

Editor's note: Reconsideration granted; reaffirmed as modified -- 115 IBLA 218 (July 12, 1990); Secy. rev'd as to issuance of general rule (June 25, 1991)

MICHAEL GOLD ET AL.

IBLA 86-1575

Decided April 24, 1989

Appeal from a decision of the Farmington Area Manager, Bureau of Land Management, approving an application for permit to drill. NM 28709.

Set aside and remanded.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--Oil and Gas Leases: Drilling

The categorical exclusion found at 516 DM 6, Appendix 5.4D(2)(d), exempting APD approval from the NEPA process, applies only to exploratory wells and not to development wells.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--Oil and Gas Leases: Drilling

Where an environmental assessment prepared for consideration of an APD is deficient in its discussion of possible effects of the proposed action on wildlife, fails to discuss relevant mitigation measures, and does not document the reasons why it rejects various alternatives to the proposed action, approval of the APD based on such an environmental assessment must be set aside.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--Oil and Gas Leases: Drilling

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD triggers the requirement for an Environmental Impact Statement, unless an Environmental Impact Statement has already been prepared which analyzes the impacts that can be expected from full field development.

APPEARANCES: Grove T. Burnett, Esq., Glorieta, New Mexico, for appellants; Margaret C. Miller, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management; and Robert G. Stovall, Esq., Farmington, New Mexico, for intervenor, Dugan Production Corp.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Michael and Patricia Gold, the Golden Horn Corporation, and Cedar Mountain-Camp Wanagi have appealed from a decision of the Farmington Area Manager, Bureau of Land Management (BLM), dated May 20, 1986, approving an application for permit to drill (APD) the Divide #2 well on lease NM 28709, located in S\ S\ sec. 35, T. 26 N., R. 2 W., New Mexico Principal Meridian, filed by Dugan Production Corporation (Dugan). The Golds are the principals in the Golden Horn Corporation, which owns the surface of the land in question, and they operate a children's wilderness camp (Cedar Mountain-Camp Wanagi) on the subject land during the summer months.

The land in question, S\ S\ of sec. 35, was originally included in a patent issued to one Loyd J. Ingram under the provisions of the Stock-Raising Homestead Act (SRHA), 43 U.S.C. | 291 (1982). ^{1/} Pursuant to section 9 of the SRHA, 43 U.S.C. | 299 (1982), the patent expressly reserved "all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the [SRHA]."

In 1971, Patricia and Michael Gold purchased 800 acres of land, including, *inter alia*, the S\ S\ of sec. 35. In 1984, the Golds established Cedar Mountain-Camp Wanagi as a children's wilderness camp for the purpose of introducing children from urban areas to the wilderness experience.

Competitive oil and gas lease NM 28709 issued to Mountain Fuel Supply Company, effective November 1, 1978, for an initial 5-year term, embracing all of sec. 35. This lease was extended for an additional 2-year period due to diligent drilling operations (see 43 CFR 3107.1). A successful well, the #1 Divide, was ultimately completed in the SE^ NE^ sec. 35, in 1983. In 1984, record title to lease NM 28709 was assigned to Celsius Energy Company. Dugan is the designated operator of the lease and owner of 50 percent of the operating rights from the surface to a depth of 7,750 feet. The remaining operating rights are held, 20 and 30 percent respectively, by W. E. Land and R. L. Andes.

On February 28, 1986, Dugan filed its APD for a site in the SE^ SE^ of sec. 35. Accompanying the APD was a letter from Dugan recounting its unsuccessful attempts to reach a surface-use agreement with Michael Gold.

^{1/} While section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, expressly repealed the SRHA (with the exception of section 9 of the Act, 43 U.S.C. | 299 (1982)), the Department had long held that the SRHA had been impliedly repealed by the Taylor Grazing Act, 43 U.S.C. | 315 (1982). See Daniel A. Anderson, 31 IBLA 162 (1977); George J. Propp, 56 I.D. 347 (1938).

Gold had suggested that Dugan place its well north of his property and directionally drill into the desired formation. Dugan noted that even its proposed drilling site would not adequately protect lease NM 28709 from drainage by a producing well completed by Mallon Oil Company in the NE[^] NE[^] sec. 2, T. 25 N., R. 2 W., and that a well site further north, given the topography, was not a realistic possibility.

On March 4, 1986, the Area Office notified Dugan that, while its APD had been accepted for processing, it was deficient in certain respects, including the failure to include a showing of the surface owner's consent. See 43 CFR 3814.1(c). By letter dated March 14, 1986, Dugan responded reiterating its earlier statement that Gold was not willing to enter into a surface-use agreement.

On April 30, the Acting Area Manager received a copy of a letter written by Gold's attorney to the attorney for Dugan advising him that any entry by Dugan onto Gold's property would be considered a trespass and threatening criminal and civil action in such an event. 2/

An environmental assessment (EA) of the proposed well was subsequently prepared by the staff of the Area Office. This included an evaluation of any possible effects of the proposal on any threatened or endangered species, as well as a cultural resources survey of both the proposed access and drill site conducted by Jicarilla Archaeological Services under BLM Permit No. 20-2920-85 C. The EA concluded that the proposed action together with the mitigation measures ordered would not result in significant environmental effects on the human environment and, accordingly, concluded that an Environmental Impact Statement (EIS) was not needed.

Pursuant to the conclusions reached in the EA, the APD was approved on May 20, 1986. It should be noted that the route of access for which Dugan expressed a preference and which, Dugan contended, would result in the least amount of environmental impacts would be partially off-lease. A special stipulation was attached to the APD expressly providing: "The approval of this action does NOT grant or imply approval of any off-lease or off-unit action. It is the responsibility of the applicant to obtain any such approvals from the appropriate Surface Management Agency, including BLM, and/or any private landowners" (emphasis in original).

Appellants had already advised the Area Manager of their intent to challenge the approval of any APD which impacted upon their property.

2/ On this point, we are constrained to note that Dugan has a statutory right, as the lessee of the United States, to enter upon appellants' property for the purpose of extraction of reserved minerals provided it complies with the requirements of 43 U.S.C. | 299 (1982). Indeed, this right was expressly reserved in the patent upon which appellants' title is based. Appellants' rights as surface owner are, in law, subservient to the right of the United States, as reserved mineral interest holder, to authorize its lessees to prospect for and develop these reserved minerals. See, e.g., Reno Livestock Corp. v. Sun Oil Co., 638 P.2d 147 (Wyo. 1981).

Appellants were duly notified of the issuance of the APD and, on June 27, 1986, formally appealed the decision of the Area Manager approving the APD. ^{3/}

In their statement of reasons in support of the appeal, appellants challenge the APD on various grounds, including, *inter alia*, the legal sufficiency of the EA prepared by BLM, particularly objecting to the failure of BLM to order certain mitigation measures. Appellants also assail BLM's conclusion that under the National Environmental Policy Act of 1970 (NEPA), 42 U.S.C. | 4331 (1982), no EIS was needed because operations under the APD would result in no significant impact on the human environment. Appellants additionally assert that approval of the APD violated provisions of the National Historic Preservation Act (NHPA), 16 U.S.C. | 470 (1982). ^{4/} Both BLM and Dugan have filed answers generally arguing that the decision of BLM comports with applicable laws and regulations.

[1] We note initially that the Department of the Interior has determined that, as a general matter, APD approval for exploratory drilling is an action categorically excluded from the NEPA process. See Glacier-Two Medicine Alliance, 88 IBLA 133, 140 (1985); Colorado Open Space Council, 73 IBLA 226 (1983); 516 DM 6, Appendix 5.4D(2)(d). Under 40 CFR 1508.4, the effect of a categorical exclusion is to eliminate the necessity for preparation of an EA. Glacier-Two Medicine Alliance, *supra*; Colorado Open Space Council, *supra*. However, in the instant case, this categorical exclusion did not apply. It is clear from Dugan's own submissions that the well in question is not an exploratory well but a development well. Thus, at a minimum, an EA was needed in order to assess the effects of development of the field associated with this well.

Appellants have argued that, under NEPA, an EIS is needed to assess the impacts of approval of the APD. Appellants argue that the finding of no significant impact (FONSI) in the EA is not supportable. Alternatively, they argue that, even if an EA were theoretically adequate, the EA approved in the instant case should be rejected because of certain deficiencies, including the failure to recommend specific mitigation measures which they deemed essential.

A BLM FONSI will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of

^{3/} BLM subsequently filed a motion to dismiss the instant appeal on the ground that appellants were not parties to the case within the meaning of 43 CFR 4.410. This motion was denied by Order dated Dec. 22, 1986.

^{4/} In their initial statement of reasons, appellants had also attacked BLM's decision approving the APD on the ground that it granted access to the well site over lands not included within Dugan's lease. As we noted earlier in the text of this decision, however, BLM expressly declined to approve the access route. Appellants' confusion on this point was apparently engendered by the failure of BLM to provide them with a complete set of the various stipulations appended to the APD. See Appellants' Reply Brief at 4. In any event, this question is clearly moot insofar as the instant appeal is concerned.

environmental concern have been identified, and the final determination that no significant impact will occur is reasonable in light of the environmental analysis. Glacier-Two Medicine Alliance, supra at 141; Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1987). Thus, a party challenging a FONSI determination must show that it was premised on 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 for which the analysis was prepared. Utah Wilderness Association, supra at 68; Glacier-Two Medicine Alliance, supra; United States v. Husman, 81 IBLA 271, 273-74 (1984); see also In re Otter Slide Timber Sale, 75 IBLA 380, 382 (1983); Curtin Mitchell, 82 IBLA 275, 282 (1974). In this regard, mere differences of opinion provide an insufficient basis for reversal of BLM's decision. Glacier-Two Medicine Alliance, supra; Oregon Shores Conservation Coalition, 83 IBLA 15 (1984).

Moreover, in determining whether BLM is required to prepare an EIS, we have previously noted that "even if an action would have significant effects, the proposal may be modified to mitigate those effects to the point they are no longer significant. If mitigation accomplishes this purpose, an EIS need not be prepared." Glacier-Two Medicine Alliance, supra at 148; Cabinet Mountain Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982). With these considerations in mind, we turn to the specific arguments pressed in the instant appeal.

[2] It is clear that the adequacy of the EA is central to this appeal, since it not only analyzed possible environmental impacts and proposed measures to mitigate them, but it also served as the basis for the FONSI determination. In this regard, we must agree with appellants that the EA prepared exhibits substantial defects. Thus, the EA noted that "[t]he area is heavily used by deer and elk, and is an important winter range." It further provided that "[t]he proposed action would be subject to all environmental stipulations normally required on an approved APD (see Addendum II)." Yet, even though one of the standard environmental stipulations expressly directed that "[n]o construction or drilling activities shall be conducted between November 1 and March 31 because of elk/deer/bald eagle winter habitat areas," this stipulation was not applied to the APD.

On appeal before the Board, in response to appellants' objections on this point, BLM responded that "although within the general wildlife use area identified in the environmental assessment, the lease site is not within the specific areas identified by the Agency as being protected habitat regions for elk and deer." BLM Answer at 3. This response is simply inadequate.

While we recognize that BLM may be differentiating between a range area and a habitat area, we have nothing beyond the assertion on appeal that this is a distinction of any real substance. Moreover, even if we could credit the reality of the differentiation, the fact of the matter is that this argument finds absolutely no support in the EA. Indeed, the EA does not even identify what impacts might occur on elk and deer use. Thus, in the section entitled "Environmental Consequences," while short-term adverse effects on air quality, increased soil erosion and elevated noise levels are

referenced, not a single word relates to the effect of winter drilling on elk and deer, even though it was expressly noted that the area is heavily used and is "an important winter range." Unless we are expected to assume that no adverse impacts would result, the EA provides a totally inadequate basis upon which to judge whether drilling will produce short or long term impacts on wildlife and, if so, what mitigation measures might be deemed suitable to lessen or avoid these impacts.

A similar infirmity exists with reference to the question of possible alternatives. Thus, the EA recognized that one proposed alternative, clearly favored by appellants, would be to move the drill site to another location within the lease. This alternative was rejected as "not a practical alternative due to the rough topography in the area." Further, it was noted that "[d]irectional drilling was considered but not accepted as an alternative because we lack authority to require it." But, the case file also contains a copy of an unsigned cover letter, denominated as "Statement of Reasons for Approving the APD for the # 2 Divide Well," which declares that "[d]irectional (slant) drilling would be technologically impossible with the distances and depths involved."

There is, we would suggest, a substantial difference between a finding that directional drilling is impractical or that BLM lacks authority to compel it, 5/ and a finding that it is technologically impossible. Clearly, if directional drilling is impossible, consideration of such a proposal is the functional equivalent of consideration of the no action alternative since the same result would obtain. Once again, however, nothing in the EA supports the conclusion, advanced by Dugan and maintained by BLM before this Board, that a well site north of appellants' land would make it impossible to intersect the desired formation and prevent drainage from the offsetting well to the south. 6/

5/ To the extent that this statement is merely a recognition that BLM cannot affirmatively order directional drilling it may be true since BLM generally lacks authority to compel drilling in any circumstance, though it can assess compensatory royalty for the failure to drill a well needed to protect against drainage. See generally Nola Grace Ptasynski, 63 IBLA 240, 89 I.D. 208 (1982). But, to the extent that this statement implies that BLM cannot, under any circumstances, direct placement of a well site so that directional drilling would be the only possible way of intersecting the desired formation, it is simply wrong. Nothing in an oil and gas lease has ever vested in a lessee the absolute right to insist upon a specific well site. While added costs to a lessee is certainly a proper matter for consideration by BLM in determining well placement, the mere fact that a lessee may absorb increased costs by being confined to a less environmentally degrading site does not, ipso facto, prevent BLM from limiting the lessee to such a site.

6/ We do not mean to imply that we have reason to believe that such a site would be technologically feasible, particularly given the necessity of preventing drainage. What we are focussing on, however, is the failure of the EA to provide factual data supportive of such a conclusion.

In State of Wyoming Game & Fish Commission, 91 IBLA 364 (1986), we discussed the importance of a proper preparation of an EA. Therein, we noted:

The fact that NEPA is essentially procedural, however, does not lessen the obligations it imposes to develop a record which fully discloses the rationale and basis for the decision, adequately explores the reasonably foreseeable impacts, and fairly analyzed alternatives to the proposed activity. Indeed, the opposite is true. Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA.

Id. at 367.

In State of Wyoming Game & Fish Commission, *supra*, because of a fail-ure to consider a clearly relevant alternative, we set aside a decision to proceed with a timber sale and remanded the case to BLM for the supplemen- tation of the EA. Similarly, in our recent decision in Colorado Environ-mental Coalition, 108 IBLA 10 (1989), we reversed a BLM decision approving an APD for failure of the EA to consider cumulative impacts beyond those associated with the individual well involved. See also John A. Nejedly, 80 IBLA 14 (1985). Normally, in view of the inadequacies of the EA, 7/ we would set aside approval of the APD and remand the case for supplementation of the EA. However, for reasons which we will set forth below, we have concluded that an EIS is necessary before this specific APD may be approved.

[3] Central to our conclusion is the fact that, unlike the decisions approving an APD for exploratory drilling which this Board has heretofore reviewed, the instant case involves the drilling of a well to further development. 8/ Thus, the precedential value of our prior decisions relating to exploratory drilling under an approved APD is of limited scope in the instant case. More germane is the analysis contained in a recent decision by the Tenth Circuit Court of Appeals in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987).

The Park County case involved, *inter alia*, the question whether, as a precondition for lease issuance, BLM and the Forest Service were required

7/ In addition to the shortcomings directly addressed in the text, we note that there is absolutely no consideration in the EA of cumulative impacts from oil and gas development in the area. See generally Colorado Environmental Coalition, *supra* at 16-18.

8/ We recognize that, technically, the Divide #2 well might be deemed an offset rather than a development well, since one of the stated justifications for the specific well site is the need to protect against drainage. But, inasmuch as the subject lease is in its extended term due to production from another well (the Divide #1), the well is also properly classified as a field development well. See Williams & Meyers, Manual of Oil and Gas Terms (3rd ed.) at 170. In any event, Dugan has clearly passed beyond the exploration stage insofar as this lease is concerned.

to prepare an EIS. In its decision, the Court of Appeals affirmed a decision of the Wyoming District Court and rejected a contention that an EIS was necessary prior to leasing. Appellants had contended that an EIS was necessary at the leasing stage because of the eventual cumulative and foreseeable effects of exploratory drilling and subsequent full field development. The court disagreed, noting that only 1 out of 10 leases issued ever had exploratory activities conducted thereon and, of those, only 1 out of 10 proceeded to development. The court concluded that

[t]o require a cumulative EIS contemplating full field development at the leasing stage would thus result in a gross misallocation of resources, "would trivialize NEPA and would 'diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.'" Cabinet Mountain Wilderness, 685 F.2d at 682 (quoting Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1003 (D.C. Cir. 1979), cert. denied, 445 U.S. 915).

Id. at 623.

The court, however, carefully distinguished subsequent development activities from the situation existing at the leasing stage:

This is not to say that drilling or development at a single site will never require an overall assessment. * * * As an overall regional pattern or plan evolves, the region-wide ramifications of development will need to be considered at some point. A singular, site-specific APD, one in a line that prior to that time did not prompt such a broad-based evaluation, will trigger that necessary inquiry as plans solidify. We merely hold that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry.

Id.

It seems clear from the foregoing that, far from holding that the approval of an APD would never necessitate the requirement to prepare a full-blown EIS, the court affirmatively recognized that, as drilling proved successful and activities proceeded from exploration to development, a point would be reached where the decisionmaker, in order to fulfill the mandate of NEPA, would be required to examine the cumulative and synergistic effects of not only the individual APD but the entire field development. Accord, Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission, 539 F.2d 824, 841 (2d Cir. 1976), vacated on other grounds, 434 U.S. 1020 (1978).

We recognize, of course, that it is arguable whether such consideration must necessarily entail a full EIS. Indeed, a review of the Departmental Manual provisions indicates that, while some type of environmental document is required, there is no requirement that it automatically rise to the level of an EIS. Thus, not only is there a categorical exclusion for exploratory drilling (516 DM 6, Appendix 5.4D(2)(d)) there is also a categorical exclusion for "Approval of an APD for oil and gas wells subsequent to the first

confirmation drilling for which an environmental document is required." 516 DM 6, Appendix 5.4D(2)(f) (emphasis supplied). ^{9/}

A careful review of the court's decision in Park County, however, leaves little room for doubt that the court was of the view that an EIS would be required. Thus, after noting the distinction between reviewing a FONSI determination which required a "reasonableness" analysis and reviewing a determination as to the timing of an EIS which justified the lower "rational basis" scrutiny, the court noted:

The inquiry with respect to an oil and gas lease does not fall indisputably within one category rather than the other. If no exploration under the lease is ever pursued, determining whether an EIS is required at the lease issuance stage falls within the first category. If oil or gas is found and development undertaken, an EIS is clearly required, and determining whether that EIS should issue at the leasing stage becomes merely a timing question. The difficulty in oil and gas leasing, of course, is that one cannot predict which path will eventually be taken at the leasing stage. We have thus considered both possibilities herein and conclude that in neither context is an EIS required at the leasing stage absent firm plans to develop. [Emphasis supplied.]

Id. at 624 n.5.

Thus, under the court's analysis, when the instant lease proceeded from the exploratory stage to the developmental stage, an EIS became necessary unless such a document had already been prepared analyzing the environmental impacts of development. The record before this Board shows no evidence that an EIS has ever been prepared with respect to development of the area in question. On the contrary, the 1982 Environmental Assessment for Oil and Gas Leasing and Related Activities for the Farmington Resource Area contained a FONSI declaration. ^{10/} While it is of substantially greater detail than the short, 4-page EA prepared for the APD herein, it is also of far larger geographic scope, encompassing the entire Farmington Resource Area which includes the San Juan Basin, the second largest gas field in the

^{9/} This conclusion is further supported by the absence of approval of APD's where field development is contemplated from the list of actions normally requiring an EIS. See 516 DM 6, Appendix 5.3A.

^{10/} We note that BLM has questioned appellants' standing to attack either the 1982 EA or the 1979 EA, arguing that such a challenge is time-barred by 30 U.S.C. | 226-2 (1982). BLM had cited the decision of the Wyoming District Court in Park County Resource Council, Inc. v. United States Department of Agriculture, 613 F. Supp. 1182 (1985), in support for its contention. Suffice it for our purposes to note that this holding of the District Court was reversed by the Court of Appeals. Moreover, to the extent that appellants have challenged the failure to prepare an EIS prior to approval of this specific APD, the challenge would not be time-barred even if 30 U.S.C. | 226-2 (1982) was deemed to apply.

United States, with over 9,000 wells, 10,000 miles of road, and thousands of miles of pipelines. See EA at 2, 64.

We need not decide whether the FONSI declaration was sustainable with respect to the 1982 EA. The question before this Board is whether, consistent with the decision of the Tenth Circuit Court of Appeals in Park County Resource Council, Inc. v. United States Department of Agriculture, supra, the EA prepared for the APD in this case represents a proper discharge of the Department's responsibilities under NEPA. For the reasons set for above, we hold that it does not. In the absence of either a field-wide EIS for the San Juan Basin or an EIS for a more limited geographic area embracing the area of the lease, we must hold that an EIS should be prepared prior to allowance of the subject APD.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision is set aside and the case files are remanded for further action consistent with the foregoing.

James L. Burski
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member