

THEODORE ROOSEVELT CONSERVATION PARTNERSHIP v. SALAZAR

661 F.3d 66 (D.C. Cir. 2011)

SENTELLE, Chief Judge:

The Pinedale Anticline Project Area (the PAPA) consists of a little over 198,000 acres of federal, state, and private land in western Wyoming. The Bureau of Land Management (BLM or the Bureau) manages roughly 80 percent of this land, which contains the third-largest natural gas field in the United States. In 2000, the Bureau issued a Record of Decision (2000 Record of Decision or 2000 ROD) meant to guide the management of the first substantial development of the PAPA's natural gas resources. In 2008, the Bureau adopted a new Record of Decision (2008 Record of Decision or 2008 ROD), which, among other things, authorized the development of more natural gas wells than the earlier Record of Decision had sanctioned and provided for management and mitigation of the development. Theodore Roosevelt Conservation Partnership (TRCP), an association including members who pursue recreational hunting in the PAPA, filed for declaratory and injunctive relief in the district court, arguing that the Bureau's 2008 Record of Decision violated the Federal Land Policy and Management Act; that the accompanying environmental impact statement (EIS) violated the National Environmental Policy Act; and that the 2000 Record of Decision violated both acts. The district court granted summary judgment for the Bureau. TRCP appeals from that judgment. We affirm the judgment of the district court.

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II. Background

A. The Pinedale Anticline Project Area

* * * [Besides the Pinedale natural gas field, t]he PAPA also provides other natural resources, including recreational opportunities and wildlife habitat. In particular, the PAPA supports part of the “winter range” for mule deer and pronghorn, which serves as survival habitat during harsh winter conditions. The PAPA also provides year-round habitat for part of a significant population of the greater sage-grouse. This habitat includes mating-display grounds called leks as well as brood-rearing areas and wintering areas. Mule deer, pronghorn, and sage-grouse are game species of particular interest to this region's hunters.

* * * The [federal] government has leased most of its mineral resources, including most of the Pinedale Field, to oil and gas companies (the Operators). Energy development in the PAPA remained negligible until the 1990s, when new drilling technology allowed for commercially practicable recovery of the PAPA's natural gas.

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D. The 2008 Record of Decision

* * * [The September 2008 ROD] authorized development of up to 4,399 wells on no more than 600 well pads (down from the 700 producing well pads authorized by the 2000 Record of Decision). The 2008 Record of Decision also included the following mitigation measures intended to minimize and offset the environmental impact of development:

- Cessation of seasonal restrictions on development for five development areas in the “core area” of the PAPA, which makes up 23 percent of the PAPA, along with concentrated development in the core area.

- “Geographically phased” development within each core development area—i.e., concentrated development that proceeds in stages in smaller areas rather than all at once.

- Voluntary suspension of the Operators' mineral leases on the PAPA flanks, and, for all but one Operator, a prohibition on new development on the flanks even beyond the five-year period until comparable acreage in the core area has been returned to functional wildlife habitat.

- Various measures intended to reduce human impact, including directional drilling (which allows for more wells on each well pad and thus fewer well pads), a liquids-gathering system to reduce truck traffic, installation of computer-controlled systems for some Operators, and busing of work crews.

- A monitoring and mitigation fund “will be used for both on-site and off-site mitigation and project-related activities in the PAPA vicinity including additional air quality monitoring, additional wildlife, livestock, vegetation, and reclamation.” 2008 ROD at 17. Operators were required to contribute at least \$4.2 million initially, and they must pay into the fund for each well drilled up to a total of \$36 million.

- A wildlife monitoring and mitigation matrix detailing measures for monitoring wildlife in the PAPA and sequential mitigation responses based on changes identified by that monitoring. The matrix includes triggers for mitigation for mule deer when the population declines from 2005–2006 levels by 15 percent.

Based on these mitigation measures—particularly the concentration of development in both area and duration—the Bureau reasoned that the 2008 Record of Decision would “afford superior crucial winter range and greater sage-grouse habitat in the long-term through reducing disturbance, both to habitat and that caused by human presence, during the production phase.”

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C. The Bureau's Determination that the 2008 Record of Decision Prevents Unnecessary or Undue Degradation

The Bureau's 2008 Record of Decision permits significant expansion of energy development in the PAPA. It also implements measures intended to mitigate the adverse environmental effects of

the development. TRCP asserts that the 2008 Record of Decision violates FLPMA because these measures will fail, leaving in place a development plan that degrades the environment without mitigation.

FLPMA requires that the Bureau, in managing public lands, “take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). The Department of the Interior's Board of Land Appeals has interpreted “unnecessary or undue degradation” to mean the occurrence of “something more than the usual effects anticipated” from appropriately mitigated development. Biodiversity Conservation Alliance, 174 I.B.L.A. 1, 5-6 (March 3, 2008). Application of this standard is necessarily context-specific; the words “unnecessary” and “undue” are modifiers requiring nouns to give them meaning, and by the plain terms of the statute, that noun in each case must be whatever actions are causing “degradation.” See, e.g., *Utah v. Andrus*, 486 F.Supp. 995, 1005 n. 13 (D.Utah 1979) (defining “unnecessary” in the mining context as “that which is not necessary for mining”) (emphasis added). Here, that action is the development required to extract natural gas from the PAPA's formidable reserves. Our inquiry, then, is whether the record supports the Bureau's determination that the 2008 Record of Decision will implement sufficient measures to prevent degradation unnecessary to, or undue in proportion to, the development the Record of Decision permits.

We also must view FLPMA's “unnecessary or undue degradation” standard in light of its overarching mandate that the Bureau employ “principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a). While these obligations are distinct, they are interrelated and highly correlated. The Bureau must balance multiple uses in its management of public lands, including “recreation, range, timber, minerals, water-shed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.” 43 U.S.C. § 1702(c). It must also plan for sustained yield—“control [of] depleting uses over time, so as to ensure a high level of valuable uses in the future.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). Thus, by following FLPMA's multiple-use and sustained-yield mandates, the Bureau will often, if not always, fulfill FLPMA's requirement that it prevent environmental degradation because the former principles already require the Bureau to balance potentially degrading uses—e.g., mineral extraction, grazing, or timber harvesting—with conservation of the natural environment. If the Bureau appropriately balances those uses and follows principles of sustained yield, then generally it will have taken the steps necessary to prevent unnecessary or undue degradation.

In light of FLPMA's multiple-use and sustained-yield mandates, the Bureau did not act arbitrarily or capriciously in determining that the plan in the 2008 Record of Decision will prevent unnecessary or undue degradation of the PAPA. In adopting the 2008 Record of Decision, the Bureau recognized the primary competing uses of the PAPA: the recovery of natural gas from the third-largest natural gas field in the continental United States and recreational use of the PAPA's other natural resources. Pursuant to its multiple-use mandate, the Bureau decided to allow additional natural gas extraction in the PAPA while implementing significant measures to mitigate the degradation the Bureau conceded would be necessary to

allow significant recovery. The record supports the Bureau's determination that these mitigation measures would be adequate to prevent degradation that is unnecessary to, or undue in proportion to, the natural gas development that the 2008 Record of Decision permits.

The record shows that human presence constitutes the primary source of harm to the game species with which TRCP is primarily concerned. The mitigation scheme of the 2008 Record of Decision is geared towards reducing human presence while still allowing for development. Indeed, several parts of the mitigation scheme, including computer-assisted re-remote monitoring of wells, directional drilling from fewer well pads, busing of crews, centralized processing and storage, and a liquids-gathering system, are intended to reduce human presence in the PAPA year-round. The Bureau could reasonably conclude that these mitigation measures would adequately serve to prevent unnecessary or undue degradation of wildlife by reducing harmful human presence. Indeed, the Wyoming Game & Fish Department (WGFD) expressly recommended these measures for precisely this purpose. Letter from Terry Cleveland, Director, WGFD, to Matt Anderson Pinedale Field Office, Bureau of Land Management (Apr. 6, 2007) (WGFD Letter).

Other measures required by the 2008 Record of Decision also target human presence. The Record of Decision concentrates development necessary to recover natural gas in a core area of the PAPA while leaving undeveloped large contiguous blocks of wildlife habitat, including critical winter range, on the PAPA flanks. As well pads in the core area are fully reclaimed, they are to be returned to functioning habitat. Lifting seasonal development restrictions will accelerate this habitat reclamation. Further, most of the Operators will only be allowed to begin developing the flanks at the later of five years or when comparable acreage in the core area is returned to functional habitat. This will leave 49,903 acres undisturbed. WGFD recommended these steps because they would benefit wildlife by “retaining the maximum amount of functional habitat for wildlife over as much of the project area as possible throughout delineation, development and production of the field.” WGFD Letter. The Bureau could reasonably conclude that this phased, accelerated development scheme would aid in preventing unnecessary or undue degradation by limiting the amount of human presence and leaving functional habitat available at all times.

In addition to these impact-reducing measures, the 2008 Record of Decision requires a monitoring and mitigation fund for on- and off-site mitigation as needed. It also incorporates a Monitoring and Mitigation Matrix that sets forth a sequence of mitigation measures, some to be implemented immediately and others to be used as a backstop in the event of further wildlife declines.

TRCP does not carry its burden of showing that the Bureau acted arbitrarily and capriciously. TRCP * * * failed to address several important mitigation measures upon which the Bureau also relied to make its determination. Further, as to the measures TRCP does address, other statements in the record draw conclusions contrary to TRCP's. For example, TRCP contends that there is no evidence that removing the seasonal restrictions on development will benefit wildlife,

but the * * * [record also reflects] that past and ongoing studies have not been able to show that continuing the seasonal restrictions will provide effective mitigation either. Additionally, as the district court noted, WGFD supported removing the seasonal restrictions on development because the overall mitigation plan contained “longer-term” and “significantly better” benefits for wildlife than the measures in place in the 2000 Record of Decision. WGFD Letter.

Even where TRCP offers evidence that a particular mitigation measure likely will be ineffective, it fails to provide any other solution that still would permit significant recovery of natural gas—a use FLPMA requires the Bureau to balance with conservation. Specifically, TRCP argues that there is no evidence that the Bureau's one-quarter-mile buffer for greater sage-grouse leks will prevent the sage-grouses from abandoning their leks or attending in smaller numbers. The Bureau concedes that one-quarter-mile buffers “will not avoid adverse consequences to the greater sage grouse,” but the record shows that TRCP's recommended two-mile buffer would prevent natural gas extraction in nearly the entire PAPA. Again, FLPMA prohibits only unnecessary or undue degradation, not all degradation.

In sum, the Bureau could reasonably conclude that the mitigation measures the 2008 Record of Decision implements, which comport with WGFD recommendations and utilize reasonably available technology, will prevent unnecessary or undue degradation by (1) reducing the footprint and duration of human presence, (2) providing funding for and oversight of monitoring and mitigation, and (3) specifying additional mitigation measures to be implemented if further declines in wildlife populations are observed. TRCP's arguments to the contrary—pointing out the ineffectiveness of a few of the specific mitigation measures in place while failing to offer feasible alternatives that would still allow for significant development and ignoring conflicting evidence in the record—do not establish that the Bureau's determination was arbitrary or capricious. We conclude that the record supports the Bureau's determination that the measures implemented by the 2008 Record of Decision will prevent unnecessary or undue degradation of the PAPA.

NOTES AND QUESTIONS

1. Judge Sentelle fails to cite Mineral Policy Center v. Norton. Is his interpretation of the “unnecessary or undue degradation” (UUD) standard in FLPMA consistent with *Mineral Policy Center*? How does it differ from the two solicitor opinions? For example, the court says that the two adjectives “unnecessary” and “undue” require nouns to give them meaning, and in both cases the noun “must be whatever actions are causing ‘degradation’.” The might be accurate with regard to “unnecessary,” that is, the UUD standard presumably prevents the Secretary from allowing degradation here that is not necessary to oil and gas development. But is it true for “undue”? Might degradation be “necessary” for mining but still pose such harm that its degradation of existing conditions might be said to be “undue”? Put a little differently, is the

court here conflating the two adjectives, by reading the "or" that divides" them as "and"? What does the court mean when it says the record supports BLM's determination that its mitigation measures are "adequate to prevent degradation that is ... undue in proportion to the natural gas development [the 2008 ROD] permits"? Is it reasoning in a circle?

2. How correlated are the multiple-use, sustained-yield requirements of FLPMA with the UUD standard? FLPMA defines "multiple use" in part to mean that "some [public] land" may be used "for less than all of the resources," "with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." Do Judge Sentelle, and the BLM, assume that because this area of public lands contains substantial natural gas resources, those resources must be developed? Doesn't the "multiple use" definition give the BLM the authority not to develop the resources, at least at this time? See the discussion of multiple use in the casebook, p. ____.

3. Are the court and the agency saying that, if the BLM appropriately balances mineral development with environmental values under "multiple use," it has necessarily met the UUD standard? Does the fact that Congress included the UUD standard on top of the multiple use standard in the same statute, FLPMA, mean the two standards must have some meaning independent of each other?

4. What if BLM had decided to allow oil and gas development here without requiring any mitigation of its impacts on wildlife resources, even though the agency's wildlife biologists say major adverse effects on wildlife will result. Might the BLM's decision be said to satisfy the "multiple use" standard, but still cause "undue degradation" in violation of the UUD standard?

5. Should the BLM be subject to different standards for hardrock mining plan approvals, where it has not specifically invited mineral development, as compared to oil and gas development, where the agency gets to make the initial decision about how much land to lease and where? That is, does the BLM make a "multiple use" decision in whether to allow hardrock mining on the public lands it manages? If not, does that change how UUD ought to apply in this context?