

DEGANAWIDAH-QUETZALCOATLE UNIVERSITY

IBLA 2003-310

Decided December 8, 2004

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing a protest to the inclusion of Parcel CA 6-03-31 in a competitive oil and gas lease sale, resulting in the issuance of oil and gas lease CACA-45350.

Affirmed.

1. National Environmental Policy Act: Environmental Assessments--National Environmental Policy Act: Environmental Impact Statements--Oil and gas Leases: Competitive Leases

BLM properly denies a protest of a competitive oil and gas lease sale on the basis that BLM violated the National Environmental Policy Act of 1969 when the environmental analyses demonstrate that BLM took a hard look at the potential significant environmental consequences, considering all relevant matters of environmental concern.

APPEARANCES: Melissa A. Schlichting, Esq., and Barbara E. Karshmer, Esq., Berkeley, California, for appellant; and Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Deganawidah-Quetzalcoatl University (D-Q University) has appealed from a June 17, 2003, decision of the California State Office, Bureau of Land Management (BLM), dismissing its protest to BLM's proposed offering of

Parcel CA 6-03-31, containing 643.05 acres of private surface/Federal mineral land in sec. 5, T. 8 N., R. 1 E., Mount Diablo Meridian, Yolo County, California, in its June 2003 Competitive Oil and Gas Lease Sale.^{1/} Offering the parcel resulted in the issuance of competitive oil and gas lease CACA-45350 to Output Exploration, LLC (OPEX), effective July 1, 2003.

On June 2, 2003, D-Q University, in response to an April 18, 2003, Notice of Competitive Oil and Gas Lease Sale, filed a protest to the proposed offering of Parcel CA 6-03-31 in the June 2003 lease sale.^{2/} D-Q University is said to be a small tribally-controlled two-year college near Davis, California, which provides higher education to underprivileged Native American and Chicano students from all over the United States. It asserted that it is the owner of the subject parcel pursuant to a February 19, 1993, quitclaim deed, whereby the United States conveyed the land, subject to a reservation of all oil, gas, and other hydrocarbon substances, and all minerals, and associated rights.^{3/} D-Q University stated that, while it had not yet had an opportunity to “fully evaluate and identify” the impact of oil and gas leasing,

^{1/} In referring to the appellant herein, we have adopted the spelling of its name which is reflected in its statement of reasons (SOR) for appeal, while recognizing that the record also contains slight variations of that spelling (Deganawidah-Quetzalcoatl and Deganawidah-Quetzalcoatl).

^{2/} BLM’s decision to offer Parcel CA 6-03-31 was originally contained in a Mar. 26, 2003, Decision Record/Finding of No Significant Impact (DR/FONSI) of the Field Manager, Ukiah (California) Field Office, BLM, which was based on a Mar. 24, 2003, Environmental Assessment (EA) (No. CA-340-03-012).

^{3/} D-Q University has stated that, until the initiation of the present oil and gas lease sale, it had long “believed [that] the quit[.]claim deed transferred both the surface and sub-surface rights of the property.” (Protest at 1.) However, the February 1993 quitclaim deed reflects a broad reservation by the United States of “any oil, gas, or other hydrocarbon substances, and all minerals, in on, or under the [deeded] land.” (Quitclaim Deed, dated Feb. 19, 1993, at 3 (emphasis added).) Thus, the deed reserved to the United States any surface and subsurface minerals. In addition, the United States retained the rights to take and recover possession of said minerals and to enter upon said land for the purpose of “exploring for, mining, drilling for, extracting, producing, transporting or marketing the same.” *Id.* Given the explicit language in the deed, we must disagree with D-Q University’s assertion, in its protest, that, when the subject parcel was transferred, “[u]se of the Property for oil and gas exploration and extraction was not contemplated by DQ.” (Protest at 3.)

and related oil and gas exploration and development operations, on D-Q University and the environment, it

believe[d] that the leasing of the oil and gas rights to the Property will cause significant hardship upon DQ by potentially decreasing the [farm] lease revenues upon which DQ relies in operating the university, by inhibiting the ability of DQ to expand and use its land for educational and vocational training purposes, by not adequately protecting currently used areas of the Property for DQ purposes, and by interfering with the current use of the land for farming by disrupting said use.

(Protest, dated June 2, 2003, at 1-2.)

D-Q University explained that it currently leases a “significant portion” of the subject parcel for farming purposes, receiving close to \$64,000 (or over two percent of its operating funds) each year in rental income, and fears that oil and gas operations may disrupt and even preclude farming, thus threatening its farm lease and related revenues.^{4/} (Protest at 2.) While recognizing that BLM provided, in its notice of sale, that 53.2 acres of the leased lands would be subject to no surface occupancy in connection with oil and gas operations, in order to protect University activities, D-Q University asserted that BLM’s designation of protected areas was “inadequate,” and did not accurately encompass areas currently used by the University for educational purposes. *Id.* at 3. D-Q University also argued that BLM should provide for prior University approval for any on-site access in connection with oil and gas operations, rather than only prior BLM approval. D-Q University further argued that leasing and related operations may detract from the “educational environment” of the University, and adversely affect the expansion of University facilities, thus “interfer[ing] with [its] educational programs and pursuits,” and undermining the very reason that the subject parcel was transferred to the University. *Id.*

^{4/} We note that D-Q University has not, either in its protest or appeal, specified how potential oil and gas operations might adversely impact the University’s farm lease, or threaten any of the rental income generated by farming activities. BLM, which was aware of the farm lease, reports that it determined that “current farm land” was likely to be affected by leasing, but that, since it expected only one to three wells, and supporting facilities, the total disturbance would encompass “from 1.5 to 4.5 acres,” over the 10-year lease term. (Answer at 3; *see* EA at 1, 3, “Reasonable Foreseeable Development Scenario.”) D-Q University has made no effort to demonstrate that this would substantially diminish rental income, or affect the viability of the farm lease.

Finally, D-Q University asserted that, while it had not yet had an “opportunity to review” BLM’s March 2003 EA, the EA may not accurately reflect the likely impacts of oil and gas operations on D-Q University and the environment. D-Q University stated in its June 2, 2003, protest that it had only received the April 2003 Notice of Competitive Oil and Gas Lease Sale “less than a month ago,” and thus had not had an adequate opportunity to review the notice or the underlying BLM documentation, including the March 2003 EA. (Protest at 1.) The State Office responded, in its June 2003 decision, that D-Q University was involved in the environmental review process, and that, in addition to posting the sale notice “in local BLM offices and on the Internet on April 18, 2003,” D-Q University’s President/CEO was “provided a copy of the sale notice on that day.” (Decision at 2; see EA at 2, 5; BLM Answer at 5.) D-Q University provides no evidence or argument contradicting BLM’s assertions. We thus think that the University was provided with more than an adequate opportunity to obtain and review the EA, and otherwise to consider the implications of BLM’s decision to lease Parcel CA 6-03-31. (Protest at 3.) D-Q University requested BLM to remove the subject parcel from the June 2003 competitive oil and gas lease sale, or, in the alternative, to postpone the sale, in order that it might determine and offer for BLM’s review, the likely impacts of the sale.

OPEX responded to D-Q University’s protest on June 16, 2003, offering to agree to “waiv[e] any and all right of ingress and egress” across the subject parcel, thus alleviating the University’s principal concern regarding the potential loss of surface use by the University’s farm lessee and the consequent loss of rental income by the University, and instead to directionally drill for oil and gas from contiguous private lands, which had been leased to OPEX.^{5/} (Letter to BLM, dated June 11, 2003.)

BLM went forward with the June 2003 competitive oil and gas lease sale on June 4, 2003. OPEX was declared the high bidder for Parcel CA 6-03-31, and paid the first year’s rental and total bonus bid for the parcel.

In its June 2003 decision, the State Office dismissed D-Q University’s protest, addressing all of the arguments raised. The State Office specifically noted that authorizing oil and gas leasing and related operations generally conformed with its multiple-use management responsibility, and that such operations were appropriate even in the vicinity of a school. It also stated that it anticipated that any impact to the University and its current and future activities would be minimal or non-existent,

^{5/} OPEX noted that it would not waive its “future rights” to negotiate with D-Q University for ingress and egress across University lands, should access prove necessary to its oil and gas operations. (Letter to BLM, dated June 11, 2003.)

especially where operations were expected to be limited and where OPEX was required to coordinate with the University concerning access across University lands ^{6/} and obtain BLM's prior approval with respect to specific operations: "Because the production in the area is generally gas, it is anticipated that no more than 1-3 wells would be drilled on this entire parcel, with a maximum disturbance, including roads, of 4.5 acres." (Decision at 2; see EA at "Reasonable Foreseeable Development Scenario (RFD)" ("There are both producing and dry wells surrounding the parcel. Based on the general density of wells drilled in the immediate area, we estimate that between 1 and 3 wells may be drilled on this parcel within the next 10 years.)) The State Office further noted that, prior to any surface-disturbing operations, the lessee was required to enter into an agreement with D-Q University which would mandate the payment of compensation to the University "for all real damages resulting from oil and gas operations," or to post a bond with BLM, payable to the University, in an amount designed to achieve that end: "The damages * * * would include but not be limited to loss of rental/lease/farming income." (Decision at 1.) Finally, the State Office held that its March 2003 EA had adequately considered potential environmental impacts of leasing the parcel and related operations.

Following its June 2003 decision, BLM issued lease CACA-45350 to OPEX, effective July 1, 2003, on June 23, 2003. ^{7/} OPEX's lease was issued for 10 years, and so long thereafter as oil or gas was produced in paying quantities, pursuant to the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 484, 486(d) (2000). ^{8/} Section 6 of the lease provides that the lessee "shall

^{6/} We note that, once issued, the lease specifically provided that "any on-site access" would be "coordinate[d]" with D-Q University, thus requiring that the University and OPEX reach a mutual agreement. (Lease, Exhibit A (Special Stipulation).) However, BLM noted, in its June 2003 decision, that this did not mean that the University could deny OPEX "reasonable access" to the leased lands, since this was ensured by the University's quitclaim deed and OPEX's lease. (Decision at 2.)

^{7/} The lease encompasses all of sec. 5, T. 8 N., R. 1 E., Mount Diablo Meridian, Yolo County, California, with the exception of a 70-foot-wide strip of land running along the southern boundary of the section.

^{8/} OPEX informs us that it has drilled a test well on its contiguous leased private lands, which proved to be a dry hole. However, it states that it remains interested in engaging a third party to drill a well on the leased lands at issue here, but will not undertake any efforts in that regard until the "cloud on the title to the leasehold" is removed by the Board's resolution of the appeal. (Letter to Board, dated Nov. 24,

(continued...)

conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to * * * other resources, and to other land uses or users,” including taking “reasonable measures deemed necessary” by BLM to achieve that end. In addition, section 9 requires the lessee to hold the United States “harmless from all claims for damage or harm to persons or property as a result of lease operations.”

Further, incorporated into the lease was a Special Stipulation (Exhibit A), which provides that “[n]o surface occupancy or use” under the lease will be allowed in specified portions of the “DQ University area,” specifically: “(1) the Campus Area (31.20 acres), (2) the Ceremonial Grounds (10.00 acres), [(3)] the Wetlands Area off Chicahominy Slough (10.00 acres), and [(4)] the Sewer pond and pump area (2.00 acres).” The Special Stipulation conformed to Stipulation No. 6, which had been made applicable to Parcel CA 6-03-31 in the April 2003 Notice of Competitive Oil and Gas Lease Sale. BLM did not provide for no surface occupancy as to the entire parcel, which would have required directional drilling by OPEX from outside the parcel, or otherwise limit access across the parcel. In addition, BLM provided that the lessee would not undertake any surface disturbance without the prior approval of BLM, and would notify BLM and coordinate with D-Q University prior to accessing the leased lands for oil and gas and any other purposes.

D-Q University filed a timely appeal from the State Office’s June 2003 decision. In its SOR, D-Q University contends that, in deciding to dismiss its protest and thus go forward with leasing Parcel CA 6-03-31, BLM failed to properly take into account the issues raised by appellant “concerning oil [and] gas exploration and extraction interfering with the existing use of the property and with D-Q University’s educational goals.”^{2/} (SOR at 3.) It also specifically challenges the “adequacy” of BLM’s EA to address the “environmental concerns of D-Q University as an educational institution, or the concerns of its students, and the potential effects on the health and

^{8/} (...continued)
2003.)

^{2/} Appellant also challenges the “adequa[cy]” of the State Office’s consideration of its protest given the “short” period of time between the June 2 filing and BLM’s June 17 resolution of appellant’s protest: “Fifteen days is hardly enough time to investigate and consider the concerns of D-Q University as expressed in its protest.” (SOR at 2, 3.) We are not persuaded that BLM failed to properly consider appellant’s protest simply based on the length of time consumed by BLM’s review, even were the concerns raised to have been matters of significance, or even complexity. We find no basis, on its face, for concluding that 15 days was not sufficient. Rather, we will look to the substance of appellant’s concerns, and the appropriateness of BLM’s response.

safety of students and staff.” *Id.* Appellant asks the Board to overturn BLM’s dismissal of its protest, and thus the awarding of oil and gas lease CACA-45350 to OPEX, and to preclude BLM from issuing any lease until BLM has first investigated and determined the potential impacts of oil and gas exploration and development on appellant and its property.

On December 5, 2003, OPEX, which had sought to intervene in the present proceeding, requested the Board to expedite consideration of appellant’s appeal. Because it will clearly be adversely affected by the Board’s resolution of the appeal and otherwise could have independently maintained an appeal from BLM’s adjudication of appellant’s protest of the decision to lease Parcel CA 6-03-31, we hereby grant OPEX’s motion to intervene in the instant proceeding. However, because we here decide appellant’s appeal from the State Office’s June 2003 decision dismissing its protest, OPEX’s request for expedited consideration will be denied as moot.

We are not persuaded that BLM committed any legal or factual error in deciding to lease Parcel CA 6-03-31. Nowhere, in either its protest or appeal, did appellant assert that BLM violated any Federal statute or regulation in the course of its environmental review of the proposal to lease the parcel, or otherwise during the course of its decisionmaking process leading to the Field Manager’s March 2003 DR/FONSI, which approved leasing the parcel. We note that BLM properly states that, under Departmental regulation, the “opposition to lease * * * expressed by the party controlling the surface affords no legal basis or authority to refuse to issue the lease.” (Answer at 5 (quoting from 43 CFR 3101.8).)

[1] At best, D-Q University indicated that BLM violated section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), by failing to take a “hard look” at the potential environmental impacts stemming from leasing the parcel, and the resulting exploration and development operations for the recovery of oil and gas. However, in his March 2003 DR/FONSI, the Field Manager, relying on BLM’s March 2003 EA, approved the leasing of the parcel, concluding that no significant impact was likely to occur as a consequence, requiring prior preparation of an environmental impact statement (EIS). We find no evidence, nor does appellant offer any evidence, that BLM failed to consider a specific environmental impact which was likely to occur as a result of leasing the parcel, generally authorizing OPEX to engage in exploration and development operations on the leased lands, or that BLM’s analysis of a particular impact was deficient in any material respect. We particularly find no basis for D-Q University’s assertion that oil and gas operations are likely to adversely impact the “health and safety” of its students and staff, requiring BLM to consider such impacts

in its EA, or to adopt measures to ensure that no such impact occurs. (SOR at 3.) Nor does D-Q University assert at all that BLM failed to appreciate the likelihood of a significant environmental impact which, under section 102(2)(C) of NEPA, would require the preparation of an EIS.

Most importantly, D-Q University fails to establish any error in the State Office's June 2003 decision dismissing its protest. D-Q University does not demonstrate that BLM erred, as a matter of law or fact, in responding to each of the allegations raised in its protest, but focuses only upon BLM's purported dismissal of its concerns regarding potential impacts to the University and its students, staff, current educational programs, and future educational goals. D-Q University complains that its "[a]ttempts * * * to negotiate an agreement for surface access with the oil [and] gas operator have been thwarted because [OPEX] * * * has refused to negotiate with D-Q University until such time as this appeal is settled, and that it has no assurances that "any issues can be resolved to its satisfaction."^{10/}

BLM did not hold, in its June 2003 decision, that any and all issues concerning the potential impacts of oil and gas operations under the lease can and would be fully resolved by agreement between D-Q University and OPEX. Rather, it stated only that compensation for damages to D-Q University were required to be settled, prior to surface disturbing activities, by "agreement" of D-Q University and OPEX, or, if necessary, by having OPEX obtain a bond sufficient to ensure the payment of appropriate compensation to D-Q University. (Decision at 1.) We note that the lease requires OPEX to hold BLM harmless for all claims for any "damage or harm to persons or property" caused by "lease operations." (Lease, Section 9.) This would, of course, protect BLM, presumably by ensuring that damage claims, such as by the surface owner, are resolved.

Moreover, BLM notes that it has provided, as a matter of policy in the case of the leasing of split-estate (private surface/Federal mineral) lands for oil and gas purposes, that a Federal lessee or its operator is required to obtain the surface

^{10/} OPEX has challenged appellant's allegation that it refused to negotiate regarding surface access until the present appeal is settled, noting that appellant simply "misunderst[ood]" OPEX's cancellation of a scheduled meeting regarding access when it received notice that appellant had appealed BLM's June 2003 decision. (Letter to BLM, dated Aug. 21, 2003, at 1.) OPEX explains that it cancelled the meeting simply so that it could consider the "reasons for the appeal," and thus decide how to proceed, and, having done so, was willing, even during the pendency of the appeal, to pursue negotiations regarding access and appellant's other concerns regarding potential impacts to the University and its interests. *Id.*

owner's prior agreement regarding compensation for reasonable and foreseeable damages for loss of crops and tangible improvements or, in lieu thereof, an adequate bond sufficient to compensate the surface owner for any such damage. (Answer at 8 (citing Instruction Memorandum (IM) No. 2003-131, dated Apr. 2, 2003, at 1-2).) Indeed, the IM requires, as a precondition to BLM consideration of the approval of surface-disturbing activities, that a Federal oil and gas lessee or its operator

[either] certif[y] that an agreement with the [private] surface owner exists, or * * * enter into good-faith negotiations with the private surface owner to reach an agreement for the protection of surface resources and reclamation of the disturbed areas, or payment in lieu thereof, to compensate the surface owner for loss of crops and damages to tangible improvements, if any.

(IM No. 2003-131 at 1.) The lessee or its operator is ultimately required to reach an "agreement" with the surface owner regarding compensation, or to post an "adequate bond, sufficient in amount, to secure payment for loss of damages to crops and tangible improvements." *Id.* at 2. The IM further states that, absent agreement regarding compensation, "BLM will require an adequate surface owner bond," the amount of which, if necessary, will be determined by BLM, and that the "authorized [BLM] officer will [generally] ensure compliance with the [IM] requirements." *Id.* The IM is plainly the genesis of the requirements for compensation for damages set forth in BLM's June 2003 decision.^{11/} Thus, this policy is now clearly applicable in the present case. D-Q University fails to show that its interests will not, given these measures, be adequately protected in the event of any actual damage caused by oil and gas operations.

Further, while questions of access and compensation for damages were to be generally worked out between D-Q University and OPEX, the lease provided that all surface-disturbing activities were subject to the prior approval of BLM. Indeed, OPEX would be required to obtain BLM approval of applications for permits to drill (APDs),

^{11/} We note that the IM is intended to "reemphasize" the directive of Onshore Oil and Gas Order No. 1, 48 FR 48915 (Oct. 21, 1983), which itself has the force and effect of law, that the requirements of 43 CFR Subpart 3814, which provide, in relevant part, for the protection of private surface owners in the case of Stock Raising Homestead Act patents, are applicable to "all split estate lands." (IM No. 2003-131 at 4; see 43 CFR 3164.1; 48 FR at 48927; e.g., Richard Rudnick, 143 IBLA 257, 261-62 (1998).) That Order and CFR Subpart provide the regulatory underpinning for the requirements in the IM, which are carried through to BLM's June 2003 decision. See 48 FR at 48927; 43 CFR 3814.1(c).

in the case of oil and gas wells and associated activity. It is now well established that BLM will undertake further environmental review under section 102(2)(C) of NEPA, and engage in additional decisionmaking, in the course of deciding whether to approve specific APDs, given the anticipated site-specific environmental impacts of authorizing drilling and related activity. See EA at 1 (“Site-specific conditions of approval for the APD would be done at th[e] time [of APD submission] with a site-specific NEPA review”); e.g., Southern Utah Wilderness Alliance, 159 IBLA 220 (2003). Such approvals are not subject to agreement between D-Q University and OPEX, and thus cannot be affected at all by the willingness of either party to engage in negotiations, or to do so in good faith. Rather, the matter will be determined by BLM, subject to its lease obligation to authorize oil and gas operations somewhere and at some time on the leased lands, but to do so in a way that properly takes into account the impacts on the human environment, including D-Q University and its students, staff, current educational programs, and future educational goals. Further, D-Q University will have the opportunity to provide input into that process. See, e.g., IM No. 2003-131 at 3; 48 FR at 48922-23, 48926. Above all, it must be remembered that BLM’s site-specific environmental review and decisionmaking regarding specific surface-disturbing activities may, as a consequence of reasonable measures imposed by BLM so as to “minimize adverse impacts to other resource values, land uses or users,” affect the siting or timing of lease activities, thus obviating all of D-Q University’s concerns. 43 CFR 3101.1-2; see, e.g., Wyoming Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 91-92 (D.D.C. 2003); Mack Energy Corp., 153 IBLA 277 (2000).

Simply put, we cannot, at this juncture, conclude that BLM erred by issuing the lease because oil and gas operations are necessarily incompatible with the University or its interests. Nor can we say that BLM’s determination of where and when to authorize specific drilling or other activity on the lease will not properly take into account, or will necessarily adversely affect, the University or its interests. Once any determination is made by BLM to permit any surface-disturbing activity to occur, that action will itself be subject to review by this Board, pursuant to a timely-filed appeal, and appellant’s concerns can be properly raised and fully adjudicated at that time.

We, therefore, conclude that the State Office, in its June 2003 decision, properly dismissed appellant’s protest to BLM’s proposed offering of Parcel CA 6-03-31 in its June 2003 Competitive Oil and Gas Lease Sale.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, OPEX's motion to intervene in the present proceeding is granted, the decision appealed from is affirmed, and OPEX's request for expedited consideration of the appeal is denied as moot.

James F. Roberts
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge