

SIERRA CLUB LEGAL DEFENSE FUND, INC.  
NATURAL RESOURCES DEFENSE COUNCIL, INC.  
CALIFORNIA WILDERNESS COALITION

IBLA 84-4

Decided January 7, 1985

Appeal from a decision of the California State Office, Bureau of Land Management, denying a protest to issuance of oil and gas leases in areas of critical environmental concern.

Affirmed as modified.

1. Oil and Gas Leases: Generally -- Rules of Practice: Appeals:  
Generally -- Rules of Practice: Protests

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

2. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

A decision to issue oil and gas leases within an area of critical environmental concern pursuant to a categorical exclusion review will ordinarily be set aside and remanded for preparation of an environmental assessment where the categorical exclusion review discloses potential adverse impacts on threatened and endangered species. This constitutes an exception to the categorical exclusion review process under Departmental procedures, 516 DM 2, Append. 2, § 2.8.

3. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

Analysis of the impact of a proposed action under the National Environmental Policy Act, as amended, 42 U.S.C. § 4332 (1982), is required prior to an irrevocable commitment of resources. A decision deferring preparation of an environmental assessment and/or environmental impact statement in connection with issuance of a non-competitive onshore oil and gas lease until such time as a site-specific plan of operations is submitted by the lessee may be affirmed where the lessee's right to surface occupancy is conditioned upon approval of a site-specific plan of operations in light of that environmental analysis.

APPEARANCES: Laurens H. Silver, Esq., for Sierra Club Legal Defense Fund, Inc.; Johanna H. Wald, Esq., for Natural Resources Defense Council, Inc.; Lynn M. Cox, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., and the California Wilderness Coalition appeal from a decision of the California State Office, Bureau of Land Management (BLM), dated July 29, 1983, denying their protest against the issuance of 118 noncompetitive oil and gas leases encompassing portions of several areas of critical environmental concern (ACEC's) located within the California Desert Conservation Area (CDCA). The BLM State Director determined that as to 115 of the leases issued before the protest was filed on September 7, 1982, the protest was untimely. Hence, BLM dismissed the protest with respect to these leases. As to the three remaining leases issued after September 7, 1982, the State

Director held that these leases were issued in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1982), and denied appellants' protest on its merits.

The California Desert Conservation Area Plan 1/ was developed in response to the legislative mandate in section 601(d) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1781(d) (1982), which states:

The Secretary \* \* \* shall prepare and implement a comprehensive, long-range plan for the management, use, development, and protection of the public lands within the California Desert Conservation Area. Such plan shall take into account the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights-of-way, and mineral development. Such plan shall be completed and implementation thereof initiated on or before September 30, 1980.

Section 103(a) of FLPMA, 43 U.S.C. § 1702(a) (1982), defines an ACEC as an area

within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

From January 1, 1981, through January 4, 1983, the California State Office, BLM, issued 118 noncompetitive oil and gas leases encompassing

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1/ Bureau of Land Management, United States Department of the Interior, California Desert Conservation Area Plan (1980).

portions of several ACEC's within the CDCA. On September 7, 1982, appellants filed with BLM an appeal of the approval of all oil and gas lease applications affecting ACEC's. Appellants contended that an environmental impact statement (EIS) should have been prepared before BLM issued oil and gas leases in the ACEC's and that it was improper to issue the oil and gas leases on the basis of a categorical exclusion. Appellants argued that ACEC's are "ecologically significant or critical areas" within the meaning of the exception to the categorical exclusion procedure. 516 DM 2, Append. 2, § 2.2.

BLM treated this appeal as a protest under the regulations at 43 CFR 4.450-2. The State Director denied the protest by decision of July 29, 1983, from which this appeal is brought. In its decision, BLM denied appellants a right to a hearing on the merits with respect to leases approved prior to the filing of the protest because the protest was untimely. With regard to the three leases issued after the filing of the protest, 2/ BLM held that the decision to issue the oil and gas leases in question did not amount to a proposal for major Federal action requiring preparation of an EIS under NEPA. BLM found that the stipulations attached to each lease as a result of the categorical exclusion review (CER) procedure reserved authority enabling BLM to modify or reject any proposed development plans. BLM also found that those stipulations, coupled with its reliance on the environmental review and management prescriptions developed in conjunction with the CDCA Plan and its associated EIS, provided sufficient protection for the unique resource values of each of the ACEC's.

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2/ The leases issued subsequent to the filing of the protest on Sept. 7, 1982, are: CA 10018, CA 10363, and CA 12959.

Appellants contend on appeal that BLM acted unlawfully in denying the protest with respect to leases issued prior to the time of filing of their protest. The regulation pertaining to protests, 43 CFR 4.450-2, provides as follows:

Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

The main thrust of appellants' argument is that 43 CFR 4.450-2 does not compel the filing of a protest before the decision is made, but simply gives BLM discretion to treat as a protest objections which do not constitute a "contest." Appellants assert that it is unfair to deprive them of their appeal remedies when there was no advance public notice of BLM's intention to issue oil and gas leases. Appellants contend that the Board has in the past reviewed the denial of protests by BLM where the protest was filed after BLM had approved a proposed action and issued a permit or other authorization.

Appellants assert that BLM erred in denying them a right to a hearing on the merits with respect to leases approved prior to the filing of the protest. Appellants request that the Board decide the legality of all 118 leases in issue or remand to BLM the cases involving the 115 leases issued prior to the filing of the protest, with instructions for BLM to decide the protest on the merits.

In response, BLM points out that 43 CFR 4.450-2 establishes a mechanism by which interested members of the public may voice their concerns to

BLM about actions proposed to be taken in proceedings before BLM. BLM contends that, had appellants challenged approval of the lease applications under 43 CFR 4.450-2 by filing a timely protest with BLM, their standing as a "party to the case" under 43 CFR 4.410(a) to appeal issuance of a lease would not be questioned, provided appellants could show that they had been "adversely affected" by the State Director's decision as required by 43 CFR 4.410(a). As for notice of the lease applications, BLM points out that both the master title plats and the serial register books note applications to lease and both are public records available to anyone interested in reviewing leasing activity in a particular location.

Appellants' second argument is that BLM violated NEPA when it issued oil and gas leases in ACEC's without first preparing an EIS. Appellants assert that, because of the highly vulnerable nature of ACEC's, along with the special management attention Congress and BLM have mandated for these areas, any proposed actions affecting them, including issuance of oil and gas leases, constitute major Federal actions within the meaning of NEPA. Therefore, appellants reason that before development activities can take place within an ACEC, an EIS must be prepared.

Appellants cite Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983), for its holding that to comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude all surface-disturbing activities until an appropriate environmental analysis is completed. Appellants assert that BLM neither prepared an EIS prior to leasing nor retained the authority to preclude all surface-disturbing activities pending an environmental evaluation, thereby failing to comply with

NEPA. Appellants request that the Board require BLM to comply with applicable law by preparing EIS's in connection with leasing in the ACEC's and setting aside leases already issued in ACEC's.

In its answer, BLM states that its determination that issuance of leases CA 10018, CA 10363, and CA 12959 is not a major Federal action requiring the preparation of an EIS is rationally based on, and fully supported by, the administrative record; that BLM's use of the CER screening process to reach that decision accords fully with the Council on Environmental Quality's (CEQ) NEPA regulations at 40 CFR Part 1500 and the Department's NEPA guidelines at 516 DM 6; and that the inclusion of standard and special stipulations in each lease ensures that any unforeseen adverse impacts to the environment can be fully mitigated to the point of insignificance. BLM agrees with appellants that it may not deny all development of the leases, but contends it has retained authority to prohibit surface-disturbing activities within the specific portions of the leaseholds included within the ACEC's if environmental analysis of a specific plan of operations indicates significant adverse impact might result.

This appeal presents three major issues. The first is whether a protest of a decision filed after the decision has been implemented, by one who was not previously a party to the case, is properly dismissed as untimely filed. The second question is whether issuance of an oil and gas lease embracing lands within an ACEC pursuant to the CER process is inconsistent with NEPA. Finally, if the answer to the last question is affirmative, the issue is whether the environmental assessment (EA) may be deferred until submission of a plan of operations.

[1] The regulation at 43 CFR 4.450-2 clearly states that a protest is an objection "to any action proposed to be taken." (Emphasis supplied.) Therefore, a protest to issuance of an oil and gas lease filed after the lease has issued is not timely. Patricia C. Alker, 79 IBLA 123 (1984); Goldie Skodras, 72 IBLA 120 (1983). <sup>3/</sup> In the absence of a protest or conflicting application filed prior to issuance of the oil and gas leases in question, appellants were not a party to the case and could not assert standing to appeal lease issuance. 43 CFR 4.410; In Re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). Thus, the BLM decision must be affirmed to the extent it dismissed appellant's protest of the leases already issued. <sup>4/</sup>

Although appellants imply that issuance of the oil and gas leases was a surprise, BLM correctly points out that both the master title plats and the serial register books note applications to lease shortly after they are filed. These are public documents which are available for review.

In light of our holding on the first issue, consideration of the second issue will focus on the three leases issued after the filing of the protest, CA 10018, CA 10363, and CA 12959. Small portions of ACEC No. 64 are included in leases CA 12959 and CA 10363. A portion of lease CA 10018 is located within ACEC No. 60.

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<sup>3/</sup> In these cases, the "protests" were filed after lease issuance by conflicting applicants with potential priority in simultaneous oil and gas lease drawings. The Board held that such "protests" were properly regarded as appeals from rejection of the protestants' conflicting applications to lease rather than protests to the issuance of the oil and gas leases.

<sup>4/</sup> Appellants are mistaken in their assertion that the precedent of California Ass'n of Four Wheel Drive Clubs, 30 IBLA 383 (1977), compels a different result. The protest/appeal in that case was filed prior to occurrence of the proposed action being protested.

As a preliminary matter, we note that it was error for BLM to issue these leases prior to adjudication of the protest. This Board has frequently held that the filing of a timely protest suspends the authority of BLM to act on the matter protested prior to adjudication of the protest and during the time in which a party adversely affected may file a notice of appeal. James W. Smith, 44 IBLA 275 (1979); Duncan Miller (On Reconsideration), 39 IBLA 312 (1979); D. E. Pack, 31 IBLA 283 (1977); California Association of Four Wheel Drive Clubs, *supra*.

[2] NEPA requires preparation of an EIS whenever a proposed major Federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1982). To determine the nature of the environmental impact from a proposed action and whether an EIS will be required, Federal agencies prepare an EA. 40 CFR 1501.4(b), (c). If, on the basis of the EA, the agency finds that the proposed action will produce "no significant impact" on the environment, then an EIS need not be prepared. 40 CFR 1501.4(e).

Certain types of action may qualify for a categorical exclusion from preparation of an EA and/or EIS. The significance of such a determination is explained in the regulations at 40 CFR 1508.4 as follows:

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances

in which a normally excluded action may have a significant environmental effect.

The Department of the Interior has determined that, subject to certain exceptions, issuance of noncompetitive onshore oil and gas leases qualifies as a categorical exclusion. 516 DM 6, Append. 5, 5.4D(2)a. At the time this categorical exclusion was promulgated, the preamble to the published exclusion (originally codified at 5.4D(4)) explained:

§ 5.4D(4). One commentor questioned our exclusion of individual upland oil and gas leases, because they are discretionary duties. We have revised the language to exclude only noncompetitive leases because over the past ten years we have issued over 100,000 such leases and our tens of thousands of EAs have not even lead [sic] to one EIS. We believe our exceptions to the exclusions listed in 516 DM 2.3A(3) will capture those few noncompetitive leases that may have some impact.

46 FR 7493 (Jan. 23, 1981).

Actions embraced within the scope of a categorical exclusion from preparation of an EIS may under certain circumstances be excepted from the exclusion, i.e., require preparation of an EA and/or an EIS. Thus, a categorical exclusion is not applicable and environmental documents must be prepared for actions which may:

2.2 Have adverse effects on such unique geographic characteristics as historic or cultural resources, park, recreation or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

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2.8 Have adverse effects on species listed or proposed to be listed on the List of Endangered or Threatened Species, or have adverse effects on designated Critical Habitat for these species.

516 DM 2, Append. 2.

This Board has, in the past, upheld such actions as approval of an application for drilling permit on an oil and gas lease after completion of a CER where the determination that no EA and/or EIS was required was made in good faith, on the basis of a proper and sufficient record, and is reasonably supported by such record. Colorado Open Space Council, 73 IBLA 226 (1983).

With regard to lease CA 10018, the record discloses that the lands under lease are located within the Salt Creek Desert Pupfish/Rail Habitat ACEC (No. 60). The lease offer was submitted to a CER by BLM prior to lease issuance. The worksheet for this review dated March 29, 1982, identified three threatened or endangered species: Yuma Clapper Rail, California Black Rail, and Desert Pupfish. The CER also referenced the Salton Sea Oil and Gas Environmental Assessment concerning the lands involved and noted the need for a "section 7" 5/ consultation on the listed species.

The BLM decision of October 20, 1982, rejecting the lease offer in part was based on the results of that consultation which concluded that oil and

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5/ Section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (1982). This section calls for consultation by Government agencies with the Secretary of the Interior (Fish and Wildlife Service) to ensure that actions taken by them are not likely to jeopardize threatened or endangered species.

gas leasing of a portion of the land applied for would threaten the Yuma Clapper Rail. The same decision also imposed certain stipulations, entitled "Oil and Gas Lease -- Surface Disturbance Stipulations" which provide that any drilling, construction, or other operation on the leased lands that will disturb the surface or otherwise affect the environment shall be subject to prior approval by the District Oil and Gas Supervisor and "to such reasonable conditions, not inconsistent with the purposes for which this lease is issued, as the Supervisor may require to protect the surface of the leased lands and the environment." Included among the surface-protection stipulations was the following:

9. The leased lands may be in an area suitable for the habitat of threatened or endangered plant and animal species. All viable habitat of these species will be identified for the lessee by the Authorized Officer of the Bureau of Land Management during the preliminary environmental review of the lessee's proposed surface disturbing activity. This analysis may also include, on Bureau of Land Management initiative, formal consultation with the U.S. Fish and Wildlife Service to determine whether or not the proposed activity would jeopardize the continued existence of these species [see Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536)]. This process may result in some restrictions to the lessee's plan of development, or even disallow surface disturbance. The plant survey must be coordinated with the Authorized Officer, Bureau of Land Management. To assist in this process the lessee may be required to provide a report from a Wildlife Biologist and/or Botanist acceptable to the District Manager, Bureau of Land Management, identifying the anticipated impacts of the proposed plan of development on the endangered species habitat.

However, none of the stipulations, in and of itself, precluded occupancy of all of the surface of the lease by the lessee.

The potential impact on threatened and endangered species disclosed in the CER establishes an exception to the CER procedure and, hence, the need for

an EA. Indeed, review of the record reveals an EA was prepared. Reference to the March 1982 Salton Sea Oil and Gas EA # CA-066-2-4 discloses that a finding of no significant impact from oil and gas leasing was predicated in part on a no-surface-occupancy restriction for lands in secs. 1 through 4, 9 through 16, 21 through 29, and 33 through 36 in T. 8 S., R. 11 E., San Bernadino Meridian (EA at 88). Lease CA 10018 included lands within secs. 4, 12, and 24. Accordingly, we find that stipulation 9 quoted above, in the context of this lease, is properly construed as precluding surface occupancy of the identified sections pending submission of a plan of operations and approval thereof based upon a supplemental EA and/or EIS.

With respect to leases CA 10363 and CA 12959, the files contain a document entitled "Oil and Gas Preleasing Environmental Checklist." These project a high impact on sensitive habitat areas from oil and gas exploration and development. Specifically noted is the high impact in ACEC No. 64 on flat-tailed horned lizard habitat. Both leases issued with stipulations similar to those attached to CA 10018, including stipulation 9 quoted above. Like the latter lease, neither included a stipulation explicitly reserving the right to preclude all surface occupancy.

We find that the potential impact on threatened and endangered species within the ACEC brings these leases within the scope of the exceptions to the categorical exclusion review process for actions which may have adverse effects on threatened or endangered species habitat. 516 DM, Append, 2, 2.8. Hence, an EA is required. The question remaining is whether the EA could be deferred until submission of a site-specific plan of operations.

[3] It is the position of BLM that the protective stipulations are sufficient to preclude adverse environmental impacts and, hence, obviate the need to prepare an EA prior to submission of a specific plan for surface-disturbing operations. NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment. The EIS is a decisionmaking tool intended to "insure that \* \* \* environmental amenities and values may be given appropriate consideration in decisionmaking." 42 U.S.C. § 4332(2)(B) (1982). Therefore, the appropriate time for preparing an EA and/or an EIS is prior to a decision, when the decisionmaker retains a maximum range of options. See Environmental Defense Fund v. Andrus, 596 F.2d 848, 852-53 (9th Cir. 1979). An EIS is required when the "critical agency decision" is made which results in "irreversible and irretrievable commitments of resources" to an action which will affect the environment. See Mobil Oil Corp. v. F.T.C., 562 F.2d 170, 173 (2d Cir. 1977).

In Sierra Club v. Peterson, supra, the court considered the issue of when "irreversible and irretrievable commitments of resources" are made in regard to issuing noncompetitive oil and gas leases. The leases involved in Peterson were located in a roadless area in the Targhee and Bridger-Teton National Forests of Idaho and Wyoming, known as the Palisades Further Planning Area. All of the leases for the Palisades contained stipulations which required the lessee to obtain approval from the Department of the Interior before undertaking any surface-disturbing activity on the lease. However, stipulations for some of the leases did not authorize the Department to preclude all surface activities which the lessee might propose. The Department could not deny a permit to drill, but it could only impose "reasonable"

conditions designed to mitigate the environmental impacts of the drilling operations. Sierra Club v. Peterson, *supra* at 1411.

In addition, the court noted that leases of lands in certain "highly environmentally sensitive" areas were issued subject to a no-surface-occupancy stipulation which precluded surface occupancy unless and until such activity is specifically approved by the Forest Service. *Id.* The opinion of the district court characterized this as a "conditional" no-surface-occupancy stipulation. Sierra Club v. Peterson, 17 ERC 1449, 1453 (D.D.C. Mar. 31, 1982), *rev'd*, 717 F.2d 1409 (D.C. Cir. 1983). On appeal, the circuit court specifically noted that the leased lands covered by this latter stipulation were not a subject of the appeal, appellant having conceded that the Department had retained authority to preclude all surface-disturbing activity until further site-specific environmental studies are made. 717 F.2d at 1412.

On the facts of the Peterson case, the court determined that the critical agency decision resulting in irreversible and irretrievable commitment of resources, insofar as lands leased without the conditional no-surface-occupancy stipulation were concerned, occurred at the point of leasing. On the other hand, the court held that the Department may delay preparation of an EIS provided that it reserves both the authority to preclude all activities pending submission of site-specific proposals and the authority to prevent proposed activities if the environmental consequences are unacceptable.

Upon careful review of the record we find that the surface-disturbance stipulations attached to these leases, in particular stipulation 9 quoted

previously, are effective to condition surface occupancy upon completion of an EA and/or EIS in the context of a site-specific plan of operations and a finding that any impact is either mitigable or acceptable. See Sierra Club (On Reconsideration), 84 IBLA 175, 180 (1984). We recognize that a lessee could argue that the surface-disturbance stipulations only envision restrictions reasonably consistent with development of the oil and gas resources in the leased lands. However, such an interpretation would clearly be inconsistent with the Department's obligation under NEPA and other statutes, such as section 7 of the Endangered Species Act of 1973. 16 U.S.C. § 1536 (1982). The surface-disturbance stipulations must be construed in such a manner as will impart to them a lawful effect rather than an unlawful effect.

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 as modified.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Will A. Irwin  
Administrative Judge.

