

COLORADO ENVIRONMENTAL COALITION
THE WILDERNESS SOCIETY

IBLA 2004-32

Decided April 8, 2005

Appeal from a decision of the Colorado State Director denying a protest of a decision approving Applications for Permit to Drill on Lease No. COD055850A. SDR CO-03-06.

Affirmed.

1. Administrative Procedure: Generally--Administrative Procedure: Administrative Review--Rules of Practice: Generally--Rules of Practice: Mootness--Appeals: Generally

When wells that were the subject of a protest of the issuance of Applications for Permit to Drill have been drilled, the appeal ordinarily will be dismissed as moot because there is no further relief that can be granted on appeal. Where the appeal raises issues which are capable of repetition and may yet evade review, the Board properly determines to adjudicate the appeal even though the relief sought by an appellant cannot be granted for the particular event.

2. Federal Land Policy and Management Act of 1976: Land Use Planning--Federal Land Policy and Management Act of 1976: Oil and Gas Leasing--Federal Land Policy and Management Act of 1976: Valid Existing Rights

Section 102(a) of Federal Land Policy Management Act of 1976 (FLPMA) imposes broad stewardship duties, including the requirement to manage land in a manner that will protect the quality of environmental values. 43 U.S.C. § 1701(a)(8) (2000). Section 302(b) of FLPMA

mandates that the Secretary shall take any action necessary to prevent unnecessary or undue degradation of the land. 43 U.S.C. § 1732(b) (2000). FLPMA also provides that nothing in the Act shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act. 43 U.S.C. § 1701, note (a) (2000). FLPMA further provides that all actions by the Secretary shall be subject to valid existing rights. 43 U.S.C. § 1701, note (h) (2000).

3. Federal Land Policy and Management Act of 1976: Oil and Gas Leasing--Federal Land Policy and Management Act of 1976: Valid Existing Rights--Oil and Gas Leases: Generally

Under the Mineral Leasing Act, 30 U.S.C. § 226 (2000), the decision whether to issue an oil and gas lease is a matter within the discretion of the Secretary. Once issued, the holder of an oil and gas lease issued prior to the enactment of FLPMA may develop the leasehold to the extent authorized by the issuance document.

4. Federal Land Policy and Management Act of 1976: Oil and Gas Leasing--Federal Land Policy and Management Act of 1976: Valid Existing Rights--Oil and Gas Leases: Generally

A no surface occupancy (NSO) restriction in a Resource Management Plan that is by its terms to be applied to future oil and gas leases does not provide an independent basis for imposing an NSO restriction on a pre-FLPMA lease on which drilling and production had commenced before enactment of the statute.

APPEARANCES: Michael L. Chiropolos, Esq., Boulder, Colorado, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; Barbara J.B. Green, Esq., Boulder, Colorado, for National Fuel Corporation.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Colorado Environmental Coalition and The Wilderness Society have appealed the September 29, 2003, decision of the Colorado State Director, Bureau of Land

Management (BLM), denying their protest of the decision of the Grand Junction (Colorado) Field Office approving Applications for Permit to Drill (APD) filed by National Fuel Corporation (NFC).^{1/} The wells are to be drilled on NFC's lease (COD-5850-A), which was executed in 1951. The lease has been held by production since the expiration of the primary lease term. On June 18, 2003, BLM issued a draft Environmental Assessment CO-GJFO-01-31-EA (EA) to analyze the impacts of approving the APD's.^{2/} Two alternatives were considered, including the no action alternative. Other possibilities discussed and not pursued were alternative well sites and directional drilling. By letter dated July 14, 2003, appellants submitted comments on the EA. By decision dated August 5, 2003, BLM determined to implement alternative A with mitigation measures embodied in Conditions of Approval (COA's) to be attached to the APD's and issued its decision and finding of no significant impact. On September 15, 2003, appellants sought State Director Review (SDR) in which they requested a remand of the APD's to add a no surface occupancy (NSO) restriction or, alternatively, remand to initiate preparation of an environmental impact statement. On September 29, 2003, the State Director denied appellants' protest. Appellants timely appealed the SDR decision on November 3, 2003. By order dated December 11, 2003, the Board denied appellants' request for a stay and disposed of other procedural matters as well, including granting NFC leave to file its brief as an adversely affected party.

Appellants filed a statement of reasons for appeal (SOR), which incorporates by reference and supplements the arguments advanced in their Petition and their Reply to the Government's Response to their Petition (Reply). (SOR at 1.) Accordingly, it is appropriate to briefly comment on the parties' arguments relative to the Petition. Appellants' position was that, because the two wells are located within the "pristine Hunter Canyon area," they are subject to the land use restrictions established in the RMP, including its no surface occupancy (NSO) restriction for that portion of Hunter Canyon. (Petition at 1.) In addition, appellants contended that the decision approving one APD should be stayed because the well to which it relates is within the Hunter Canyon Citizens Wilderness Proposal (HCCWP). (Petition at 4, 5.)^{3/} Appellants further argued that under the terms of NFC's lease, BLM retained

^{1/} The APD's relate to Well 11 in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 29 and Well 12 in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32, T. 8 S., R. 100 W., 6th Principal Meridian, Mesa County, Colorado.

^{2/} The EA was tiered to the January 1987 Grand Junction Resource Management Plan (RMP). (EA at 2.) The RMP was submitted as Ex. E to appellants' Notice of Appeal and Petition for Stay (Petition).

^{3/} The Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1711, 1782 (2000), required the Secretary of the Interior to conduct an
(continued...)

authority to enforce all regulations that became applicable after lease execution, including the obligation to prevent undue and unnecessary degradation established by FLPMA. (Petition at 14-15, 21-22.) Asserting that BLM erroneously construed 43 CFR 3101.1-2 in stating that the APD approval process is not a discretionary action once a lease has been issued (Petition at 16, citing SDR decision at 3), appellants argue that applying the RMP's NSO restriction constitutes a reasonable restriction within the meaning of the regulation (Petition at 16-18). They reason that, since the APD's were granted free of the NSO restriction, the approval was contrary to the RMP and therefore violated FLPMA. (Petition at 19-21.)

Through counsel, BLM opposed the Petition. In its Response to Appellants' Petition for Stay (Response), BLM urged two lines of argument: first, that the appeal was moot because both wells had been drilled and completed, one or both wells had encountered gas in paying quantities, and NFC was engaged in laying gathering lines (Response at 1-2); and second, that Board precedent had established that a party with a valid existing right may drill regardless of the fact that the land is later included in a WSA, subject to reasonable restraints necessary to prevent unnecessary and undue degradation of the land (Response at 2), and that, in any event, citizens'

^{3/} (...continued)

inventory for various resource values, including wilderness characteristics described in the Wilderness Act of Sept. 3, 1964, 16 U.S.C. §§ 1131-1136 (2000). Under section 603(a) of FLPMA, the Secretary was required to submit recommendations to the President as to the suitability of areas for wilderness designation. 43 U.S.C. § 1782(a) (2000). The Secretary conducted a wilderness inventory of public lands between the years 1978 and 1985 and made recommendations for wilderness study areas (WSA's). BLM's authority to designate new WSA's pursuant to section 603 of FLPMA expired as of Oct. 21, 1993. Thus, even when land has been nominated for wilderness designation in a pending legislative proposal, until it is enacted, BLM has no authority to establish, manage, or otherwise treat public lands, other than Congressionally designated wilderness under FLPMA, 43 U.S.C. § 1782 (2000), as a WSA or as wilderness under FLPMA's land use planning provisions, 43 U.S.C. § 1712 (2000).

It is well settled that BLM may administer lands not included in a WSA for other purposes, including oil and gas activities. Colorado Environmental Coalition, 162 IBLA 293, 299-300 (2004); Colorado Environmental Coalition, 161 IBLA 386, 393-94 (2004); Southern Utah Wilderness Alliance, 163 IBLA 16, 25 (2004); Southern Utah Wilderness Alliance, 160 IBLA 225, 230-31 (2003); Southern Utah Wilderness Alliance, 158 IBLA 212, 214 (2003); Southern Utah Wilderness Alliance, 151 IBLA 338, 341-42 (2000); Southern Utah Wilderness Alliance, 150 IBLA 263, 266-67 (1999); Southern Utah Wilderness Alliance, 128 IBLA 52, 66 (1993); Southern Utah Wilderness Alliance, 123 IBLA 13, 18 (1992). Any argument or suggestion to the contrary is without merit and will not be further addressed.

wilderness proposals are not subject to the provisions of section 603 of FLPMA, 43 U.S.C. § 1782 (2000) (Response at 2-3).

NFC also opposed the stay and moved to dismiss it (Motion), arguing the Petition was moot. On that score, NFC confirms that it “has drilled the wells and entered into binding commitments in reliance on the approved APDs.” (Motion at 3-4.) In the alternative, NFC argues that the RMP’s NSO stipulation does not apply to a pre-FLPMA lease. (Motion at 7-8.) Additionally, NFC contended that BLM had adequately considered environmental impacts. (Motion at 8-9.)

In their SOR, appellants argue that BLM violated the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4332(2)(C)(iii) and 4332(2)(E) (2000), in that BLM failed to adequately address alternative drilling technologies such as directional drilling. (SOR at 2.) They argue that this Board has recognized the “necessity to rigorously explore and objectively evaluate reasonable alternatives that include directional drilling,” citing an unpublished dispositive order issued in Biodiversity Associates, IBLA 2001-166 (Dec. 6, 2001). (SOR at 3.) They also cite Southern Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48, 52-53 (D. D.C. 2002), arguing that BLM’s conclusion regarding the feasibility of directional drilling was neither supported by any independent analysis nor consistent with the fact that directional drilling is possible from a distance of up to 6 miles. (SOR at 5-6.) They seek to distinguish the precedent cited by BLM and maintain that BLM is required to comply with FLPMA’s prohibition against allowing undue and unnecessary degradation. (Reply at 6-7.)

[1] As noted, the wells have been drilled. Ordinarily, the appeal would be dismissed as moot. As the Board observed in Nikki Lippert, 160 IBLA 149, 150 n.2 (2003), an appeal may be properly dismissed as moot where, as a result of events occurring subsequent to the appeal, there is no further relief which can be granted on appeal. See, e.g., Craig C. Downer, 111 IBLA 339 (1989). However, when an appeal raises issues which are capable of repetition, and yet evade review, it is proper to adjudicate the appeal even though the relief sought by an appellant cannot be granted for the particular event. William J. Thoman, 157 IBLA 95, 97 (2002), citing Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 112 (2000); McMurry Oil Co., 153 IBLA 391, 393 (2000); Desert Vipers Motorcycle Club, 142 IBLA 293, 294 (1998); Southern Utah Wilderness Alliance, 137 IBLA 24, 26 (1996). Appellants have raised an issue that is capable of recurrence while evading review, which argues against dismissing the appeal as moot, and accordingly, we have determined to adjudicate it.

Appellants believe that BLM inappropriately rejected the possibility of directional drilling as unfeasible. According to appellants, BLM should have considered directional drilling from one of the other eight well pads on NFC’s lease.

(SOR at 6.) They conclude that the EA therefore “did not ‘rigorously explore’ the directional drilling alternative or take the requisite ‘hard look’ at the proposed action.” (SOR at 6.) The EA explained that there were no alternative sites for either well that would meet NFC’s “drilling geologic requirements and be less impacting.” (EA at 2.) The EA stated that the reason for rejecting the possibility was “due to the extreme build and drop angle that would be required to penetrate the producing horizon (1692' - 1914') from the closest surface location (Hunter Canyon 7 well).” (EA at 2.) In addition, however, the EA articulated more reasons for not pursuing such an alternative: additional equipment would be required, additional surface disturbance at the Hunter Canyon well 7 would result, and a different drilling system would likely be required “to maintain hole integrity with such a high hole deviation.” (EA at 2.) Appellants charge that these conclusions are “unsubstantiated.” (SOR at 5.)

We begin with the observation that appellants do not affirmatively contend that directional drilling is feasible. Instead, their argument merely poses the question of whether it might be possible. Appellants also do not identify the particular well pad or pads that are appropriate for directional drilling. The EA’s rationale for concluding that directional drilling is not feasible is admittedly rather spare, but appellants also have not asserted any specific contravening factual or scientific premise or evidence that would show or suggest that BLM’s conclusions are unwarranted or unsupported or inapplicable to the other well pads. To the extent appellants believe that the EA would have reached a different conclusion about the feasibility of directional drilling had other well pads been considered, it behooved them to state with particularity the facts and circumstances that support that contention, including evidence showing that, contrary to the EA’s statements, no greater impact would be occasioned by the use of a different drilling system. See Great Basin Mine Watch, 160 IBLA 340, 366-67 (2004), and cases cited. In the absence of a response to the specific reasons articulated in the EA, appellants have failed to carry their burden of demonstrating by a preponderance of evidence that BLM’s contrary conclusion is not supported by the record, and have merely expressed a different opinion regarding the feasibility of the alternative. Great Basin Mine Watch, 160 IBLA at 367, and cases cited; Colorado Environmental Coalition, 135 IBLA 336, 361 (1996), aff’d, 932 F. Supp. 2d 124 (D. Colo. 1996).

[2] We now turn to appellants’ arguments regarding BLM’s obligations under FLPMA. As stated, appellants contend that BLM has authority to enforce regulations promulgated after lease execution, that these regulations include FLPMA’s prohibition against unnecessary and undue degradation of the land, and that BLM cannot authorize any activity that is contrary to the NSO restriction for the Hunter Canyon cliffs established by the Grand Junction RMP because doing so constitutes unnecessary or undue degradation. See Reply at 4-7. Section 102(a) of FLPMA imposes broad stewardship duties, including the requirement to manage land “in a

manner that will protect the quality of * * * environmental * * * values.” 43 U.S.C. § 1701(a)(8) (2000). More specifically, section 302(b) of FLPMA mandates that “the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the land.” 43 U.S.C. § 1732(b) (2000). This standard allows the Secretary to impose reasonable mitigating measures to protect environmental values on activities necessary to the exercise of valid existing rights. See Colorado Open Space Council, 73 IBLA 226, 229-30 (1983), an appeal involving a pre-FLPMA oil and gas lease in a WSA, in which the Board quoted with approval Solicitor’s Opinion M-36910, 88 I.D. 909, 913 (1981) (which pertained to WSA’s and the effect of the exercise of valid existing rights on the wilderness nonimpairment standard). However, FLPMA also provides that “[n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [October 21, 1976].” 43 U.S.C. § 1701 note (a) (2000). In addition, FLPMA expressly provides that “[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights.” 43 U.S.C. § 1701 note (h) (2000).

[3] Under the Mineral Leasing Act, 30 U.S.C. § 226 (2000), the decision whether to issue an oil and gas lease is a matter within the discretion of the Secretary. Lowell J. Simmons, 114 IBLA 284, 289-90 (1990), citing Burglin v. Morton, 527 F.2d 486, 488 (9th Cir.), cert. denied, 425 U.S. 973 (1976); Haley v. Seaton, 281 F.2d 620, 624-625 (D.C. Cir. 1960); see also Solicitor’s Opinion M-36910, 88 I.D. at 912, and cases cited. Once issued, “the holder of an oil and gas lease * * * issued prior to the enactment of FLPMA may develop the leasehold * * * to the extent authorized by the issuance * * * document.” Mitchell Energy Corp., 68 IBLA 219, 224 (1982), citing Solicitor’s Opinion, M-36910, 88 I.D. at 913.

[4] In this case, NFC’s 1951 lease grants the “exclusive right and privilege to drill for, mine, extract, remove, and dispose of all oil and gas deposits except helium gas” in or under the the leasehold, “together with the right to construct and maintain thereupon all works * * * or other structures necessary to the full enjoyment thereof.” (Lease, Section 1 at 1.) Being a pre-FLPMA lease, it is not encumbered by either surface occupancy or environmental restrictions. The lease also does not contain a clause generally pertaining to the applicability of statutes and regulations enacted and promulgated after the date of lease execution. Section 4 of the lease, “Drilling and producing restrictions,” has some relevance, and it provides:

It is covenanted and agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and

regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both.

(Lease, Section 4 at 2.)^{4/}

As stated, appellants assert that directional drilling is a feasible alternative to surface occupancy, and given the availability of a feasible alternative, they reason that BLM's decision not to require such drilling therefore constitutes undue or unnecessary degradation of the lands within the leasehold. We have determined that appellants have failed to carry their burden of proof with respect to the threshold issue of feasible alternatives to surface occupancy and drilling. Since the lease clearly authorizes surface occupancy and drilling free of restrictions, what remains of appellants' arguments are the questions of whether the RMP's NSO restriction in the Hunter Canyon area affects NFC's lease rights and whether surface occupancy and drilling otherwise constitutes undue or unnecessary degradation. We conclude that in the absence of evidence that directional drilling is feasible, there is no factual or legal basis for prohibiting surface occupancy under FLPMA or a land use planning document developed pursuant to FLPMA.

The authority conferred by FLPMA is expressly made subject to valid existing rights, and therefore an RMP prepared pursuant to FLPMA's authority, after lease execution and after drilling and production has commenced, is likewise subject to NFC's valid existing right to exploit its lease, and cannot serve to defeat or materially restrain that right. See Colorado Environmental Coalition, 135 IBLA at 360, citing cf. Sierra Club v. Hodel, 848 F.2d 1068, 1086 n.16 (10th Cir. 1988) (impairment of the WSA through reasonable exercise of valid existing rights in a county road allowed). Appendix D to the RMP, Oil and Gas Lease Stipulations, explicitly recognizes as much and states that such stipulations, including the NSO stipulation, "will be added as appropriate to any future oil and gas leases," and "added to * * * APDs on existing leases to the extent consistent with lease rights." (Appendix D at D-1, emphasis added.) Accordingly, the RMP's NSO restriction for the Hunter Canyon area does not provide an independent basis for denying NFC the right to occupy and continue to develop its lease.

^{4/} Section 4 of the lease is consistent with Board and judicial precedent recognizing that the Secretary's discretion to manage oil and gas activities on the public lands in the public interest extends not just to the initial leasing decision, but also to subsequent regulation of the manner and pace of development activities. See, e.g., Powder River Basin Resources Council, 120 IBLA 47, 54-55 (1991), citing Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981), and Union Oil Company of California v. Morton, 512 F.2d 743, 749-51 (9th Cir. 1975).

Nor is the RMP's NSO restriction properly imputed to the right in Section 4 of the lease reserved to the Secretary to manage and control "the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease." The exercise of the Secretary's authority under Section 4 is subject to a determination that such control is in the public interest, and while other laws and rules "regulating either drilling or production, or both" may be considered with respect to a specific exercise of control, Section 4 cannot be interpreted to authorize the imposition of an NSO restriction where there apparently is no feasible alternative to surface occupancy and drilling.

As to FLPMA's prohibition against undue or unnecessary degradation of the public lands, to the extent appellants mean to suggest that surface occupancy and drilling per se constitute undue or unnecessary degradation, we do not agree. Neither FLPMA nor implementing regulations defines the term "undue or unnecessary degradation." See 43 U.S.C. § 1702 (2000). In other contexts, BLM has promulgated regulations defining the term. See, e.g., 43 CFR 2800.0-5(x) (rights-of-way); 43 CFR 3600.0-3 (mineral materials disposal); 43 CFR 3715.0-5 (surface occupancy); 43 CFR 3802.0-5(l) (exploration and mining and wilderness review); 43 CFR 3809.5 (surface management). No similar definition appears in the onshore oil and gas regulations. Compare 43 CFR 3100.0-5 (definitions for Onshore Oil and Gas Leasing: General) and 3160.0-5 (definitions for Onshore Oil and Gas Operations). However, those regulations authorize and direct the authorized officer to, among other enumerated responsibilities, "require that all operations be conducted in a manner which protects other natural resources and the environmental quality, protects life and property and results in the maximum ultimate recovery of oil and gas with minimum adverse effect on the ultimate recovery of other mineral resources." 43 CFR 3161.2. Notwithstanding the lack of a definition in the onshore oil and gas regulations, to show that an action results in undue or unnecessary degradation of leasehold lands, at a minimum, an appellant would have to show that a lessee's operations are or were conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology, such that the lessee could not undertake that action pursuant to a valid existing right. Appellants' arguments show no such breach.

We note, lastly, that the EA stated in the responses to public comments that the COA's will mitigate the impacts of drilling to protect resources. (EA at 9-10.) Specifically, the EA states that "RMP standard design practices to protect resources will be applied as conditions of approval to the APD consistent with lease rights (See Mitigation Section of EA." (EA at 10.) Appellants have offered nothing that convinces us that these specific mitigation measures are inconsequential or ineffective. In fact, appellants' arguments do not even acknowledge the COA's, nor have they submitted any evidence of undue or unnecessary degradation of leasehold lands that actually occurred when the wells were drilled.

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 affirmed.

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge