SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

194 IBLA 333

Decided July 2, 2019
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IBLA 2018-166 Decided July 2, 2019

Appeal from the Bureau of Land Management’s decision denying a protest of the inclusion of eight oil and gas lease parcels in Utah in a competitive lease sale held on March 20, 2018. DOI-BLM-UT-Y010-2017-0285-DNA.

Motion for Leave to File Reply Granted; Motion to Remand Granted With Modification; Protest Decision Set Aside and Remanded; Decision Effective July 17, 2019


OPINION AND ORDER BY ADMINISTRATIVE JUDGE HAUGRUD

In this appeal the Southern Utah Wilderness Alliance, Center for Biological Diversity, and Sierra Club (collectively SUWA) challenge the decision of the Bureau of Land Management (BLM) to include eight oil and gas lease parcels in a competitive lease sale held on March 20, 2018.1 SUWA primarily alleges that BLM erred by issuing the leases without complying with the National Environmental Policy Act (NEPA).2

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1 SUWA Statement of Reasons (SOR) at 2 (identifying the eight leases, which BLM denotes as UTU93004 (UT0318-010), UTU93005 (UT0318-012), UTU93006 (UT0318-014), UTU93007 (UT0318-016), UTU93008 (UT0318-018), UTU93009 (UT0318-019), UTU93010 (UT0318-021), and UTU93011 (UT0318-023)).

2 Id. at 6-21 (alleging various violations of NEPA, 42 U.S.C. §§ 4321-4370h (2012)).
BLM’s Motion for Remand

BLM has filed a motion requesting the Board to return jurisdiction to the Bureau so that it “can suspend the appealed leases and conduct additional NEPA analysis.” Blick BLM seeks this remand because, once a notice of appeal of an agency decision has been filed, the agency has no authority to change that decision while the appeal is pending before the Board. Blick BLM’s plan is to complete additional NEPA analysis and then, “based on such analysis, issue an appealable decision for each of the eight leases in which it will lift the suspension without modifying the relevant lease terms and conditions, lift the suspension while modifying the lease terms and conditions, or rescind the lease.” Blick BLM states that it has notified the leaseholders of its intention to issue suspensions and that during the suspension period, “BLM will not authorize or allow leaseholder operations on any of the eight leases.” Blick BLM specifically requests the Board not to vacate BLM’s issuance of the eight leases.

SUWA opposes BLM’s motion. SUWA argues that BLM’s motion is tantamount to a confession of error and that the appropriate remedy is “to vacate the underlying agency decision.” SUWA working from the premise that “BLM has acknowledged that it failed to prepare the necessary NEPA analysis prior to offering and issuing the eight leases at issue,” SUWA argues that BLM’s leasing decision has no legal effect so that “the leases are invalid and cannot be suspended.” SUWA concludes that “because BLM lacks the legal authority to suspend the leases, the Board should order the agency to cancel and close the relevant lease files.”

BLM has moved to file a reply, which we grant. In its reply, BLM argues that the Board has discretion to remand without vacatur. In doing so, BLM clarifies that it believes its existing NEPA analysis is legally deficient, stating that BLM “has concluded that the pre-lease sale NEPA analysis involving the eight leases did not meet the GHG-
analysis bar set by [WildEarth Guardians v. Zinke\textsuperscript{12}], and that it is therefore appropriate to suspend the leases and conduct additional NEPA [analysis].\textsuperscript{13}

For the reasons discussed below, we grant BLM's motion to remand with modification. We set aside the challenged protest decision but do not vacate the issued leases. This will allow BLM to undertake its proposed administrative process yet will ensure that no development of the leases may occur until BLM issues a new leasing decision. However, because BLM did not request that the protest decision be set aside, we will defer the effective date of this Order to allow BLM to withdraw its motion if it desires.

Synopsis of Background Facts

The eight leases at issue are a subset of 43 parcels offered for leasing as part of BLM's March 2018 Lease Sale in Utah.\textsuperscript{14} In the process leading to the Lease Sale, BLM determined that 14 of the parcels, including the 8 leaseholds on appeal, were included within the region covered by the Moab Master Leasing Plan (Moab MLP). For these 14 parcels, BLM concluded that its existing NEPA analyses, in particular the EISs prepared for the Moab MLP and the two applicable resource management plans, provided adequate environmental analysis to support the Lease Sale. BLM accordingly prepared a Determination of NEPA Adequacy (DNA) that documented its conclusion. For the remaining parcels located outside the boundaries of the Moab MLP, BLM completed an Environmental Assessment.

Drafts of the DNA, EA and other sale documents were made available for public review and comment in September 2017.\textsuperscript{15} On December 1, 2017, BLM posted its notice of competitive lease sale for the March 2018 Lease Sale, which provided that protests could be filed through January 2, 2018.\textsuperscript{16} SUWA timely protested the inclusion of 8 of the 14 parcels for which the DNA had been prepared, alleging violations of NEPA and

\textsuperscript{12} 368 F. Supp. 3d 41 (D.D.C. 2019).
\textsuperscript{13} BLM Reply at 4.
\textsuperscript{14} Unless otherwise noted, the facts are summarized from SUWA's Statement of Reasons at 2-5 and BLM's Answer at 1-5, both of which include citations to the Administrative Record (AR) filed with the Board.
\textsuperscript{16} AR 4074-4084.
other statutes. BLM held the lease sale on March 20, 2018, and received bids on all 14 parcels covered by the DNA. On May 17, 2018, BLM issued a decision dismissing SUWA’s protest to the inclusion of the 8 parcels, and issued a separate decision record (DNA DR) deciding to issue leases on all 14 parcels supported by the DNA.

SUWA timely filed its notice of appeal on June 18, 2018, challenging BLM’s “decision to dismiss SUWA’s protest of the inclusion of eight (8) parcels” in the March 2018 Lease Sale. No parties sought to intervene, and merits briefing has been completed.

Discussion

A. The Board Has No Duty to Vacate BLM’s Decision

Addressing first SUWA’s contentions, the Board is not compelled to vacate the leases. Even given BLM’s admission that the NEPA analysis is deficient, the leases are not void ab initio. The Board has held that an oil and gas lease issued by BLM in violation of NEPA is voidable rather than void, and the Board has repeatedly acknowledged the broad authority of the Secretary in such instances to cancel any lease issued contrary to law. We have held that cancellation is required when BLM’s error involves mistakenly leasing land that is simply not available for leasing, such as lands statutorily or administratively withdrawn from leasing. But when the land is otherwise

17 AR 46603-46646 (redacted version (confidential archaeological information) and excluding exhibits).
18 SUWA Protest Decision, AR 49913-49925.
19 Decision Record on DNA Parcels, AR 37536-37539.
20 SUWA Notice of Appeal at 1-2.
21 Clayton W. Williams, Jr., 103 IBLA 192, 210 (1988) (“[S]ince NEPA is primarily procedural, even if a lease were issued in violation thereof, such a lease would be merely voidable rather than void.”).
22 See, e.g., Liberty Southern Partners, LLC, 183 IBLA 383, 388 (2013) (“[I]t is well established that the Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates, including administrative errors committed prior to lease issuance.”) (quoting Celeste C. Grynberg, 169 IBLA 178, 183 (2006) (citing Boesche v. Udall, 373 U.S. 472, 478-79 (1963), aff’d, Grynberg v. Kempthorne, No. 06-cv-01878 (D. Colo. July 2, 2008))).
23 See Hanes M. Dawson, 101 IBLA 315, 318 (1988) (cancellation required where land being leased was found to be within Congressionally designated wilderness area withdrawn from mineral leasing); see also Clayton W. Williams, Jr., 103 IBLA at 202-03 (discussing distinction between void and voidable leases).
available for mineral leasing, and the lease “has been issued in violation of established procedures,” the “lease is considered voidable rather than void.”

While the Board has not always explicitly addressed the void/voidable distinction in its decisions, it has acted in line with these principles. When finding a pre-lease violation of NEPA, the Board has “reversed” the protest decisions but it has not declared the leases void; rather, it has remanded to BLM “for additional appropriate action consistent with this opinion.”

The rationale for deeming the lease voidable is that the lease becomes effective at the time of execution by the BLM authorized officer, even if a procedural flaw has occurred in the leasing process, but the lease is “subject to cancellation if improperly issued.” Relying on this authority, BLM has on occasion undertaken the very process it proposes here and suspended leases while it conducts NEPA analysis to determine whether to cancel, modify or reaffirm them.

The judicial decisions SUWA cites do not reject our precedent or require vacatur as the remedy. Dine Citizens did not involve the validity of leases but rather BLM’s approval of applications for permit to drill (APDs). Even though the Tenth Circuit vacated the APDs because of a NEPA violation, it did not hold that vacatur was required but instead stated it was often an appropriate remedy: “Vacatur of agency action is a

24 Clayton W. Williams, Jr., 103 IBLA at 203.
25 See, e.g., Wyoming Outdoor Council, 156 IBLA 347, 359 (2002), aff’d sub nom. Pennaco Energy, Inc. v. DOI, 377 F.3d 1147 (10th Cir. 2004); see also SUWA, 164 IBLA 118, 125 (2004) (finding that BLM had violated NEPA in issuing leases and holding that “the decision appealed from is reversed and the case remanded for further action consistent with this opinion as to the seven parcels at issue”).
26 43 C.F.R. § 3120.2-2 (“All competitive leases shall be considered issued when signed by the authorized officer.”); see also, e.g., Weston B. Andrews, 116 IBLA 41, 43 (1990) (“The Department has recognized that upon signature of a lease by both parties, it becomes a binding instrument and cannot be vitiated by unilateral action, all else being regular.” (quoting Carl J. Taffera, 71 IBLA 72, 76 (1983))).
27 43 C.F.R. § 3108.3(d); see High Plains Petroleum Corp., 125 IBLA 24, 26 (1992) (“[W]here an officer of BLM acts beyond the scope of his authority in issuing an oil and gas lease, such action is incapable of binding the Department and any lease so issued is ‘voidable.’”) (citing numerous IBLA cases).
29 Dine Citizens Against Ruining Our Envt v. Bernhardt, 923 F.3d 831 (10th Cir. 2019).
common, and often appropriate form of injunctive relief granted by district courts.\textsuperscript{30} The decision thus does not hold that an agency's action must be declared void \textit{ab initio} because of a NEPA violation.

SUWA's reliance on \textit{Sangre De Cristo Dev. Co. v. United States}\textsuperscript{31} is also misplaced. In that case the Department had administratively cancelled a surface estate lease agreement between the plaintiff development corporation and the Tesuque Indian Pueblo. The plaintiff was the former lessor, who sought damages from the United States for the cancellation under various legal theories.\textsuperscript{32} The case did not involve the Mineral Leasing Act (MLA) or its implementing regulations. Instead, it involved the application of 25 U.S.C. § 415 (2012), which requires that a lease of restricted tribal land be approved by the Secretary before it becomes effective.\textsuperscript{33} In an earlier case the court of appeals had concluded that the Bureau of Indian Affairs had not lawfully approved the Pueblo's lease because it had not complied with NEPA.\textsuperscript{34}

The development corporation nevertheless claimed that it had a vested property interest in the invalidly-approved lease. In rejecting that contention, the Tenth Circuit held that the statute required a valid approval before a tribal lease took effect: “Because we read 25 U.S.C. § 415(a) as requiring a valid approval from the Department in order for the lease contract to have legal effect, the invalid lease contract between Sangre and the Pueblo vested no property interest in Sangre.”\textsuperscript{35} The court did not purport to address the MLA or assert that an oil and gas lease issued without proper NEPA compliance by BLM is void rather than voidable. The case, along with the other tribal leasing cases cited by SUWA, is simply inapposite because it involves an entirely different statutory and regulatory scheme from the one at issue here.

In cases involving BLM and its mineral leasing decisions, courts have recognized that they have discretion whether to invalidate leases that have been issued without proper NEPA compliance. In \textit{Colo. Envtl. Coalition v. Salazar},\textsuperscript{36} for example, the court found that BLM had violated NEPA but refused the plaintiffs' request to cancel the leases. Instead, the court remanded to BLM to correct the NEPA work, recognizing that BLM may "reach the same decision (albeit upon a more complete record or more specific

\textsuperscript{30} Id. at 859 (quoting \textit{WildEarth Guardians v. BLM}, 870 F.3d 1222, 1239 (10th Cir. 2017)).
\textsuperscript{31} 932 F.2d 891 (10th Cir. 1991).
\textsuperscript{32} Id. at 892 (summarizing appellant's claims).
\textsuperscript{33} Id. at 893.
\textsuperscript{34} Id. at 893-94 (discussing \textit{Davis v. Morton}, 469 F.2d 593 (10th Cir. 1972)).
\textsuperscript{35} Id. at 895.
\textsuperscript{36} 875 F. Supp. 2d 1233 (D. Colo. 2012).
Similarly, in *WildEarth Guardians v. Zinke,* the court refused to vacate oil and gas leases despite finding a NEPA violation, specifically concluding that it had “discretion to leave the Wyoming Leases in place while BLM attempts to cure the deficiencies raised.”

The Tenth Circuit has also made it clear that leases are not void in a case brought by SUWA. In *SUWA v. Norton,* the district court concluded that BLM had violated NEPA in issuing 16 leases and ordered that BLM’s “decision denying SUWA’s protest – and its decision to lease the 16 parcels at issue here – is REVERSED and REMANDED for further consideration consistent with the court’s decision.” In a subsequent appeal by certain lessors who had unsuccessfully moved to intervene after the district court’s decision, the court of appeals was clear that BLM could “honor” the leases on remand:

Certainly, the district court's judgment for now precludes BLM approval of mining activities based on the subject leases. At this stage, Movants must advance their case, not before us, but before the administrative body responsible for adjudicating the underlying question of NEPA compliance. Once the administrative process runs its course, the BLM must, if consistent with NEPA and any other applicable law, honor the Movants' leases. To that extent, Movants' current claim of injury is speculative. Movants' legally protected interests will be jeopardized only if the BLM ultimately refuses to permit development and production of the oil and gas reserves subject to Movants' leases.

Thus, judicial precedent is consistent with the Department's longstanding position that oil and gas leases issued by BLM without proper NEPA compliance are not void but voidable.

In sum, SUWA's insistence that the only course available to the Board and BLM is to vacate the underlying leases is not accurate. Our precedent establishes that oil and gas leases issued by BLM without proper NEPA compliance are voidable, not void, and BLM has in the past corrected NEPA violations involving lease issuance using precisely

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37 *Id.* at 1259.
39 *Id.* at 84 (citing *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018)).
41 *Id.* at 1269 (emphasis in original).
42 *SUWA v. Kempthorne*, 525 F.3d 966, 970 (10th Cir. 2008).
the process it here proposes. The question remains whether BLM’s request at this stage to remand without vacatur is appropriately granted.

B. BLM’s Motion is Granted, But the Challenged Protest Decision is Set Aside

Ordinarily, when the Board grants a bureau’s motion to remand an appealed decision, it sets aside the decision without opining on the merits, leaving the bureau free upon remand to reissue the decision, reissue a modified decision, or take other action (if any) as appropriate based on the bureau’s reconsideration. Because no merits decision is made, such an order does not imply that the original decision was illegal or improper.

This practice is not merely a procedural convention adopted by the Board but is typically necessary to prevent potential prejudice to the appellant. Once the Board remands and removes an appeal from its docket, an appellant cannot re-appeal the same underlying decision because the time to do so has passed. Nor does the Board have procedures for remanding with enforceable conditions. Thus, unless the Board sets aside the decision as part of a remand order, the appellant has effectively lost its appeal rights even though the decision remains in effect with no enforceable requirement that BLM replace it with a new appealable decision.

But the present appeal and remand request present atypical circumstances. If we vacated the issuance of the leases as part of a remand, it would result in the leases being treated as void rather than voidable, in direct contravention of our longstanding precedent. Also, the DNA DR addresses more than the eight leases SUWA challenges, so vacating it in its entirety would exceed the scope of the appeal. On the other hand, a simple remand now – without BLM having yet suspended the leases – would deprive

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44 43 C.F.R. §§ 3000.4 (appeal regulations at 43 C.F.R. Part 4 apply to minerals management decisions), 4.411(a)(2)(i) (appeal must be filed within 30 days of decision), 4.411(c) (“No extension of time will be granted for filing the notice of appeal.”).

45 See, e.g., Randall G. Knowles, 187 IBLA 99, 101 (2016) (stating that “neither the Board nor an ALJ exercises supervisory authority over BLM” and upholding an ALJ’s conclusion that he had no authority to impose conditions on BLM when remanding a decision).
SUWA of its appeal rights based solely on BLM’s stated intentions to suspend the leases and reissue appealable decisions.

Instead of adopting either of these alternatives, we believe the legitimate concerns of the parties may be addressed by granting BLM’s motion but setting aside the challenged protest decision without vacatur of the DNA DR or the underlying leases. By doing so, BLM is required to issue a new appealable decision on whether to rescind, modify or reaffirm the eight leases, and it may do so by carrying out its intended administrative actions. SUWA will effectively receive the same remedy it would have received if it had prevailed in its appeal — a logical result given that BLM has admitted to deficiencies in its current NEPA analysis. Moreover, SUWA’s environmental interests will be protected during BLM’s process, since there can be no on-the-ground activities associated with the leaseholds while a suspension of operations and production is in effect.

Order

With the foregoing considerations in view, and based on the averments, information, and documentation provided by BLM, the Board grants BLM’s motion for remand with modification and orders as follows:

1. BLM’s decision dated May 17, 2018, dismissing SUWA’s protest to the inclusion of eight parcels in the March 2018 Lease Sale, is set aside but without vacatur of the leases at issue;

2. The matter is remanded to BLM for appropriate administrative action consistent with this Opinion and Order;

3. SUWA’s appeal is removed from the Board’s docket; and

46 See supra note 25 and accompanying text.

47 See Oil & Gas Lease Suspension, M-36953, 92 Interior Dec. 293, 298 (1985) (“We conclude that a ‘suspension of operations and production’ under section 39 of the [Mineral Leasing] Act means just that -- no operations are allowed and no production is allowed.”); see also Board of County Comm’rs of Pitkin County, Colorado, 186 IBLA 288, 294 and n.9 (2015) (quoting BLM suspension as prohibiting ground-disturbing activities but noting that BLM allows for “casual use” during a suspension, which by definition does not ordinarily lead to appreciable disturbance or damage to lands).
4. This Order will take effect July 17, 2019. If BLM files a motion to withdraw its motion for remand before that date, this Order will be withdrawn and have no effect.

/s/

K. Jack Haugrud
Administrative Judge

I concur:

/s/

Silvia Riechel Idziorek
Acting Chief Administrative Judge

48 See 43 C.F.R. § 4.403(a) ("The Board's decision . . . is effective on the date it is issued, unless the decision itself provides otherwise.").