

INTERIOR BOARD OF LAND APPEALS

Wyoming Outdoor Council, et al.

156 IBLA 347 (April 26, 2002)

Title page added by:  
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**Editor's Note: appeal filed sub nom. Pennaco Energy, Inc. v DOI, Civ. NO. 02CV-116D (D. Wyo. June 20, 2002), REVERSED, (May 30, 2003)**

WYOMING OUTDOOR COUNCIL, ET AL.

IBLA 2000-241

Decided April 26, 2002

Appeal from a decision of the Acting Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management, dismissing a protest to an oil and gas lease sale. WY 3100 (922 Mistarka).

Reversed and remanded.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Competitive Leases

A BLM decision dismissing a protest of a competitive oil and gas lease sale will be reversed as to the three parcels for which the appellants established standing when the determination to offer the parcels for leasing was based on existing environmental analyses which either did not contain any discussion of the unique potential impacts associated with coalbed methane extraction and development or failed to consider reasonable alternatives relevant to a pre-leasing environmental analysis.

APPEARANCES: Daniel Heilig, Esq., and Thomas F. Darin, Esq., Lander, Wyoming, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; Charles L. Kaiser, Esq., and Charles A. Breer, Esq., Denver, Colorado, for intervener Pennaco Energy, Inc.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Wyoming Outdoor Council and Powder River Basin Resource Council (the Councils or appellants) have appealed the April 7, 2000, decision of the Acting Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), dismissing their January 27, 2000, protest to the offering of 49 parcels of land located within the Powder River Basin in Campbell, Johnson, and Sheridan Counties, Wyoming, at the February 1, 2000, competitive oil and gas lease sale. On October 6, 2000, the Board issued a decision dismissing the Councils' appeal as to all but three of

the sale parcels 1/ for lack of standing, granting their request for a stay of BLM's decision as to those three parcels, and ordering the Councils and BLM to serve all previously-filed documents on the purchasers of those three parcels. Wyoming Outdoor Council, 153 IBLA 379, 384, 389-90 (2000). By order dated November 14, 2000, the Board granted the motion to intervene filed by Pennaco Energy, Inc. (Pennaco), whose lease broker was the successful bidder on the three parcels at issue.

In August 1999, various interested parties nominated the subject lands for inclusion in the next available oil and gas lease sale. In response to these nominations, on September 28, 1999, the Acting Field Manager, Buffalo Field Office, BLM, issued separate but identical "Interim Documentation of Land Use Conformance and NEPA Adequacy" worksheets (DNA's) for each of the three parcels, assessing whether inclusion of the nominated parcels in the February 2000 oil and gas lease sale conformed to existing land use plans and whether existing documents prepared to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2) (1994), were adequate to support that proposal. 2/

In the DNA's, the Acting Field Manager found that the proposed action conformed to the October 4, 1985, Buffalo Resource Management Plan (RMP) and Environmental Impact Statement (EIS), which specifically authorized the continued leasing and development of Federal oil and gas in the

1/ The three parcels are WY-0002-082, WY-0002-092, and WY-0002-093. Lease WY-002-082 includes 39.83 acres of land in sec. 7, T. 48 N, R. 75 W., 6th PM, Campbell County; Lease WY-0002-092 encompasses 1,092.92 acres of land in secs. 4, 5, 8, 9, 17, and 18, T. 57 N., R. 77 N., 6th PM, Sheridan County; and Lease WY-0002-093 embraces 1,513.1 acres of land in secs. 14, 15, 22, 26, 27, and 35, T. 57 N., R. 77 N., 6th PM, Sheridan County.

2/ The DNA's are five-page forms consisting of specific questions and spaces for the responses. They were designed to allow BLM employees to "assess whether you can rely on existing NEPA documents for a current proposed action and, if so, assist you to record your rationale for your conclusion." Instruction Memorandum (IM) No. 99-149, appended as Ex. E to the Councils' Jan. 27, 2000, Protest, at 1. The IM cautions that BLM employees

should not assume that existing NEPA documents are adequate. Generally, the use of existing NEPA documents is appropriate when: a current proposed action previously was proposed and analyzed (or is part of an earlier proposal that was analyzed); resource conditions and circumstances have not changed; and there is no suggestion by the public of a significant new and appropriate alternative.

If you determine you can properly rely on existing NEPA documents, you must establish an administrative record that documents clearly that you took a 'hard look' at whether new circumstances, new information, or unanticipated environmental impacts warrant new analysis or supplementation of existing NEPA documents and whether the impact analysis is valid for the proposed action. The documentation can be concise but must adequately address the criteria.

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Id.

Buffalo Resource Area, and to the May 4, 1999, Wyodak Draft EIS, and identified those documents also as the applicable NEPA documents covering the proposed action. (DNA at 1-1.) As to the adequacy of the Buffalo RMP/EIS and the Wyodak Draft EIS for the current proposal, he relied on the Tenth Circuit Court of Appeals decision in Park County Resource Council, Inc. v. U.S. Department of Agriculture (Park County), 817 F.2d 609 (10th Cir. 1987), which, he stated, held that site-specific NEPA analysis was not possible absent concrete proposals, and that the filing of an application for permit to drill (APD) was the first useful point at which a site-specific environmental appraisal should be undertaken. (DNA at 1-2.) He found that sufficient alternatives had been analyzed in the existing NEPA documents, given current environmental concerns, interests, and resource values. Id. at 1-2, 1-3. As far as new information or circumstances were concerned, he indicated that, although future listings for threatened and endangered (T&E) species in the proposed lease areas were being discussed, there were no known new species at that time, adding that, given the existence of potential habitat for species that might be listed in the future, the special Lease Notice for T&E or other special status plants and animal species would be applied to the lease areas. Id. at 1-3.

The Acting Field Manager found that the interdisciplinary approach used in the existing NEPA documents continued to be appropriate for the proposed action. Id. In response to questions addressing whether the impacts of the current proposal were substantially unchanged from those identified in existing NEPA documents and whether those documents analyzed the proposal's site-specific environmental impacts, he again cited Park County for the proposition that site-specific analysis was unnecessary prior to the filing of an APD. Id. He further determined that the cumulative impacts of the proposed action were substantially unchanged from those analyzed in the Wyodak Draft EIS, although he noted that development greater than the maximum number of wells evaluated in that EIS was "questionable." Id. at 1-4. He also considered the numerous public meetings and hearings associated with the existing NEPA documents sufficient to provide ample public involvement for the proposed action. Id. The Acting Field Manager concluded that the proposed inclusion of the parcels in the February 2000 oil and gas lease sale conformed to the applicable land use plan and that current NEPA documentation fully covered the proposed action and satisfied NEPA's requirements. Id.

In a protest dated January 27, 2000, the Councils challenged BLM's offering of 49 parcels located in Campbell, Johnson, and Sheridan Counties, including the 3 parcels at issue in this appeal, at the February 1, 2000, competitive oil and gas lease sale. They alleged that BLM had violated NEPA by offering the parcels for lease without first preparing an EIS because the leases would permit surface occupancy and thus represented a full and irretrievable commitment of resources which, under Connor v. Burford (Connor), 848 F.2d 1441 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989), triggered the requirement to prepare an EIS. 3/ The Councils

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3/ The Councils contended that Informational Bulletin (IB) 92-198, dated Jan. 21, 1992, which was signed by the BLM Assistant Director, Energy and

opined that coalbed methane (CBM) development was the most likely predominant use for the proposed leases and charged that, although the 1985 Buffalo RMP/EIS had addressed the environmental effects of oil and gas leasing in general, it had not analyzed the impacts of CBM extraction because such extraction was not a contemplated use in 1985. They argued, therefore, that the Buffalo RMP/EIS could not serve as the required pre-leasing EIS especially since the effects and environmental impacts of CBM extraction and development were not comparable to those of other oil and gas development.

The Councils also asserted that BLM had violated the provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732 (1994), and its implementing regulations, requiring that all resource management decisions conform to the approved RMP. They contended that since the terms, conditions, and decisions in the Buffalo RMP did not even contemplate CBM development, extraction of CBM could not be in conformance with the RMP.

In his April 7, 2000, decision dismissing the protest, the Acting Deputy State Director found that the proposed oil and gas leasing conformed to the Buffalo RMP, as amended or maintained, which specifically provided for oil and gas exploration and development. He determined that authorized oil and gas exploration and development included the production of CBM, as well as oil and natural gas produced from other types of reservoirs such as limestone and sandstone, and that "methane" and "natural gas" were used interchangeably, regardless of the source. He disagreed with the Councils' assertion that CBM production differed significantly from other methane or natural gas production or had unique production problems because of produced water, stating that water production associated with oil and gas production was commonplace in the oil and gas industry and methods to deal with it had been well established decades before completion of the RMP. He rejected the Councils' allegation that BLM had not fully evaluated the unique, potentially serious environmental impacts of CBM extraction as unsupported by known scientific and engineering principles and facts. He concluded that BLM had taken the requisite hard look at the environmental effects of leasing the parcels through its NEPA analyses and was fully informed of the environmental consequences of its action. (Decision at 1-2.)

The Acting Deputy State Director also relied on the Park County decision which, he stated, "held that an [EIS] need not be prepared before issuance of oil and gas leases, particularly where the leases were issued for unexceptional land with no unusual resource values," such as the land proposed for leasing here. (Decision at 2-3.) He distinguished Connor, supra, the Ninth Circuit Court of Appeals decision cited by the Councils,

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fn. 3 (continued)

Mineral Resources, and addressed to all BLM State Directors, explicitly adopted the rule in Connor when it stated at page 1: "The simple rule coming out of the Connor v. Burford case is that we will comply with NEPA and ESA [Endangered Species Act] prior to leasing." IB 92-198 at 1.

on its facts because it involved a large and nearly pristine area containing endangered species. He added that, even if there were a conflict between the Tenth Circuit decision in Park County and the Ninth Circuit decision in Connor, BLM in Wyoming followed the law of the Tenth Circuit, the circuit in which it was located, not the law of other circuits. (Decision at 3.)

In their Statement of Reasons for Appeal (SOR), which incorporates the "Success on the Merits" portion of their Notice of Appeal and Request for Stay (NA/Stay Request), the Councils argue that BLM violated both NEPA and FLPMA in conducting the lease sale. As to NEPA, they contend that since the leases were sold without no surface occupancy (NSO) stipulations, BLM was required to prepare an EIS prior to the sale because the sale of non-NSO leases represents a full and irretrievable commitment of resources, citing Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Circ. 1983), Connor, and IB 92-198, which, the Councils submit, directs all BLM State Offices to follow the rule in Connor. They maintain that because CBM extraction and development, which were not contemplated land uses in 1985, will be the predominant uses of the sold leases, the 1985 Buffalo RMP/EIS cannot serve as the required EIS because it did not mention, much less adequately analyze, any of the unique and potentially significant impacts of CBM extraction and development, the existence of which BLM itself acknowledges in the Wyodak Draft EIS. According to the Councils, these impacts include "significant groundwater and aquifer depletion, the concurrent impacts on surface water quality and quantity, aquifer recharge, effects on distant water wells, methane migration to the ground surface (with concomitant effects on human health, soils, vegetation and wildlife) and underground fires via spontaneous combustion." (NA/Stay Request at 10.)

The Councils specifically criticize three statements in the Acting Deputy State Director's decision. First, citing excerpts from BLM's "Budget Justifications and Annual Performance Plan, FY 2001," attached to their NA/Stay Request as Exhibit 8, the Councils dispute his claim that the decision authorizing leasing of the parcels was in conformance with the RMP, as maintained or amended, pointing out that BLM publicly admitted to the U.S. Congress that CBM development in the Powder River Basin had not been adequately addressed in the RMP/EIS. The Councils add that BLM cannot rely on the concept of RMP maintenance to validate the leasing approval because the regulations provide that maintenance is "limited to further refining or documenting a previously approved decision incorporated in the plan. Maintenance shall not result in expansion in the scope of resource uses or restrictions, or change the terms, conditions and decisions of the approved plan." 43 CFR 1610.5-4. According to the Councils, BLM's admission that CBM extraction differs from deep gas drilling and has not been documented or analyzed in the existing RMP/EIS thwart its reliance on RMP maintenance to sustain its leasing decision.

Second, the Councils challenge the Acting Deputy State Director's representation that CBM extraction is not significantly different from the production of other methane, citing two BLM documents, attached to the

NA/Stay Request as Exhibits 9 and 10, 4/ which, they submit, demonstrate that BLM itself recognizes the substantial differences between CBM and conventional gas production.

Third, the Councils disagree with the Acting Deputy State Director's statement that BLM in Wyoming must follow the law of the circuit where it is located, *i.e.*, the Tenth Circuit's Park County decision, and not the law of another circuit, specifically the Ninth Circuit's Connor decision. That statement, they argue, ignores IB 92-198, which they characterize as directing all BLM state offices to follow Connor. (Stay Request at 14-15; SOR at 2.)

The Councils also assert that BLM violated FLPMA because CBM development is not in conformance with the Buffalo RMP. They contend that the RMP must be amended before CBM extraction can be authorized and the leases issued.

In its Answer, BLM asserts that "in terms of NEPA documentation, it is fair to say that the Powder River Basin is probably the most over-studied area in the United States, if not in the world." (Answer at 11.) BLM states that four regional EIS's, as well as numerous other EIS's and environmental assessments (EA's), have been prepared and that groundwater has also been thoroughly studied in detailed documents required for the permitting of large surface coal mines in the basin. BLM points to the thorough analysis of the environmental impacts of CBM production from coal formations in the Powder River Basin found in the November 1999 final Wyodak EIS and questions how, given that EIS, the Councils can argue that there has been insufficient NEPA analysis for the challenged oil and gas lease sale. BLM maintains that it complied with NEPA by the preparing the Wyodak EIS and that the Councils have failed to show any defect in that document.

BLM disputes the Councils' allegation that the Buffalo RMP/EIS is defective because it did not consider the environmental effects of CBM production and must be amended before the lease sales can be authorized. BLM asserts that the 1985 RMP/EIS designated more than 99 percent of the lands in the Buffalo Resource Area as available for oil and gas leasing and production, and that most of that land was then and still is sparsely populated, unexceptional prairie, fit mainly for grazing and mineral production. While the character of the land and the proportion available for leasing has not changed in the last 15 years, BLM contends that the RMP has been updated by a process known as "maintenance" pursuant to which additional analyses generated by new NEPA studies performed for unanticipated projects were added to the original RMP, thus extending that RMP's useful life. BLM explains that it utilizes maintenance when RMP

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4/ Exhibit 9 is a copy of a document signed by three BLM officials in June 1990 proposing "Plan Change No. 2," which the Councils represent as relating to the Buffalo RMP. That document states under the heading "CHANGE:"  
 "Add environmental analysis of [CBM] development. This type of technology was not considered in the RMP." Under the heading "REASONS," it states "RMP did not cover this non-traditional type of oil and gas activity."

decisions to use specific lands for particular purposes, such as oil and gas leasing, have not changed but additional information has become available, citing, as an example, the Wyodak EIS.

In reply, the Councils define the FLPMA non-conformity issue as whether use of the land for CBM extraction and the environmental consequences of that use were properly and thoroughly considered in the 1985 RMP/EIS. They contend that, because BLM has admitted that these issues were not addressed in the 1985 RMP/EIS, any CBM extraction is illegal under FLPMA until the RMP is amended. They deny that interim maintenance actions have cured this defect, pointing out that under 43 CFR 1610.5-4, maintenance applies only where there are minor changes in data and cannot expand the scope of resource uses. CBM extraction constitutes just such an expansion, they contend.

The Councils also challenge BLM's reliance on the Wyodak EIS and other CBM EA's and EIS's in the Powder River Basin to satisfy NEPA requirements for the leasing decision. They differentiate between those project-level NEPA documents and required pre-leasing NEPA documentation. The Councils submit that project-level NEPA documents consider how to proceed with CBM extraction on previously sold leases, not whether to lease in the first place, and thus do not address various leasing alternatives and other criteria that must be considered in pre-leasing NEPA documents, including lease stipulations, stipulation waivers, exceptions and modifications, NSO lease areas, non-NSO lease areas, and areas not open to any leasing at all, citing BLM Handbook, H-1624-1, entitled "Planning For Fluid Mineral Resources."

The Councils assert that none of those NEPA documents qualifies as the requisite NEPA document for the leasing decision since they did not take a hard look at those pre-leasing issues. As to whether Park County or Connor controls in this case, the Councils argue that, even if Park County applies, the result here would not change because that case involved a pre-leasing EA which, according to the court, demonstrated that BLM had taken the requisite hard look at the environmental consequences of oil and gas leasing, while no EA discussing the impacts of CBM extraction was prepared for the specific lease sale challenged here. For that reason, the Councils assert, BLM violated NEPA under Park County, as well as under Connor.

In its response to the Councils' appeal, Pennaco argues that BLM complied with NEPA before offering the disputed parcels for oil and gas leasing because the analysis in the Buffalo RMP/EIS and Wyodak Draft EIS

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fn. 4 (continued)

Exhibit 10 is a copy of Colorado State Office Notice to Lessees 88-2, dated Sept. 26, 1988, stating at page 1: "Production characteristics of [CBM] gas wells are radically different than gas completed in conventional reservoirs."

constitute the requisite hard look at the potential environmental effects of that action, citing among other sources, the Affidavit of Richard A. Zander, the Assistant Field Manager for Minerals and Lands, Buffalo Field Office (Zander Affidavit), attached to its response as Exhibit B, as support for that conclusion. The company contends that the RMP/EIS addressed the potential environmental impacts of oil and gas activities varying widely in produced water quantity, surface requirements, and hydrocarbon characteristics, and that the Wyodak Draft EIS was prepared specifically to analyze the environmental effects of CBM development. Contrary to the Councils' assertions, Pennaco maintains that CBM activities are not unique but fall within the range of those for other oil and gas wells and that the impacts from CBM activities are neither devastating nor largely unstudied, pointing out that numerous comprehensive and thorough studies addressing the consequences of CBM activities have been completed. Pennaco further disputes the Councils' contention that BLM must ignore the analysis contained in the Wyodak Draft EIS because that document is a project-level NEPA document, arguing that the Draft EIS and the analyses it contains are highly relevant to BLM's leasing decision.

Pennaco asserts that both judicial and Board precedent establish that the Tenth Circuit decision in Park County, rather than the Ninth Circuit decision in Connor, controls this leasing decision because this case arises in the Tenth Circuit. Pennaco submits that IB 92-198, cited by the Councils, does not undermine this conclusion because that bulletin merely states that BLM will comply with NEPA prior to leasing, which BLM does in the Tenth Circuit by following Park County. Pennaco contends that, in any event, information bulletins simply disseminate information of interest to BLM employees and do not contain BLM policy, directives, or instructional material. It argues that, even if Connor did apply, BLM has satisfied that test as well as the Park County test because the Buffalo RMP/EIS addressed oil and gas leasing and activities and the Wyodak Draft EIS evaluated CBM production, the impacts of that development, and mitigation and monitoring requirements.

Pennaco also contends that BLM's decision to offer the parcels for oil and gas leasing conforms to the Buffalo RMP/EIS, which authorizes the leasing of the lands embraced by the parcels for oil and gas development, and thus fully complies with FLPMA. It submits that the authorized oil and gas development includes the production of oil and gas from any formation where gas is found, pointing out that the Department has expressly rejected any distinction between CBM and gas produced from other formations. The Councils' non-conformance arguments are meritless, Pennaco maintains, because they have previously been rejected in a Board order issued in another appeal (Wyoming Outdoor Council, IBLA 2000-178 (Sept. 28, 2000)), mischaracterize the leases at issue as CBM leases instead of oil and gas leases, and assume a level of detail in land use plans far exceeding the broad, objective-oriented statements envisioned by FLPMA.

In a reply to Pennaco's response, the Councils deny that the extraction methods and the impacts of CBM production are the same as those of conventional deep natural gas production which were studied in the Buffalo RMP/EIS. To the contrary, they assert that the recognized unique impacts

of CBM production, which were not even contemplated, much less addressed, in the RMP/EIS, include the high salinity and sodium adsorption rate values of the produced water which affect the availability of the water for plant uptake; the aquifer depletion and recharge caused by the withdrawal of large amounts of water associated with CBM extraction; the massive reservoir construction and consequent surface disturbance occasioned by CBM production; and the possibility of methane venting. See Appellants' Reply Brief at 2-3 and Exs. 1-17. They also identify some of the differences between conventional wells and CBM wells, including those designed to handle the significant volume of water produced by CBM wells. See Appellants' Reply Brief at 3-4 and Exs. 18 and 20.

The Councils dismiss Pennaco's reliance on the Wyodak Draft EIS as adequate to serve as the requisite pre-leasing NEPA document. They note that the Draft EIS is a project-level NEPA document, prepared after an initial leasing decision had been made and leases issued, and thus did not need to analyze issues critical to a pre-leasing NEPA assessment, including lease stipulations, stipulation waivers, exceptions, and modifications, the development of NSO and non-NSO lease areas, parcels requiring conditions of approval at the APD level, and areas closed to all fluid mineral leasing.

They point out that the Board specifically rejected BLM's identical reliance on the Wyodak Draft EIS in the decision partially granting their stay request, citing Wyoming Outdoor Council, 153 IBLA at 388-89. The Councils challenge the sufficiency of the DNA's prepared for the parcels, pointing out that these documents are mere checklists, which depend on the Buffalo RMP/EIS and the Wyodak Draft EIS to justify no further NEPA review, a conclusion which the Councils vigorously dispute. In the Councils' opinion, none of the NEPA documents relied on by BLM establishes that BLM took the hard look necessary to justify offering the parcels for leasing.

The Councils also question the value of the Zander Affidavit, noting that, although Zander claims in the affidavit that the impacts of CBM extraction were adequately addressed in the Buffalo RMP/EIS and the Wyodak Draft EIS, he previously had acknowledged that the RMP/EIS had not considered this nonconventional type of natural gas extraction and its singular impacts. They further reinforce their contention that offering the parcels for leasing does not conform to the Buffalo RMP/EIS because that action was not specifically provided for in the RMP nor is it clearly consistent with the terms, conditions, and decisions of that plan. The Councils distinguish the Board's order in IBLA 2000-178 as a one-judge order issued in response to a stay petition, which was wrongly decided on the FLPMA non-conformity argument.

In an answer to the Councils' reply, Pennaco asserts that appellants have failed to carry their burden of demonstrating with objective proof that BLM failed to consider a substantial environmental impact of leasing the subject parcels. It also argues that appellants have not addressed the Board's holdings rejecting similar NEPA challenges to BLM leasing decisions based on less thorough environmental analyses than those BLM utilized here. According to Pennaco, appellants' silence highlights the fact that the environmental impact data BLM possessed before offering the parcels for

leasing far exceeded the data it routinely obtains in conducting lease sales. Pennaco considers meritless the Councils' assertion that BLM cannot consider the results of recent studies addressing the very activities and impacts to which they object, including those reflected in the Wyodak Draft EIS. It argues that the Councils have cited no authority for their contention that BLM cannot consider relevant studies completed only months before the challenged decision.

Pennaco notes that the Wyodak Draft EIS was designed to be a programmatic analysis of the environmental effects of CBM activities addressing widespread and cumulative impacts, to which ensuing site-specific analyses could be tiered, and asserts that just this type of tiered decision-making occurred here when BLM used the Draft EIS to assess the potential environmental impacts of leasing the parcels. Since the recent studies relied upon by BLM involve the very lands at issue and consider the water and air impacts forming the core of the Councils' concerns, Pennaco maintains that those studies cannot be considered worthless or irrelevant.

Pennaco repeats that BLM has the legal authority to prepare an RMP that discusses oil and gas activity in general without specifically mentioning the drilling of oil and gas wells in different formations, as it did in the Buffalo RMP/EIS, and that, since CBM is gas leased under Federal oil and gas leases and subject to oil and gas regulations, BLM's decision to offer the parcels for oil and gas leasing conforms to the RMP.

In response to Pennaco's answer, the Councils assert that, in accordance with BLM Supplemental Program guidance, leasing-level NEPA analysis must address, among other things, whether leasing should occur in certain areas in the first place, which the Wyodak Draft EIS did not do because leases had already been issued, thus removing the no action alternative from among the viable alternatives. Pennaco's attempt to characterize that EIS as programmatic and designed to cover all cumulative impacts of other wells, projects, and leasing decisions outside the boundaries of the project fails, the Councils submit, because that document assessed the impacts of 5,000 CBM wells, and BLM now predicts 51,000 CBM wells will be drilled in the Powder River Basin.

The Councils also question why, if the Buffalo RMP/EIS covered CBM, BLM is currently proposing to amend the RMP to account for CBM issues, including reexamining areas open or closed to oil and gas leasing, lease stipulations, and necessary mitigation measures. According to the Councils, BLM has now publicly admitted that the Buffalo RMP/EIS does not address CBM issues and needs to be amended, citing 65 FR 69954-56 (Nov. 21, 2000). The Councils maintain that, since the Wyodak Draft EIS cannot support BLM's leasing decision and the Buffalo RMP/EIS did not even mention, much less address, CBM issues, those documents do not provide the requisite NEPA analysis for BLM's leasing decision.

In this case, BLM did not prepare either an EIS or an EA specifically addressing the proposed leasing of the disputed parcels. Instead, BLM prepared identical DNA's for each of the parcels nominated for leasing and, without any site-specific assessments, determined that existing NEPA

documentation, specifically the 1985 Buffalo RMP/EIS and the Wyodak Draft EIS, adequately analyzed the impacts of the proposed leasing for NEPA purposes. Therefore, BLM decided to include the disputed parcels in the February 2000 competitive lease sale without conducting any further NEPA review. Thus, the primary issue in this case is whether BLM correctly determined that the Buffalo RMP/EIS and the Wyodak EIS adequately analyzed the environmental effects of the proposed inclusion of the affected parcels in the February 2000 competitive lease sale or whether the agency violated NEPA by failing to undertake additional site-specific environmental reviews before deciding to offer the parcels for oil and gas leasing.

We find significant omissions in both the Buffalo RMP/EIS and the Wyodak EIS which render those documents insufficient to provide the requisite pre-leasing NEPA analysis for the sale parcels in question. Accordingly, for the reasons stated below, we conclude that BLM's failure to conduct further environmental analyses violated its duties under NEPA and reverse the Acting Deputy State Director's decision dismissing the Councils' protest as to the three parcels at issue.

[1] The Board has held that the appropriate time for considering the potential environmental impacts of oil and gas exploration and development under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), is when BLM proposes to lease public lands for oil and gas purposes because leasing, at least without NSO stipulations, constitutes an irreversible and irretrievable commitment of resources by permitting surface disturbing activities in some form and to some extent. Colorado Environmental Coalition, 149 IBLA 154, 156 (1999), and cases cited; see also Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983). In this case, the 1985 Buffalo RMP/EIS addressed the impacts of conventional oil and gas leasing and designated lands, including those within the disputed parcels, as open to oil and gas development. 5/

The question before us is whether this RMP/EIS satisfied section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994). The adequacy of an EIS under that section depends on whether it constitutes a detailed statement which takes a hard look at the environmental consequences of the proposed action, considering all relevant matters of environmental concern. Colorado Environmental Coalition, 149 IBLA at 156; Colorado Environmental Coalition, 142 IBLA 49, 52 (1997), and cases cited. The EIS must fulfill the primary purpose of NEPA which is to ensure that a Federal agency, in exercising its discretion to approve or disapprove a project, is fully informed of the environmental consequences of such action. See 40 CFR 1500.1(b) and (c); Natural Resources Defense Council v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987); Colorado Environmental Coalition, 142 IBLA at 52. The Buffalo RMP/EIS addressed general oil and gas leasing, analyzed the impacts of conventional oil and gas exploration, production, and development, and, based on that analysis, authorized the continued leasing and

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5/ Since a pre-leasing EIS was prepared in this case, we need not decide whether Connor or Park County controls here. Suffice it to say that, even under Park County, the pre-leasing NEPA documentation, whether in the form of an EA or an EIS, must take a hard look at the environmental consequences of the proposed action. See Park County, 817 F.2d at 622.

development of Federal oil and gas in the Buffalo Resource Area. 6/ The RMP/EIS did not specifically discuss CBM extraction and development, which were not contemplated uses in 1985, although they are the planned uses for the leases issued for the disputed parcels. See Appellants' Reply Brief, Ex. 20.

The Acting Deputy State Director concluded, and BLM and Pennaco argue, that the techniques and impacts associated with CBM extraction and production are not significantly different from those analyzed in the Buffalo RMP/EIS. We find, however, that not only does the record amply demonstrate that the magnitude of water production from CBM extraction in the Powder River Basin creates unique problems and that CBM development and transportation present critical air quality issues not adequately addressed in the RMP/EIS, but BLM itself has also acknowledged the inadequacy of the RMP/EIS as far as the analysis of CBM issues is concerned. See, e.g., NA/Stay Request, Exs.3-6, Ex. 8-9; Appellants' Reply Brief, Exs. 18; see also Wyoming Outdoor Council, 153 IBLA at 388. Because the Buffalo RMP/EIS failed to take the requisite hard look at the impacts associated with CBM extraction and development, which clearly are relevant matters of environmental concern in this case, BLM could not rely on that document to satisfy its NEPA obligations for the proposed leasing decisions at issue here.

In apparent recognition of the deficiencies in the Buffalo RMP/EIS, BLM also relies on the October 1999 Wyodak Final EIS, which incorporates the Draft EIS and adds only changes and new information and analysis responsive to public comments, to justify its decision to issue the leases without further NEPA analysis. The Wyodak EIS is a project-level EIS designed to analyze the impacts of developing Federal CBM properties by drilling, completing, operating, and reclaiming approximately 5,000 new productive CBM wells and related production facilities in the eastern Powder River Basin within Campbell and parts of Converse, Johnson, and Sheridan Counties, Wyoming. Since leases authorizing surface occupancy had already been issued for the lands involved in the proposed action, the Department lacked the authority to deny all Federal drilling activity based on environmental concerns unrelated to threatened or endangered species. See Wyodak Draft EIS at 4-130; Wyodak Final EIS at 2-26; November 1999 Wyodak Coal Bed Methane Project EIS Record of Decision at 27; see also National Wildlife Federation, 150 IBLA 385, 403 (1999). Given that the

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6/ We note that, while an RMP may generally designate lands as available for leasing, BLM may, when considering whether or not to lease particular parcels within those lands, refuse to lease on the basis of environmental considerations. Marathon Oil Co., 139 IBLA 347, 356 (1997). In this regard, we note that BLM is currently preparing an EIS for oil and gas development, including CBM, in the Powder River Basin which will evaluate and possibly amend RMP decisions concerning areas open or closed to oil and gas development, lease stipulations or mitigation measures necessary for CBM development, and other appropriate decisions. See 65 FR 69954 (Nov. 21, 2000); see also Draft Environmental Impact Statement and Draft Planning Amendment for the Powder River Basin Oil and Gas Project (WY-070-02-065), dated January 2002, at x-xii.

156 IBLA 358

IBLA 2000-241

leasing decisions had already been made and the leases issued, the

EIS did not consider reasonable alternatives available in a leasing decision, including whether specific parcels should be leased, appropriate lease stipulations, and NSO and non-NSO areas. <sup>7/</sup> Thus, despite the Wyodak EIS' detailed analysis of the impacts of CBM development, which we note parenthetically undercuts BLM's claim that the impacts of CBM extraction are the same as those of other methane production, that document's failure to consider reasonable alternatives relevant to a pre-leasing environmental analysis fatally impairs its ability to serve as the requisite pre-leasing NEPA document for these parcels.

Since the existing NEPA documents relied upon by BLM, whether viewed separately or taken together, do not constitute the requisite hard look at the environmental consequences of the proposed action, BLM was required to conduct further NEPA analysis before deciding whether to approve the sale of the parcels at issue. The DNA's, dependent as they were on the Buffalo EIS/RMP and the Wyodak EIS, fail to even identify, much less independently address, any of the relevant areas of environmental concern or reasonable alternatives to the proposed action and thus do not satisfy BLM's NEPA obligations in this case. Accordingly, we reverse the Acting Deputy State Director's dismissal of the Councils' protest as to the parcels in question and remand the matter to BLM for further appropriate action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed as to parcels WY-002-082, WY-002092, and WY-002-093, and the matter is remanded to BLM for additional appropriate action consistent with this opinion.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

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<sup>7/</sup> See note 6, *supra*.