be adversely affected is related directly to new trails or roads. Increased access to and visibility of cultural resources has led to site disturbance and destruction. A second problem is illegal surface collection. Even when told of the laws protecting cultural resources, many people continue to collect surface arti-facts illegally. Within the high, moderate and low occurrence areas, [11/] the cumulative impact could be significant due to surface collection and illegal excavation.

(SEA at 12).

[3] In the context of a challenge to a FONSI based on an EA tiered to an EIS, the issue before the Board is whether the EA demonstrates that BLM has taken a hard look at the proposed action, identified relevant areas of environmental concern, and made a convincing case that any environmental impacts of the proposed action not previously analyzed in the EIS are insignificant. See Yuma Audubon Society, supra. If the EA for the proposed action discloses that implementation of the action may significantly affect the quality of the human environment, the effects must be analyzed in an

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10/ The introduction to the SEA noted that the 1983 EIS prepared in support of the RMP failed to address the impacts of reasonably foreseeable actions to cultural resources (SEA at 4).
11/ The ratings refer to the probable potential for oil and gas deposits in a given area. The area involved in the present appeal is rated as high to moderate in potential (SEA at 18).

EIS. Southern Utah Wilderness Alliance, 123 IBLA 302, 306 (1992). The SEA conclusion that cumulative impacts to cultural resources could result from increased access simply does not support a FONSI.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge