



Tenth Circuit Court of Appeals Halts Lease Issuance and Federal Land Use Plan for Otero Mesa

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A recent U.S. Tenth Circuit Court of Appeals decision may have significant ramifications for land use plans and oil and gas leasing on federal land. On April 28, 2009, the Tenth Circuit reversed in part, a New Mexico federal court decision regarding one federal oil and gas lease sold to Harvey E. Yates Company (HEYCO) in the Otero Mesa area, in southern New Mexico. *New Mexico ex rel. Richardson v. Bureau of Land Management*, ___ F.3d ___ (10th Cir. 2009), 2009 WL 1119662 (*Richardson v. BLM*). [[View Decision](#)]

At issue in this case were the 2005 Final Environmental Impact Statement (FEIS) and Resource Management Plan (RMP) Amendment for Otero and Sierra Counties, New Mexico that authorized oil and gas leasing. Following completion of the Otero Mesa RMP/FEIS, the Bureau of Land Management (BLM) auctioned one oil and gas lease parcel within the existing Bennett Ranch federal unit. HEYCO was the sole bidder and won the tract. Governor Bill Richardson filed suit on behalf of the State of New Mexico and a separate suit by several environmental groups followed. Plaintiffs alleged that BLM violated the National Environmental Policy Act (NEPA) for, among other things, failing to analyze potential impacts to underground water aquifers and wildlife habitat fragmentation arising from natural gas development.

The New Mexico federal district court held that BLM's NEPA analysis adequately considered an appropriate range of alternatives and took a "hard look" at impacts to underground water aquifers. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 459 F. Supp. 2d 1102, 1114-16, (D.N.M. 2006). But the lower court also held that BLM was required to conduct a site-specific NEPA analysis on the impacts of leasing the particular parcel prior to lease issuance. *Id.* at 1118-19.

The Tenth Circuit affirmed the district court's holding that site-specific NEPA was necessary prior to leasing the Bennett Ranch parcel, but reversed the lower court's decision, holding that BLM's FEIS violated NEPA for failure to adequately consider the impacts to the Salt Basin Aquifer, failure to provide the public with notice and comment on a change in alternatives and for failure to consider a "no-development" alternative.

The Tenth Circuit's ruling that site-specific environmental analysis at the oil and gas leasing stage turned on unique facts and circumstances: there was only one lease at issue, in an existing federal unit. The Tenth Circuit held that site-specific NEPA analysis for leasing is only necessary when oil and gas development is "reasonably foreseeable." *Richardson v. BLM*, at *26. The Tenth Circuit found that development was reasonably foreseeable because: (1) considerable exploration had already occurred on adjacent parcels; (2) natural gas is known to exist on these parcels; (3) HEYCO had plans to drill 30 wells on the Bennett Ranch parcel; and (4) a pipeline had been approved that would allow transportation of gas produced from the wells on the parcel at issue. *Id.* The Tenth Circuit required BLM to perform this additional analysis and provide additional documentation, but it did not require BLM to find a particular substantive result or state that Otero Mesa could not be developed for oil and gas. *Id.*

Importantly, the Tenth Circuit's decision did not include a broader holding that site-specific analysis is always required for all oil and gas leasing. The Tenth Circuit explained that "there is no bright line rule" mandating site-specific analysis, and the requirement is a very fact/case specific process that must be examined in context. *Id.* at 26.

The Tenth Circuit made several other holdings of interest:

- Plaintiffs' claims under the Endangered Species Act regarding the Fish and Wildlife Service's (FWS) decision were moot because the FWS's decision to reintroduce the Aplomado Falcon in the Otero Mesa area resulted in the loss of the falcon's status as "endangered." *Id.* at *12.
- BLM was required to issue a supplemental EIS for public review and comment that analyzed the impacts of a modified alternative created after issuance of the FEIS and adopted in the record of decision. This modified alternative imposed a quantitative restriction on roads and development. *Id.* at *15-16. The Court further found this error was not harmless because the change in the alternative was not minor. *Id.*

at *17.

- BLM was required to analyze an alternative that would have closed Otero Mesa to oil and gas development because non-development and environmental protection are potential land uses under the Federal Land Policy and Management Act's multiple use mandate. *Id.* at *20.
- BLM was not required to consider an alternative that would have created new Wilderness Study Areas, although the Court "assume[s] arguendo that wilderness study area designation under § 1712 is a lawful land management option." *Id.* at *21; *Id.* at n 34.
- The administrative record and BLM's FEIS did not substantiate BLM's determination that the impacts to the Salt Basin Aquifer would be minimal. *Id.* at *23-24. BLM, however, could come to the same conclusion once it provides the necessary support. *Id.* at *24 ("Of course, BLM is not precluded from making the same determination once again if it provides an evidentiary basis for doing so.").
- BLM's failure to circulate Governor Richardson's alternative plan did not violate NEPA and the public was given adequate notice and opportunity comment on the Governor's proposals for management of Otero Mesa. *Id.* at *27-28.