

COLORADO OPEN SPACE COUNCIL  
SIERRA CLUB

IBLA 86-151

Decided June 20, 1989

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying a protest to the approval of a suspension of the automatic elimination provisions of the Winter Flats Unit Agreement, CO-922.

Appeal dismissed.

1. Rules of Practice: Appeals: Standing to Appeal

In order for an individual or organization to establish standing to appeal under 43 CFR 4.410, the individual or organization must show that he or she is a party to the case and that a legally cognizable interest has been adversely affected by the decision being appealed.

2. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

Where, on appeal from a denial of a protest, an appellant fails to make an adequate showing how any legally cognizable interest has been adversely affected by the denial of the protest, such an appellant will be deemed to lack standing to appeal and the appeal will be dismissed.

APPEARANCES: Lori Potter, Esq., and Susan Andre, Esq., Denver, Colorado, for appellants; Robert D. Buettner, Esq., Wichita, Kansas, for Koch Exploration Company; Marla E. Mansfield, Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Colorado Open Space Council (COSC) and the Rocky Mountain Chapter of the Sierra Club (Sierra Club) have appealed from a decision of the Colorado State Office, Bureau of Land Management, dated October 7, 1985, denying their protest against the approval of a suspension of the automatic elimination provisions of the Winter Flats Unit Agreement No. 14-08-0001-17042. BLM has filed a motion to dismiss the instant appeal on the ground that appellants lack standing to appeal as they are

not adversely affected by the decision. For the reasons set forth below, we hereby grant that motion and dismiss the appeal. 1/

In order to discuss the question of appellants' standing to appeal, it is first necessary to briefly review the history of the Winter Flats Unit up to the point of BLM's decision. The Winter Flats Unit was originally approved effective October 25, 1978, embracing more than 31,000 acres of land within Mesa County, Colorado. Forty-four Federal leases were either fully or partially committed to the unit and constituted over 98 percent of the total acreage within the unit area. Koch Industries, Inc., was originally appointed unit operator. Subsequently, Koch Exploration Company (Koch) was substituted as unit operator, effective December 13, 1982.

On November 2, 1979, the Area Oil and Gas Supervisor approved two initial participating areas, 2/ effective May 8, and May 23, 1979, aggregating a total of 1,280 acres. A number of additional wells were completed so that by May 8, 1984, the fifth anniversary of the establishment of the first participating area, more than 7,100 acres were included in participating areas.

Section 2(e) of the unit agreement provided, inter alia, that:

All legal subdivisions of lands \* \* \*, no parts of which are entitled to be in a participating area on or before the fifth anniversary of the effective date of the first initial participating area established under this unit agreement, shall be eliminated automatically from this agreement, effective as of said fifth anniversary, and such lands shall no longer be a part of the unit area and shall no longer be subject to this agreement, unless diligent drilling operations are in progress on unitized lands not entitled to participation on said fifth anniversary, in which event all such lands shall remain subject hereto for so long as such drilling operations are continued diligently, with not more than 90 days elapsing between the completion of one such well and the commencement of the next such well.

Thus, pursuant to this provision, in order to keep the nonparticipating acreage within the unit, the unit operator was required to conduct diligent drilling operations as of May 8, 1984, and to continue such operations as provided for above.

1/ We note that this case is being decided en banc with all regular members of the Board participating. See 43 CFR 4.2(a); cf. 28 U.S.C. § 46(c) (1982).

2/ A participating area is "[t]hat part of a unit area which is considered reasonably proven to be productive of unitized substances in paying quantities or which is necessary for unit operations and to which production is allocated in the manner prescribed in the unit agreement." 43 CFR 3180.0-5. See 48 FR 26764 (June 10, 1983).

By letter dated May 4, 1984, a landman for Koch informed BLM that, while its 90-day drilling requirement necessitated the commencement of a well by May 8, 1984, Koch had been informed by the Grand Junction District Office, BLM, that, due to adverse weather and road conditions, it would not be permitted to move equipment to the site specified in its approved Application for Permit to Drill (APD). Accordingly, Koch requested an extension of its drilling requirement to June 8, 1984. By return letter of the same date, the requested extension was granted.

According to a Sundry Notice and Report filed on June 11, 1984, well No. 1-2-100 was begun on May 29, 1984, when Koch drilled a 30-inch hole to 40 feet, ran casing, and cemented to the surface. Work continued sporadically on the well until August 19, 1984, when the production casing was set. On August 29, 1984, Koch filed a notice of intent to fracture and acidize in order to test the well. The drilling rig was moved off-site on September 24, 1984, and completion work was started at that time. The pipe was perforated at the Dakota formation, but the well was not fractured. Instead, by notice dated October 30, 1984, Koch requested permission to suspend fracturing operations, citing winter weather and road conditions. On December 7, 1984, the District Manager approved the suspension until May 15, 1985.

By letter dated January 24, 1985, the Deputy State Director for Mineral Resources expressly advised Koch that failure to commence completion operations on or before May 15, 1985, would result in the contraction of the Winter Flats Unit, effective November 30, 1984. <sup>3/</sup> Koch subsequently sought and received an additional extension of 30 days in which to commence completion operations due to adverse road conditions. Well No. 1-2-100 was completed on June 12, 1985. Therefore, under the unit agreement, in order to prevent the automatic elimination of all lands not within a participating area, another well was required to be commenced on or before September 11, 1985.

By letter dated August 29, 1985, Koch alluded to the requirement that it commence drilling prior to September 12, and requested a 30-day extension under section 25 of the Winter Flats Unit agreement. As a basis of this extension, Koch noted that it was in the process of preparing an application for suspension of operations for the Winter Flats Unit and that it needed more time to garner the signatures necessary under Instruction Memorandum (IM) No. 85-537. By letter dated September 4, 1985, the Deputy State Director granted the requested extension to October 11, 1985.

On September 16, 1985, a letter was submitted on behalf of COSC and the Sierra Club, protesting suspension of the automatic elimination provisions of the unit agreement. The protestants argued:

Members of COSC and the Sierra Club have a long-standing interest in the multiple uses of the resources of the lands contained within the Winter Flats Unit. Both organizations have

<sup>3/</sup> This date was determined by using the date of the last completion activity, Sept. 1, 1984, and allowing 90 days for the commencement of another well as provided for in section 2(e) of the Unit Agreement.

sponsored member-led outings to these lands for the purposes of enjoyment of scenery, native flora and fauna, the wild horse herd, primitive recreation, and solitude. Suspension of the unit agreement on the grounds of unavoidable delay due to gas market conditions will render undue hardship on those resources of greatest value to our members by continuing the dominance of oil and gas development over other resources in the area.

Arguing that the granting of the suspension would run counter to, inter alia, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. || 1701-1783 (1982), and the Mineral Leasing Act of 1920, 30 U.S.C. || 181-287 (1982), the protestants requested that the State Director deny the requested suspension.

By letter dated September 19, 1985, Koch formally requested suspension of the automatic elimination provisions and tolling of the unit term. In this letter, Koch noted that 12 gas wells existed within the unit boundaries but that all were currently shut-in due to a lack of market for the gas and the necessity of reducing the CO<sub>2</sub> content of the gas. Koch further noted that Northwest Pipeline Company had unilaterally terminated a gas purchase contract which it had entered into with Koch and had further refused to transport gas for Celsius Energy Company (a working interest owner in all of the wells) pursuant to a gas purchase contract between Celsius and Mountain Fuel Supply Company, because the gas did not meet the contract standards for CO<sub>2</sub>.

After alluding to the requirement under section 2(e) of the Unit Agreement that Koch commence drilling another well by October 11, 1985, in order to avoid the automatic elimination of non-participating lands, the letter continued:

Under the market conditions described above, as Operator, Koch believes that nothing can be gained by drilling and shutting in still more gas wells simply to avoid contraction of the unit. By suspension of the continuous drilling obligations and of the automatic elimination provisions of the Unit Agreement, the unit would be retained intact for development as a unit when the gas market improves. As a result, pursuant to Section 25 of the Unit Agreement, Koch, as Operator of the Unit, requests a suspension of the automatic elimination provisions until the gas market improves in accordance with the guidelines provided in Instruction Memorandum 85-537 issued on July 9, 1985.

By letter dated October 7, 1985, the Deputy State Director, pursuant to section 25 of the Unit Agreement (Unavoidable Delay), suspended the automatic elimination provisions of section 2(e) for a 2-year period, commencing on October 12, 1985. The letter noted that, upon expiration of the extension period, Koch would be required to commence drilling within 90 days in order to forestall the automatic elimination of non-participating lands, and further noted that, since the unavoidable delay was not caused by any action undertaken by BLM, there was no suspension of the operating and producing requirements of the Federal leases committed to the unit, as set forth at 43 CFR 3103.4-2.

By letter of the same date, the Deputy State Director informed appellants of his decision to grant the request for a suspension. In this letter, he noted that:

The existence of the Winter Flats Unit has enabled the BLM to manage the development of the gas resources in an orderly fashion. Without the existence of the unit agreement, each of those leases could be developed on an individual lease basis thus creating more surface disturbance and increasing the impacts on other resources. Unitization decreases surface disturbances by regulating the optimum number of wells required to maximize resource recovery and prevents the drilling of additional wells due to the drainage of mineral resources by neighboring leases.

The Deputy State Director also referenced the generalized allegations that suspension would be contrary to various laws. He noted that, pursuant to IM No. 85-537, inability to obtain a market for gas produced from presently completed wells could be considered as a "force majeure" situation. He concluded that, inasmuch as no market presently existed for the gas produced from the Winter Flats Unit, suspension of the automatic elimination provision of section 2(e) was in accord with the IM. A notice of appeal was duly filed from this determination.

In their statement of reasons (SOR) in support of their appeal, appellants first noted that approximately 8,200 acres of land which would have been subject to automatic elimination from the unit were in either the Little Bookcliffs Wilderness Study Area (WSA) or the Little Bookcliffs Wild Horse Range (WHR). After describing the organization of both COSC and the Sierra Club, and their active participation in past land management decisions concerning the lands in question, appellants addressed the question of the adverse effect of the decision on their interests:

Members of the Sierra Club and COSC use Little Bookcliffs WSA and WHR for various forms of outdoor recreation, including nature study, photography, backpacking, camping, and picnicking. BLM's decision to suspend the automatic elimination provision of the Unit Agreement adversely affects COSC's and Sierra Club's rights to use these lands in their pristine state and to work for their designation as wilderness. Therefore, Appellants are parties adversely affected and entitled to seek review by this Board under 43 CFR | 4.410 and California Association of Four Wheel Drive Clubs, et al., 30 IBLA 383 (1977).

(SOR at 3). The remainder of appellants' SOR was directed to the substantive matters which they argued were involved in this appeal.

On February 18, 1986, counsel for BLM filed a motion seeking dismissal of the instant appeal on the ground that appellants had not been adversely affected by the decision to suspend the automatic elimination provisions of the unit agreement and thus had no standing to appeal therefrom. Thus, BLM noted that, while the Board has traditionally afforded standing to appeal to organizations alleging injury from an action undertaken by BLM, the Board

still requires a nexus between the decision under appeal and the interests which the association seeks to protect. BLM argued that, in the instant case, there was no correlation between the decision to suspend the automatic elimination provision and the interests of appellants' members.

On March 24, 1986, appellants submitted their reply to the motion to dismiss. Appellants asserted that the Board had already held that "where a party appeals BLM's approval of mining activity, the possibility that the activity may continue despite BLM's action is no bar to standing" (Reply at 1, citing In re Pacific Coast Molybdenum, 68 IBLA 325 (1982)). Appellants contended that:

The existence of mineral leases in the Little Bookcliffs WSA is the major impediment to designation as a Wilderness Area. Once the leases expire, that impediment is removed. BLM's suspension of the automatic elimination of non-participating areas allow the terms of the non-producing leases in the WSA to be extended by their inclusion in the unit. \* \* \*

Even though the inclusion of the WSA lands in the unit may be only one of a series of impediments to Appellants' goal of wilderness area designation, this does not deprive Appellants of the right to remedy each impediment as the issue becomes ripe. The existence of unit operations is a bar to Appellants' goal. If Appellants succeed in this action, that bar will be removed.

(Reply at 2).

[1] Before addressing the specific issues involved in this appeal, it is useful to briefly recapitulate the elements necessary to show standing to appeal under 43 CFR 4.410. That regulation, with limited exceptions not applicable herein, confers standing to appeal on "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management." 43 CFR 4.410(a). The decisional law of the Department has clearly established that the question of standing must be resolved by a two-step analysis. First, are the appellants parties to the case within the meaning of the regulation? Second, assuming that the answer to this first question is in the affirmative, have the appellants been adversely affected by the decision being appealed? See Oregon Natural Resources Council, 78 IBLA 124, 125 (1983); In re Pacific Coast Molybdenum, *supra*; United States v. United States Pumice Corp., 37 IBLA 153, 158-59 (1978).

With respect to the "party to a case" criterion, the Board has consistently held that this test is met where the party seeking to appeal has filed a timely protest to the action being taken under 43 CFR 4.450-1. <sup>4/</sup> Appellants clearly filed a timely protest and BLM does not challenge their

<sup>4/</sup> This is not the only way, of course, that an individual may become a party to a case. Thus, for example, an oil and gas lease applicant may file an appeal from rejection of the application without ever having filed a protest to BLM's action. The filing of a timely protest, however, in and of

assertion that they are parties to the case within the meaning of 43 CFR 4.410.

But, as the Board has reiterated on numerous occasions, the mere fact that an individual is a party to a case does not necessarily establish that he or she has been adversely affected by the decision under appeal. See, e.g., George Schultz, 94 IBLA 173, 177-78 (1986); Mark Altman, 93 IBLA 265 (1986). On the contrary, the Board has expressly held that in order to maintain an appeal, "the record must show that appellants have a legally recognizable interest." Sharon Long, 83 IBLA 304, 308 (1984). Nor will the Board indulge in idle speculation as to why an appellant is concerned about a decision. See Mark Altman, supra; Save Our Ecosystems, Inc., 85 IBLA 300, 301 (1985); James W. Smith, 85 IBLA 237, 239 (1985); Phelps Dodge Corp., 72 IBLA 226, 228 (1983). It is the responsibility of the appellant to allege facts establishing the nature of the injury for which redress is sought. Donald Pay, 85 IBLA 283 (1985). Moreover, the injury must be an injury in fact; mere speculation that an injury might occur in the future will not suffice. There must, in short, be a causal relationship between the action undertaken and the injury alleged. See Save Our Ecosystems, Inc., supra. It is with these principles in mind that we must examine the contentions of the parties in the present appeal.

[2] Appellants allege that the decision of BLM to approve Koch's request for a suspension of the automatic elimination provision effectively injures their interest in having the land within the Little Bookcliffs WSA permanently designated as a wilderness area by indefinitely continuing the oil and gas leases presently in existence. BLM, for its part, argues that appellants have suffered no injury by the BLM decision because, even if BLM had refused to suspend the automatic elimination provision and the unit had contracted, the individual lessees would have retained the right to develop their leases during the 2-year extension afforded by 30 U.S.C. | 226(j) (1982). 5/ For reasons which we will explicate infra, we agree with BLM

fn. 4 (continued)

itself establishes that the individual is a "party to a case," and obviates any further need to examine the specific interests asserted insofar as this element of standing is concerned. See Elaine Mikels, 41 IBLA 305 (1979).

5/ We are aware of the fact that appellants have also challenged BLM's determination that any of the leases were subject to extension beyond their original lease terms because appellants assert there has never been production in paying quantities under the unit (SOR at 23). Even assuming appellants are correct in their assertion that there has been no production in paying quantities from any well within the unit, the leases would not be subject to termination because 30 U.S.C. | 226(f) (1982) provides, in relevant part, that

"[n]o lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail, within which to place such well in a producing status \* \* \*."

that appellants have failed to allege or prove facts sufficient to establish that they have been adversely affected by the decision under appeal.

Initially, we would note that it is arguable whether appellants could ever have standing to challenge a decision solely on the ground that the decision made it less likely that a specific WSA would be included in the permanent wilderness system, absent a showing that the decision, itself, led to impairment of the wilderness characteristics of the land. This is so because, once a decision has been made to classify acreage as a WSA, ultimate inclusion of that land within the wilderness system is a question which is, by statute, left solely to Congress, acting upon the recommendations of the President. See 43 U.S.C. | 1782(b) (1982).

The Department of the Interior's role in this process is clearly delineated. The Secretary is required to review each WSA and report to the President as to his recommendations for inclusion or noninclusion within the wilderness system. See 43 U.S.C. | 1782(a) (1982). Thus, not only is the Department's role limited to the making of recommendations, that function is, itself, vested in the Secretary. Since this Board is precluded from reviewing any decision approved by the Secretary (43 CFR 4.410(a)(3)), such recommendations as he may see fit to make are beyond the jurisdiction of the Board. 6/

This is to be contrasted with the unquestioned right of appellants to challenge a decision which would adversely affect their members in their enjoyment of the lands involved or which would result in a violation of the undue degradation or nonimpairment standards, as applicable. 7/ Thus, for

fn. 5 (continued)

This provision has been held equally applicable to unit wells. See Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 95 I.D. 1 (1988). As early as Aug. 16, 1979, the Acting Oil and Gas Supervisor found that Koch had completed a well capable of production within the Winter Flats Unit. Thus, appellants' assertion that a number of the leases would not be eligible for an extension upon the automatic elimination of the non-producing acreage is erroneous.

6/ In contrast to the wilderness inventory phase, which was essentially adjudicatory and required the Department to ascertain the existence of wilderness characteristics on specific parcels in conformity with statutory guidelines, the ultimate decision to include or exclude land from the permanent wilderness system is inherently political. Thus, the fact that both the Federal Courts (see, e.g., Sierra Club v. Watt, 608 F. Supp. 305 (D. Cal. 1985)), and this Board, in cases too numerous to list, reviewed the correctness of BLM decisions to designate or not designate various inventory units as WSA's is functionally irrelevant to whether or not ultimate inclusion of any WSA in the permanent wilderness system is subject to administrative or judicial review.

7/ As the Board indicated in Colorado Open Space Council, 73 IBLA 226 (1983), in the absence of any actual drilling operations prior to the enactment of FLPMA on an individual lease or within a unit, the nonimpairment standard is applicable, as drilling would not be considered a grandfathered

example, if BLM were to approve an APD for land within the Winter Flats Unit, appellants might properly allege that this action would interfere with their enjoyment of the lands in question and could show, therefore, that they were adversely affected. But in such a case appellants are adversely affected not because, in some theoretical sense, the decision makes it less likely that the land will be included within the wilderness system, but because, in a real and immediate way, the decision authorizes physical actions which, in and of themselves, may adversely affect those interests which appellants seek to protect.

Moreover, as a practical matter, the assertion that the mere existence of these leases makes it less likely that the lands in question will be included in the permanent wilderness system does not withstand analysis. Appellants state "BLM's Grand Junction Resource Management Plan [RMP] explicitly acknowledges that existing oil and gas leases preclude a recommendation in favor of wilderness designation." See SOR at 22. In point of fact, the RMP does no such thing.

The Draft RMP, which was appended to the SOR as Exhibit G, analyzed various impacts from different sources on the wilderness character of a number of areas under consideration for inclusion in the wilderness system. Among the impacts considered were those from oil and gas management. That discussion is, in its entirety, set forth below:

Development of oil and gas leases would be the most severe in the Demaree Canyon and Little Book Cliffs WSAs where the probability of development is high as evidenced by the areas being completely under oil and gas lease. BLM has estimated there will be 33 wells developed in the Demaree Canyon WSA and 31 wells developed in the Little Book Cliffs WSA over the next 20 years. The

fn. 7 (continued)

use. However, the Board cautioned that where pre-FLPMA leases are involved, section 701(h) of FLPMA, 90 Stat. 2786, 43 U.S.C. | 1701 note (1982), expressly makes all actions of the Secretary subject to valid existing rights. Thus, the Board noted that "the nonimpairment standard cannot be used to defeat a lessee's valid existing right to develop a lease." Id. at 229.

Consistent with this analysis, the Department has adopted the policy that, for pre-FLPMA leases which, as a general rule, were not encumbered with either a wilderness protection or a no surface occupancy stipulation and for which an adequate APD has been filed but denied for wilderness considerations, a suspension of the operation or production requirements will be granted "for the time necessary to complete necessary studies and consultations and, if applicable, for a decision on wilderness status to be made." Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) at III.J.1.d. Thus, paradoxically, if appellants were successful in their appeal and the non-participating acreage eliminated from the unit, it is possible that many of the individual leases would be indefinitely suspended until a decision on the inclusion of the Little Bookcliffs WSA in the permanent wilderness was made by Congress.

resulting surface disturbance would segment these WSAs into parcels of less than 5,000 acres in size, disrupt naturalness and minimize opportunities to experience outstanding solitude and/or primitive confined recreation. Special features in the Little Book Cliffs WSA would also be impaired.

Development of ten pending applications for permit to drill (APD's) in the Little Book Cliffs area would have the following impacts: Two of the APD's area [sic] outside of the Little Book Cliffs WSA and would have no impact on wilderness characteristics. Development of seven APDs in Zone 1 would directly impact about 62 acres and would eliminate this northern portion of Zone 1 from further wilderness consideration. This would constrain Congress' ability to designate the balance of the area as wilderness. One well in Zone 2 would impact about 9 acres and would be a major impact on the unit. Any development in Zone 2 incrementally lessens this core area from being manageable as wilderness. Further well development on the pre-FLPMA leases that make up more than 90 percent of Zone 2 could make the entire WSA unsuitable for wilderness designation.

The probability of oil and gas development is low in The Palisade, where a pre-FLPMA lease extends into the WSA and covers 120 acres. Overall, the impact from oil and gas development would be expected to be minimal. Prohibiting future oil and gas leasing and development in the Black Ridge Canyons (both units), Dominguez Canyon, and Sewemup Mesa WSAs would help preserve the areas' wilderness characteristics. [Emphasis added.]

(Draft RMP at 215-16). No changes were made in the Final RMP with respect to the language quoted above.

A review of the RMP makes it clear beyond any dispute that it was not the existence of the leases which constituted a ground for recommending denial of wilderness status but the likelihood of development of those leases. This is a critical distinction, since, while BLM's decision arguably had the effect of lengthening the period of the leases' existence, it was neutral (if not beneficial) with respect to development activities under the leases.

As noted above, Koch sought a suspension of the drilling requirements under the unit agreement in order to obviate the necessity of drilling additional wells within the unit area until a market could be obtained for the gas which it had discovered. Leaving aside the question whether BLM ought to have granted the suspension, it is important to recognize that there were three distinct futures that could have resulted from Koch's application. First, BLM could, as it did, grant the suspension. The effect then would be to suspend drilling requirements for 2 years and essentially continue the unit in status quo.

Alternatively, BLM could have denied the suspension. Koch, as unit operator, would have been faced with the immediate choice of either drilling

or allowing automatic contraction. It might have elected to drill. In that event, assuming the drilling was timely under the unit agreement, all acreage would have been retained within the unit. Upon completion of the well, Koch would have 90 days, under section 2(e) of the unit agreement, in which to commence another well. So long as Koch continued to drill wells in accordance with section 2(e), all acreage would be retained within the unit for at least an additional 5 years, and possibly longer. <sup>8/</sup>

The third possibility was that BLM would deny the suspension and Koch would be unwilling or unable to timely commence drilling the required well. In that case, pursuant to section 2(e) of the unit agreement, all non-participating acreage would have been automatically eliminated. This would not mean, however, that the leases covering this acreage would thereby terminate or expire. On the contrary, all leases or parts of leases eliminated would be continued for their original term or for not less than 2 years, whichever was longer, and so long thereafter as oil or gas were produced in paying quantities. See 30 U.S.C. | 226(j) (1982). <sup>9/</sup>

What is important to note is that either of the latter two possibilities would have resulted in the necessity of drilling in the immediate future in order for the lessees to protect their interests. Thus, to the extent that development of the lands may represent an effective impediment to their inclusion in a wilderness area, a decision denying suspension of the drilling requirements would have almost certainly accelerated that development.

Indeed, if BLM had denied Koch's suspension request under section 25 of the unit agreement, appellants could have just as easily protested on the ground that the alternatives of either continued drilling or automatic exclusion of the non-participating acreage under section 2(e) made development of that acreage more likely in the next 2 years. Thus, we seem to be faced with a situation in which appellants could claim to be adversely affected irrespective of the actual decision by BLM on the issue being appealed. How this can be possible is unclear.

The short answer, we would suggest, is that appellants would not be adversely affected by either action of BLM. It is not the continuation of the lease or the unit but the likelihood of development which provided the basis for BLM's recommendation with respect to the WSA. The decision being appealed is silent as to this point. In fact, we believe it is demonstrably clear that by suspending the drilling requirements, BLM has made it more likely that Congress might afford favorable consideration to inclusion of the Little Bookcliffs WSA in the wilderness system. This is so for the elementary reason that so long as an area retains its wilderness characteristics the possibility always remains that Congress will determine to preserve that area, even if this requires the expenditures of funds to acquire

<sup>8/</sup> Under the unit agreement, an additional 2-year extension may be obtained pursuant to certain specified conditions.

<sup>9/</sup> Moreover, we should recognize the possibility that the owners of excluded acreage might have formed a new unit and, upon the drilling of a successful well, obtained additional extensions.

fee or leasehold estates. Once, however, the wilderness characteristics of an area are destroyed, there is little, if any, likelihood that such land would obtain favorable review for inclusion in the wilderness system.

Moreover, appellants appear to be operating under the assumption that, should the unit contract and the subject leases simply disappear, the land would automatically be deemed appropriate for inclusion in the wilderness system. But, by definition, all lands included within the study phase possess wilderness characteristics. This does not mean that all such land would be ultimately designated as wilderness areas. On the contrary, as this Board has noted innumerable times, the purpose of the wilderness study phase is

to analyze each WSA's suitability for wilderness designation in conjunction with the whole range of other public land uses that Congress has authorized. Thus, the mineral potential of any tract would be examined in the study phase to determine the impact that a permanent wilderness designation might have on such values. Moreover, this analysis is not limited to only mineral values, but embraces the full range of public uses, including grazing and recreational use, with an aim to determining the relative merits of a specific parcel's inclusion in the wilderness system. Indeed, the entire purpose of the study phase is the generation of data sufficient to make informed choices between competing claims to the land.

Union Oil Company (On Reconsideration), 58 IBLA 166, 170 (1981). Therefore, quite independent of the present right of any party to develop the minerals within the unit area, the mere existence of these mineral values could serve as a basis for a determination by Congress that the land should not be included within the wilderness system.

We do not mean to suggest that such a conclusion necessarily flows with respect to the instant acreage. Such a determination is ultimately committed to Congress. But we do believe that recognition of the realities of wilderness designation must make us wary of allowing simplistic arguments to substitute for real injuries. Appellants, in order to maintain an appeal to this Board, are required to show that they have suffered an injury in fact from the decision being appealed. Appellants' stated concern relates to the inclusion of the subject land within the wilderness system. The decision being appealed in no way negatively affects either the suitability of the land for inclusion therein or the likelihood that the land might actually be included, even assuming that appellants could properly base an appeal on this last contention. Thus, appellants have failed to meet the second prong of our traditional standing test--they have failed to establish that any legally cognizable interest has, in fact, been adversely affected by the decision which they seek to appeal.

A few comments on the dissent's standing analysis appear warranted. The dissent commences with a nod towards the Board's often-stated observation that "there is no necessary congruity between the standing requirements which control the availability of judicial review and those which animate

the arena of administrative practice" (In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982)), and then proceeds to launch into a catalogue of judicial interpretations of Article III standing, supportive of the most expansive view of standing before the Federal courts. It is one thing to note, as we did in Pacific Coast Molybdenum, that determinations of judicial standing "provide a useful guide as to the types of interests which have been deemed relevant." Id. at 332 (emphasis supplied). It is something far different to suggest, as the dissent does, that determinations of judicial standing control our adjudications of administrative standing. Indeed, that view was expressly rejected in Pacific Coast Molybdenum.

Moreover, application of the judicial pronouncements guiding Article III standing leads, we believe, to the same conclusion as that reached under our own standing adjudications. Thus, the "injury in fact" requirement embraces three separate elements, requiring, "at an irreducible minimum," that "the party who invokes the court's authority \* \* \* 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982) (citations omitted).

The "actual or threatened injury" standard requires a concrete injury, not an injury to "abstract" interests. See Diamond v. Charles, 476 U.S. 54, 66-67 (1986); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976). To the extent that appellants are attempting to premise standing on the right to be free from the fear that development may, at some future point, occur, they are not alleging a "concrete injury," but rather attempting to vindicate an abstract interest. To the extent, however, that appellants are basing their challenge on the likelihood of physical impairment of the wilderness characteristics, the possible injury cannot fairly "be traced to the challenged action," since, as we have explained above, the decision being appealed has a neutral, if not beneficial effect, on actual development.

The dissent suggests that the possibility of development, had BLM denied the requested suspension, is speculative. But it is no more speculative than appellants' fears that the suspension of the drilling requirement will ultimately result in the destruction of the wilderness characteristics of the land. If Koch is unlikely to develop the leases in the short run, where, then, is the perceived threat? As the Supreme Court has noted, "unadorned speculation will not suffice to invoke the federal judicial power." Simon v. Eastern Kentucky Welfare Rights Org., supra at 44.

Finally, the dissent argues that "BLM's motion to dismiss appellants for lack of standing cannot be granted without offering them the opportunity for a hearing or other means of supplementing the record (such as affidavits) to support their standing." Infra at \_\_\_. In point of fact, appellants had precisely such an opportunity. BLM's motion to dismiss was not filed ex parte. On the contrary, appellants subsequently filed a response

to the motion, the substance of which is quoted in the text of this decision. That their response has proved inadequate to establish their standing is a deficiency which must be laid at their door. We are unaware of any rule of adjudication, either administrative or judicial, which supports the dissent's apparent theory that, after a motion to dismiss for lack of standing has been fully briefed by both sides, the deciding authority must, if it is of the view that the motion should be granted, afford the appellant yet another opportunity to cure the inadequacies of its original submissions. Having had ample opportunity to establish their standing to appeal in the instant case, we will not indulge in idle speculation as to what appellants might be able to show if afforded one more opportunity to establish standing to appeal. See Oregon Natural Resources Council, supra.

While our conclusion on standing negates any necessity to address the substantive issues raised in this appeal, since the dissent proceeds to rule that Koch has not shown it was prevented from drilling the wells required by unit agreement by circumstances "beyond its reasonable control," we feel compelled to offer the following observation. If this were a matter of statutory or regulatory interpretation, we would agree that Koch had failed to establish that the lack of a present market for its high carbon dioxide content gas has a causative relationship to its ability to drill additional wells as required by the unit agreement. But, this is not such a case.

Rather than presenting a question of statutory or regulatory construction, the issue is essentially one of contract interpretation. While it is true that the Department has provided a model form for unit agreements (see 43 CFR 3186.1), the unit agreement itself is a consensual undertaking of the various interest holders, the unit operator, and the United States for joint operation of the area to allow maximum recovery of hydrocarbons.

In essence, therefore, what the present case presents is a situation in which the parties to a contract are in agreement as to the interpretation of one of its provisions and a stranger to the contract asserts that the interpretation espoused by the signatories to the agreement is erroneous. 10/ Clearly, even if one were willing to permit such a third party to challenge an interpretation agreed to by all signatories, this Board owes more than a passing deference to the interpretation espoused. A review of the dissent shows that, rather than requiring appellants to clearly establish that the interpretation adopted by BLM and Koch is contrary to the original intent of the parties, the dissent proceeds to interpret the language as if it were

10/ Indeed, none of the provisions being analyzed is required by either statute or regulations. The applicable statute, 30 U.S.C. | 226(j) (1982), is written so as to grant the Department broad authority to approve unit agreements, but there is nothing in the statute concerning the duration of such unit agreements, the drilling requirements which may be enforced or the conditions for suspending or continuing the unit. Similarly, the regulations, 43 CFR Part 3180, while containing a model unit agreement, expressly authorize variances where appropriate. See 43 CFR 3181.1. Thus, even when the model unit agreement is utilized without variation, this does not represent the mandate of the regulations but rather the agreement of the parties.

writing on a tabula rasa with total freedom to implement the policy it feels should be adopted. This, we would suggest, is an improper standard of review. Thus, even assuming appellants had established their standing to appeal, the ultimate conclusion of the dissent is not sustainable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the instant appeal is dismissed on the grounds that appellants have failed to establish how any legally cognizable interest has been adversely affected by the decision which they seek to appeal.

James L. Burski  
Administrative Judge

We concur:

\_\_\_\_\_  
Wm. Philip Horton  
Chief Administrative Judge

\_\_\_\_\_  
Gail M. Frazier  
Administrative Judge

\_\_\_\_\_  
C. Randall Grant, Jr.  
Administrative Judge

\_\_\_\_\_  
Bruce R. Harris  
Administrative Judge

\_\_\_\_\_  
John H. Kelly  
Administrative Judge

## ADMINISTRATIVE JUDGE MULLEN DISSENTING IN PART AND CONCURRING IN PART:

The line of reasoning in the majority opinion gives me no little trouble. One of the primary bases for the final conclusion reached on the issue of standing is the fact that the final determination regarding whether lands will be made a part of the wilderness system is left solely to Congress. The majority correctly notes that Congress acts upon the recommendations of the President.

If the Presidential authority extends only to making recommendations to Congress, it stands to reason that Congress may reject those recommendations, not only as to the lands that are recommended for inclusion, but may also designate lands as a part of the wilderness system in spite of a Presidential conclusion that those lands should not be made a part of the wilderness system. E.g., Senator Cranston's proposal regarding the size and scope of the wilderness system in California.

Using the same logic used by the majority I could reject the vast majority of the appeals previously considered by this Board. A wilderness designation can only be made by Congress. Congress can create a wilderness which includes lands which had never been designated as a wilderness study area (WSA), and could make Federal lands having no wilderness characteristics a wilderness area. Thus, using the reasoning expressed in the majority opinion, one could hold that appellants such as those now before us are not adversely affected by a determination that lands should be excluded from a WSA.

I look at the decision to suspend the provision of the unit agreement calling for automatic elimination of the land as a decision which directly affects the status of the land. As a result of this decision, land which would otherwise be excluded remains subject to the agreement to develop the underlying oil and gas reserves as a unit. If the Bureau of Land Management (BLM) had reached the opposite conclusion, the land would no longer be encumbered by the unit agreement. Is this that much different than a decision to exclude land from a WSA, with the result that the land is no longer encumbered with a WSA designation? Similarly, if an oil company were to challenge a decision to include certain lands in a WSA, could we not say that they have no standing because the mere designation of the land as a WSA is no assurance that Congress will make it a part of a wilderness area, and it may eventually be open to "unrestricted" leasing?

I find that appellants in this case have no less standing than the appellants had in Utah Wilderness Ass'n, 86 IBLA 89 (1985); The Wilderness Society, 81 IBLA 181 (1984); Sierra Club, Et al. (On Judicial Remand), 80 IBLA 251 (1984); and California Wilderness Coalition, 63 IBLA 330 (1982).

On the other hand, I agree with the majority finding that the ultimate conclusion set out in the dissenting opinion cannot be sustained. The BLM decision to suspend the automatic elimination provision of the Winter Flats

Unit Agreement was a legitimate contractual option and was supported by the facts. The BLM decision should be affirmed.

---

R. W. Mullen  
Administrative Judge

## ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I. Appellants Have Demonstrated an Actual Injury in Fact

This Board has recognized that whether one has a right of appeal involves different considerations than whether one has standing to obtain judicial review of agency action:

We note, initially, that there is no necessary congruity between the standing requirements which control the availability of judicial review and those which animate the arena of administrative practice. Koniag, Inc. v. Andrus, 580 F.2d 601, 606 (D.C. Cir. 1978). As Judge Bazelon has shown in his concurring opinion in Koniag, the underpinnings of judicial standing are functionally discrete from those which buttress standing requirements in an administrative agency. Rather than being based on other constitutional or prudential factors, administrative standing is more properly determined by an analysis embracing "the nature of the asserted interest, the relationship of his interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions." Id. at 615 (Bazelon, J., concurring).

In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331-32 (1982). Nevertheless, the Board went on to say it would "be guided by judicial determinations on such matters [as] the types of interests which have been deemed relevant and the concerns which are properly considered in adjudicating administrative appeals." Id. at 332.

If the majority were actually to follow the statement in Pacific Coast Molybdenum Co. about being guided by judicial determinations, they would find the Bureau of Land Management's (BLM) decision in this case constitutes an injury in fact under decisions of the U.S. Supreme Court. The interests that may be injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 154 (1970). "[A]dversely affect[ing] the scenery, natural and historic objects and wildlife \* \* \* may amount to an 'injury in fact' sufficient to lay the basis for standing." Sierra Club v. Morton, 405 U.S. 727, 734 (1972). "[A]n identifiable trifle is enough for standing." United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973). 1/ See also Japan

1/ "[T]he injury alleged here is also very different from that at issue in Sierra Club [v. Morton] because here the alleged injury to the environment is far less direct and perceptible. The petitioner there complained about the construction of a specific project that would directly affect the Mineral King Valley. Here, the Court was asked to follow a far more attenuated line of causation to the eventual injury of which the appellees complained -- a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which

Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986). <sup>2/</sup> An injury may be "actual or threatened." Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982).

Appellants said in their September 12, 1985, letter of protest to the Colorado State Director of BLM:

Members of COSC and the Sierra Club have a long-standing interest in multiple uses of the resources of the lands contained within the Winter Flats Unit. <sup>3/</sup> Both organizations have sponsored member-led outings to these lands for the purposes of enjoyment of scenery, native flora and fauna, the wild horse herd, primitive recreation, and solitude. Suspension of the unit agreement on grounds of unavoidable delay due to gas market conditions will render undue hardship on those resources of greatest value to our members by continuing the dominance of oil and gas development over other resources in the area.

In their Statement of Reasons appellants state at pages 2-3:

Both organizations actively participate in the wilderness designation process and in land management decisions regarding the Little Bookcliffs Wilderness Study Area and the Wild Horse Range. Members of the Sierra Club and COSC use Little Bookcliffs WSA [Wilderness Study Area] and WHR [Wild Horse Range] for various forms of outdoor recreation, including nature study, photography, hiking, backpacking, camping and picnicking. BLM's decision to suspend the automatic elimination provision of the Unit Agreement adversely affects COSC's and Sierra Club's rights to use these lands in their pristine state and to work for their designation as wilderness. Therefore, Appellants are parties adversely affected and entitled to seek review by this Board under 43 CFR § 4.410 and California Association of Four Wheel Drive Clubs, et al., 30 IBLA 383 (1977).

In their Reply to BLM's Motion to Dismiss for Lack of Standing appellants state at pages 2-4:

The existence of mineral leases in the Little Bookcliffs WSA is the major impediment to designation as a Wilderness Area. Once

---

resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." *Id.* at 688.

<sup>2/</sup> "[Under our decisions in Sierra Club v. Morton \* \* \* and United States v. SCRAP \* \* \* [respondents] undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting." 478 U.S. at 231 n.4.

<sup>3/</sup> See Animal Protection Institute of America, 79 IBLA 94, 91 I.D. 115 (1984); Colorado Open Space Council, 73 IBLA 226 (1983).

the leases expire, that impediment is removed. BLM's suspension of the automatic elimination of non-participating areas allows the terms of the non-producing leases in the WSA to be extended by their inclusion in the unit. If this Board overrules that action, the terms of the underlying leases will be shortened at least by the amount of time the suspension has been in effect. \* \* \* Even though the inclusion of the WSA in the unit may be only one of a series of impediments to Appellants' goal of wilderness area designation, this does not deprive Appellants of the right to remedy each impediment as the issue becomes ripe. The existence of unit operations is a bar to Appellants' goal. If Appellants succeed in this action, that bar will be removed. This is all that is necessary for standing. \* \* \*

In addition to the certain benefit of shortening the lease terms, Appellants obtain yet another benefit from automatic elimination. Once individual leases are eliminated from the unit and economy of scale is removed, individual lessees are more likely to decide it is not profitable to commence operations. Williams & Meyers, Oil & Gas Law § 910 (1984 abridged Ed.) (discussing economic benefits of voluntary unitization). Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 77-78 (1978) \* \* \*. 2/

---

2/ The only information available leads to the conclusion that individual leaseholds are less likely to be developed than unitized lands. The unit operator, with the benefit of economy of scale, has determined that it is not economical to drill new wells because of the soft market. The information available about the future of the market is grim. Weak natural gas markets and prices are causing operators to cut spending for domestic exploration and development; 1986 will be the worst year for land drilling in a four-year down turn; natural gas well completions and drilling expenditures will fall by 18-19% in 1986. Oil & Gas Journal, Jan. 6, 1986, p. 59.

In the context of the Supreme Court's cases on standing reviewed above, it is not difficult to see the actual injury in fact to appellants from BLM's decision. Appellants use some of the lands that are subject to oil and gas leases in the Winter Flats Unit for activities that depend on the wilderness characteristics of the lands. The leases have definite terms. Those terms are extended if the unit operator completes a well every 90 days. If he does not, the leases are eliminated from the unit and may be developed for only another 2 years under 30 U.S.C. § 226(j) (1982) (now 226(m), see § 5102(d), P.L. 100-203, 101 Stat. 1330-257). When BLM suspends the unit operator's obligation to drill for 2 years (at least), as it did in this case, the time when the lands subject to the leases will be free from the potential for development that would impair the wilderness characteristics for which appellants value those lands is postponed. The lands are burdened with the leases and with the risk they will be developed for a longer time. Appellants' interest in using the lands as wilderness in the

present and their interest in having them designated as wilderness in the future are adversely affected because the unit operator or the lessees have 2 additional years in which to develop them and render them unsuitable for use or designation as wilderness, and because BLM will be less likely to recommend them to the Secretary as suitable for preservation as wilderness so long as the lands remain subject to the leases. In effect the lessees' use of the lands for oil and gas production gets a free ride -- for 2 years and as long thereafter as BLM extends the suspension because there is still no market for the gas -- at the expense of the appellants' use of the lands for wilderness.

The majority's ability to see the adverse effect of BLM's decision on appellants is apparently obscured by their ability to imagine different decisions BLM could have made that might have had different consequences. It is development of the leases that would impair the use or suitability of the lands for designation as wilderness, in the majority's view, not "the mere existence of these leases" (majority opinion at 282), so would not a denial of the requested suspension be more detrimental to appellants' interests? <sup>4/</sup> If BLM had denied a suspension, they suggest, then the unit operator would have drilled again (and again? and again?) to keep the leases from being eliminated. Or perhaps the unit operator would not have drilled and the leases would have been eliminated, and then the lessees would have developed the leases (or formed a new unit) to keep them alive.

Maybe. Maybe not. Actually, given the lack of a market for the gas and the expense of drilling, the answer is probably not. It was to avoid that expense that the unit operator sought the suspension that BLM granted, for its September 19, 1985, request reads in part:

Under the market conditions described above, as Operator, Koch believes that nothing can be gained by drilling and shutting in still more gas wells simply to avoid contraction of the unit. By suspension of the continuous drilling obligations and of the automatic elimination provisions of the Unit Agreement, the unit would be retained intact for development as a unit when the gas market improves. \* \* \* Because of uncertainty as to when conditions causing the currently depressed gas market will be resolved, Koch requests that such suspension be for an initial two year period and, thereafter, subject to annual review as to whether continuation is warranted. Such suspension would terminate upon obtaining a market for gas produced from unit wells. If granted, the effect of suspension of the automatic elimination provisions would be to stop the time clock from running during the period of suspension relative to the time frames specified in Section 2(e)

---

<sup>4/</sup> "Thus, to the extent that development of the lands may represent an effective impediment to their inclusion in a wilderness area, a decision denying suspension of the drilling requirements would have almost certainly accelerated that development" (Majority opinion, supra at 284 (emphasis in original)).

and appropriate adjustments would be made to the remaining term of the Unit Agreement for the period of suspension.

But the majority's speculation is irrelevant. The question is whether appellants suffered an injury from the decision BLM did make, not whether they might have suffered an injury different in kind or degree if BLM had made another decision. The decision BLM did make suspended the running of the terms of the leases. The reason that prolonging the "mere existence" of the leases adversely affects appellants is clear: if the leases do not exist, they cannot be developed. The sooner the leases cease to exist, the sooner they will not be developed. BLM's decision increased the opportunity for the leases to be developed. Extending the time one is subject to a limitation or postponing the time one is free of a risk is an injury. That is the actual injury in fact BLM's decision caused.

II. Appellants Have Also Demonstrated A Threatened Injury In Fact

The U.S. Court of Appeals for the District of Columbia Circuit has recently explained that a plaintiff may demonstrate a threatened injury sufficient to establish his standing if he makes a credible allegation that he will be harmed by an action taken by a third party in response to an action of the Government:

Although the mere threat of an injury might at first glance appear not to render a party "aggrieved by agency action," and may seem noncognizable in a judicial system given jurisdiction only over cases or controversies, the Supreme Court has accommodated allegations of threatened injury in two settings.

\* \* \* \* \*

The other setting 5/ comprises cases in which the government acts directly against a third party, whose expected response in turn will injure the plaintiff. \* \* \*

\* \* \* \* \*

In a pair of environmental lawsuits directly relevant to today's case, the Supreme Court has explained how a plaintiff may show threatened personal injury in a three-party setting. When the plaintiff in Sierra Club v. Morton \* \* \* argued that the government's decision to permit private development of a national game refuge would injure its general interest in the

---

5/ "The first setting involves cases in which the plaintiff alleges that governmental action will be taken directly against him. \* \* \* In all these cases involving claims of threatened injury emanating directly from governmental conduct, the Court has assessed the likelihood that the clash between the government and the plaintiff will in fact occur."

Wilderness Society v. Griles, 824 F.2d 4, 11 (D.C. Cir. 1987).

conservation of national parks, the Court denied standing, finding that "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the \* \* \* development." [405 U.S.] at 735. \* \* \* The successful plaintiff in United States v. SCRAP \* \* \*, on the other hand, alleged that its members' use of natural resources "surrounding the Washington Metropolitan area," [412 U.S.] at 678 \* \* \* would be injured by a chain of third-party responses to an ICC rate decision. Thus, cases like Sierra Club and SCRAP parallel in the three-party context the search for likelihood of injury that governs standing in the two-party context. In both settings, the Court attempts to predict what the government's and/or third party's actions will be and requires a credible allegation that plaintiff's course of behavior will be harmed by the carrying out of those actions.

To sum up, whether an allegation of threatened injury suffices for standing turns upon the likelihood of the occurrence of that injury. \* \* \* In a three-party case, the court must ascertain whether the third party's response to governmental action will, likewise, affect the plaintiff's intended behavior. Where the alleged injury involves access to land in a three-party case, as in Sierra Club, SCRAP, and the case at bar, the judgment regarding the likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action. Otherwise, the threat of injury would be too amorphous or uncertain; it would be no greater for the plaintiff than for any person simply opposed to the governmental action in question. 6/

Wilderness Society v. Griles, 824 F.2d at 11-12. 7/

Applying the court's analysis to this case is quite straightforward. The third party is the operator of the Winter Flats Unit. As a result of BLM's decision we may reasonably predict what the operator's actions will be: it will await the eventual rise in prices necessary to the development of a market for the gas available from the unit and then develop the land for oil and gas production; in the meantime it will request that the present suspension be continued from year to year because there is still no market,

6/ See also National Wildlife Federation v. Burford, 835 F.2d 305, 313-14 (D.C. Cir. 1987), infra note 9.

7/ The court held, in the context of a motion for summary judgment, that the Wilderness Society did not have standing because it had not pointed to any specific lands its members wished to use that had been or would be transferred from Federal to state or Native ownership under the Department of the Interior policy it challenged of excluding submerged lands from the acreage counted as part of the lands selected by State of Alaska or Alaska Natives under the Alaska Statehood Act, the Alaska Native Claims Settlement Act, or the Alaska National Interest Lands Conservation Act. 824 F.2d at 15.

and BLM will presumably grant those requests unless it believes a market has developed. Appellants' course of behavior is to use the lands within the unit that are within the wilderness study area and the wild horse range for the outdoor recreation activities they set forth in their statement of reasons. Appellants' future conduct of these activities would occur in the same location as the unit operator's response. These facts show that appellants' intended behavior will be injured as a result of BLM's decision to suspend the unit operator's obligation to drill for 2 years. Wilderness Society v. Griles, *supra*.

### III. Appellants Have Alleged Facts Sufficient for Standing; the Motion to Dismiss May Not Be Granted Without Affording Them an Opportunity to Supplement the Record

Even if they are not persuaded that "the record \* \* \* show[s] that appellants have a legally recognizable [sic] interest" that is injured, Sharon Long, 83 IBLA 304, 308 (1984), the majority ignore a fundamental procedural right of appellants that precludes dismissing their case at this stage. As noted, *supra* note 7, the court in Wilderness Society v. Griles considered plaintiffs' standing in the context of a motion for summary judgment, *i.e.*, a situation where they had had an opportunity to supplement their pleadings. See 824 F.2d at 16-17. In National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987), plaintiffs challenged the Department of the Interior's Land Withdrawal Review Program and the Department moved to dismiss for lack of standing. The court said:

[T]he standing issue arose before the district court on the Department's motion to dismiss the Federation's complaint. This posture has two important ramifications. First, we review the allegations of the Federation's complaint. In so doing we must accept as true all material allegations and construe the complaint in favor of the Federation. See Warth v. Seldin, 422 U.S. 490, 501 \* \* \* (1975). <sup>8/</sup> Second, and more important, the posture affects the degree of specificity of facts which the Federation must show to establish a sufficient likelihood of personal injury to its members. See The Wilderness Society v. Griles, 824 F.2d 4, 16 (D.C. Cir. 1987). In SCRAP, for example, the Court found that the plaintiff-organization's alleged injury, based only on its members' use and enjoyment of natural resources surrounding the Washington Metropolitan area, was enough to survive a motion to dismiss. The Court acknowledged, however, that on a motion for

---

<sup>8/</sup> "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *E.g.*, Jenkins v. McKeithen, 395 U.S. 411, 421-422 (1969). At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."

Warth v. Seldin, 422 U.S. 490, 501 (1975).

summary judgment, plaintiff might have to show injury with greater specificity, for example, by naming a specific forest that was used and would be affected by the challenged agency action. [Emphasis in original.]

The majority, however, dismiss the appeal in response to BLM's motion to dismiss without accepting appellants' allegations as true, without construing them in the light most favorable to the organizations, and without affording appellants any opportunity to support the allegations of fact that would show sufficient likelihood of injury to establish their standing. See National Wildlife Federation v. Burford, supra at 312. Instead, the majority simply conclude that "appellants have failed to allege or prove facts sufficient to establish that they have been adversely affected" (Majority opinion, supra at 281).

There are several problems with the reasons the majority offer to support this conclusion. First of all, they simply ignore appellants' allegation that BLM's decision adversely affects their use of the lands for nature study, photography, hiking, backpacking, camping, and picnicking. Rather, they begin by "noting" that it is "arguable whether appellants could ever have standing to challenge a decision solely on the ground that the decision made it less likely that a specific WSA would be included in the permanent wilderness system" -- and then go on to argue why they could not. Id. But they do not give appellants a chance to argue it, or, more importantly, to support their claim that BLM's decision to suspend would reduce the chances that the Little Bookcliffs WSA would be designated -- e.g., by introducing evidence that an agency such as BLM less frequently recommends inclusion of areas that are subject to oil and gas units or leases than areas that are not to the Secretary or that the Secretary less frequently recommends them to the President or that the President less frequently recommends them to the Congress or that the Congress less frequently includes them in the areas it designates. Whether the Board has jurisdiction to review the Secretary's wilderness recommendations (majority opinion at 281) is not germane; the question is whether BLM's decision adversely affects appellants because it reduces the chance that the lands will be recommended for wilderness.

---

9/ The Court rejected the Department's objection to the Federation's standing:

"[T]he Department protests that the Federation has not shown 'concrete,' 'discernible' injury because the harm alleged is merely hypothetical. At bottom, appellant challenges the Federation's reliance on allegations of threatened injury that allegedly will occur in the future as a result of third parties' responses to the Department's actions. \* \* \* In this regard, the Federation's allegations of injury suffice; because the Program acts directly on the land (rather than on third parties), we can be certain that the challenged agency action has affected the land areas that the Federation's members use and that the anticipated response by third parties will concern those lands."

835 F.2d at 313-14 (emphasis in original).

Further, the majority say that "the assertion that the mere existence of the leases makes it less likely that the lands in question will be included in the permanent wilderness system does not withstand analysis." Id. at 282. Rather than affording appellants any opportunity to present either facts or analysis on the issue, however, they offer their essay suggesting that a BLM decision denying the suspension might have been more likely to lead to development of the lands for oil and gas but concluding that appellants would not have had standing to challenge that decision even so.

BLM's motion to dismiss appellants for lack of standing cannot be granted without offering them the opportunity for a hearing or other means of supplementing the record (such as affidavits) to support their standing. Warth v. Seldin, supra at 501; Wilderness Society v. Griles, supra at 16-17; National Wildlife Federation v. Burford, supra at 312; National Wildlife Federation v. Hodel, 839 F.2d 694, 703 (1988); Natural Resources Defense Council, Inc. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 1, 8 n.3, 92 I.D. 389, 393 n.3 at 424 (1985).

#### IV. Appellants Have A Right of Appeal Under the Less Restrictive Criteria Applicable to Administrative Agencies

There is sound precedent for applying less restrictive criteria in deciding whether appellants have a right of appeal to the Board than are applied to whether a party has standing to seek judicial review of agency action:

In the [Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)] case the court assumed that the same standards apply to determining standing before an agency and standing to obtain judicial review and went on to hold that the FCC must permit listeners to participate in broadcast relicensing proceedings. In the National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970)] case the court reasoned that a party with an interest sufficient to obtain judicial review of agency action should be permitted to participate before the agency to ensure it meaningful judicial review on all the issues. But it does not follow from either case that a party must be excluded from participation before the agency if it does not have a sufficient interest to meet Article III requirements for judicial review. Indeed, as we pointed out in the National Welfare Rights Organization case, "standing to sue depend[s] on more restrictive criteria than standing to appear before administrative agencies. \* \* \*." 139 U.S. App. D.C. at 53 n.27, 429 F.2d at 732 n.27; see Gardner v. FCC, 174 U.S. App. D.C. 234, 238, 530 F.2d 1086, 1090 (1976). See also K. Davis, Administrative Law Treatise § 22.08, at 240 (1958). To determine what a party must show to qualify as aggrieved under the regulations, we look to the scheme intended and devised by the Congress and the Secretary. See Office of Communication of the United Church of Christ v. FCC, supra, 123 U.S. App. D.C. at 334-36, 359 F. 2d at 1000-02. [Emphasis in original.]

Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601, 606 (D.C. Cir. 1978). 10/

Thus, under the regulation involved in this case, 43 CFR 4.410, which gives a party to a case who is "adversely affected" by a decision a right to appeal, we could look to the "scheme intended and devised by the Congress and the Secretary" to determine whether appellants have a right to appeal to the Board. Alternatively, we could adopt the "functional analysis of administrative standing" suggested by Judge Bazelon in his concurrence in Koniag. With a rule as "general and indefinite" as section 4.410 is, he "would examine the nature of the asserted interest, the relationship of [the appellant's] interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions." Id. at 614-15. 11/ Were we to follow Judge Bazelon's approach, we would conclude that appellants' interests in the wilderness values of the Little Bookcliffs WSA lands included in the Winter Flats Unit closely correspond to the Department's mandate to manage these lands so as not to impair their suitability for preservation as wilderness, see 43 U.S.C. § 1782(b) (1982),

10/ The majority's evaluation of the scheme under the Alaska Native Claims Settlement Act was:

"Congress sought to quiet the Native land claims in Alaska justly and expeditiously, so that the State's development could proceed. At the same time Congress took care to assure that grants of public lands would be made only to eligible Native groups by requiring the Secretary to review the eligibility of each village. Over two hundred villages were involved. Although many findings could be perfunctory because eligibility was clear, the eligibility of some villages was in dispute. It is apparent that the Secretary intended the area director of the BIA [Bureau of Indian Affairs] to settle the easy, undisputed cases, but when a party was adversely affected by the area director's determination, the Secretary would make his own eligibility determination after more elaborate fact-finding in the three-tiered appeal process. A necessary corollary to this scheme is that the term 'party aggrieved' must be construed generously to achieve the congressional objective that determinations be careful as well as quick. We conclude, therefore, that grafting strict judicial standing requirements onto these regulations would be inconsistent with the Act and the Secretary's plan to implement it."

Id. at 606.

11/ Judge Bazelon elaborated on this formulation at page 616:

"These authorities suggest a functional analysis composed of the following factors:

- "(1) The nature of the interest asserted by the potential participant.
- "(2) The relevance of this interest to the goals and purposes of the agency.
- "(3) The qualifications of the potential participant to represent this interest.
- "(4) Whether other persons could be expected to represent adequately this interest.
- "(5) Whether special considerations indicate that an award of standing would not be in the public interest."

and that granting them a right to appeal BLM's decision would contribute to an objective administrative review of it. See 43 U.S.C. § 1701(a)(5) (1982). 12/ Were we to follow the approach of the majority in Koniag, we would conclude that the scheme devised by the Congress in these provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), as well as in the National Environmental Policy Act, would entitle them to a right of appeal. See note 19, infra.

#### V. Appellants Have A Right of Appeal Under Board Precedents

In Pacific Coast Molybdenum, supra, the Board said it would be "guided by judicial determinations" concerning the "types of interests" and "concerns" that should be considered in deciding whether a person is adversely affected by a BLM decision so as to have a right of a appeal to the Board. The majority tell us, however, that decision "expressly rejected" the view that such determinations should "control our adjudications of administrative standing" (Majority opinion, supra at 286). Instead, they look to "our own standing adjudications" to determine whether appellants are adversely affected. Id. However, the majority ignore several Board decisions that are persuasive precedents for appellants' right of appeal in this case.

One such decision is Pacific Coast Molybdenum itself. Relying on Judge Bazelon's concurrence in Koniag, supra, the Board held in Pacific Coast Molybdenum that "administrative standing is more properly determined by an analysis embracing 'the nature of the asserted interest, the relationship of his interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions.'" 68 IBLA at 332.

In Pacific Coast Molybdenum the appellant organizations were granted a right of appeal from the denial of their protests against a mineral patent application covering 32 mining claims that were found to contain a valuable

---

12/ In 43 U.S.C. § 1701(a)(5) (1982), Congress declared its policy that "in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to \* \* \* structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking." Although Congress provided in section 1701(b) that this and other policies set forth in subsection (a) "shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation," several courts have drawn guidance from these policy provisions. See United States ex rel. Bergen v. Lawrence, 848 F.2d 1502, 1509 (10th Cir. 1988); National Wildlife Federation v. Burford, supra at 308; Sagebrush Rebellion v. Hodel, 790 F.2d 760, 768 (9th Cir. 1986) (upholding the adequacy of hearings with respect to a withdrawal); National Wildlife Federation v. Watt, 571 F. Supp. 1145, 1150 (D.D.C. 1983) (enjoining issuance of coal leases). In Perkins v. Bergland, 608 F.2d 803, 805-06 (9th Cir. 1979), the court expressly predicated its exercise of judicial review on the policy stated in subsection (a)(6) and specifically rejected the argument that subsection (b) provided a basis for ignoring that policy.

mineral deposit. One organization alleged that its members fished in rivers whose tributaries were located in the patent area and argued that mining the molybdenum deposit as proposed "could have significant adverse environmental impact on the fishery resource." 68 IBLA at 332. The other organization alleged that it was organized to "promote the conservation and appreciation of the scenic, wilderness, fish, wildlife, recreation, and other natural resources of southeast Alaska," that individual members used the lands in the Misty Fiords National Monument that included the mining claims, and that "many members make a substantial portion of their livelihood from the commercial fishery and wilderness values which may be impaired by the proposed mining activities of [the Pacific Coast Molybdenum Company]." *Id.* The Board held that "the nature of the asserted interest"

is such as has been recognized in a number of judicial pronouncements as sufficient to confer standing in a general sense, that is, when such a showing is coupled with a showing of causality between the objected action and the complained injury in a specific case, standing will lie. See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Save the Bay, Inc. v. United States Corps of Engineers, 610 F.2d 322 (5th Cir. 1980), cert. denied, 444 U.S. 900 (1980); Animal Welfare League v. Krepes, 561 F.2d 1002 (D.C. Cir. 1977), cert. denied, 434 U.S. 1013 (1978). We will discuss the causality aspect below.

Id.

In discussing causation, the Board acknowledged that, because a mining claimant does not need a patent in order to conduct mining operations, "it is certainly arguable that the real injury of which appellants complain is unrelated to the patent proceeding, since its cause is the mining of the deposit which could be accomplished in the absence of any patent application." *Id.* at 333. The Board answered this argument by observing that the filing of a mining claim required no action by the Department, but that an application for a patent initiates procedures leading to the recognition of valid claims and that this recognition was an action against which a protest could be filed. "[W]here an adverse interest is shown," the Board stated, such recognition is properly the subject of an appeal. The Board held that the two organizations "have alleged interests which were adversely affected by the denial of their protests within the meaning of 43 CFR 4.410." *Id.* at 333-34.

The decision in Pacific Coast Molybdenum supports appellants' claim to a right of appeal in this case. In that case, as here, appellants alleged injury from potential mineral development to specific resources and wilderness values and to activities that depended on them, and alleged that their members used the lands involved. In that case, as here, although mineral development could have taken place without the BLM decision that was being protested, the risk of mineral development would have been enhanced by such a decision, as it was in this case. Thus, both the nature of the asserted interest and the cause-and-effect relationship between the decision complained of and the injury alleged to that interest have been demonstrated

at least as adequately in the present case, for purposes of determining whether appellants have been adversely affected, as in Pacific Coast Molybdenum.

In California State Lands Commission, 58 IBLA 213 (1981), the State of California appealed the rejection of its protest against BLM's designation of wilderness study areas in the California Desert Conservation Area. The principal bases for the appeal were the State's concern that the designation would interfere with its rights to select lands to compensate for deficiencies in the grant of school sections it was entitled to under 43 U.S.C. § 851 (1976) and its argument that these rights were valid existing rights that were protected under FLPMA. See 58 IBLA at 215. The State's standing to appeal was challenged on the grounds it had no specific indemnity application pending. Recognizing that "the issue of standing is inextricably intertwined with the substance of" these arguments, id., the Board first discussed those arguments (and rejected them) and then held the State had standing:

With respect to the standing of the State of California to pursue this appeal, while we have ruled that the State's substantive claim cannot stand, the nature of its argument was such that, by its internal logic, no selection was necessary to claim adversity in the decision below. We are cognizant, of course, that the question of when a party is "adversely affected by a decision" cannot depend on that party's subjective determination. Nevertheless, where, as here, at least colorable allegations of injury exist, the existence of standing cannot be made dependent upon ultimate substantive success on appeal.

58 IBLA at 217.

In this case, too, appellants have made "at least colorable allegations of injury." The basis of appellants' right to appeal in this case is not a "subjective determination" (or what the majority characterize as an attempt to premise their standing on "the right to be free from the fear that development may, at some future point, occur," majority opinion, supra at 286), but rather the risk -- an objective phenomenon measured by the 2-year period of the suspension BLM granted -- that mineral development would be more likely as a result of BLM's decision. Even if that risk is not substantial or does not materialize, it is adequate for purposes of demonstrating adverse effect, just as the State's ultimately unsuccessful concern that its indemnity rights would be impaired by BLM's wilderness designation decision was in California State.

In National Wildlife Federation, 82 IBLA 303 (1984), BLM objected to the National Wildlife Federation's (NWF) standing when it appealed a BLM decision to proceed with an exchange of public grasslands that had relatively high wildlife values. NWF had commented that the prospective owner intended to "sodbust" the grasslands and convert them to grain production. BLM responded that the owner did not so intend. 82 IBLA at 305. In discussing BLM's motion to dismiss the Board stated:

In its statement of reasons NWF states that it is the country's largest conservation organization; that its members regularly hunt, fish, and camp on BLM lands in Montana, and that it has participated in the BLM land use planning process throughout Montana. NWF alleges that sec. 35, T. 21 N., R. 19 E., provides year round habitat for some 300 to 500 sage grouse and that sec. 6, T. 20 N., R. 20 E., and part of sec. 31, T. 21 N., R. 20 E., contain a large reservoir which is important to both nesting and migrating waterfowl. NWF claims that both tracts provide good hunting opportunities and are regularly used by the public. \* \* \*

Further, in response to BLM's motion, NWF submitted a statement of standing. Therein, NWF asserts that this case is easily distinguishable from Oregon Natural Resources Council, [78 IBLA 124 (1983)], in that NWF has more than a mere interest in a problem. In that regard NWF claims standing on three separate grounds. First, it asserts that it has members who hunt on the selected lands, and that they will suffer an injury in fact if the proposed land is exchanged. 3/

\* \* \* \* \*

With regard to NWF's first assertion, it has shown that its members actually use the land in question. Such a showing is itself sufficient to confer judicial standing on NWF. See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton [404 U.S. 727 (1972)]; National Forest Preservation Group v. Butz, 485 F.2d 408, 410 (9th Cir. 1973). It also clearly satisfies the requirement of 43 CFR 4.410 that an appellant be adversely affected by the decision being appealed. See In Re Pacific Coast Molybdenum, supra at 332-34. Thus, we deny the motion by counsel for BLM. 4/

3/ In support of this assertion NWF submitted with its statement of standing the affidavits of two of its members, Frank Cook and Terry Constan. Each of these individuals stated that he had hunted on the selected lands in the past and looked forward to hunting on them in the future.

4/ This determination precludes the necessity to address the other grounds for standing set forth by NWF.

82 IBLA at 307-08.

In this case, appellants alleged their members used the lands in question, just as in National Wildlife Federation. In this case, appellants have participated in the wilderness designation process, just as the National Wildlife Federation had participated in the Montana BLM land use planning process. And in National Wildlife Federation, the Board found injury in fact based on the allegation of the organization's members that their use of the land for hunting would be impaired if it were exchanged and

perhaps converted from grasslands to production of grain, just as appellants in this case have alleged injury from the increased likelihood the lands will be developed as a result of the suspension of the unit operator's drilling obligations.

In Storm Master Owners, 103 IBLA 162 (1988), the Board found that owners of wind turbine generators who held only a conditional right under a private contract to the use of generator sites within a right-of-way had standing to appeal a decision of BLM requiring removal of all generators from the right-of-way. "The requirement that the appellant be adversely affected by the decision appealed from has been interpreted by the Board to require that a legally cognizable interest of the appellant be adversely affected. [Kenneth W. Bosley, 102 IBLA 235, 236 (1988); Oregon Natural Resources Council, 78 IBLA 124, 125 (1983)]." 103 IBLA at 177.

However, it is not necessary that an appellant have an interest "in the land" which is adversely affected in order to be accorded standing to appeal a BLM decision. In re Pacific Coast Molybdenum Co., [supra]. Thus, an appellant may properly base a claim of standing upon the mere lawful use of public land. Id. at 332-34; see also National Wildlife Federation, 82 IBLA 303, 308 (1984); Desert Survivors, 80 IBLA 111, 113 (1984). Moreover, the interest which is asserted to be adversely affected by a BLM action may proceed from a color or claim of right as to public land and need not ultimately be determined to be valid where "the existence of standing cannot be made dependent upon ultimate substantive success on appeal." California State Lands Commission, 58 IBLA 213, 217 (1981).

Id.

The Board concluded that appellants in Storm Master Owners had a claim of right to the use of wind turbine generator sites based upon a requirement, in the BLM decision that approved an assignment of the right-of-way, that the assignee execute new authorized user agreements with the parties who had such agreements with the assignor.

That claim of right to use the facilities on the right-of-way, subject to enforcement by BLM, is a legally cognizable interest. It is not necessary that these appellants have an interest in the right-of-way grant itself in order to have a legally cognizable interest where lawful use of and, certainly, a claim of right to use public land is sufficient [citing cases]. Standing to object to BLM actions is not limited solely to those who have entered into a formal relationship with BLM by way of lease, contract, right-of-way grant or otherwise [citing cases]. Finally, appellants' interest will not be regarded as any less of a legally cognizable interest where its validity has not been finally determined by BLM or the Board.

Id. at 182-83. In this case, too, appellants have a claim of right to use the public lands for their activities that is a sufficient legally

cognizable interest and the BLM decision suspending the unit operator's obligation under the unit agreement is an injury to that interest.

These cases illustrate that appellants' interests in this case are no more remote and the injury to them no more attenuated than those the Board has frequently deemed sufficient for a finding that appellants were adversely affected and therefore had a right of appeal.

#### VI. BLM's Decision Is Inconsistent with the Mineral Leasing Act

The leases that covered the approximately 24,000 nonparticipating acres of the Winter Flats Unit on May 8, 1984, the fifth anniversary of establishment of the first participating area, continued in existence because there are wells capable of production on other leases in the unit. 30 U.S.C. § 226(f) (1982) (now § 226(i), *see* § 5102(d), P.L. 100-203, 101 Stat. 1330-257) provides that "[n]o lease \* \* \* covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall not be less than sixty days after notice by registered or certified mail, within which to place such well in producing status." Under section 226(f), a unit well capable of production prevents the expiration of all leases committed to the unit. Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 390-91, 95 I.D. 1, 11-12 (1988); Solicitor's Opinion, M-36953, "Oil & Gas Lease Suspension," 92 I.D. 293, 294-95 (1985). The leases covering the nonparticipating areas were therefore prevented from expiring at the end of their primary terms because no notice requiring production from the unit wells had been issued under section 226(f). <sup>13/</sup>

This provision of section 226(f) was added to the Mineral Leasing Act in 1954. <sup>14/</sup> The following analysis of the amendment prepared for the Congress by the Bureau of Land Management indicates it was added to provide relief for a lessee who had to shut in a well capable of production because of the lack of a market:

Under existing law, if a discovery is made on a lease by a well capable of producing oil or gas in paying quantities but is shut off for various reasons, such as lack of transportation facilities, lack of market, etc., upon the shutting-off of such well, departmental decisions have held that if the lease is in its secondary term by virtue of the discovery well, it terminates when production ceases. The proposed amendment would continue the lease for 60 days or more after notice that he must place his well on a producing status.

---

<sup>13/</sup> It is for this reason that appellants' argument that these leases had expired for lack of production is erroneous. Nor were the leases extended by production under 30 U.S.C. § 226(j) (1982), as BLM suggests in its Answer at page 2, because all the unit wells were shut in and section 226(j) requires actual production. *See Hiko Bell Mining & Oil Co. (On Reconsideration)*, *supra* at 389, 95 I.D. at 11.

<sup>14/</sup> Act of July 29, 1954, P.L. 555, ch. 644, § (1), 68 Stat. 584.

H.R. Rep. No. 2238, 83d Cong., 2d Sess. (1954) at 3, reprinted in 1954 U.S. Code Cong. and Ad. News 2695 at 2697.

The Congress was concerned that this amendment not be abused, however:

ADMINISTRATION TIGHTENED

The committee has made every effort to close all possible loopholes in the administration of the law as amended by S. 2380, such as, for example, the possibility that a lessee might avoid production requirements, \* \* \*. It is recognized that a certain amount of administrative discretion and flexibility are necessary. Oil and gas are found under a great variety of types of terrain and localities. Many different and highly technical factors may be controlling in different cases. Legislative rules and standards which would be fair and equitable in one case might well prevent any operations at all in another. Therefore, the Secretary of the Interior must have administrative discretion to deal with particular problems in particular areas as they arise. However, the committee has endeavored to tighten the administrative provisions and still allow the necessary administrative discretion.

For example, the first amendment requiring that a lessee of lands on which there is a well capable of producing oil or gas in paying quantities shall receive not less than 60 days' notice to place such a well on a producing status before cancellation for nonproduction might, on its face, at least, be subject to abuse. therefore the committee wrote the following proviso into the bill before reporting it:

Provided, That after such status is established production shall continue on the leased premises unless and until suspension of production is allowed by the Secretary of the Interior under the provisions of this Act.

H.R. Rep. No. 2238, supra at 2, reprinted in 1954 U.S. Code Cong. and Ad. News at 2696.

It is also clear from this statement that the Congress intended the Department to exercise discretion in deciding under what circumstances a lessee should be excused from the requirements of the Mineral Leasing Act. BLM's decision in this case contradicts this intention because it equates the lack of a market for gas from the unit with a force majeure event that automatically suspends the unit operator's drilling obligation under section 25 of the unit agreement. The decision stated that it was

based on the fact that [Koch had] been unable to establish a marketing outlet for the gas which can be produced from presently completed wells in the unit due to a depressed gas market. It has been determined that the lack of a gas market constitutes an unavoidable delay situation in accordance with Section 25 of the unit agreement.

Section 25 of the Winter Flats Unit Agreement provides:

25. UNAVOIDABLE DELAY. All obligations under this agreement requiring the Unit Operator to commence or continue drilling or to operate on or produce unitized substances from any of the lands covered by this agreement shall be suspended while the Unit Operator, despite the exercise of due care and diligence, is prevented from complying with such obligations, in whole or in part, by strikes, acts of God, Federal, State, or municipal law or agencies, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials in open market, or other matters beyond the reasonable control of the Unit Operator whether similar to matters herein enumerated or not. No unit obligation which is suspended under this section shall become due less than thirty (30) days after it has been determined that the suspension is no longer applicable. Determination of creditable "Unavoidable Delay" time shall be made by the Unit Operator subject to approval of the Supervisor.

On July 9, 1985, the Director, BLM, issued Instruction Memorandum (IM) No. 85-537, providing instruction to State Directors concerning the suspension of the automatic elimination provisions of section 2(e) of the model form of unit agreement for unproven areas. Section 2(e) of the unit agreement calls for the elimination of leases that are not within a participating area within 5 years after the establishment of the first participating area unless the operator is diligently conducting drilling operations. <sup>15/</sup> The memorandum discussed three separate cases, one of which involved the Hancock Gulch Unit in Colorado. The operator had drilled wells capable of producing gas, and three separate participating areas had been established. However, there was no market available to take the gas from the completed wells, apparently because of the current over-supply of gas, the amount of reserves proven to date, and the fact that the gas from the wells contained a significant amount of carbon dioxide. After discussing the Hancock Gulch and other cases, the memorandum set forth guidelines to govern the suspension of the automatic elimination provisions. The first two guidelines provided as follows:

1. The circumstances must be such as to constitute a force majeure situation under the Unavoidable Delay provisions of the unit agreement. Thus, it is essential that the inability to perform under the terms of the unit agreement results from circumstances which, despite the exercise of due care and diligence, are beyond the reasonable control of the unit operator.

2. If an unavoidable delay situation exists, the authorized officer may suspend the automatic elimination provisions, provided that the required percentages of committed working interest owners

---

<sup>15/</sup> For the text of section 2(e), see the corresponding section of the model onshore unit agreement that is set forth in 43 CFR 3186.1. See also 48 FR 26765 (June 10, 1983).

and basic royalty interest owners (exclusive of the United States) in the currently nonparticipating acreage consent to that suspension. 16/

BLM's explanation for the second guideline was that it should take the step

of determining whether the owners of working interests and basic royalty interests in the presently nonparticipating acreage [are] agreeable to a deferral of the automatic elimination date, absent periodic drilling operations being conducted on or for the benefit of such nonparticipating lands. Clearly, such a deferral has the greatest impact on these lands and the owners of interest therein. We see such a deferral as being somewhat analogous to that when a unit operator seeks a 2-year extension of the 10-year automatic elimination date. There, the model form of unit agreement provides that the authorized officer may grant a single 2-year extension if consented to by the owners of 90 percent of the working interest and 60 percent of the royalty interest (exclusive of that of the United States) in the current nonparticipating unitized lands. We believe the same consent requirements should be applied whenever a unit operator requests a suspension of the automatic elimination provisions during the first or second 5-year period following the establishment of the initial participating area. 17/

On the basis of the guidelines set forth in the IM, the Director concluded that a suspension of the automatic elimination provisions could be granted for the Hancock Gulch unit. The Director suggested that the initial suspension be for no more than 2 years, subject to an annual review, "due to uncertainty as to when a marketing outlet may become available." Id. Because the circumstances concerning the Winter Flats Unit apparently resembled the grounds for which the suspension was granted for the Hancock Gulch unit, presumably BLM's consideration of granting Koch a suspension under section 25 was in response to the IM.

On August 29, 1985 -- before the September 11, 1985, deadline for drilling another well -- Koch requested "a thirty-day extension under Section 25 \* \* \* in which to submit its Application for Suspension" in order to enable Koch to obtain the consent of the required percentages of the nonparticipating committed working interest owners and the nonparticipating basic royalty interest owners. By letter dated September 4, 1985, BLM granted Koch "a 30-day extension of the 90-day drilling obligation \* \* \* [p]ursuant to Section 25." By letter dated September 19, 1985, Koch submitted its formal request for the suspension of the automatic elimination provision in accordance with the IM. By letter dated

October 7, 1985, BLM granted a "suspension of the automatic elimination provisions of Section 2(e)" until October 12, 1987. Although this decision is phrased in

---

16/ IM No. 85-537 at 4.

17/ Id. at 3.

terms of suspending the automatic elimination provision of the unit agreement, BLM's action is more precisely characterized as a suspension of the 90-day drilling obligation. Section 2(e) of the unit agreement provides for the automatic elimination of lands from the unit after the fifth anniversary of the establishment of the first participating area, unless certain drilling obligations are met. If those drilling obligations are suspended, the automatic elimination provision is also suspended.

The importance of this distinction bears on the following statement in BLM's decision:

The effect of the above suspension is to extend the second five-year term, after establishment of the initial participating area, requiring contraction to participating areas under Section 2(e) of the unit agreement. When the suspension expires, you will be required to commence drilling operations on nonparticipating lands within 90 days to forestall automatic contraction. If diligent drilling operations do not elapse for more than 90 days from completion of one well to the commencement of the next, you will have approximately 4 years and 8 months to develop nonparticipating lands before the unit contracts to participating areas as of said tenth anniversary after establishment of the initial participating area on May 8, 1979.

Presumably the "4 years of 8 months" is a mathematical error, since at the time of BLM's decision it had been 6 years and 5 months since the first participating area was effective.

More importantly, however, section 2(e) does not provide that diligent drilling operates to prevent automatic elimination of nonparticipating areas after 10 years from the effective date of the first participating area, so the suspension of the drilling obligations that BLM granted could not have the effect of extending the second 5-year term. The procedure for such an extension is provided in section 2(e) itself:

If conditions warrant extension of the 10-year period specified in this subsection 2(e), a single extension of not to exceed 2 years may be accomplished by consent of the owners of 90 percent of the working interests in the current non-participating unitized lands and the owners of 60 percent of the basic royalty interests (exclusive of the basic royalty interest of the United States) in non-participating unitized lands with approval of the Director, provided such extension application is submitted to the Director not later than 60 days prior to the expiration of said 10-year period.

The principal difficulty with BLM's treating the lack of a market as a matter for which a suspension should be requested under section 25, which request required the approval of BLM and the consent of those holding interests in the unitized leases, is that it ignores the most important feature of section 25, namely, that it suspends the operator's obligations in certain circumstances without request or prior approval. Section 25 does not

provide that the unit operator's obligations may be suspended if the parties to the agreement consent and BLM approves. Rather, it provides that the specified obligations under the agreement "shall be suspended while the unit operator \* \* \* is prevented from complying with" them by various matters beyond his reasonable control. Under section 25 of this agreement, the only matter requiring approval by BLM is the unit operator's determination of creditable unavoidable delay time. <sup>18/</sup> If advance approval, or even advance application, were required for the matters enumerated in section 25, the purpose of this provision would be frustrated: acts of God, unavoidable accidents, and uncontrollable delays in transportation do not lend themselves to prediction or permission.

Another difficulty is that BLM's decision says it suspends the automatic elimination provision only for 2 years. If a matter beyond the unit operator's reasonable control exists, however, the operator's obligations remain suspended under the language of section 25 for the duration of the condition which prevents him from meeting those obligations. Were the lack of a market for gas such a matter, the obligations would remain suspended for as long as that condition exists.

Section 25 lists several kinds of circumstances that prevent compliance, concluding with "other matters beyond the reasonable control of the Unit Operator whether similar to matters herein enumerated or not." Both BLM and Koch contend that a total lack of market as well as certain economic conditions are matters beyond the control of the operator within the meaning of this provision. Although such circumstances might not be similar to the specific matters listed in the provision, BLM suggests we need not employ the ejusdem generis rule as an aid in construing the final clause. While that may be so, neither can it be construed so broadly as to make all the obligations under the unit agreement illusory. An operator cannot avoid drilling, operating, or producing obligations simply because he considers it uneconomical to drill or produce. The language of the provision itself precludes an open-ended interpretation of the final clause. It is not sufficient that the matter be beyond the reasonable control of the unit operator; the unit operator must be "prevented" from complying with its obligations by the matter. That is, the unit operator must be able to demonstrate that the circumstance was the proximate cause of his failure to perform the particular obligation. In considering whether the reasons given by Koch and BLM constitute a proximate cause that prevents Koch from meeting its drilling obligations, it must be observed that Koch has been unable to market any production from this unit since the first well "capable of production" was completed and shut in 9 years ago. The inability to market that gas did not prevent Koch from drilling 11 additional wells also "capable of production" since then. Only BLM's new interpretation of section 25 makes it possible to prevent it now.

BLM contends:

In the current situation, a total lack of a market makes it illogical to drill another well. All that could be accomplished

---

<sup>18/</sup> Section 25 of the model unit agreement set forth in 43 CFR 3186.1 contains no provision for BLM to determine creditable time.

would be to shut it in along with the already existing 12 shut-in wells. Logic, therefore, prevents a well from being drilled. See I.M. 85-537.

It is acknowledged that a "logical" constraint on drilling differs from the enumerated examples of unavoidable delay that indicate a physical inability to drill. However, the catchall phrase does not require one to employ ejusdem generis. Moreover, recognizing this restraint is not at variance with the purposes of the Mineral Leasing Act.

(Motion to Dismiss and Response to Statement of Reasons at 11).

I cannot agree that employing section 25 to recognize the effects of a lack of a market is consistent with the Mineral Leasing Act. Although it may be necessary to shut in gas wells because of the lack of a pipeline or market, or because a processing plant is needed to reduce the carbon dioxide content of gas from the field, there is no precedent for holding that such conditions mandatorily suspend an operator's drilling obligations. On the contrary, those circumstances usually require rigorous enforcement of drilling obligations to ensure the establishment of sufficient reserves to justify the building of pipelines and other facilities to bring the gas to market. The stated objective of unitization is the conservation of the resources of an oil or gas field via a unit plan of "development or operation," see 30 U.S.C. § 226(j) (1982), not the speculative holding of thousands of unproductive acres in anticipation of a time when those leases can be profitably developed. If conditions do not warrant such development, it does not necessarily follow that drilling obligations should be suspended. It would be equally logical to conclude that the field is no longer amenable to unit development, and to consider again whether the existing wells are capable of production in paying quantities.

From the legislative history of section 226(f) related above, it is clear that Congress did not intend that lack of a market would constitute a basis for a mandatory suspension of operations or production or extending a lease for a period longer than 60 days. To construe section 25 as mandating a suspension with a similar effect not only abdicates the discretionary authority Congress expressly intended the agency to exercise, but creates the very type of loophole Congress sought to avoid. Because section 25 of the unit agreement implements the Department's statutory authority under the Mineral Leasing Act, it should be construed and applied consistently with such clear expressions of legislative intent. As we said in Hiko Bell Mining & Oil Co. (On Reconsideration), supra:

The provisions of 30 U.S.C. § 226(j) (1982) both establish and limit this Department's authority with respect to unit agreements; the Department cannot by contract exceed the scope of authority conferred by the statutory provision. The agreements must be subject to the statute; the construction of the statute cannot be subject to the agreements.

100 IBLA at 393-94; 95 I.D. at 13. The same analysis requires rejection of an application of section 25 that is inconsistent with the intent of Congress in enacting section 226(f).

Force majeure clauses in contracts are not lightly construed to excuse obligations on the basis of market conditions. Recently the U.S. Court of Appeals for the Fourth Circuit declined to accept a drop in world oil prices resulting from Saudi Arabia's effort to regain its share of the world oil market as a reason for invoking such a clause in a fixed-price contract for the purchase of oil. Langham-Hill Petroleum Inc. v. Southern Fuels Co., 813 F.2d 1327 (4th Cir. 1987). The court quoted a decision of the Seventh Circuit rejecting the argument that a regulatory body's denial of a rate increase justified a utility's attempt to escape from a long-term, fixed-price contract to purchase coal:

A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed-price contract is to allocate risk this way. A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.

Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265, 275 (7th Cir. 1986). The results are similar in construing force majeure clauses in oil and gas leases. In Champlin Petroleum Co. v. Mingo Oil Producers, 628 F. Supp 557 (D. Wyo. 1986), the court held that bankruptcy proceedings did not excuse the lessee's failure to produce oil or gas in time to prevent termination of the lease at the end of its primary term. And in Koch Exploration Co., 100 IBLA 352 (1988), this Board affirmed BLM's denial of a suspension of the unit operator's drilling obligations under section 25 of the Monument Valley Unit Agreement. BLM had denied the requested suspension on the grounds that "'the inability to contract a 'favorable' sales price do[es] not constitute [a matter] beyond the reasonable control of the unit operator as specified in Section 25.'" 100 IBLA at 354. The Board affirmed on the grounds that the unit operator had not shown it was commercially impracticable to continue drilling and noted that the apparent basis for appellant's argument that it should be excused from its section 2(e) drilling obligation was "plainly an outgrowth of the common law and has no bearing on the present case, which is governed by the express provisions of section 25 of the unit agreement taken from Departmental regulation, as they are interpreted herein." Id. at 362 n.13.

Finally, we note that BLM has recently acknowledged that force majeure does not include "lack of a market by itself" when it rejected a comment suggesting that the proposed amendment of 43 CFR 3103.4-2(a) be expanded "to include lack of market for new production[,] to handle the recent market volatility":

Force majeure generally includes such events as strikes, acts of God, and unforeseeable administrative delay, but not lack of a market by itself. No changes have been made in the final rulemaking, in order to avoid limiting the discretion of the authorized officer to address unique situations that may occur in lease operations.

53 FR 17344 (May 16, 1988).

Thus, BLM's decision to suspend Koch's drilling obligation on the basis of section 25 of the unit agreement is contrary to the Mineral Leasing Act and to the proper construction of the unit agreement itself. That is, suspension of the drilling obligation because there is no market for the gas is not mandatory under section 25, as indeed the procedures adopted in BLM's Instruction Memorandum implicitly recognized. It is, however, within BLM's discretion to approve a modification of the unit agreement to suspend the drilling obligation, if it determines it is "in the public interest and is for the purpose of more properly conserving natural resources" to do so. See 43 CFR 3183.3-1. Because a decision to approve such a modification would be discretionary, rather than mandatory, however, BLM would be obligated to evaluate the environmental effects of doing so and authorized to condition any suspension it granted by the imposition of nonimpairment stipulations on leases within a wilderness study area that were issued before the enactment of section 603 of the FLPMA, 43 U.S.C. § 1782 (1982), in a manner reasonably tailored to conserve the environmental values of the leased premises. Getty Oil Co. v. Clark, 614 F. Supp. 904, 915-16 (D. Wyo. 1985), aff'd sub nom. Texaco Producing, Inc. v. Hodel, 840 F.2d 776 (10th Cir. 1988). <sup>19/</sup> And, of course, its decision would be subject to appeal, where it would be subject to de novo review. United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983).

BLM's belief that the leases issued before enactment of FLPMA would be entitled to be developed "regardless of the BLM's action in this case," see Motion to Dismiss for Lack of Standing and Response to Statement of Reasons

---

<sup>19/</sup> "NEPA requires an agency to evaluate the environmental effects of major federal actions at the point of commitment. \* \* \* Since the enactment of NEPA, the Secretary is required to manage lands under Wilderness Act review so as not to impair the suitability of such areas for preservation as wilderness. The Secretary must, to the fullest extent possible, interpret and administer the policies, regulations and public laws of the United States in accordance with the policies embodied in NEPA, if there is no direct conflict between such policies and the law applicable to the agency's operations, in this case the MLA [Mineral Leasing Act]. \* \* \* Environmental concerns must be evaluated in conjunction with the determination of whether or not to grant a suspension of operations requested by an operator or lessee under a Federal lease. \* \* \* The Secretary is not only permitted, but required, to take environmental values into account in carrying out his regulatory functions, unless there is a clear and unavoidable statutory authority prohibiting the Secretary from complying with NEPA's mandate." Getty Oil Co. v. Clark, supra at 919-20.

at pages 5-6, is apparently the basis for its October 7, 1985, determination that its action of suspending the drilling obligations was categorically excluded from environmental review under the National Environmental Policy Act (NEPA) as well as its statement in denying appellants' protest that its action was "not in conflict with the intent of the acts cited" by appellants, *i.e.*, FLPMA, NEPA, the Wild Free-Roaming Horses and Burros Act, the Wilderness Act, and the Mineral Leasing Act. <sup>20/</sup> The decision in Getty Oil Co., *supra*, was issued shortly after BLM's IM No. 85-537 in July 1985, so it is possible BLM was not aware of its applicability to its decision to suspend the drilling obligation. On this assumption, we would set aside BLM's decision and remand the matter for BLM to consider in light of Getty Oil Co.

## VII. Conclusion

As this case illustrates, the doctrine of standing is a Trojan horse. What at first may appear as an attractive device to dispose of an unwelcome appellant or avoid an unfamiliar issue opens the gate to a swarm of difficult questions. In Article III courts, once injury has been established, one must consider causation <sup>21/</sup> and redressability, <sup>22/</sup> and then the three prudential issues, *i.e.*, whether the injury is the sort the law seeks to protect, whether the plaintiff's claims are based on his own legal rights, and whether the harm is a generalized grievance. <sup>23/</sup>

"The main failure of the law of standing \* \* \* is the inconsistency, unreliability, and inordinate complexity." <sup>24/</sup> According to some experienced litigators, whether a particular plaintiff is found to have standing or not depends as much on the trial judge or appellate panel he draws as anything else. The result is that Federal court litigation has become what one litigator has termed "a crap game."

---

<sup>20/</sup> BLM said in its denial of the protest that its reason for not addressing is compliance with any of these statutes was because appellants "did not provide any specific section that [they] believe we are incorrectly implementing."

<sup>21/</sup> "The second prong of the standing inquiry is causation: the injury alleged must be 'fairly traceable' to the action under attack. The Supreme Court's decisions on this point show that mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice \* \* \*." National Wildlife Federation v. Hodel, *supra* at 705.

For the court's analysis of the causation prong in that case, *see id.* at 707-16.

<sup>22/</sup> "[A] party seeking judicial relief need not show to a certainty that a favorable decision will redress his injury. A mere likelihood will do. Village of Arlington Heights v. Metropolitan Housing [Development] Corp., 429 U.S. 252, 261 \* \* \* (1977)." National Wildlife Federation v. Hodel, *supra* at 705.

<sup>23/</sup> *See Ozonoff v. Berzak*, 744 F.2d 224, 227-28 (1st Cir. 1984).

<sup>24/</sup> Davis, Administrative Law Treatise, Second Edition, § 24:1 (1983).

It is both unnecessary and unfortunate for this Board to ape that game in carrying out the administrative review authority the Secretary has delegated to it. Yet it is apparent that is what the Board does. Sometimes it is guided by judicial determinations in arriving at a decision on whether an appellant is adversely affected by a BLM decision, sometimes it is not. Once it said administrative standing was more properly determined by the analysis suggested by Judge Bazelon in Koniag, Pacific Coast Molybdenum, supra at 332, but it has never once actually performed such an analysis in making its decisions. Once it "afforded all parties the opportunity to file additional briefs on the standing question" after receiving a motion to dismiss for lack of standing and a reply to it, Pacific Coast Molybdenum, supra at 328, but here it does not allow any further inquiry. Sometimes it awards standing to appellants who use the public lands and who allege that a BLM decision will indirectly cause injury to their interest in doing so, sometimes it does not.

I agree with Judge Bazelon: "[A]bsent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law of judicial standing into the administrative process." 25/ It is enough to answer the question whether someone is adversely affected by a decision of the Department based either on the "functional analysis" suggested by Judge Bazelon in Koniag, supra, or by looking to the "scheme intended and devised by the Congress and the Secretary," as the majority did in that case.

Under either analysis in Koniag, or under an Article III analysis, or under our own standing adjudications, however, I believe appellants in this case have shown they were adversely affected by BLM's decision. If they have not, they should be given an opportunity to do so before the motion to dismiss is granted. BLM's decision is inconsistent with the Mineral Leasing Act and with a proper interpretation of the provisions of section 25 of the unit agreement. By allowing a suspension of the drilling obligation on the basis of section 25, rather than as an exercise of its discretion, BLM avoided its obligations under NEPA and surrendered an opportunity to consider the imposition of nonimpairment stipulations on the pre-FLPMA leases in the Little Bookcliffs Wilderness Study Area.

I would deny the motion to dismiss, set aside the decision, and remand the matter for adjudication in accordance with Getty Oil Co., supra.

I dissent.

---

Will A. Irwin  
Administrative Judge

We concur:

---

David L. Hughes  
Administrative Judge

---

Franklin D. Arness  
Administrative Judge.

---

25/ Koniag, Inc., supra at 614.

