



STANLEY ENERGY, INC.

179 IBLA 8

Decided March 23, 2010



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

STANLEY ENERGY, INC.

IBLA 2009-324

Decided March 23, 2010

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting competitive oil and gas bids. WYW-0606-114 through WYW-0606-118, WYW-0606-122, and WYW-0606-123.

Set aside and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Competitive Leases--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Offers to Lease

BLM's exercise of discretion in rejecting a competitive bid for an oil and gas lease must be supported by a rational and defensible basis which is set forth in the decision, or it will be found to be arbitrary and capricious and set aside by the Board.

APPEARANCES: Andrew C. Emrich, Esq., and Jere C. (Trey) Overdyke, III, Esq., Cheyenne, Wyoming, and Davis O. O'Connor, Esq., Denver, Colorado, for Stanley Energy, Inc.; James C. Kaste, Esq., Levi Martin, Esq., Cheyenne, Wyoming, for the State of Wyoming; Lisa D. McGee, Esq., Lander, Wyoming, for Wyoming Outdoor Council, The Wilderness Society, Greater Yellowstone Coalition, and Wyoming AFL-CIO; Michael A. Saul, Esq., Boulder, Colorado, the for National Wildlife Federation and Wyoming Wildlife Federation; Gary Cukjati, Lander, Wyoming, for The National Outdoor Leadership School; Dave Glenn, Lander, Wyoming, for Trout Unlimited; and Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Stanley Energy, Inc. (Stanley), has appealed from and petitioned for a stay of an August 21, 2009, decision of the State Director, Wyoming State Office, Bureau of Land Management (BLM), rejecting its competitive bids for seven oil and gas lease

parcels (WYW-0606-114 through WYW-0606-118, WYW-0606-122, and WYW-0606-123 (hereinafter, parcels 114 through 118, 122, and 123)), included in the June 6, 2006, competitive lease sale.¹ For the reasons that follow, we set aside the State Director's decision and remand the case to BLM.

BACKGROUND

The seven parcels encompass a total of 5,519.64 acres of Federal land in T. 33 N., Rs. 114 and 115 W., and T. 34 N., R. 114 W., Sixth Principal Meridian, Sublette County, Wyoming, in the Wyoming Range, within the Bridger-Teton National Forest (BTNF). Each proposed lease was to be subject to several special stipulations dictated by the Forest Service (FS), U.S. Department of Agriculture, which has surface management jurisdiction over National Forest lands, that would restrict the location, timing, and manner of oil and gas operations.

In 2005, FS recommended that BLM offer 44,720 acres on the eastern edge of the BTNF for competitive oil and gas leasing. BLM offered this acreage for competitive leasing at four separate quarterly lease sales: December 6, 2005; April 4, 2006; June 6, 2006; and August 1, 2006. Stanley was declared the high bidder for Parcels 114 through 118, 122, and 123 at the June 2006 lease sale. Stanley paid, and BLM accepted, a total of \$822,889.46 for the bonus bids, first year rentals, and administrative fees for the seven lease parcels.

Prior to the sale, various organizations filed protests challenging the inclusion in the sale of 13 parcels in the BTNF, including the seven at issue. BLM proceeded with the sale, but in a January 8, 2007, decision, the Deputy State Director (DSD), Minerals and Lands, Wyoming, BLM, notified the protestants that in light of two orders of the Board dated July 10, 2006 (*Wyoming Outdoor Council*, IBLA 2006-184), and September 21, 2006 (*Wyoming Outdoor Council*, IBLA 2006-208), he had decided to defer leasing the parcels "until the concerns raised by the IBLA are sufficiently addressed." DSD Decision, Jan. 8, 2007, at 9.

In the July and September 2006 orders, the Board had granted petitions for stay of decisions denying protests of competitive oil and gas lease sales for parcels in the Wyoming Range portion of the BTNF. At issue were challenges to BLM's inclusion of 1 or more parcels in the December 2005 and April 2006 competitive oil

¹ If issued, Parcels 114 through 118, 122, and 123 would be included in competitive oil and gas leases WYW-173037 through WYW-173041, WYW-173045, and WYW-173046, respectively. Parcels 114 through 118 and 123 fall entirely under the jurisdiction of BLM's Pinedale Field Office, and Parcel 122 falls under the jurisdiction of its Pinedale and Kemmerer Field Offices.

and gas lease sales. In each order, the Board found that the protestants had shown a likelihood of prevailing on the merits of their challenges to BLM's decisions under section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2006). In the July 2006 order in IBLA 2006-184, the Board specifically concluded that BLM's March 7, 2006, Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA), which was prepared after the lease sale, was cursory in nature and did not clearly conclude that the existing environmental analysis adequately addressed the likely impacts of leasing the parcels at issue. Order, *Wyoming Outdoor Council*, IBLA 2006-184, at 8-10. In our September 2006 order in IBLA 2006-208, we rejected attempts by BLM to justify the DNA, concluding that the deficiencies in the existing environmental analyses could not be rectified by pre-leasing analysis that was not prepared pursuant to section 102(2)(C) of NEPA, or by post-leasing environmental analysis. Order, *Wyoming Outdoor Council*, IBLA 2006-208, at 5-10.²

By order dated February 14, 2007, at BLM's request, the Board set aside the BLM decisions in IBLA 2006-184 and IBLA 2006-208. BLM expressly sought a remand so that it might "consider how best to remedy the concerns identified" by the Board, and we remanded the cases directing BLM to take "appropriate action." Order, *Wyoming Outdoor Council*, IBLA 2006-184 and 2006-208, dated Feb. 14, 2007, at 1.

Thereafter, in February 2008, BLM and FS published in the *Federal Register* a Notice of Intent to jointly prepare a Supplemental Environmental Impact Statement (SEIS) concerning oil and gas leasing of the 44,720 acres of Federal land in the BTNF, including the lands in question. 73 Fed. Reg. 6453 (Feb. 4, 2008). The purpose of the proposed action, the agencies stated, was "to determine whether and to what extent analysis of new issues and information might alter the oil and gas leasing decision as it relates to the 44,720 acres forwarded to the BLM for competitive lease sale." *Id.* The agencies stated that the SEIS would address "the issues identified by IBLA as inadequately or inappropriately addressed in previous NEPA analyses informing leasing decisions and other issues identified through scoping." *Id.* The proposed action to be addressed in the SEIS was whether "to lift the current suspension on the issued December 2005 and April 2006 leases

² At issue in IBLA 2006-184 and IBLA 2006-208 were, respectively, 1 parcel and 11 parcels of land, all of which were in Management Area (MA) 24 of the BTNF. The Aug. 5, 1993, EA considered the environmental impacts of leasing National Forest lands in MA 24. Other FS EAs covered other MAs in the National Forest. Parcels 114 through 118, 122, and 123 are situated in MA 24 and MA 25. In its Mar. 7, 2006, DNA, BLM purported to assess the adequacy of the EA covering leasing in MA 24, as well as EAs covering leasing in MAs 12, 22, 23, 25, 26, 31, 32, and 49.

and to issue those that were sold but not issued from the June and August 2006 sales.”³ *Id.*

On March 30, 2009, during preparation of the SEIS, Congress enacted the Omnibus Public Land Management Act of 2009 (Omnibus Act or Legacy Act), Pub. L. No. 111-11, 123 Stat. 991, section 3202 of which barred, subject to valid existing rights, oil and gas leasing in the “Wyoming Range Withdrawal Area” (WRWA), which encompasses over 1.2 million acres, including the lands within the subject parcels.⁴ 123 Stat. at 1128.

In his August 2009 decision, the State Director rejected Stanley’s competitive oil and gas lease bids for the seven parcels. Therein, he referred to the Board’s July and September 2006 orders, cited above, and stated that “the decision to offer your parcel[s] for lease relied upon the same NEPA documentation and is therefore affected by the defects identified in the IBLA orders.” Decision at 1. He also referred to the Omnibus Act, stating that the President and Congress had determined that there were higher and better uses for lands in the WRWA than oil and gas exploration and development.

The State Director cited the broad discretionary authority vested in the Secretary by the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-287 (2006), “to lease or not to lease Federal land which is otherwise available for leasing.”⁵ Decision at 1. He stated that “[t]he Secretary (through BLM) may exercise that broad authority to reject a bid and decline the offer to lease *for any reason*, prior to lease execution”). *Id.* (emphasis added). He stated that “[e]xercising that authority, and

³ In a “Weekly receipt of Environmental Impact Statements” published in the *Federal Register* on Feb. 5, 2010, the Environmental Protection Agency provided the following listing: “EIS No. 20100028, Draft Supplement, USFS WY, Bridger-Teton National Forest, Proposal to Determine What Terms and Conditions to Allow Development of Oil and Gas Leasing in the Wyoming Range, Sublette County, WY, Comment Period Ends: 03/22/10.” See also Information Memorandum for the Director from the State Director, dated Aug. 14, 2009, at 2.

⁴ Section 3202 of the Omnibus Act is found in Subtitle C of Title III of the Act, which is referred to as the Wyoming Range Legacy Act. See, e.g., BLM Opposition to Petition for Stay (Opposition) at 3.

⁵ In the absence of FS’ consent to leasing, BLM would have been precluded from leasing the seven parcels. See 30 U.S.C. § 226(h) (2006) (“The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture”); 43 C.F.R. § 3101.7-1(c); *Board of Commissioners of Pitkin County*, 173 IBLA 173, 180 (2007).

in consideration of the facts discussed above, we have determined to reject your bid on [the] lease parcel[s] . . . and will refund your filing fee, your first year rental payment, and your bonus bid.” *Id.*

Stanley appealed and requested a stay of the State Director’s Decision.⁶

DISCUSSION

[1] We begin with the proposition that BLM was fully entitled, for *sufficient* reason, to reject Stanley’s bids after the sale and after Stanley was declared the high bidder, since it retained discretionary authority under section 17 of the MLA, 30 U.S.C. § 226 (2006), to decide whether to lease Federal lands. *See Udall v. Tallman*, 380 U.S. 1, 4 (1965); *McDonald v. Clark*, 771 F.2d 460, 463-64 (10th Cir. 1985); *McDade v. Morton*, 353 F. Supp. 1006, 1009-10 (D.D.C. 1973), *aff’d*, 494 F.2d 1156 (D.C. Cir. 1974); *Continental Land Resources*, 162 IBLA 1, 7-9 (2004). A bid by the high bidder at a competitive lease sale constitutes a binding lease offer, and BLM is generally directed, upon payment of the administrative fee, bonus bid, and first year’s rental, to accept the offer by executing the lease and issuing it to the high bidder, provided it is qualified to hold a lease. *See* 30 U.S.C. § 226(b)(1)(A) (2006); 43 C.F.R. § 3120.5-3(a) and (b); *Wyoming Outdoor Council*, 160 IBLA 387, 397 (2004); *William C. Francis*, 124 IBLA 119, 120, n.4 (1992). BLM is not required to accept the offer and issue a lease where inclusion of the parcel in the sale has been protested, and BLM thereafter decides, for sufficient reason, to uphold the protest and withdraw the parcel from leasing.⁷ *Continental Land Resources*, 162 IBLA at 7.

⁶ By order dated Dec. 29, 2009, the Board denied Stanley’s request for a stay, ruling that it had failed to show a likelihood of immediate and irreparable harm from denial of the stay. The Board also granted motions to intervene filed by Wyoming Outdoor Council, The Wilderness Society, and Greater Yellowstone Coalition (collectively, WOC), National Wildlife Federation and Wyoming Wildlife Federation (collectively, NWF), The National Outdoor Leadership School and Trout Unlimited (collectively, NOLS), and the State of Wyoming, all of which had originally protested the offering of these parcels at the competitive sale. However, the Board denied the motion to intervene of Wyoming AFL-CIO. Order, Dec. 29, 2009, at 5.

⁷ The Notice of Competitive Oil & Gas Lease Sale, June 6, 2006, dated Apr. 21, 2006, provides at viii:

We will issue no lease for a protested parcel until the State Director makes a decision on the protest. If the State Director denies the protest, we will issue your lease concurrently with that decision. . . . If we uphold a protest and withdraw the parcel from leasing, we will refund your first year’s rental, bonus bid and administrative fee.

An exercise of BLM's discretionary authority must be supported by a rational and defensible basis which is set forth in the decision, or it will be found to be arbitrary and capricious. *Id.* A party challenging such a decision bears the burden to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. *Mary Byrne*, 174 IBLA 223, 232 (2008). That burden is not carried simply by expressions of disagreement with BLM's analysis and conclusions. *Id.*

The State Director offered two justifications for his decision to reject Stanley's competitive lease bids for the seven parcels at issue.⁸ First, he referred to the fact that Congress had enacted the Omnibus Act withdrawing the land covered by the seven parcels from oil and gas leasing. *See* BLM Opposition at 11 (“[P]assage of the Wyoming Range Legacy Act withdrawing the area from future leasing provided a powerful rationale not to issue new leases”). Second, he referred to the July and September 2006 orders in which the Board held that the appellants were likely to succeed on the merits of their appeals because of perceived deficiencies in BLM's compliance with section 102(2)(C) of NEPA. We will address these two justifications in turn.

A. *The Omnibus Act*

Section 3201 of the Omnibus Act created the WRWA, which consists of all National Forest lands and Federally-owned minerals within the Wyoming Range of the BTNF, as identified on an October 17, 2007, map on file with FS and the Supervisor of the BTNF, and section 3202(a)(3) of the Act withdrew such lands, subject to valid existing rights, “from . . . disposition under laws relating to mineral and geothermal leasing.” 123 Stat. at 1128. However, section 3202(e) of the Omnibus Act, which concerns prior oil and gas lease sales, provides:

⁸ WOC argues that the State Director's reference to the Board's 2006 Orders and the 2009 Omnibus Act did not offer the rationale, but rather provided only the factual context, for his August 2009 decision to reject Stanley's bids. *See* Opposition at 15-16, 18-19. If that is true, the only rationale offered for the decision is that BLM may reject a bid “for any reason,” even one that is not set out or discussed in the decision. Decision at 2. We will set aside such a decision. *See, e.g., Terrence Timmins*, 158 IBLA 318, 320 (2003). In stating that BLM had determined to reject the bids “in consideration of the facts discussed above,” *i.e.*, the Board's 2006 Orders and the Omnibus Act, we deem it clear that the State Director intended those “facts” to constitute the rationale for his decision. *Id.*

Nothing in this section prohibits the Secretary from taking any action necessary to issue, deny, remove the suspension of, or cancel a lease, or any sold lease parcel that has not been issued, pursuant to any lease sale conducted prior to the date of enactment of this Act, including the completion of any requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

123 Stat. at 1128 (emphasis added).

Although the Omnibus Act prospectively precluded oil and gas leasing in the WRWA, Stanley argues that in section 3202(e) of the Act Congress recognized that BLM retained its existing authority to lease parcels already offered and sold prior to enactment of the Act, including the seven parcels currently at issue. Stanley asserts that “[b]y its plain language, the Wyoming Range withdrawal legislation . . . specifically preserved the authority of BLM and the Forest Service to address the final disposition of those . . . lease parcels sold prior to the Act[.]” Petition at 29; *see id.* at 27-31 (citing *Gorbach v. Reno*, 219 F.3d 1087, 1094 (9th Cir. 2000)).

We agree with Stanley. Section 3202(e) is expressly applicable to the seven parcels at issue, which had been sold but not yet leased when the Omnibus Act was enacted,⁹ and is plainly intended to afford BLM the discretionary authority to go forward with the leasing of those parcels, subject to the terms and conditions set forth in the competitive lease sale notice, or not, as it deems appropriate. Further, section 3202(e) applies by its terms to a sold lease parcel anywhere in the WRWA,

⁹ When the Wyoming Range Legacy Act was introduced as S. 2229 in the 110th Congress, the report that accompanied the bill expressly referred to the leases issued but suspended the December 2005 and April 2006 sales, and the lease parcels sold but unleased in the June and August 2006 sales, noting that preparation of the SEIS was ongoing. *See* S. Rep. No. 110-363 (2008), 2008 WL 2442332, at *3. Later, during debate, Senator John Barrasso of Wyoming, the lead sponsor of the Wyoming Range Legacy Act, also acknowledged such sales:

[T]here are 35 oil and gas leases covering almost 45,000 additional acres that have been issued and are under protest or have been sold but not yet issued. The legislation does not cancel any of these areas which are being contested. . . . I repeat: This legislation today does not cancel any of these currently contested leases.

155 Cong. Rec. S254 (daily ed. Jan. 9, 2009).

not only to oil and gas resources that are within 1 mile of the boundary of the WRWA.¹⁰

In his August 2009 decision, the State Director took the position that rejection of the seven parcels at issue was warranted because the President and Congress had determined that there were higher and better uses for the lands included in the WRWA than oil and gas exploration and development. Decision at 1. He erred as a matter of law to the extent he concluded that rejection of Stanley's bids was warranted simply because the parcels are within the WRWA. The Omnibus Act does not necessarily preclude leasing of the lands embraced by the 35 parcels at issue in the December 2005 and April, June, and August 2006 lease sales. BLM may, pursuant to section 3202(e) of the Act, "deny" or "issue" a lease as to "any sold lease parcel that has not been issued," but it must do more than simply note the fact that the parcels at issue are situated in the WRWA, and invoke the withdrawal effected by the Act. 123 Stat. at 1128. The Act was not designed solely to preclude leasing and exploration and development in the WRWA, as the State Director suggests, because section 3202(e) provided authority for issuing leases for the parcels at issue. However, if BLM, acting for the Secretary, decides not to issue leases, he must offer a rational and defensible basis for taking such action. *See Continental Land Resources*, 162 IBLA at 7. The State Director's reliance on the WRWA withdrawal in rejecting the bids does not provide such a basis.

B. The Board's July and September 2006 Orders

With regard to BLM's second justification, the Board's July and September 2006 orders, Stanley argues that BLM erred in concluding that the Board's orders would have any effect on the offering of the seven parcels, since neither order concerns BLM's compliance with NEPA in connection with the June 2006 sale or, ultimately, the validity of leasing any of the seven parcels now at issue. Further, Stanley asserts that the Board ruled only on the appellants' stay petitions, and did not resolve the merits of their NEPA challenges to the December 2005 and April 2006 lease sales. *See* Petition at 21-22, 24-25.

¹⁰ Section 3202(f) of the Omnibus Act, which concerns an exception to the prohibition of oil and gas leasing in the WRWA, states that, "[n]otwithstanding the withdrawal" in subsection (a), "the Secretary may lease oil and gas resources in the [WRWA] that are within 1 mile of the boundary of the [WRWA]," where, *inter alia*, access to the resources is obtained only from outside the WRWA and other conditions are met. 123 Stat. at 1129. Stanley does not assert that section 3202(f) applies to any of the seven parcels at issue.

Stanley is correct that the July and September 2006 orders did not resolve the question of whether there was in fact a NEPA violation in connection with the December 2005 and April 2006 sales. However, the Board did note the presence of deficiencies in BLM's March 2006 DNA, which BLM relied on to support oil and gas leasing in the Wyoming Range of the BTNF. The June 2006 sale, at issue in Stanley's appeal, relied upon the same DNA.

In his Decision, the State Director rejected Stanley's bids for the seven parcels on the basis that the decision to lease these parcels had relied upon the "same NEPA documentation" that the Board had found deficient in our July and September 2006 orders. Decision at 1. That documentation consisted of NEPA "leasing decision documents prepared by [FS] in the early 1990s." *Id.* At issue herein is the same DNA that we found deficient in our orders. BLM has indicated that the decision to offer the seven parcels now at issue was "affected by the defects" in that DNA. It is clear that the DNA contained major defects, including the fact that it was facially prepared without any input from BLM personnel with any expertise in evaluating the adequacy of NEPA documentation.

Therefore, at a minimum, BLM would have been required to review the adequacy of the NEPA documentation supporting the leasing of the parcels in question, and, if that documentation were determined to be adequate, to prepare a new DNA. However, in February 2008, BLM and FS issued the Notice of Intent to prepare an SEIS "to determine whether and to what extent analysis of new issues and information might alter the oil and gas leasing decision as it relates to the 44,720 acres forwarded to the BLM for competitive lease sale." *See* 73 Fed. Reg. at 6453. The agencies explained:

The proposed federal action is to lift the current suspension on the issued December 2005 and April 2006 leases and to issue those that were sold but not issued from the June and August 2006 sales. To do so requires the analysis of new issues and information not available to the deciding officials at the time the leasing decision was made.

Id. Thus, the purpose of preparing an SEIS was to provided the necessary NEPA documentation to support lifting the suspension on issued leases, as well as to support the issuance of leases for sold parcels, including the parcels involved in this case. It is not necessary to complete the SEIS in order to reject high bids for leased parcels, though BLM may choose to await the completion of that analysis before acting to reject the bids. What is necessary, in either event, is a decision supported by a rational and defensible basis for taking that action.

CONCLUSION

For the reasons given, we conclude that the State Director's exercise of discretion in this case is not supported by a rational and defensible basis which is set forth in his decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision is set aside and the case is remanded for further action consistent herewith.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
R. Bryan McDaniel
Administrative Judge