



FEDERAL COURT UPHOLDS OIL AND GAS EXPLORATION ON LEASED PUBLIC LANDS

by

L. Poe Leggette and Bret A. Sumner

Late this past summer, in *Southern Utah Wilderness Alliance v. Norton*, 326 F. Supp. 2d 102 (D.D.C. 2004), Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia upheld the Bureau of Land Management's ("BLM") permit authorizing Bill Barrett Corporation ("BBC") to conduct three-dimensional seismic exploration in Utah, known as the "Stone Cabin 3D Seismic Survey Project" (the "Project"). The Project area encompasses approximately 57,500 acres of mostly federal lands in Carbon County, Utah, within the Uintah oil and gas basin. In addition, the Project encompassed portions of two BLM-established wilderness study areas ("WSAs"). The Project received significant attention because of its proximity to Nine Mile Canyon, a nationally known area famous for its prehistoric rock art and other cultural and historic resources.

A coalition of five environmental organizations¹ (collectively, "SUWA") sought to stop the Project by alleging that BLM violated the National Historic Preservation Act ("NHPA"), the National Environmental Policy Act ("NEPA"), and the Federal Land Policy Management Act ("FLPMA") when it approved the Project and issued the permit to BBC. This decision is noteworthy for two reasons. It is the first case in the D.C. Circuit to interpret the contours of the NHPA within the context of an oil and gas project on public lands and it underscores the benefits of federal lessees being proactive in assuring an adequate administrative record.

Background: The Stone Cabin Project. On May 29, 2002, BBC's contractor submitted a Notice of Intent ("NOI") for the Stone Cabin Project to BLM's Price field office. After extensive analysis of the potential impacts of the Project on the environment and on cultural resources, BLM issued an Environmental Assessment ("EA") for public comment in September 2003. On March 19, 2004, BLM released the Decision Record and Finding of No Significant Impact ("FONSI"), approving the NOI and authorizing Project activities. As approved, the BLM-selected alternative for the Project authorizes the use of both buggy and heli-drilled shotholes and vibroseis source points. In addition, as conditions of approval for the Project, BLM required BBC to implement extensive mitigation measures to protect cultural resources, including funding on-site archeologists to observe Project operations and to survey for cultural resource sites, as well as a ground vibration specialist to monitor vibration levels produced by Project operations.

¹The Southern Utah Wilderness Alliance, the Natural Resources Defense Council, the Wilderness Society, the Sierra Club, and the Utah Rock Art Association.

L. Poe Leggette is a partner, and Bret A. Sumner is a senior associate, in the Washington, D.C. office of the law firm Fulbright & Jaworski L.L.P.

The Lawsuit. On April 30, 2004, soon after filing its complaint in the D.C. federal court, SUWA moved for a preliminary injunction to prevent commencement of the Project. After two days of hearings on the preliminary injunction motion, SUWA withdrew its motion after receiving assurances that BBC would allow SUWA's archeologist to observe the calibration of vibroseis vehicles prior to commencement of the Project and that BBC would not enter WSAs before July 22, 2004. The judge set the case for expedited briefing on the merits.

SUWA's primary concern was the proximity of the Project to Nine Mile Canyon. In particular, SUWA argued that BLM and BBC did not conduct adequate surveys to identify cultural resources within the area and, as a result, these resources — particularly rock art — were at risk of harm from vibrations caused by vibroseis vehicles. In response to this argument, BLM and BBC pointed to administrative record evidence in the EA to confirm that vibrations from Project activities would remain below BLM-established thresholds and would not harm rock panels or standing structures. SUWA also argued that BLM's imposition of additional cultural resource survey requirements on BBC after issuance of the Decision Record also constituted a violation of the NHPA and required re-opening of the NHPA consultation process.

The court rejected SUWA's arguments, determining that SUWA's "fatal flaw" was its failure to prove that any resources would be harmed by Project operations, 326 F. Supp. 2d at 111, and further, that it did not identify any other study or evidence to contradict BLM's findings. Judge Sullivan determined that the Project, coupled with extensive mitigation measures and on-the-ground monitoring, will not harm cultural resources. In response to SUWA's claims that the agency violated the NHPA by expanding a limited number of cultural survey corridors after BLM approved the Project, the court noted, "BLM and BBC cannot be faulted for their continued effort to protect cultural resources." *Id.* at 114. Importantly, despite SUWA's attempts to read additional requirements into the NHPA, the court was "persuaded by defendants' plain language reading of the NHPA regulations," and ultimately held that BLM's procedures, analysis, and conclusion that the Project would not harm cultural resources were reasonable. *Id.* at 115.

The court also rejected SUWA's allegations that BLM violated NEPA and FLPMA. In upholding BLM's NEPA analysis, the court concluded that the agency's cumulative impacts analysis was sufficient and that its decisions not to prepare an Environmental Impact Statement or to supplement the EA were reasonable. As with its NHPA determination, the court's NEPA decision primarily turned on SUWA's failure to prove that the Project would harm cultural resources within the Project area. Finally, with regard to FLPMA, the court definitively dismissed SUWA's claims that the BLM's approval of heli-portable seismic operations within WSAs was a *per se* violation of FLPMA.

Lessons Learned: The Benefits of Pre-Permit Litigation Risk Assessment and Investment in Additional Mitigation Measures and Monitoring Plans. Defendants' success in *SUWA v. Norton* stems from their ability to persuasively argue the reasonableness of BLM's actions by pointing time and time again to substantial administrative record evidence to rebut and undermine SUWA's arguments. This case emphasizes the importance of collaborative efforts between permit applicants and the BLM to develop a fully sound administrative record during the permit application process. Given that the Project's profile had been heightened by media coverage and that a legal challenge by SUWA was a foregone conclusion, BBC performed an extensive litigation risk assessment at the early stages of development of the Project EA. After identifying potential litigation issues, BBC worked with BLM to develop and strengthen the underlying administrative record to ensure that the record could fully support BLM's permit issuance.

This case also demonstrates the importance of thinking through effective ways to mitigate and minimize impacts to sensitive areas by anticipating arguments of opponents to the development of these areas and documenting mitigation and monitoring plans. The court's opinion repeatedly cited the extensive precautions BBC took, both as applicant-committed mitigation measures as part of the EA and as additional protective measures established by BLM during pre-work meetings to ensure the protection of cultural resources throughout Project operations. The short-term expense of funding these mitigation and monitoring requirements was a worthwhile long-term investment, ensuring no delay in project operations.