



BOARD OF COUNTY COMMISSIONERS
OF PITKIN COUNTY, COLORADO, *ET AL.*
(ON RECONSIDERATION)

187 IBLA 328

Decided May 5, 2016



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

703-235-3750

703-235-8349 (fax)

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OF PITKIN COUNTY, COLORADO, *ET AL.*
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IBLA 2014-277-1

Decided May 5, 2016

Motion for reconsideration and petition for stay of the Board's decision in *Board of County Commissioners of Pitkin County, Colorado*, 186 IBLA 288 (2015), wherein the appeals were dismissed for lack of standing.

Motion for reconsideration denied; request for stay denied as moot.

1. Administrative Procedure: Generally--Rules of Practice:
Appeals: Reconsideration

The Board may reconsider its decision in extraordinary circumstances. 43 C.F.R. § 4.403(b). Extraordinary circumstances that may warrant reconsideration include evidence that was not before the Board at the time the Board's decision was issued and that demonstrates error in the decision. 43 C.F.R. § 4.403(d)(4). The Board will deny a motion for reconsideration of its decision dismissing an appeal for lack of standing, where the motion is based on information that was not before the Board at the time of the Board's decision, when such information does not invalidate the premise upon which the Board dismissed the appeal.

2. Administrative Procedure: Generally--Rules of Practice:
Appeals: Reconsideration

A motion for reconsideration may include a request that the Board stay the effectiveness of its decision. 43 C.F.R. § 4.403(b)(2). A motion for reconsideration will not stay the effectiveness or affect the finality of the Board's decision unless so ordered by the Board for good cause. 43 C.F.R. § 4.403(b)(4). When the Board denies a motion

for reconsideration of a decision dismissing an appeal for lack of standing, it will also deny as moot a request for stay of the Board's decision, since the Board no longer has jurisdiction over the matter.

APPEARANCES: John M. Ely, Esq., Aspen, Colorado, for Board of County Commissioners of Pitkin County, Colorado; Michael S. Freeman, Esq. and Joel Minor, Esq., Denver, Colorado, for Wilderness Workshop; Charles A. Breer, Esq., and Jonathan D. Tjornehoj, Esq., Longmont, Colorado, and Rebecca W. Watson, Esq., Denver, Colorado, for SG Interests I, Ltd. and Ursa Piceance, LLC; Arthur R. Kleven, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE ROBERTS

The Board of County Commissioners of Pitkin County, Colorado (Pitkin County) and Wilderness Workshop (Workshop) (together, Appellants) have filed a Motion for Reconsideration and Request for Stay (Motion/Request) of the effectiveness of the Board's decision in *Board of County Commissioners of Pitkin County, Colorado [Pitkin County]*, 186 IBLA 288 (2015). Appellants base their Motion for Reconsideration on "new evidence" that they claim "demonstrate[s] that the premise of the Board's dismissal no longer holds true." Motion/Request at 1. The central premise of our decision was that Appellants lacked standing to appeal under 43 C.F.R. § 4.410 because they had not shown that the decisions on appeal adversely affected their respective interests. Because we conclude that Appellants do not show that the "new evidence" invalidates the premise of our decision, or that the premise of our decision is affected in any way, we deny their Motion for Reconsideration. We also deny their Request for Stay as moot, since we no longer have jurisdiction over the matter.

THE BOARD'S DECISION: APPEALS DISMISSED FOR LACK OF STANDING

Involved in this matter are four State Director Review (SDR) decisions issued on August 14, 2014, by the Deputy State Director, Colorado State Office (CSO), Bureau of Land Management (BLM). The Deputy State Director affirmed decisions dated April 9, 2013, in which BLM's Colorado River Valley Field Office (CRVFO) granted suspensions of operations and production (SOPs) on oil and gas leases held by Ursa Piceance, LLC (Ursa) and SG Interests I, Ltd. (SG) (together, Ursa/SG), and decisions dated March 31, 2014, approving Ursa/SG's applications to renew the SOPs. Pitkin County, City of Glenwood Springs, Colorado, and the Town of Carbondale, Colorado (together, Local Governments) and the Workshop appealed the SDR Decisions. BLM and Ursa/SG filed motions to dismiss the appeals for lack of standing. The Board granted the motions to dismiss, specifically concluding that "the injuries alleged by

Appellants are contingent on a series of future occurrences that may or may not happen,” and that “BLM’s SOP decisions do not adversely affect any interest of the Local Governments or the Workshop.” *Pitkin County*, 186 IBLA at 295-96 (citing *Western Watersheds Project*, 185 IBLA 293, 299 (2015) (quoting *Colorado Open Space Council*, 109 IBLA 274, 280 (1989))).

The CRVFO granted the SOPs based on its “need to address a NEPA deficiency” under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2012), “associated with the decisions to issue the leases.” *Pitkin County*, 186 IBLA at 293 (quoting Apr. 9, 2013, CRVFO Decisions at 2). The CRVFO decided to “undertake additional NEPA analysis addressing the decisions to issue the Leases to determine whether the leases should be voided, reaffirmed or subject to additional mitigation measures for site specific development proposals.” *Id.* (quoting Apr. 9, 2013, CRVFO Decisions at 2-3). The CRVFO stated that the additional environmental analysis will assist BLM in making that determination. In granting the suspensions, the CRVFO declared that it “*will not authorize any ground-disturbing activities during the period of suspension. Any operations such as road construction, site preparation, or drilling taking place on a suspended lease will automatically terminate the lease suspension.*” *Id.* at 294 (quoting Apr. 9, 2013, CRVFO Decisions at 6 (emphasis added)).

In *Pitkin County*, we stated: “The fate of the Leases will remain undetermined and unknown until some future date, when BLM completes its NEPA review, in compliance with the Board’s decision in *Pitkin County* [173 IBLA 173 (2007)], and renders decisions on whether the Leases ‘should be voided, reaffirmed or subject to additional mitigation measures for site specific development proposals.’” *Pitkin County*, 186 IBLA at 297 (quoting Apr. 9, 2013, CRVFO Decisions at 2; SDR Decisions at 13). Furthermore, “[a]s BLM explained, the agency will take no further action on the [applications for permits to drill (APDs)] submitted by Ursa and SG, or on their unit applications, or authorize ‘leasehold activities’ until the NEPA review is completed.” *Id.* at 297-98 (quoting Apr. 9, 2013, CRVFO Decisions at 2).

The Board’s rule concerning standing, 43 C.F.R. § 4.410, provides that “[a] party to a case is adversely affected . . . when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” 43 C.F.R. § 4.410(d). In the Board’s decision, we held that the Appellants lacked standing to appeal the SDR Decisions. We concluded that none of the Appellants had met the burden to show any concrete and immediate injury resulting from BLM’s decisions to grant the SOPs. *Pitkin County*, 186 IBLA at 318. Accordingly, on November 17, 2015, we dismissed these appeals.

On January 14, 2016, Appellants timely filed their Motion/Request. On February 2, 2016, Ursa and SG filed their Opposition to Motion for Reconsideration and Request for Stay (Ursa/SG Opposition). On February 8, 2016, BLM filed a Response to Motion for Reconsideration and Request for Stay (BLM Response).

THE MOTION FOR RECONSIDERATION: “NEW EVIDENCE”

A. *Legal Standard: Must Be “Extraordinary Circumstances”*

The Board “may reconsider its decision in extraordinary circumstances.” 43 C.F.R. § 4.403(b). “Extraordinary circumstances” that may warrant granting reconsideration include, but are not limited to (1) error in the Board’s interpretation of material facts; (2) recent judicial developments; (3) change in Departmental policy; or (4) *evidence that was not before the Board at the time the Board’s decision was issued and that demonstrates error in the decision.* 43 C.F.R. § 4.403(d). Appellants base their Motion for Reconsideration on § 4.403(d)(4).

While we have granted petitions for reconsideration where the party requesting reconsideration provides information that invalidates the premise upon which the Board’s original decision was based, that is not the case here. *See, e.g., Ulf T. Teigen (On Reconsideration)*, 159 IBLA 142, 144-45 (2003); *Dugan Production Corp. (On Reconsideration)*, 117 IBLA 153, 154 (1990). Appellants argue that “extraordinary circumstances” exist for reconsideration on the basis of two pieces of “new evidence.” Motion/Request at 5. The first document is BLM’s Draft Environmental Impact Statement (Draft EIS), issued November 18, 2015, and entitled, “Previously Issued Oil and Gas Leases in the White River National Forest.” The second document is the U.S. Forest Service’s Final Record of Decision (Forest Service ROD), dated December 3, 2015, entitled, “Oil and Gas Leasing on Lands Administered by the White River National Forest.” Appellants argue that this “new evidence demonstrate[s] that the premise of the Board’s dismissal no longer holds true.” *Id.* at 1. They contend that “[b]oth documents show that injury to Appellants from the Suspensions is *substantially likely.*” *Id.* at 2.

In this case, Appellants could not have provided the “new evidence” to the Board during the course of their original appeal since the Draft EIS and the ROD were not issued until after the Board issued its decision. We conclude that neither of those documents invalidates the premise upon which we decided *Pitkin County*, nor would our conclusion have been different had either document been available to the Board when we issued our decision. Contrary to Appellants’ argument, the premise of our decision remains true: “Appellants’ claims of adverse effect are necessarily contingent on a series of future occurrences, *i.e.*, BLM’s NEPA review and *ultimate decision* based on that review.” *Pitkin County*, 186 IBLA at 298 (emphasis added). Appellants’

predictions as to what decisions BLM will eventually make, *i.e.*, whether to void or reaffirm the leases, or modify them by imposing undetermined mitigation measures when evaluating SG's and Ursa's site specific proposals, are no less conjectural now than when we issued our opinion in *Pitkin County*.

B. BLM's Draft EIS

Concerning BLM's Draft EIS, Appellants contend that "four of the five alternatives considered by BLM . . . will leave some or all of the 25 leases in effect," and that "the fifth option is not being seriously considered." Motion/Request at 6. They state that "[b]ecause all four alternatives will leave leases in effect, they make it much more likely that oil and gas development will occur," and that "[t]hose four alternatives are only made possible by the suspensions challenged in this appeal, which prevented the Companies' leases from expiring." *Id.* at 7. They argue that "[o]nly under the fifth alternative will Wilderness Workshop avoid further harm," since "Alternative 5 would cancel all the leases in question." *Id.* Appellants emphasize that "BLM makes clear, however, that it is not likely to choose this alternative." *Id.* To support this argument, they quote from the Draft EIS, in which BLM states, "[t]his alternative is included mainly to facilitate a full range of analysis." *Id.* (quoting Draft EIS at 2-61). They also rely upon BLM's statement that Alternative 5 is "not within BLM's sole authority to implement," and will require the agency to "pursue judicial action," the result of which is uncertain. *Id.* (quoting Draft EIS at 2-61).

Appellants conclude: "[T]he Board's premise in dismissing this appeal is no longer accurate: after BLM prevented the leases from expiring, its proposed action for them—and all four of the options the agency is seriously considering—will harm Wilderness Workshop." Motion/Request at 7. In their view, the Draft EIS "confirms that Appellants are 'substantially likely' to suffer injury to their interests caused by the lease suspensions." *Id.* (quoting 43 C.F.R. § 4.410(d)). Furthermore, they assert that the Draft EIS "reflects a greater than 80 percent likelihood (four of the five Draft EIS alternatives) that harm from the suspensions will be realized." *Id.* They contend that "[t]his threat is 'more than hypothetical' and goes well beyond 'mere speculation.'" *Id.* (quoting *Pitkin County*, 186 IBLA at 297 (quoting *Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992) and *Colorado Open Space Council*, 109 IBLA at 280)). They argue that "the Board's assumption that the 'fate of the Leases will remain undetermined and unknown until some future date,' also no longer holds." *Id.* at 8 (quoting *Pitkin County*, 186 IBLA at 297). They conclude that "the threat of injury to Appellants is 'real and immediate.'" *Id.* (quoting *Pitkin County*, 186 IBLA at 297 (quoting *Legal & Safety Employer Research Inc.*, 154 IBLA 167, 172 (2001)); see *Laramie Energy II, LLC*, 182 IBLA 317, 325 (2012)).

We agree with Ursa/SG that “the Draft EIS is just that—a ‘Draft,’” and that “[b]y its nature, a Draft EIS cannot make any decision as to what leases, if any, will be retained and, consequently, cannot make it any more likely for Appellants to incur harm from oil and gas development on those leases.” Ursa/SG Opposition at 4 (citing *Los Alamos Study Group v. Dep’t of Energy*, 692 F.3d 1057, 1066 (10th Cir. 2012); *Friends of Potter Marsh v. Peters*, 371 F. Supp. 2d 1115 (D. Alaska 2005)). Ursa/SG argue that “it is rank speculation for Appellants to claim that Alternative 5 (canceling all 65 leases) in the BLM Existing Leases [Draft] EIS ‘is not being seriously considered’ by BLM and that the alleged harm from oil and gas development is now ‘much more likely’ under the Draft EIS.” *Id.* at 5 (quoting Motion/Request at 6, 7); *see also* BLM Response at 3. Ursa/SG contend that “Appellants have no idea what alternative or combination of alternatives BLM will adopt.” *Id.* (citing *National Committee for the New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004) (“By its very nature, the [Draft] EIS is a draft of the agency’s proposed [Final] EIS and, as such, the purpose of the [Draft] EIS is to elicit suggestions for change.”). As BLM notes, “[i]dentification of the proposed action and range of alternatives in the draft NEPA document, however, does not render Appellants’ claimed injuries from potential development any less speculative or less contingent on future events.” BLM Response at 4; *id.* at 5 (“Even release of a final NEPA analysis, on its own, does not constitute a BLM ‘decision’ for purposes of review by the Board, *see* 43 C.F.R. § 4.1(b)(2).”). We agree with Ursa/SG’s point that “perhaps the most significant barrier to Appellants’ reliance on the Draft EIS” is our clear holding that “any alleged harm could possibly arise only after BLM completes the Final EIS and BLM renders a decision.” *Id.* at 7 (citing *Pitkin County*, 186 IBLA at 297, 298). We therefore reject Appellants’ argument that the Draft EIS constitutes new information sufficient to warrant reconsideration of our decision.

C. *The Forest Service ROD*

Appellants further assert that the new Forest Service ROD renders invalid the Board’s premise that “even if BLM had allowed the leases to expire, Appellants might still need to devote organizational resources to keeping these lands from being re-leased and developed by some other company.” Motion/Request at 9. In *Pitkin County*, we considered and rejected Appellants’ argument that BLM’s approval of the SOPs has required them to divert resources away from their respective operations and programs, and that this “diversion of resources” is an adverse effect for purposes of standing. 186 IBLA at 305. In their Motion for Reconsideration, they point to a single sentence in our lengthy analysis of this issue, in which we state: “Allowing SG’s and Ursa’s leases to terminate would not prevent BLM from requesting and obtaining consent from the Forest Service to re-offer the subject parcels should BLM’s NEPA review support such an action.” Motion/Request at 9 (quoting *Pitkin County*, 186 IBLA at 307). They claim that 16 days after the Board issued its decision in

Pitkin County, “the Forest Service eliminated this premise by closing most of these lands to future oil and gas leasing.” *Id.*

In its ROD, the Forest Service chose to authorize some lands for future leasing availability and close other lands for leasing. ROD at 11. Concerning current leases, the Forest Service ROD provides: “Currently 114,520 acres are leased. These leases are not subject to this decision. If these leases expire, are relinquished, are terminated, or completed and rehabilitated, then the parcels become subject to this decision.” *Id.* at 4. Thus, Appellants assert that “if BLM had allowed the SG and Ursa leases to expire in 2013, most of the lands at issue could not be offered for re-leasing.” Motion/Request at 9.

Appellants assert that the “new ROD confirms that the Board’s understanding in rejecting Appellants’ *Havens* injury is no longer correct.”¹ Motion/Request at 9. They renew their argument that they “are being required to devote considerable organizational resources to advocating for cancellation of these leases, working to prevent them from being developed, and responding to the application for drilling permits and related permit materials that have been filed, including site visits that were scheduled after the Suspensions were issued.” *Id.* They contend “[t]hose expenses would be unnecessary if the leases had expired instead of being suspended, because the Forest Service has now closed most of this area to new leasing.” *Id.* at 10. Consequently, they argue they have established the adverse impact requirement needed for standing under 43 C.F.R. § 4.410. *Id.*

Ursa/SG and BLM dispute Appellants’ claim that the Forest Service ROD constitutes new evidence that undercuts the Board’s holding that Appellants did not show a causal connection between the organizational harms alleged and BLM’s issuance of the SOPs. In its ROD, the Forest Service specifically stated that the

¹ This argument derives from *Havens Realty Corp. v. Coleman [Havens]*, 455 U.S. 363, 379 (1982), in which the U.S. Supreme Court held that in certain circumstances a drain on resources may create a harm to an organization itself, and provide a basis for judicial standing under Article III of the U.S. Constitution. In applying the *Havens* doctrine, we concluded that Appellants had not “established the requisite causal connection between the SOPs and the harm alleged.” 186 IBLA at 310. Specifically, we found that they had “not shown that the SOP decisions have caused the alleged diversion of resources or effects an ‘inhibition of their daily operations, an injury both concrete and specific to the work in which they are engaged.’” *Id.* (quoting *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep’t of Agriculture*, 7 F. Supp. 3d 1, 8 (D.D.C. 2013) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986))).

114,520 acres that are already leased are not subject to the ROD, and that only if those “leases expire, are relinquished, are terminated, or completed or rehabilitated [will] the parcels become subject to this decision.” ROD at 4. Ursa/SG note that Appellants relied on the prior Draft Final ROD in their briefs to the Board in their original appeal, emphasizing that in the Draft Final ROD the Forest Service “prohibited future leasing on portions of the SG and Ursa leases.” Ursa/SG Opposition at 8. Ursa/SG argue that “on this precise point [the Draft Final ROD] is virtually identical to the ‘new’ 2015 Final ROD Appellants rely on in the Motion.” *Id.* In any case, certain portions of the Ursa/SG leases are not subject to the Forest Service’s future leasing prohibition. Further, the Final ROD states that “[t]his decision is valid for future leasing and does not change the status of existing leases on the White River National Forest.” Final ROD at 4. The fact remains that the leases still await completion of the NEPA review the CRVFO stated was necessary before it could render a decision on whether “the leases should be voided, reaffirmed or subject to additional mitigation measures for site specific development proposals.” Apr. 9, 2013, CRVFO Decisions at 2. The fate of the Ursa/SG leases is no less speculative than when the Board issued its decision in *Pitkin County*.

Appellants focus upon the Board’s observation that “[a]llowing SG’s and Ursa’s leases to terminate would not prevent BLM from requesting and obtaining consent from the Forest Service to re-offer the subject parcels should BLM’s NEPA review support such an action.” *Pitkin County*, 186 IBLA at 307. We were emphasizing that BLM’s NEPA review would have been required “in the absence of the SOPs,” and that “[t]he analysis undertaken by BLM to remedy [the NEPA] deficiency will have a scope beyond the Leases at issue here.” *Id.* BLM correctly states that “Appellants miss the overall context of the statement, that their participation in the BLM’s NEPA process does not constitute injury via a diversion of resources, in part because the suspension decisions did not drive the BLM’s NEPA process and since participation in that process is voluntary[.]” BLM Response at 10-11 (citing 186 IBLA at 307). The Forest Service’s Final ROD does not change our analysis and conclusion in *Pitkin County*.

Moreover, the single sentence targeted by Appellants reflects one of many factors we took into account in rejecting Appellants’ argument concerning diversion of resources. *See Pitkin County*, 186 IBLA at 305-10. For instance, we rejected the Workshop’s argument that the SOPs have given rise to the need for public outreach and education of its members and partners, since we found it was already engaged in public outreach related to issues concerning the leases prior to BLM’s approval of the suspensions. We stated that “[t]he Workshop’s decision to spend time and resources explaining to the public that BLM has suspended the leases, pending a future decision on whether to terminate, modify, or allow them to expire, is a matter of the Workshop’s election,” and that its “participation . . . in the NEPA process is voluntary, as is the level

at which they elect to participate.” *Id.* at 307. We reviewed the Federal court precedent cited by Appellants concerning diversion of organizational resources, and concluded that they had not cited “to any case in which a Federal court has applied the *Havens* doctrine in a situation sufficiently analogous to an oil and gas suspension to support their claim of standing.” *Id.* at 309-10. Notwithstanding Appellants’ arguments, we still conclude that Appellants have not established the requisite causal connection between the SOPs and the harm alleged. *See id.* at 310. Accordingly, we deny reconsideration of our decision in *Pitkin County*, and reaffirm our decision dismissing the appeals.

THE PETITION FOR STAY DENIED AS MOOT

Appellants request that we stay the effectiveness of our decision, as well as further proceedings in this appeal, until BLM issues its final decision on whether to cancel or reaffirm or suspend the Ursa and SG leases.

[2] A motion for reconsideration may include a request that the Board stay the effectiveness of its decision. 43 C.F.R. § 4.403(b)(2). Such a motion will not stay the effectiveness or affect the finality of the Board’s decision unless so ordered by the Board for good cause. 43 C.F.R. § 4.403(b)(4). Our denial of their Motion for Reconsideration means that our dismissal of their appeals remains unchanged, and those appeals are no longer awaiting the Board’s review on the merits. No further proceedings are pending before the Board in connection with those appeals. We therefore deny Appellants’ Request for Stay of our decision as moot, since the Board no longer has jurisdiction over the matter.

Appellants contend that a stay will allow them to “provide additional proof eliminating any remaining question about whether they are injured by the Suspensions.” Motion/Request at 12. Appellants do not specify what “additional proof” they might provide or how it may be relevant to their Request for Stay. They argue that a stay “will let the Board consider standing at a point when it becomes absolutely clear whether the suspensions have prevented the leases from terminating,” and “will also avoid any concern about interfering with BLM’s ongoing process.” *Id.* They assert that “denying reconsideration and a stay would irreparably harm Appellants by effectively denying their right to seek *any* Board review of Suspension decisions that adversely affect their interests.” *Id.* Our ruling in *Pitkin County* concerned only Appellants’ standing to appeal from the Deputy State Director’s SDR Decisions. Appellants will have an opportunity to challenge any future decision by BLM to reaffirm the Leases or re-issue them subject to as-yet undefined mitigation measures.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, on reconsideration we reaffirm the Board's decision in *Pitkin County*, 186 IBLA 288 (2015), and we deny as moot the petition to stay the Board's decision.

_____/s/_____
James F. Roberts
Deputy Chief Administrative Judge

I concur:

_____/s/_____
Amy B. Sosin
Administrative Judge