

COLORADO ENVIRONMENTAL COALITION  
THE WILDERNESS SOCIETY  
WESTERN COLORADO CONGRESS

IBLA 2004-65

Decided May 31, 2006

Appeal from a decision by the Deputy State Director, Colorado, Bureau of Land Management, upholding on State Director Review a Decision Record and Finding of No Significant Impact issued by the White River Field Office, BLM. SDR CO-922.

Affirmed.

1. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements -- National Environmental Policy Act of 1969: Finding of No Significant Impact -- Oil and Gas Leases: Drilling

A decision to approve an APD will be affirmed where the record shows that, in the EA and the RMP FEIS to which the EA was tiered, BLM considered the potential impacts of oil and gas drilling on a wild horse herd, and the surface stipulations for leases and COAs for APDs provide for mitigation of site specific impacts.

APPEARANCES: Michael L. Chiropolos, Esq., Boulder, Colorado, and Brad A. Bartlett, Esq., Durango, Colorado, for appellants; Jennifer E. Rigg, Esq., Office of the Regional Solicitor, Lakewood, Colorado, for Bureau of Land Management; Norman D. Ewart, Esq., Houston, Texas, for El Paso Production Oil & Gas Company; Laura Lindley, Esq., Denver, Colorado, for EnCana Oil & Gas (USA) Inc.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The Colorado Environmental Coalition, The Wilderness Society, and Western Colorado Congress (collectively, Appellants), appeal the October 16, 2003, decision

(Decision) of the Deputy State Director, Resource Services, Colorado, Bureau of Land Management (BLM), upholding, on State Director Review, the August 27, 2003, Decision Record and Finding of No Significant Impact (DR/FONSI) issued by the White River Field Office, Colorado, BLM. The DR/FONSI approved seven applications for permits to drill (APDs) oil and gas wells in the Big Ridge area of BLM's White River Resource Area in northwestern Colorado.<sup>1/</sup> The APDs were filed by El Paso Production Oil & Gas Company (El Paso), the operator of the leases.<sup>2/</sup>

BLM analyzed the impacts of the proposed drilling in a July 16, 2003, Environmental Assessment, CO-WRFO-03-055-EA (EA), which was tiered to the May 29, 1996, White River Resource Area Resource Management Plan (White River RMP) Final Environmental Impact Statement (FEIS). BLM received comments during a 30-day public review of the EA and provided responses. (DR/FONSI, Appendix B.) The DR approving the seven APDs authorized El Paso to drill seven "wildcat" or exploratory wells (#1002-1005 and 1007-1009) and construct associated access roads and pipelines, subject to environmental mitigation required in the Conditions of Approval, outlined in the DR at Appendix B.<sup>3/</sup>

The proposed project would disturb a total of approximately 86.8 acres of the 59,000 acres in the "East Douglas Portion" of the Piceance-East Douglas Wild Horse Herd Management Area (HMA), designated pursuant to the Wild Free-Roaming Horses and Burros Act of 1971 (WFHBA), as amended 16 U.S.C. §§ 1331-1340 (2000), and 43 CFR 4710.3.<sup>4/</sup> The population goal for the entire Piceance-East

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<sup>1/</sup> The proposed wells are located specifically in secs. 29 and 33, T. 1 N., R. 101 W., and secs. 4-6, T. 1 S., R. 101 W., Sixth Principal Meridian, Rio Blanco County, Colorado.

<sup>2/</sup> By order dated Dec. 10, 2003, the Board granted El Paso intervenor status. By order dated Dec. 24, 2003, we also granted a request to intervene submitted by EnCana Oil & Gas (USA) Inc. (EnCana), the lessee of record for the five Federal oil and gas leases. That order contains a thorough statement of the facts and summary of the parties' arguments.

<sup>3/</sup> The seven wells were to be located on five Federal oil and gas leases: #1002 and #1003 (COC-64236), #1004 (COC-63280), #1005 and #1009 (COC-63279), #1007 (COC-64235), and #1008 (COC-63281).

<sup>4/</sup> The regulations define "herd area" as "the geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d). A "herd management area" is all or part of a herd area identified in an RMP for management  
(continued...)

Douglas HMA is 165 horses, including 35 using the East Douglas Portion of the HMA. (EA at 21; BLM Opposition, Declaration of Robert J. Fowler, BLM Range Specialist.) The area proposed for oil and gas drilling constitutes part of the winter range for the East Douglas herd. Id.<sup>5/</sup>

Appellants requested State Director Review of the DR/FONSI on October 1, 2003. On October 16, 2003, Deputy State Director for Resource Services Lynn Rust issued the Decision, upholding the DR/FONSI and the approval of the APDs. Appellants appealed and submitted a Petition for Stay, which we denied. (December 24, 2003, Order at 5.) On December 22, 2003, EnCana adopted the arguments made by El Paso in its Answer and Opposition. On March 30, 2004, BLM also adopted the Answer filed by El Paso and joined El Paso's request that the Decision be affirmed.

Appellants argue that BLM failed to adequately consider the potential adverse impacts of drilling and producing the seven wells on wild horses inhabiting the public lands in the East Douglas portion of the HMA, as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C)(2000). They specifically allege that the cumulative impact analysis in the EA is insufficient given its failure to adequately consider the adverse impacts already sustained by wild horses due to oil and gas drilling in the area, and that the mitigation described in the DR/FONSI to address such impacts is impermissibly uncertain, thus leaving the level of impacts in doubt. Appellants also aver that the analysis is incomplete without BLM's analysis of the impacts of drilling on wild horses in the West Douglas Herd Area (WDHA), which the agency was undertaking (and had yet to complete) in connection with a proposed amendment to the White River

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<sup>4/</sup> (...continued)

of wild horses and burros. 43 CFR 4710.3-1. The White River RMP identified the Piceance-East Douglas HMA as a location for the long-term management of a wild horse herd. (RMP at 2-26.)

<sup>5/</sup> Six of the proposed wells are within a 24,883-acre area of public lands which a citizens group proposed for designation as a wilderness study area in the Big Ridge Conservationists Wilderness Proposal (CWP), pursuant to the Wilderness Act, as amended, 16 U.S.C. §§ 1131-1136 (2000). The DR/FONSI indicates that the Record of Decision (ROD) for the White River RMP does not provide that this area will be managed for wilderness potential, given that the BLM Colorado State Office Wilderness Study Report, Statewide Overview, ROD, approved by the Secretary of the Interior on Oct. 18, 1991, found that the area did not have the characteristics necessary for designation as a wilderness study area (WSA). (DR/FONSI at 12.)

RMP.<sup>6/</sup> Also inadequate, according to Appellants, is BLM's analysis of the directional drilling alternative.

In connection with their claim alleging a violation of the land use management requirements of section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000), appellants argue that, by granting the APDs at issue, BLM has approved "unnecessary or undue degradation" of the public lands in violation of its statutory responsibility. Appellants did not raise this issue in the comment phase of the EA process or in their request for State Director Review. Accordingly, we decline to address this argument. See Southern Utah Wilderness Alliance, 128 IBLA 52, 59 (1993) ("the Board may limit its review of an SDR decision to allegations of error in the disposition of the issues presented during SDR"); see also Thomas S. Budlong, 165 IBLA 193, 197 (2005); Western Watersheds Project v. BLM, 164 IBLA 300, 307 (2005).

[1] We focus our review on the State Director Review decision to uphold the DR/FONSI. This Board has articulated a three-part test for a NEPA challenge to a BLM decision to undertake or approve an action which was analyzed in an EA and for which BLM issued a FONSI. In re Stratton Hog Timber Sale, 160 IBLA 329, 331 (2004), citing Frederic L. Fleetwood, 159 IBLA 375, 382 (2003). We will affirm the decision to go forward with the action if the record demonstrates that BLM has (1) considered the relevant environmental issues, (2) taken a "hard look" at potential environmental impacts, and (3) made a convincing case the action will not create a significant impact or that any such impact will be reduced to insignificance by mitigation measures. Id. The ultimate burden of proof is on appellants to show, through objective proof, that the agency's determination to go forward with the proposed action, without preparing an EIS, was premised on "a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared." 160 IBLA at 332.

The Council on Environmental Quality (CEQ) regulations require agencies to include in EAs brief statements of "environmental impacts" of a proposed action. 40 CFR 1508.9(b). "Effects" and "impacts" are synonymous in the regulations and include "direct," "indirect," and "cumulative" effects. 40 CFR 1508.8; 40 CFR

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<sup>6/</sup> The White River RMP identified a management objective of managing a wild horse herd within the Piceance-East Douglas HMA to provide a healthy, viable breeding population with a diverse age structure. It identified a long-term objective (+10 years) of removing all wild horses from the North Piceance and West Douglas Herd Areas. (RMP at 2-26.)

1508.7. A cumulative impact is described 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 CFR 1508.7; see Southern Utah Wilderness Alliance, 159 IBLA 220, 236-39 (2003); Southern Utah Wilderness Alliance, 122 IBLA 165, 169-70 (1992).

As noted, the EA in this case was tiered to the FEIS prepared for the White River RMP, which covers both the East Douglas portion of the HMA, in which the seven wells are proposed to be drilled, and the WDHA. The CEQ regulations define tiering as “coverage of general matters in broader [EISs] \* \* \* with subsequent narrower statements or environmental analyses \* \* \* incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.” 40 CFR 1508.28. An EA may be tiered to an EIS that has considered particular impacts of a broader Federal action, and thus the EA need not restate the cumulative impacts analysis contained in the EIS. In re Stratton Hog Timber Sale, 160 IBLA at 331; Southern Utah Wilderness Alliance, 159 IBLA at 242.

Upon a review of the facts of this case, we find that BLM properly identified the cumulative “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” and that appellants have failed to allege any specific deficiency or weakness in the EA’s cumulative impacts analysis, as tiered to the FEIS. The RMP FEIS evaluated the impacts, including cumulative impacts, of continued and anticipated oil and gas drilling in the Piceance-East Douglas HMA on the wild horses as follows:

Surface-disturbing activities within the HMA would reduce cover and forage proportional to the amount of acreage disturbed as a result of development. Successful post-production revegetation of disturbed areas could offset the loss of up to 75 percent of the forage, but any loss of tree cover (pinyon/juniper) would be long term.

New roads associated with development would constitute long-term loss of habitat. Temporal disturbance associated with the roads would be periodic, but also long term.

Managing the expanded Piceance-East Douglas HMA to accommodate 95-140 horses and provide 2,100 AUMs [Animal Unit Months of forage]

would enhance habitat conditions for wild horses and maximize their productivity.

Adding the Greasewood allotment to the existing Piceance-East Douglas HMA would solve the problem of the presently unfenced HMA boundary and also provide additional horse habitat to offset disturbance associated with mineral development. 84 Mesa and the Douglas Creek part of the HMA are the two primary areas where physical disturbance associated with energy development is most likely to occur during the life of this plan. Both of these areas would be expected to be negatively impacted over the long term by surface disturbance associated with the above activities. There would be a continuing long-term negative impact to horses as a result of increased human presence and degradation of habitat due to surface disturbance.

(FEIS at 4-25 to 4-26.)

Considering the potential impacts from oil and gas development, BLM provided, in its RMP ROD, that approved drilling and associated activity would be implemented in a manner to minimize impacts, including impacts to wild horses. (ROD/RMP at 1, 1-2, 2-5, 2-26.) Accordingly, in signing the ROD, the Acting Colorado State Director approved surface stipulations, identified in the RMP for leases and new use authorizations issued in the EDHA, including no surface occupancy stipulations, timing limitations, and controlled surface use. (ROD/RMP at 1, 2-5, Appendix A.) All the leases at issue contain a stipulation to protect wild horses in the Piceance-East Douglas HMA by requiring the lessee to delay intensive development activities for a period of 60 days during the spring foaling period, to develop habitat improvement projects if development displaces wild horses from crucial habitat, to replace disturbed watering areas, and to provide for unrestricted access between summer and winter ranges. (RMP at A-23; BLM Opposition to Stay Request at 3.)

The ROD also approved conditions of approval (COAs), that would be implemented to mitigate site-specific impacts from APDs and surface disturbance associated with Sundry Notices. (RMP at 1, 2-5, Appendix B.)<sup>27</sup> In addition, the ROD addressed potential impacts to wild horses throughout the Piceance-East Douglas HMA by expanding the boundary of that HMA to include the Greasewood allotment that had been part of the North Piceance Herd Area, and by providing for

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<sup>27</sup> We note that, under Departmental regulations, an operator is required to comply with such conditions. 43 CFR 3101.1-2.

adjustments to long-term management levels for the HMA based on the results of monitoring. (RMP at 2-26; see also FEIS at 4-25 to 4-26.)

The EA for the proposed project explained that “current development is concentrated on the north end winter range for wild horses in the East Douglas portion of the HMA” and further described the impacts associated with this project on the wild horses, as follows: “This project would decrease the winter range by approximately 20% and result in increased wild horse use in the southern portions which are also being developed.” (EA at 21, 23.) BLM recognized the possibility that successful drilling would most likely be followed by an infill development program, resulting in loss of 4 months of winter range for approximately 10 horses, reflecting a loss of 50 AUMs of forage. (EA at 21-22.) In order to mitigate the loss of forage, BLM included COA No. 23 for each well, which states:

[T]he applicant may be required to augment lost wild horse winter range by enhancement of approximately 300 acres of pinyon/juniper woodland by removal and seeding. The enhancement area will be determined and laid out by the BLM.

See, e.g., FONSI/DR at A-1, C-1-3. The 300-acre figure would provide the 50 AUMs associated with the lost habitat, calculated on the basis of 6 acres per AUM. (EA at 22.)

BLM explained that mitigation would be required only for producing wells, as it expected no long-term loss of forage in connection with non-producing wells. Since the need for mitigation is dependent on well production and field development, BLM reasoned that “more information is required in order to determine actual impacts and need for mitigation. BLM will make this determination, and analyze impacts of necessary range enhancements when the applicant reports on the status of the wells.” (FONSI/DR at A-1.) Appellants argue, in their Petition for Stay, that the forage-replacement mitigation is inadequate, since it would be imposed only if production occurred at one or more of the wells. We disagree and find BLM’s phased approach to implementation of mitigation clearly appropriate, since the extent of impacts will not be known until the number and location of producing wells has been determined.

In similar cases involving unknown future impacts of a proposed action, we have approved of mitigation plans in which BLM identified the type of mitigation but rendered implementation contingent on assessment of whether and to what extent that mitigation was warranted, given the uncertain results of possible future activity. See Great Basin Mine Watch, 159 IBLA 324, 347-48, 354 (2003) (types of mitigation

identified in the DR/FONSI, but the exact locations to be determined in later phases of development); Power River Basin Resource Council, 144 IBLA 319, 323-24 (1998) (mitigation to be tailored to individual well-owners depending on the amount of draw-down their wells suffered as a result of the development). We find that BLM adopted appropriate measures to mitigate impacts from any production activities that may occur at the wells, for which BLM approved APDs in this case, and any additional infill wells, consistent with NEPA.

Appellants have also failed to show that BLM violated NEPA by failing to delay the proposed action until BLM completes its ongoing analysis of the cumulative impacts of drilling on wild horses in the WDHA, in connection with its proposed amendment of the White River RMP. The WDHA is a distinct herd area that is physically separated from the Piceance-East Douglas HMA by a state highway with fences on either side.<sup>8/</sup> BLM's approval of the APDs at issue in this appeal is consistent with the White River RMP and appellants have provided no significant information, not previously considered in the EA or FEIS, bearing on the impacts of this action. Nothing in NEPA or the CEQ regulations requires BLM to postpone or deny a proposed action that is covered by the EIS for the current land use plan, in order to preserve alternatives during the course of preparing a new land use plan and EIS. See 40 CFR 1506.1(c)(2).

Appellants have thus failed to show that BLM violated section 102(2)(C) of NEPA by failing to adequately consider the impacts of the project in the EA, as tiered to the FEIS. That appellants would have come to a different conclusion regarding the nature and scope of potential impacts is not sufficient to establish error in BLM's analysis or a violation of NEPA. Southern Utah Wilderness Alliance, 158 IBLA 212, 216 (2003).

Finally, appellants further argue that BLM inadequately considered the option of directional drilling. The record proves otherwise. BLM concluded that, given the distance between the existing drilling location and the target resources, directional drilling would be neither practicable nor feasible for any of the proposed wells except well #1003. BLM regulations authorize the agency to require directional drilling, consistent with lease rights, if relocation of no more than 200 meters is required. 43 CFR 3101.1-2. BLM, however, determined that requiring directional drilling for well #1003 would involve a relocation of over 400 meters—more than BLM is authorized to require. Id.; EA at 1-2. Further, El Paso presented uncontested evidence that using directional drilling for well #1003, while physically feasible,

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<sup>8/</sup> There has been no documentation of any interchange of wild horses between the areas since 1983. (BLM Opposition, Fowler Declaration at 2.)

would be technically difficult to the point of impracticality. (Letter dated Oct. 23, 2002, from Bryan Simmons, Vice-President, El Paso, to Ken Walter, Field Office Manager, White River Field Office, BLM, in response to a query from BLM regarding directional drilling on well #1003.)

Moreover, BLM's analysis showed that the environmental impacts from directional drilling at well #1003 would not be significantly less than the impacts from the traditional method of drilling. According to the EA, directional drilling would avoid the disturbance of only approximately 16 acres—the acreage necessary for one drill pad, a 0.5-mile-long access road, and a buried pipeline. Therefore, BLM did not support requiring directional drilling. (DR/FONSI at 2; Decision at 4-7.) The record clearly shows that BLM considered this alternative and made a decision, on a rational basis, not to require directional drilling.

To the extent that appellants raise other arguments not explicitly addressed above, these arguments were considered but rejected.

Appellants have failed to meet their burden of establishing, with objective evidence, that BLM premised its decision approving the seven APDs upon a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Decision of the Deputy State Director is affirmed.

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Christina S. Kalavritinos  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge