

Appeal No. 04-4153

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTAH ENVIRONMENTAL CONGRESS,
Appellant,

v.

BUREAU OF LAND MANAGEMENT of the Department of the Interior; and
CANYON FUEL COMPANY, LLC.,
Appellees.

On Appeal from the United States District Court
for the District of Utah, the Hon. Dee Benson
No. 2:03-CV-0911 DB

BRIEF OF AMICUS CURIAE STATE OF UTAH, DIVISION OF OIL, GAS
& MINING IN SUPPORT OF AFFIRMANCE and
IN SUPPORT OF APPELLEES CANYON FUEL COMPANY, LLC and
BUREAU OF LAND MANAGEMENT of the Department of the Interior

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF FACTS.....	2
INTEREST OF AMICUS CURIAE.....	3
STANDARD OF REVIEW.....	5
ARGUMENT.....	6
I. UEC has failed to meet its burden of showing BLM acted arbitrarily in its decisions, thus UEC’s motion must fail.....	6
II. UEC fails to meet any of the requirements for an injunction or stay pending appeal under Tenth Circuit Rule 8.1, therefore its motion should be denied.....	8
A. Under Tenth Circuit Rule 8.1, UEC’s appeal should be denied for failure to address the likelihood of success on the merits of its appeal.....	8
B. UEC fails to present record evidence of a significant risk of irreparable injury, and therefore its claim must also fall short.....	9
C. The balance of harms clearly weighs against UEC.....	10
D. If an injunction or stay pending appeal is issued, the public will be adversely affected.....	11
E. Because UEC has failed to present any record evidence of immediate, irreparable injury, expedition of this case is improper and UEC’s request should be denied.....	12
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>Amoco Prod. Co. v. Village of Gambell, Alaska</i> , 480 U.S. 531 (1987).....	9
<i>Baltimore Gas & Elec. Co. v. Nat. Res. Defense Council</i> , 462 U.S. 87 (1983)....	6, 7
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	6, 8
<i>Colo. Health Care Ass'n v. Colo. Dep't of Social Services</i> , 842 F.2d 1158 (10th Cir. 1988).....	8
<i>Custer County Action Ass'n v. Garvey</i> , 256 F.3d 1024 (10th Cir. 2001).....	5, 7
<i>Greater Yellowstone Coalition v. Flowers</i> , 321 F.3d 1250 (10th Cir. 2003).....	9
<i>Greenpeace v. Franklin</i> , 14 F.3d 1324 (9th Cir. 1992).....	7
<i>Marsh v. Ore. Nat. Res. Council</i> , 490 U.S. 360 (1989).....	7
<i>Olenhouse v. Commodity Credit Corp.</i> , 42 F.3d 1560 (10th Cir. 1994).....	5
<i>Park County Res. Council v. United States Dep't of Agric.</i> , 817 F.2d 609 (10th Cir. 1987).....	6
<i>Price Road Neighbor Ass'n v. Dep't of Transp.</i> , 113 F.3d 1505 (9th Cir. 1997).....	7

Statutes, Rules and Regulations

30 U.S.C. § 1257.....	4
5 U.S.C. § 706(2)(A).....	5, 6
42 U.S.C. § 4321 <i>et seq.</i>	6
30 C.F.R. § 944.30.....	4
Utah Admin. Code R645-310-121.100.....	4
Utah Admin. Code R645-200.....	4
Utah Admin. Code R645-300.....	4
Utah Admin. Code R645-301.....	4
Utah Admin. Code R645-302.....	4
Utah Admin. Code R645-301-724.....	4
Utah Admin. Code R645-301-200.....	4
Utah Admin. Code R645-301-356.....	4
Utah Admin. Code R645-301-400.....	4
Utah Admin. Code R645-301-358.....	4

INTRODUCTION

This action arises out of a challenge from Utah Environmental Congress (“UEC”) to Bureau of Land Management (“BLM”) approval of Canyon Fuel Company’s (“Canyon Fuel”) request to mine certain sections of coal underlying the East Fork of Box Canyon in Southeastern Utah. Specifically, UEC challenges the BLM’s July 2003 decision approving Canyon Fuel’s request to modify its Resource Recovery and Protection Plan (“R2P2”) for mining in what is known as the Pines Tract Lease. This BLM-approved permit modification allows Canyon Fuel to recover coal from two longwall mining panels known as the 3L and 4L sections of its SUFCO Mine.

UEC moved the district court for a permanent injunction based on BLM’s alleged violations of the National Environmental Policy Act (“NEPA”), among other federal statutes. The district court denied UEC’s motion for a permanent injunction holding that UEC had failed to meet its statutory burden. The court rejected each of UEC’s permanent injunction claims on the merits, and noted that the record extensively supported BLM’s decision.

Now, UEC asks this Court for an injunction and stay pending appeal of the district court’s Order. UEC challenges a very small aspect of a sizeable mining project that has been reviewed and approved by both state and federal agencies, and which Canyon Fuel has substantially completed. UEC is not entitled to such

relief, and Amicus Utah Division of Oil, Gas & Mining (“DOGM”) asks this Court to deny UEC’s motion.

STATEMENT OF FACTS

In 1998, Canyon Fuel proposed, as an expansion of its existing mine, a coal mining project in the Manti-LaSal National Forest in southeastern Utah, known as the Pines Tract Lease. In response to Canyon Fuel’s proposal, on January 28, 1999, BLM completed a Final Environmental Impact Statement (“FEIS”) on the Pines Tract Lease. In creating the FEIS, BLM sought input from various federal and state agencies, including DOGM, and from the public.

Upon BLM approval of Pines Tract lease, DOGM and the Department of the Interior, Office of Surface Mining (“OSM”) also approved the project and Canyon Fuel began mining coal in the lease area. In 2003, Canyon Fuel determined that due to unanticipated geologic conditions, it would have to alter its R2P2.

On February 20, 2003, Canyon Fuel submitted an application for modification of its R2P2 (“Permit Modification”). BLM consulted with OSM and DOGM and concluded that the Permit Modification was not a mining plan modification requiring approval from the Secretary of Agriculture and USFS. DOGM and OSM then initiated their review of the Permit Application Package (“PAP”) for the Permit Modification. On September 30, 2003, DOGM conditioned its approval on Canyon Fuel’s commitment to commence an

independent mitigation plan for its mining reclamation plan (“MRP”), designed exclusively for monitoring and protecting the perennial stream areas in Pines Tract Lease, including areas covered by U.S. Forest Service (“USFS”) Stipulation No. 9. *See* AR BLM0484-86. Canyon Fuel prepared a supplemental mitigation plan pursuant to a memorandum agreement among Canyon Fuel, DOGM, USFS and the Utah State Historic Preservation Officer. *See* AR BLM0539-0546.

INTEREST OF AMICUS CURIAE

The State of Utah, DOGM files as an amicus party in this action. DOGM is a division of the Department of Natural Resources of the State of Utah.

DOGM has several interests as an amicus party in this matter. First, DOGM is a regulator of entities, such as Canyon Fuel, seeking to mine coal in Utah. DOGM has an interest in sustaining the validity and correctness of its regulatory authority and decision-making. DOGM conducted a thorough and complete review of the Pines Tract lease, which required a substantial expenditure of staff time and agency resources. *See* AR BLM0484-0486.

Second, the State and its accompanying local governments are financial beneficiaries of coal mining projects, including the Pines Tract lease, through royalties garnered. Canyon Fuel pays royalties in excess of \$9 million per year to the BLM for coal mined pursuant to SUFCO Mine leases. Fifty percent of royalties paid to the BLM are rebated back to the State of Utah. Canyon Fuel

estimates that royalties to federal, state and local governments from the Pines Tract lease are estimated to be \$2,166,000. *See* Dist. Ct. Order at 8, fn. 3.

Once a company receives all the necessary approvals for its R2P2, it must submit an amendment to its MRP to DOGM, which reviews and approves the application. Once this occurs, the company receives a permit and may begin mining pursuant to the terms of the lease, the mining plan, and any permit conditions instituted by DOGM. *See* 30 U.S.C. § 1257; 30 C.F.R. § 944.30. The approved PAP and subsequent modifications become the approved MRP.

Utah law requires those proposing to mine coal in Utah submit a PAP, and include information on several scientific and environmental subjects. *See* Utah Admin. Code R645-310-121.100; *see also*, Utah Admin. Code R645-200, R645-300, R645-301, R645-302 (2003). This information consists of: (1) "Baseline information . . . includ[ing] hydrologic, geologic, and climatologic information," *see id.* at R645-301-724; (2) soil analysis, *see id.* at R645-301-200; (3) vegetation analysis, *see id.* at R645-301-356; (4) land use and air quality analyses, *see id.* at R645-301-400; and (5) wildlife analysis, *see id.* at R645-301-358.

DOGM's review of both the initial PAP and the Permit Modification to the MRP required a substantial expenditure of state resources. DOGM employs a team of specialists including hydrologists, mining engineers, soil scientists, biologists, and persons knowledgeable in cultural resources to review and analyzed each

permit and modification. An in-depth process of review results in a lengthy Technical Analysis and findings of impact. When necessary, monitoring and mitigation are required for mining in sensitive areas.

DOGM invested a significant amount of time in its review and approval of Canyon Fuel's original PAP, and found it met all state requirements. DOGM staff also conducted a thorough review of the permit modification, both in the field and in the office, which was submitted in February 2003, again finding the PAP met all state requirements. In addition, DOGM worked with the applicant, BLM, USFS and other state agencies to devise sophisticated, state-of-the-art monitoring and mitigation requirements. DOGM is interested in following through on and maintaining the integrity of such a large regulatory undertaking as this amendment to the MRP.

STANDARD OF REVIEW

UEC's claims that BLM violated NEPA when it approved Canyon Fuel's Permit Modification. NEPA claims are reviewed under the Administrative Procedures Act ("APA"). This Court may only overturn an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or not supported by substantial evidence on the record." *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1029 (10th Cir. 2001); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994), quoting 5 U.S.C. §

706(2)(A). This is a deferential standard and the “court is not empowered to substitute its judgment for that of the agency.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-16 (1971). Agency decisions are entitled to a presumption of regularity, *Overton Park*, 401 U.S. at 415, and the burden of proof is on the appellant, who is challenging the agency’s decision. *Park County Res. Council v. United States Dep’t of Agric.*, 817 F.2d 609, 621 (10th Cir. 1987).

DOGM concurs with the standard of review for a stay or injunction pending appeal as set out in Canyon Fuel’s brief. Canyon Fuel Appellee Br. at 10-11.

ARGUMENT

I. UEC has failed to meet its burden of showing BLM acted arbitrarily in its decisions, thus, UEC’s motion must fail.

UEC argues the BLM and the district court “arbitrarily and erroneously relied on evidence that the damage caused by subsidence mining could be repaired or mitigated.” Aplt. Br. at 2.

UEC appears to ask this Court to substitute its judgment for that of BLM’s. This is an incorrect statement of the standard of review. The correct standard is whether the agency’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). The Court’s role in cases alleging a NEPA violation is “to ensure that the agency has adequately considered and disclosed the environmental impact of its actions.” *Baltimore Gas & Elec. Co. v. Nat. Res. Defense Council*, 462 U.S. 87, 97-98

(1983). The court must ensure that the agency took the requisite “hard look” required by NEPA. *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 373 (1989). Here, as the district court held, the BLM’s decision is extensively supported by the administrative record. *See* Dist. Ct. Order at 12. BLM’s decision is supplemented by DOGM’s thorough review, filed investigations, analyses of impacts to mining, and its subsequent approval of the Permit Modification.

Furthermore, NEPA does not require an absence of conflicting evidence in order for a court to uphold an agency’s decision. The “mere presence of contradictory evidence does not invalidate the agencies’ actions or decisions.” *Custer County*, 256 F.3d at 1036; *Ore. Nat. Res. Council*, 490 U.S. at 386. Under NEPA, an agency has the discretion to rely on the reasonable opinions of its own qualified experts even if a court might find contrary views more persuasive. *Price Road Neighbor Ass’n v. Dep’t of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997); *Greenpeace v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). The wisdom of an agency’s decision is not a question for a court to determine. In fact, as the district court stated, “[t]he variety and complexity of the environmental factors considered by BLM in arriving at its conclusion provide a particularly apt illustration of the rationale underlying judicial deference to agency expertise in areas properly committed to agency, rather than judicial, discretion.” Dist. Ct. Order at 13, fn. 4; *Baltimore Gas*, 462 U.S. at 103.

DOGM is not a party to this litigation and UEC has not challenged DOGM's decision approving Canyon Fuel's Permit Modification, which is entitled to a presumption of procedural regularity and substantive validity. *See Citizens to Preserve Overton Park*, 401 U.S. at 415; *Colo. Health Care Ass'n v. Colo. Dep't of Social Services*, 842 F.2d 1158, 1164 (10th Cir. 1988).

Here, the range of factors taken into account, the number and type of agencies consulted, including DOGM, "believe any suggestion that the BLM's decision constituted an abuse of discretion" or otherwise violated the APA standard. Dist. Ct. Order at 13-14.

II. UEC fails to meet any of the requirements for an injunction or stay pending appeal under Tenth Circuit Rule 8.1, therefore, its motion should be denied.

A. Under Tenth Circuit Rule 8.1, UEC's appeal should be denied for failure to address the likelihood of success on the merits of its appeal.

UEC asks this Court to grant extraordinary injunctive relief without presenting any argument on the merits of an appeal or the likelihood of success on appeal. Having utterly failed to address one of the factors for granting an injunction pending appeal as required by Rule 8.1(B)-(C) of the Rules of the United States Court of Appeals for the Tenth Circuit, UEC's motion should be denied on this basis alone.

Even if UEC had addressed its likelihood of success, its arguments would still fail. As previously stated, BLM and DOGM each conducted thorough and

comprehensive reviews of Canyon Fuel's Permit Modification to the MRP.

Additionally, the district court examined an extensive administrative record and concluded that UEC had failed to establish a likelihood of success on the merits below.

B. UEC fails to present record evidence of a significant risk of irreparable injury, and therefore its claim must also fall short.

UEC's claims of irreparable harm also fail. Just as UEC failed to present sufficient evidence at the district court level, UEC again cites to very little evidence in the record, or in the decision below, to support many of its assertions of irreparable harm. Harm does not exist simply because UEC says so. For example, UEC claims that the "mining in this case will cause irreparable harm, and such harm is well documented in the record." Aplt. Br. at 3. However, UEC offers a citation to only one page in the administrative record, and no further substantial comment as to the evidence of irreparable harm.

Irreparable harm cannot be presumed. *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Claims of "potential outcomes" do not suffice to show immediate irreparable harm, i.e., permanent or of long duration, and is sufficiently likely to occur. *Id.* Furthermore, purely speculative harm does not amount to irreparable injury. *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (2003). Rather, the appellant must demonstrate through presentation of evidence whether a "significant risk" of irreparable harm

exists. *Id.* at 1259. Here, UEC presents evidence of only speculative environmental harm. Indeed, the district court held: “Based on the . . . evidence UEC has failed to meet its burden of establishing a sufficient likelihood of irreparable injury; the opposite appears to be true.” Dist. Ct. Order, at 25-26. For example, the DNA findings state there is “a low probability of affecting the stream. If impacted, the impacts would be short term in nature and would mitigate naturally.” *See* Dist. Ct. Order at 6. DOGM also required an independent mitigation plan to monitor and mitigate environmental impacts, if any, from mining the Pines Tract lease. *See* AR, BLM0484-86; BLM0539-0546. Because UEC fails to present substantive evidence, UEC’s claim of irreparable injury must fail.

C. The balance of harms clearly weighs against UEC.

UEC misunderstands the impact a permanent injunction will have not only on BLM and Canyon Fuel, but on DOGM and the State of Utah, as well. The district court held the balance of harms weighed against UEC below, the same is true in the instant action. Dist. Ct. Order at 26.

When weighing the balance of harms, the court should look to several factors. First, the financial losses to the federal, state and local governments, as well as Canyon Fuel, that would occur if the Pines Tract project was stayed. The State of Utah would also incur financial losses because fifty percent of royalties

garnered by the BLM are returned to Utah. Next, DOGM has expended state and federal resources, in time and monies, analyzing and assessing the environmental impacts of the Pines Tract lease. Third, due to the substantial preparation necessary to conduct longwall mining or to bypass coal¹, the impacts of a stay pending appeal to Canyon Fuel would risk a total shutdown of that portion of the mine.

On the other side, the court looks at the speculative and contested claims of environmental harm, unsupported by citation to the record, UEC alleges would occur if mining were permitted to go forward. Weighing these contrasting interests, the balance of harms weighs in favor of Canyon Fuel and BLM. Dist. Ct. Order at 26-27.

D. If an injunction or stay pending appeal is issued, the public will be adversely affected.

UEC claims the public has an interest in ensuring that government management of public lands be conducted in “full compliance with all applicable laws and regulations.” Aplt. Br. at 5. The district court has already held that the BLM decision-making process “did fully comply with each and every federal law and regulation applicable to the present situation[,]” and therefore the public’s

¹ See Canyon Fuel Appellee Br. at 6-8 and 9, for an explanation of longwall mining and the impacts of an injunction to the Pines Tract lease.

interest is served. Dist. Ct. Order at 27. In fact, the court stated, “[i]n reality, if the injunction is issued the public will be adversely affected.” *Id.*

If Canyon Fuel were forced to shut down, even temporarily, or to mine around the 4L panel, approximately 1.9 million tons of coal will be permanently lost. Dist. Ct. Order at 26. This coal could be used to provide electricity for 1,492,378 residents for one year. *Id.* Furthermore, he estimated market value of the coal found in the 4L panel of the Pines Tract lease is over \$27,000,000. *See id.* at 8, fn. 3. Royalties collected from the sale of this coal results in monies received for the citizens of the state of Utah.

E. Because UEC has failed to present any record evidence of immediate, irreparable injury, expedition of this case is improper and UEC’s request should be denied.

UEC’s request for expedition of oral argument and decision is without support. UEC provides no persuasive argument indicating why its appeal should be pushed ahead of other cases pending before this court. Furthermore, as UEC has failed to demonstrate immediate irreparable injury, expedition is inappropriate and DOGM asks the court to deny UEC’s request.

CONCLUSION

The Court should deny UEC's motion for an injunction pending appeal.

RESPECTFULLY submitted this 9th day of August 2004.

A handwritten signature in black ink, appearing to read "Alison D. Garner", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2004, I served two true and correct copies of the foregoing BRIEF OF AMICUS CURIAE STATE OF UTAH, DIVISION OF OIL, GAS & MINING IN SUPPORT OF AFFIRMANCE AND IN SUPPORT OF APPELLEES CANYON FUEL COMPANY, LLC AND BUREAU OF LAND MANAGEMENT, via overnight express delivery, postage pre-paid, to each of the following:

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