

**Editor's note: Reconsideration granted; decision vacated: See Concerned Citizens for Responsible Mining(On Reconsideration), 131 IBLA 257 (Nov. 23, 1994)**

CONCERNED CITIZENS FOR RESPONSIBLE MINING ET AL.

IBLA 91-319

Decided October 15, 1992

Appeal from a decision of the Malheur Resource Area Manager, Bureau of Land Management, approving a mining plan of operations for exploration. OR 46301.

Set aside and remanded.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Environment--Mining Claims: Plan of Operations National Environmental Policy Act of 1969: Environmental Statements

When an environmental assessment of a proposed mining plan of operations for exploration does not include the analysis of whether potential mining is sufficiently specific to adequately analyze it at the exploration stage and of the details of the exploration process, the mining process, and other allegedly connected activities in the area that is necessary for BLM's decision to withstand judicial review, BLM's decision will be set aside and the matter remanded so the environmental assessment may be supplemented.

APPEARANCES: Gary K. Kahn, Esq., Portland, Oregon, for appellants; Brian R. Hanson, Esq., and Murray D. Feldman, Esq., Boise, Idaho, for Malheur Mining Corporation; Donald P. Lawton, Esq., Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Concerned Citizens for Responsible Mining, Portland Audubon Society, Oregon Natural Desert Association, and the Oregon Natural Resources Council (Concerned Citizens et al.) have filed a notice of appeal of the April 15, 1991, decision of the Malheur Resource Area Manager, Bureau of Land Management (BLM), approving Malheur Mining Corporation's Plan of Operations for the Kerby Project "subject to the attached mitigating measures which were

identified in the Revised Environmental Assessment" (EA) [No. OR-030-90-09, dated March 1991]. The EA describes the project as follows:

The project is located two miles [s]outhwest of Farewell Bend in Malheur County. \* \* \* The surface disturbance activities proposed in the Plan of Operations for the Kerby Project exploration drilling program includes [sic] up to 500 drill holes and the construction of numerous drill pads using a D-8 caterpillar (or equivalent). The average pad is expected to be approximately 70 x 15 feet. Access roads to these pads are expected to be minimal as gentle topography allows for egress with minor surface disturbance. In addition to drilling, the Kerby Project will require up to 4 small trenches, approximately 100 x 15 x 10 feet in size. Approximately 10 tons of mineralized sample will be removed from each trench and transported to Denver for analysis. Total proposed surface disturbance may approach 15 acres.

(EA at 2).

Concerned Citizens et al. filed a statement of reasons for appeal in June 1991; Malheur Mining Corporation and BLM filed answers in June and July 1991. 1/ On January 8, 1992, appellants filed suit in the U.S. District Court, District of Oregon, alleging violations of the National Environmental Policy Act of 1976 (NEPA), 42 U.S.C. § 4321 (1988), and the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701, 1732(b) (1988). Concerned Citizens for Responsible Mining v. United States Bureau of Land Management, Civ. No. 92-20-JO, D. Ore. The violations alleged were the same as in this appeal. On March 30, 1992, appellants filed a request for a stay of BLM's decision with us. See 43 CFR 3809.4(f). Malheur Mining Corporation and BLM filed responses to this request in April 1992.

On April 29, 1992, the District Court dismissed the action before it, stating that until we decide this appeal, or fail to act on the appeal, there is not the final agency action required by the Administrative Procedure Act. 5 U.S.C. § 704 (1988). Concerned Citizens for Responsible Mining, supra, Opinion and Order at 10, 16-17. 2/ The Court observed:

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1/ In the statement of reasons for their appeal, appellants argued that gold exploration and gold mining are connected actions and have cumulative impacts; that a programmatic environmental impact statement must be prepared for this and other mining projects in the area; and that the proposed exploration would cause unnecessary or undue degradation of the public lands.

2/ The Court noted that 43 CFR 3809.4(g) provides that neither the authorized officer's nor the State Director's decision under section 3809.4 shall be construed as final agency action for the purpose of judicial review. The Court stated: "While plaintiffs have taken the

The issue of finality is to be determined in a "pragmatic way." \* \* \* Part and parcel of this "pragmatic" approach is a consideration of whether the case involves disputed factual issues so that a court would benefit from a fully-developed administrative record, whether the issues to be resolved involved agency expertise, whether a finding of final agency action would promote piecemeal appeals, and whether the challenged action appears sufficiently definitive to have a direct and immediate effect. \* \* \* Here, one of the central issues is whether the BLM is required to analyze the cumulative impacts of gold mining and gold exploration in an environmental document prior to the approval of the exploration proposal. While the interpretation of the requirements of NEPA does not fall within BLM's expertise, the factual determination of whether the possibility of gold mining is sufficiently specific to adequately analyze it at the exploration stage would be of significant benefit to the court. Additionally, a factual record detailing the intricacies of the exploration process, the gold mining process, and the other allegedly connected activities in the area would better enable the court to determine if NEPA requires as extensive of an examination as the plaintiffs claim. \* \* \* Turning to the definitiveness issue, if the gold exploration is already taking place, as plaintiffs claim, the approval would appear sufficiently definitive. However, the agency has already remanded the approval of this plan once, and at this point, there is no indication that the agency will not do so again.

Id. at 11-12.

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fn. 2 (continued)

first step in utilizing the administrative appeals procedures (i.e. the filing of an administrative appeal), they have not awaited a decision in that appeal before pursuing a judicial remedy." Id. at 10. See Sierra Club v. Penfold, 857 F.2d 1307, 1319 (9th Cir. 1988). But see United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 439-40 (9th Cir. 1971).

The Court added:

"If the IBLA refuses to make a timely decision in the administrative appeal, the plaintiffs can again request that the court use its discretion [to waive the requirement that plaintiffs exhaust their administrative remedies]; or alternatively, plaintiffs can argue that failure to act constitutes final agency action. 'Failure to act' is included in the definition of agency action contained in the APA. 5 U.S.C. § 551(13)."

Id. at 16-17.

In the revised EA, BLM states:

If an economically mineable gold deposit is discovered as a result of the proposed action and market and financial conditions are appropriate, the Malheur Mining Corporation may submit a mining Plan of Operations in which case a new environmental assessment will be prepared \* \* \*. For the purpose of analysis, it is assumed that an economic gold deposit will not be discovered and all reclamation will be completed after exploration.

(EA at 7). Similarly, in introducing the discussion of cumulative impacts in the EA, BLM states:

The purpose of this section is to analyze impacts which result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. Reasonably foreseeable future action does not include possible full scale mine development because approval of the proposed action does not create any additional right to development. In addition there is no evidence that the proposed exploration will automatically trigger full scale mining development.

(EA at 21).

[1] As BLM and Malheur Mining Corporation note in their answers, BLM's approach has support. See Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974). On the other hand, it is certainly permissible for BLM to include the impacts of potential mining in an environmental assessment of an exploration proposal, see Southwest Resource Council, 96 IBLA 105, 94 I.D. 56 (1987), and when, as is apparently true in this case, the claimant has not made a discovery and BLM could withdraw the land from location and entry under the mining law, it may be advisable because, absent a discovery, there is no absolute right to develop. In any event, as a practical matter the District Court's interest in whether the possibility of mining is sufficiently specific to adequately analyze it at the exploration stage and in the details of the exploration process, the mining process, and the other allegedly connected activities in the area requires BLM to supplement its environmental assessment in order that its decision may withstand judicial review. 3/

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3/ We note that BLM states, in the revised EA:

"As a result of mineral exploration activities conducted by Malheur Mining and its predecessor of interest, Western Epithermal, over the past four (4) years, substantial amounts of gold-bearing and mercury-bearing rock has [sic] been discovered. Consequently, the area of the Kerby Project has a high potential of the discovery of these metals."

(EA at 14).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's April 15, 1991, decision is set aside and the matter is remanded for action consistent with this decision.

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Will A. Irwin  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge