



## WILDEARTH GUARDIANS

188 IBLA 388

Decided October 26, 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)

WILDEARTH GUARDIANS

IBLA 2016-279

Decided October 26, 2016

Petition to stay the effect of a record of decision issued by the Bureau of Land Management, Utah State Office, deciding to hold a competitive lease sale for the Greens Hollow Federal Coal Lease Tract. UTU-84102

Petition for a stay denied.

1. Administrative Procedure: Stays

Under the Board's regulations, a party requesting a stay bears the burden of proof to demonstrate that a stay should be granted by showing sufficient justification based on: (1) the relative harm to the parties if the stay is granted or denied; (2) the likelihood of appellant's success on the merits; (3) the likelihood of immediate and irreparable harm if the stay is not granted; and (4) whether the public interest favors granting the stay. The Board will deny a petition for a stay when an appellant fails to demonstrate sufficient justification under any one of these stay criteria.

2. Administrative Procedure: Stays

A party petitioning for a stay does not demonstrate immediate and irreparable harm from a BLM decision to hold a competitive coal lease sale when the harms alleged will occur only from development of the coal, and a decision to hold a lease sale does not automatically result in issuance of a lease or authorization of any ground-disturbing activities or mining operations without further agency decision making.

APPEARANCES: Samantha Ruscavage-Barz, Esq., Santa Fe, New Mexico, for WildEarth Guardians, Michael Saul, Esq., Denver, Colorado, for Center for Biological

Diversity; Aaron M. Paul, Esq., and Neil Levine, Esq., Denver, Colorado, for Grand Canyon Trust; Nathaniel Shoaff, Esq., San Francisco, California, for Sierra Club Environmental Law Program; Michael Drysdale, Esq., William Prince, Esq., and Sarah Goldberg, Esq., Minneapolis, Minnesota, for Canyon Fuel Company, LLC; John Steiger, Esq., U.S. Department of the Interior, Office of the Solicitor, Intermountain Region, Salt Lake City, Utah, and Lauren Bachtel, Esq., U.S. Department of the Interior, Office of the Solicitor, Washington D.C., for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE SOSIN

WildEarth Guardians, Center for Biological Diversity, Grand Canyon Trust, and Sierra Club (collectively, WildEarth) appeal and petition to stay the effect of an August 12, 2016, Record of Decision (ROD) issued by the Bureau of Land Management's (BLM) Utah State Office. In its ROD, BLM decided to offer for sale the Greens Hollow Federal Coal Lease Tract, serialized as UTU-84102. Under BLM's decision, the Greens Hollow Tract to be offered for sale contains approximately 55.7 million tons of recoverable coal underlying approximately 6,175 acres of National Forest Systems lands.<sup>1</sup>

In this decision, we address only the petition for a stay of the ROD. Under the governing regulation, an appellant that seeks a stay must demonstrate that it meets four criteria justifying the stay; failure to satisfy any one of the criteria results in denial of the stay. The harms alleged by WildEarth will result only from development of the Greens Hollow Tract and not from BLM's decision to proceed with a competitive coal lease sale. WildEarth thus cannot demonstrate that it meets one of the stay criteria—the likelihood of immediate and irreparable harm if the stay is not granted—and we must deny its petition for a stay.

#### *Standards for Granting a Stay*

[1] Under the Board's regulations, a party requesting a stay bears the burden of proof to demonstrate that a stay should be granted.<sup>2</sup> Specifically, an appellant petitioning for a stay must show sufficient justification based on the following standards: (1) the relative harm to the parties if the stay is granted or denied; (2) the likelihood of appellant's success on the merits; (3) the likelihood of immediate and irreparable harm if the stay is not granted; and (4) whether the

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<sup>1</sup> ROD at 2.

<sup>2</sup> 43 C.F.R. § 4.21(b)(2).

public interest favors granting the stay.<sup>3</sup> A failure to satisfy any one of the stay criteria will result in denial of a petition for stay.<sup>4</sup>

### *Background*

The Greens Hollow Tract is located in the Manti-La Sal and Fishlake National Forests, in Sanpete and Sevier Counties, Utah.<sup>5</sup> On October 13, 2005, Ark Land Company submitted a Federal coal lease by application (LBA) to the BLM Utah State Office for the Green Hollow Tract.<sup>6</sup> Ark Land applied for the lease in order to lengthen the production life of the Southern Utah Fuel Company (SUFCO) Mine, which is adjacent to the Greens Hollow Tract.<sup>7</sup> On July 1, 2014, BLM granted Ark Land's request to assign the LBA to Canyon Fuel Company, LLC (CFC), which owns the SUFCO Mine.<sup>8</sup>

Under the Mineral Leasing Act and BLM's implementing regulations governing coal leasing, because the coal to be leased underlies National Forest System lands, BLM must obtain the consent of the Forest Service before it can offer the Greens Hollow Tract for sale.<sup>9</sup> BLM and the Forest Service jointly prepared an environmental impact statement in accordance with the requirements of the National Environmental Policy Act,<sup>10</sup> analyzing the potential environmental effects of leasing and development of the Greens Hollow Tract.<sup>11</sup> The Forest Service issued a ROD on October 5, 2015, consenting to BLM offering the Greens Hollow Tract for competitive leasing, with stipulations for the protection of non-mineral resources as described in Alternative 3 of the FSEIS.<sup>12</sup> On August 12, 2016, BLM issued the ROD now on appeal in which it selected Alternative 3 of the FSEIS and decided to offer the Greens Hollow Tract at a competitive lease sale, with the conditions and stipulations suggested by the Forest Service.<sup>13</sup>

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<sup>3</sup> *Id.* § 4.21(b)(1).

<sup>4</sup> *Jerri Tillett*, 188 IBLA 384, 385 (2016); *Petan Company of Nevada v. BLM*, 186 IBLA 81, 91 (2015).

<sup>5</sup> ROD at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 30 U.S.C. §§ 226(h) and 352 (2012); 43 C.F.R. §§ 3400.3-1, 3425.3(b).

<sup>10</sup> 42 U.S.C. §§ 4321-4370h (2012); 40 C.F.R. Parts 1501-1508; 43 C.F.R. Part 46.

<sup>11</sup> See ROD at 3 (citing to the Greens Hollow Federal Coal Lease Tract Final Supplemental Environmental Impact Statement (FSEIS), Feb. 27, 2015).

<sup>12</sup> See ROD at 3, 10.

<sup>13</sup> *Id.* at 10-11.

WildEarth timely appealed the ROD and petitioned for a stay, which BLM opposes. In an order dated October 5, 2016, we granted CFC's motion to intervene in this appeal; CFC also opposes a stay.

*WildEarth Has Not Demonstrated a Likelihood of  
Immediate and Irreparable Harm If a Stay is Not Granted*

WildEarth argues that a stay is justified under each of the regulatory criteria. We focus here on the third criterion—the likelihood of immediate and irreparable harm if the stay is not granted—and conclude that WildEarth does not meet its burden to justify a stay on this basis. Consequently, we need not address the other three criteria and must deny WildEarth's petition for a stay.

WildEarth asserts that once the lease is sold, “BLM will immediately issue the lease . . . to the highest bidder” (presumably CFC), which “will be under an affirmative obligation to diligently develop the lease . . . and BLM will be obligated to not interfere with the company's compliance with this duty.”<sup>14</sup> According to WildEarth, this means mining operations will begin, including operations that will cause irreparable environmental impacts, thus harming its members' scientific, recreational, and aesthetic interests.<sup>15</sup> For example, WildEarth states that mining operations “will lead to surface disturbances to sage grouse habitat and public lands in the area, indirect impacts related to coal combustion, coal exports, and climate impacts, and pose other adverse environmental impacts that . . . would be irreparable.”<sup>16</sup> WildEarth relies on declarations from two of its members, who each state that their interests will be harmed by coal mining in the Greens Hollow Tract and the future combustion of coal mined from the tract.<sup>17</sup>

[2] The specific harms alleged by WildEarth in support of its stay will result only from development of the Greens Hollow Tract. The decision on appeal, however, is BLM's determination to proceed with a competitive coal lease sale for

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<sup>14</sup> Notice of Appeal and Petition for Stay (Sept. 16, 2016) (Petition) at 74-75.

<sup>15</sup> Petition at 75.

<sup>16</sup> *Id.*

<sup>17</sup> See Petition, Ex. 3 (Declaration of Tim D. Peterson, Jr.) at 5 (“I do not enjoy seeing the sights or hearing the sounds of the SUFCO mining operations, they diminish the natural beauty and my enjoyment of the area.”); Petition, Ex. 4 (Declaration of Taylor McKinnon) at 7 (“The issuance of a coal lease for the Greens Hollow Tract would constitute an[] irretrievable commitment of resources, and would cause irreparable harm to my scientific, recreational, and aesthetic interests” due to “increased combustion and resulting mercury and selenium deposition.”).

the Greens Hollow Tract, which does not automatically result in the issuance of a coal lease or authorization of any ground-disturbing activities or mining operations.<sup>18</sup> This is because before BLM issues a lease it must first conduct the sale and evaluate bids received in order to determine whether the bids comport with the fair market value of the coal, the high bidder is qualified to hold a lease, and other requirements for leasing are met.<sup>19</sup> At the time of sale, therefore, no lease is issued, no rights are conveyed to the highest bidder, and no Federal lands may be disturbed or developed.<sup>20</sup>

Even if, as WildEarth claims, a lease is “immediately” issued for the Greens Hollow Tract, no coal mining would be authorized until further decision making occurs. As BLM explains, “[o]nce the Tract is sold and the lease is issued, actual mining of the Tract will be dependent upon the issuance of the appropriate Federal mine plan approval and State permit, which will entail further decisions by the Utah Division of Oil, Gas and Mining . . . and the Office of Surface Mining Reclamation and Enforcement . . . .”<sup>21</sup> Moreover, CFC states that if it is successful in obtaining the lease after the sale of the Greens Hollow Tract, it will not be able to start any mining operations until approximately 2018, based on the processes and approvals required after a lease is issued.<sup>22</sup>

We thus conclude that WildEarth cannot meet its burden to demonstrate that any of the harms alleged by the organization as a result of BLM’s decision to hold a competitive coal lease sale is “immediate and irreparable,” which is required to justify a grant of a stay. Further, we do not find persuasive WildEarth’s argument that a stay is justified at this stage because once BLM issues a lease, the lessee “will be under an affirmative obligation to diligently develop the lease in accordance with 43 C.F.R. § 3475 and BLM will be obligated to not interfere with the company’s compliance with this duty.”<sup>23</sup> A lessee’s right under a lease to develop a mineral

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<sup>18</sup> See BLM’s Response to Appellants’ Petition for Stay (Oct. 7, 2016) (BLM Response) at 9; CFC Memorandum in Opposition to Petition for Stay (Oct. 7, 2016) (CFC Opposition) at 12.

<sup>19</sup> See 43 C.F.R. §§ 3422.3-2, 3422.3-4, 3422.4.

<sup>20</sup> See 43 C.F.R. § 3422.3-2(a)(2) and (b).

<sup>21</sup> BLM Response at 9; see also CFC Opposition at 11; ROD at 6.

<sup>22</sup> CFC Opposition at 11 (“CFC presently estimates that it will not start mining the Greens Hollow Tract until April 2018, if lease issuance proceeds and CFC obtains the lease. This is a function of both the state of mining progress through SUFCO’s existing leased coal and timelines associated with future permitting.”) (citation omitted).

<sup>23</sup> Petition at 75.

resource is not absolute.<sup>24</sup> More important, however, a lessee's ability to develop a mineral resource once it has a lease does not change the fact that the BLM decision at issue in this case is to hold a lease sale for the Greens Hollow Tract, a decision that neither grants CFC (or any potential lessee) a lease nor authorizes any ground-disturbing activities, including development of the coal resource, that could give rise to any of WildEarth's alleged harms. As such, none of the harms predicted by WildEarth is "immediate and irreparable."

### *Conclusion*

We therefore find that WildEarth has failed to show a likelihood of immediate and irreparable harm to its interests from denial of a stay of the ROD. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,<sup>25</sup> we deny the petition for stay.

\_\_\_\_\_/s/  
Amy B. Sosin  
Administrative Judge

I concur:

\_\_\_\_\_/s/  
Silvia M. Riechel  
Administrative Judge

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<sup>24</sup> See 43 C.F.R. § 3481.1 (lessee must comply with BLM regulations, terms and conditions of its lease, an approved resource recovery and protection plan, and any orders issued by the authorized officer); see also *Boesche v. Udall*, 373 U.S. 472, 479 (1963) (discussing the Secretary's administrative authority to cancel leases); *Apex Mining Co.*, 86 IBLA 242, 248 (1985).

<sup>25</sup> 43 C.F.R. § 4.1.