



File Code: 1570-1

Date: June 30, 2003

Route To: (1570 - 215)

Subject: ARO Letter - Upton 12-2 DN (Oil and Gas Development) - DPG - Appeal #03-01-00-0049 - The Ecology Center, Inc.

To: Appeal Deciding Officer

This is my recommendation on the appeal filed by Jeff Juel on behalf of The Ecology Center, Inc. protesting the Decision Notice (DN) for the Upton Resources USA, Inc. Federal 12-2 Oil and Gas Well signed by the Medora District Ranger on the Dakota Prairie Grasslands (DPG).

The District Ranger's decision adopts approval of the Surface Use Plan of Operations (SUPO) for the Federal 12-2 well site. The SUPO includes construction, maintenance, and reclamation proposals for the well pad, access road, and needed oil production facilities, pipelines, and electric lines.

My review was conducted pursuant to, and in accordance with, 36 CFR 215.19 to ensure the analysis and decision is in compliance with applicable laws, regulations, policy, and orders. The appeal record, including the appellant's objections and recommended changes, has been thoroughly reviewed.

The appellant alleges violations of the National Environmental Policy Act (NEPA) and the Transportation Rule and Policy. The appellant requests the DN be withdrawn or remanded. The appellant declined the offer for an Informal Disposition Meeting.

ISSUE REVIEW

Issue 1. Environmental Impact Statement

Contention 1. The development of any Inventoried Roadless Area (IRA) is a significant federal action, for which analysis in an Environmental Impact Statement (EIS) is required.

Response: Two EISs have been prepared which consider development of the land included within the Tracy Mountain IRA. The FEIS for Oil and Gas Leasing on the Southern Little Missouri National Grassland (SLMNG FEIS) and its accompanying Record of Decision (ROD) dated April 5, 1996, determined that the lands in this project would be administratively available and the lease stipulations that would be applicable. The 2001 Northern Great Plains (NGP) FEIS, and the DPG Land and Resource Management Plan (LRMP) and its ROD, signed July 31, 2002, provide overall management direction for the DPG.

Forest Service policy (FSH 1909.15.20.6) states, "*The requirements for classes 2, 3, and 4 may be met by the appropriate use of program environmental impact statements and tiered site-specific environmental documents or by the preparation of site-specific environmental impact statements.*" The intent of the policy through the inclusion of the term "**or**" is that only one EIS



needs to be developed to address the condition of and possible changes to the undeveloped character of an IRA. In this case, the Final EIS for the DPG and the SLMNG FEIS address the potential for future oil and gas projects within the IRA. The Responsible Official correctly tiered his decision to both FEISs, thus avoiding the need to develop an additional EIS to support this project decision.

Contention 2. At what point will the Forest Service analyze the past, proposed, and reasonably foreseeable impacts of all developments on the Tracy Mountain IRA?

Response: The Forest Service has analyzed the past, proposed and reasonably foreseeable impacts on inventoried roadless areas (including the Tracy Mountain IRA) on the DPG in numerous documents. Analyses of roadless areas on the DPG, and the Tracy Mountain IRA specifically, have a unique and confusing history. I think it would be helpful to summarize that history here.

In 1970, the Forest Service studied all administratively designated primitive areas and inventoried all roadless areas greater than 5,000 acres in the National Forest System, which included the National Grasslands. This study was known as the Roadless Area Review and Evaluation (RARE I). Tracy Mountain was not included in the RARE I inventory.

In 1977, the Forest Service began another nationwide Roadless Area Review and Evaluation (RARE II) to identify roadless and undeveloped areas suitable for inclusion in the Wilderness Preservation System. No areas on the Custer National Forest or the DPG were recommended for Wilderness. However, RARE II identified 10 potential areas on the Little Missouri National Grasslands (LMNG) that met the criteria of the study. Tracy Mountain was not identified as a RARE II roadless area.

The 1987, as part of the Custer National Forest Management Plan, the RARE II areas were reevaluated and identified as inventoried roadless areas (including those on the Little Missouri National Grasslands). Tracy Mountain was not identified as inventoried roadless because of existing human uses and development. It was allocated to Management Area D, which emphasizes a mix of multiple uses that include range, wildlife and minerals.

On April 5, 1996, a Record of Decision was signed for Oil and Gas Leasing on the Southern Little Missouri National Grassland (SLMNG). This ROD determined that the lands included in this project would be administratively available for oil and gas leasing, the lease stipulations that would be applicable, and authorized leasing on certain lands. The FEIS addressed in detail the effects to inventoried roadless areas and those areas not inventoried as roadless. The FEIS effects of oil and gas development were based on a Reasonably Foreseeable Development Scenario (RFDS), which predicted wells for the Tracy Mountain area (SLMNG FEIS, Map IV-8, page IV-144). Leases were issued under this decision on Tracy Mountain in February 1997.

In 1998, as part of the process to revise the Custer National Forest Management Plan, the LMNG land base was re-inventoried to determine what areas met the roadless inventory criteria of FSH 1909.12.7. Utilizing the given criteria, 19 areas were identified as meeting the roadless evaluation criteria. The 1998 analysis did not disqualify areas that contained primitive roads

(two-tracks) or areas that contained valid existing oil and gas leases. As a result, the inventory process identified several roadless areas that were not identified in previous analyses, including the Tracy Mountain area. These areas were carried forward and addressed in the inventoried roadless area evaluation and review for the Land and Resource Management Plan revision for the Dakota Prairie Grasslands.

In July of 2001, the LRMP FEIS for the DPG was issued, which included an inventoried roadless area evaluation and review for the Tracy Mountain Inventoried Roadless Area. The FEIS acknowledged that valid existing rights would be recognized and that because the area is leased for oil and gas and contains a small area of private minerals, additional oil and gas developments could occur (FEIS, App. C, p. 100). The effects of oil and gas development were based on a Reasonably Foreseeable Development Scenario (RFDS) in the project record. The FEIS predicted 10 wells in the Tracy Mountain IRA. While development may not occur as predicted by the RFDS, it does indicate that the high potential for development in Tracy Mountain was analyzed in an EIS. Where mineral development occurs, the semi-primitive, nonmotorized character of the area would be lost for the duration of the activity. In the FEIS, the inventoried roadless analysis addressed the following elements: opportunities for solitude and serenity, natural appearance and integrity, challenge, recreation opportunities, unique characteristics, opportunities for outdoor education, size and shape, and manageable boundaries. These same elements were used to analyze the effects of the proposed Upton 12-2 SUPO.

The ROD for the DPG LRMP, signed July 31, 2002, selected Modified Alternative 3 Final. Under this alternative, the Tracy Mountain IRA was not identified as being suitable for wilderness and was allocated to non-wilderness prescriptions. The IRA was assigned the following Management Areas (MA): 1.31 "Non-motorized Backcountry Recreation" which covers the majority (91 percent) of the IRA, followed by MA 3.65 "Rangelands with Diverse Natural Appearing Landscapes" (6 percent), and MA 2.1 "Special Interest Areas" (3 percent). The Upton 12-2 proposal occurs almost solely in MA 3.65 with 0.1 acre of the project in MA 1.31. The ROD also specifically answers the question of what lands will be available for oil and gas leasing and development. The decision determined that according to 36 CFR 228.102(c) and (d), roughly 946,280 acres of federal mineral estate of the Little Missouri and Cedar River National Grasslands are determined to be administratively available. This includes the land within the Tracy Mountain IRA.

On January 12, 2001, the Roadless Area Conservation Rule was issued. Inventoried roadless areas identified under the Rule are included in a set of maps contained in the Forest Service Roadless Area Conservation FEIS (Roadless FEIS), Volume 2, dated November 2000. The Tracy Mountain IRA was identified as an inventoried roadless area under the Roadless Rule. Although the Roadless Area Conservation Rule prohibits new road construction in inventoried roadless areas, it also provided specific exceptions. One of the exceptions where the Roadless Rule allowed road construction in inventoried roadless areas is when a road is needed in conjunction with a mineral lease or lands that were under lease as of January 12, 2001. The lease for which this project was issued was on February 1, 1997. Therefore, the Roadless Rule as promulgated did not prohibit road construction for this activity.

In addition, the analysis in the Roadless FEIS specifically addresses the construction and reconstruction of roads reasonable and necessary providing access to and development within existing lease boundaries (FEIS, p. 3-314). The FEIS specifically identifies the Little Missouri National Grasslands as an example of an area where the potential for oil and gas production is identified as high within inventoried roadless areas (FEIS, p. 3-316). It also states that the prohibition on road construction and reconstruction will have no effect on current leases.

Contention 3. The simple matter of fact is the FS is trying to get away with incremental development and ignore cumulative impacts and connected actions. This decision to incrementally develop more of the Tracy Mountain IRA is a major federal action. It requires an EIS.

Response: As addressed above, development within the Tracy Mountain IRA has been addressed in two EISs. The DN (pp. 7-8) and EA (pp. 24-29) explain that the pre-existing conditions have already affected the southeastern portion of the IRA to the point that it no longer meets roadless criteria. These pre-existing conditions were established prior to the issuance of the DPG LRMP FEIS, where they were addressed as the existing condition. They were also discussed as potential effects in the FEIS for the SLMNG FEIS, which authorized leasing in the area. The EA for this project identifies the cumulative effects analysis area for the roadless resource as the southeastern portion of the Tracy Mountain IRA, as the impacts of oil and gas development are confined to this area (p. 25, Appendix 5). Cumulatively, the effects of the Upton 12-2 proposal in combination with the existing well sites, access roads, and reasonable foreseeable development will result in a continued reduction of the natural appearance and integrity; challenge; recreational opportunity and challenge; and opportunities for outdoor recreation roadless elements.

The FONSI (DN, pp. 10-12) identifies that this project is not a major federal action and it will not significantly affect the quality of the human environment, either individually or cumulatively. Therefore, an EIS is not needed at this time.

Issue 2. Wilderness Designation

Contention 1. The DN states, “the area could not be considered for wilderness designation for at least the life of the existing wells” (DN at 8). The EA and DN do not provide analysis or information that supports this claim, that the IRA’s roadless characteristics would not qualify it for wilderness consideration.

Response: The Upton Federal 12-2 project tiers to the new LRMP for the DPG, which addresses the issue of wilderness designation for the Tracy Mountain IRA. The ROD for the FEIS LRMP selected Alternative 3, modified. Under this alternative, the Tracy Mountain IRA was not identified as being suitable for wilderness and was allocated to non-wilderness prescriptions. The DN for the Upton Federal 12-2 project simply states that the preexisting condition has already impacted this portion of the IRA to the point where it does not meet roadless area criteria. Therefore, the area could not be recommended for wilderness designation for at least the life of the existing wells.

Contention 2. No where does the EA even delineate the areas that would still qualify as “roadless” either currently or following this and foreseeable proposals to degrade portions of the IRA.

Response: The EA for this project addresses the Tracy Mountain IRA, including the existing condition, and the direct, indirect and cumulative effects (pp. 24-25). The effects analysis focuses on the southeast portion of the IRA but does mention some of the pertinent information about the rest of the IRA (EA, pp. 24-29).

Contention 3. The EA DN erroneously assumes that an area’s roadless attributes and its wilderness attributes are the same. Just because a roadless area is not viewed by the FS as suitable for wilderness designation, based upon an evaluation of wilderness attributes, doesn’t mean it is no longer roadless.

Response: FSH 1909.12, Chapter 7, describes the process for identifying and evaluating potential wilderness in the National Forest System. The first step in the evaluation of potential wilderness is to identify and inventory all roadless, undeveloped areas that satisfy the definition of wilderness found in section 29(c) of the 1964 Wilderness Act. This was done in the LRMP FEIS for the DPG, which addressed the effects to the inventoried roadless area. Tracy Mountain IRA was not identified as being suitable for wilderness. However, most (91 percent) of the IRA was assigned to MA 1.31 (Non-motorized Backcountry Recreation), which acknowledges the characteristics of roadless and also allows for development of existing leases. Effects to the inventoried roadless characteristics are expanded upon in the EA, including road resources, infrastructure and mineral development.

Issue 3: Transportation Rule and Policy. Finally, the EA and DN do not demonstrate the federal actions consistency with the Transportation Rule and Policy (66 CFR 3206 and 3219).

Response: The Transportation Rule and Policy was addressed in the EA (p. 35) and DN (p. 13). The Roads Analysis for the project is in the project file (Folder 1, Docs. K-18 and M-28). The project is consistent with the Transportation Rule and Policy.

RECOMMENDATION

I have reviewed the record for each of the contentions addressed above and have found that the analysis and decision adequately address the issues raised by the appellants. I recommend the District Ranger’s decision be affirmed and the appellants’ requested relief be denied.

/s/ Richard F. Roberts
RICHARD F. ROBERTS
Appeal Reviewing Officer
Director of Ecosystem Assessment and Planning

