



SOUTHERN UTAH WILDERNESS ALLIANCE

177 IBLA 284

Decided June 2, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

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IBLA 2009-22

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Appeal from a decision of the Utah State Office, Bureau of Land Management dismissing an appeal from a Record of Decision issued by the Vernal Field Office approving a natural gas project. UT-080-2003-0300V.

Reversed and remanded.

1. Administrative Procedure: Standing--Appeals: Standing--Rules of Practice: Appeals: Standing to Appeal

An organization has standing to appeal a record of decision approving a natural gas project, even though the decision itself does not approve surface disturbing operations, when the record of decision does provide and has been a basis for approving pending applications for permits to drill (APDs), where that organization's members would be adversely affected by the approval of pending APDs in the project area.

APPEARANCES: Steven Bloch, Esq., David Garbet, Esq., and Tiffany Bartz, Esq., Salt Lake City, Utah, for appellant; James E. Karkut, Esq., Office of the Regional Solicitor, Intermountain Region, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Southern Utah Wilderness Alliance (SUWA) has appealed from the September 19, 2008, decision of the Utah State Office, Bureau of Land Management (BLM), on State Director Review (SDR), dismissing its appeal from an August 7, 2006, Record of Decision (ROD) issued by BLM's Vernal Field Office. The ROD approved the implementation of Alternative 2 as set forth in the May 2006 Final Environmental Impact Statement (FEIS) for the Resource Development Group (RDG) Uinta Basin Natural Gas Project (Project) (UT-080-2003-0300V), which authorizes the development of natural gas resources on Federal oil and gas leases in the East

Tavaputs Plateau portion of the Uinta Basin, south of White River, 40 miles southeast of Vernal, Utah. Despite the fact that BLM has been approving applications to drill (APDs) on the basis of the ROD, the State Director found that SUWA lacked standing to appeal because the ROD itself did not authorize surface-disturbing activities, so that SUWA was not adversely affected by that decision as required by 43 C.F.R. § 3165.3(b). We reverse.

BACKGROUND

Under 43 C.F.R. § 3165.3(b), “[a]ny adversely affected party that contests a . . . decision of the authorized officer issued under the regulations in this part [43 C.F.R. Part 3160 Onshore Oil and Gas Operations] may request an administrative review, before the State Director.” The regulation further states that “[a]ny party who is adversely affected by the State Director’s decision may appeal that decision to the Interior Board of Land Appeals as provided in § 3165.4 of this part.” 43 C.F.R. § 3165.3(b).¹ Although the Vernal Field Office’s decision provided that it was subject to appeal to this Board, and SUWA appealed that decision to the Board, we concluded that SUWA’s appeal must first be decided by the State Director under 43 C.F.R. § 3165.3(b), and remanded the case for SDR. *Southern Utah Wilderness Alliance*, IBLA 2007-103 (July 14, 2008). The State Director then issued the decision from which this appeal is taken.

ARGUMENTS OF THE PARTIES

In its Statement of Reasons (SOR), SUWA refers to one of our earlier decisions, *William E. Love*, 151 IBLA 309, 318-20 (2000), an appeal from a similar BLM decision where we denied a motion to dismiss an appeal for lack of standing. In that case, the ROD approved a specific project (a coalbed methane project) and established the scope and parameters of the project. Although further analyses were required to fix the exact locations of the approved wells, compressors, pipelines, powerlines, and other facilities in the project area, we held that we could not ignore the effect of the ROD which represented BLM’s approval of a massive development on public lands with on-the-ground consequences. In reaching this result, we distinguished on their facts the Board’s decisions dismissing appeals for lack of standing in *Salmon River Concerned Citizens*, 114 IBLA 344 (1990), *Colorado Environmental Coalition*, 125 IBLA 287 (1993), and *Petroleum Association of Wyoming*, 133 IBLA 337 (1995). 151 IBLA at 319-320. Accordingly, we found that the appellant’s legal interest was adversely affected by the ROD. *Id.* at 320.

¹ The regulation at 43 C.F.R. § 3165.4(a) provides that any such appeal to the Board shall be pursuant to 43 C.F.R. Part 4.

BLM argues that SUWA is not adversely affected by the ROD, and focuses on our *Love* decision, asserting that it is inconsistent with *Salmon River* and the other cases we distinguished while ignoring the fact that we *did* distinguish those cases and the reasons why we did so.²

ANALYSIS

This Board's regulations provide parties adversely affected by a BLM decision with a right of appeal. 43 C.F.R. § 4.410. Over the course of two decades, this Board has considered the merits of appeals from programmatic BLM decisions for natural gas projects much like the one issued by the Vernal Field Office in this case. *E.g.*, *Biodiversity Conservation Alliance*, 174 IBLA 1 (2008); *Biodiversity Conservation Alliance*, 171 IBLA 218 (2007); *William E. Love*, 151 IBLA 309 (2000); *Powder River Basin Resource Council*, 144 IBLA 319 (1998); *Powder River Basin Resource Council*, 120 IBLA 47, 60-62 (1991). If the RODs in those cases did not themselves approve APDs, each provided a basis for approving pending APDs, as did the ROD that is the subject of this appeal.

Neither in the decision under appeal nor in its Answer to SUWA's SOR does BLM make any effort to explain how the ROD in this case differs from all of the other natural gas project cases decided by the Board, such as those that we have listed above. Accordingly, we decline BLM's invitation to engage in a labored analysis that would only result in an iteration of what we have previously held. Instead, we point to one aspect of this case that informs our conclusion and that distinguishes this case from *Salmon River* and the other cases cited by BLM in which we found that the appellants lacked standing: BLM has been taking action on pending APDs so that denial of standing here would provide no opportunity to seek our review of such actions. *See* SOR, Exs. B, C, and D.

Although BLM relies on our *Salmon River* decision to support its argument that SUWA is not adversely affected by the ROD, BLM ignores one specific justification we provided for that result:

Not according standing to [appellant] to challenge the State Director's November 1988 ROD adopting the proposed action

² Counsel are reminded that unpublished orders of the Board are not binding precedent. *Colorado Environmental Coalition*, 173 IBLA 362, 369 (2008); *Southern Utah Wilderness Alliance*, 163 IBLA 142, 158 n.12 (2004); *see Peabody Coal Co.*, 53 IBLA 261, 265 (1981); *Cheyenne Resources, Inc.*, 46 IBLA 277, 283-84, 87 I.D. 110, 113-14 (1980); *U.S. v. Mansfield*, 35 IBLA 95, 100 (1978). Attempts to bolster an argument with citations to unpublished Board orders are not helpful to that argument.

considered in the programmatic EIS does not foreclose appellants from later challenging the adequacy of the EIS in the context of a specific instance of proposed herbicide spraying. In an appeal from a BLM decision to use herbicide spraying in a particular area after preparation of a site-specific EA, the EA would undoubtedly be tiered to the programmatic EIS, thus affording appellants at that time standing to challenge the adequacy of the EIS, as well as of the EA.

114 IBLA at 350. Similarly, in *Friends of the River*, 146 IBLA 157, 165 (1998), we dismissed appeals from the adoption of an interim strategy for managing anadromous fish-producing watersheds because we concluded that our action would not pre-empt full adjudication of site-specific actions when they were taken.

[1] In this case, however, BLM's very purpose in seeking affirmation of the State Director's dismissal appears to be to preempt adjudication of its site-specific actions or to diminish the opportunities to challenge them.³ We cannot reconcile BLM's intent in this case with its general obligation to afford opportunities for public participation in its decisionmaking. We note that in *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1314 (D. Idaho 2008), the court enjoined BLM's new grazing regulations in part because it found that the new regulations "would freeze the public out of the [particular grazing] permit process until the decision had been made and the . . . permit issued." The court found that the regulation violated a requirement of the Federal Land Policy and Management Act that requires BLM to "establish procedures . . . to give . . . the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in the preparation *and execution of plans* and programs for, and the management of, the public lands." 43 U.S.C. § 1739(e) (2006) (emphasis added). We note that this provision pertains not only to grazing, but also to activities that would execute any management plan for the public lands. Accordingly, we conclude that SUWA is "adversely affected" by the Vernal Field Office's ROD because that programmatic ROD provides the basis for approval of pending APDs on which BLM is presently taking action and SUWA has established that its members would be adversely affected by the approval of APDs in the project area.

³ There may be less opportunity to challenge site specific actions because § 390 of the Energy Policy Act of 2005, 42 U.S.C. § 15942 (2006), provides for the categorical exclusion of certain site specific actions such as approval of APDs from review that would otherwise be required under § 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2006).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed and the case remanded to the Utah State Office for consideration of the merits of SUWA's appeal on SDR.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge