

INTERIOR BOARD OF LAND APPEALS

Southern Utah Wilderness Alliance

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SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2000-358

Decided June 16, 2003

Appeal from a decision of the Deputy State Director, Utah State Office, Bureau of Land Management, affirming on State Director Review a Decision Record/Finding of No Significant Impact issued by BLM's Vernal District Office. SDR UT 00-5, UTU-76912, UTU-77673.

Affirmed.

1. Appeals: Generally--Rules of Practice: Appeals: Standing to Appeal

Under 43 CFR 4.410(a), a party to a case who is adversely affected by a BLM decision has a right of appeal to the Board. Where an organization commented on an environmental assessment and protested a finding of no significant impact, and submitted affidavits of members showing that they would be adversely affected by a BLM decision, the Board will not dismiss the appeal for lack of standing.

2. Administrative Practice--Environmental Quality: Generally--Federal Land Policy and Management Act of 1976: Land Use Planning--Oil and Gas Leases: Drilling

Where an analysis of a resource management plan (RMP) indicates that the location of a proposed well is within an area open to oil and gas leasing without special stipulations, and the RMP identifies an anticipated range of annual well approvals, the Board will not find that the projected number is a mandatory maximum which is violated by approval of a particular well.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--Oil and Gas Leases: Drilling

When making a determination whether a proposed action will have a significant effect on the human environment, the

cumulative effect of the proposed action and other actions not connected with the proposed action must be taken into consideration. A cumulative impact is one which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions and can result from individually minor but collectively significant actions taking place over time. The Board may affirm BLM's conclusion that the possible cumulative impact of a future action need not be considered significant when the reasonably foreseeable future action is speculative.

4. Environmental Policy Act--Environmental Quality:  
Environmental Statements--Oil and Gas Leases: Drilling

Connected actions are closely related and should be discussed in the same environmental impact statement if they include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.

5. Environmental Quality: Environmental Statements--National  
Environmental Policy Act of 1969: Environmental Statements

Section 102(2)(E) of NEPA, 42 U.S.C. § 4332 (2)(E) (2000), requires consideration of "appropriate alternatives" to a proposed action, including the no action alternative. In deciding whether BLM need not consider the "no action" alternative in an EA considering an application for permit to drill a well on a Federal oil and gas lease, the appropriate inquiry for BLM is whether the lease was issued after full environmental review and the no action alternative was already considered in a document to which the EA is tiered. The Board may affirm a finding of no significant impact where the no action alternative was considered.

6. Federal Land Policy and Management Act of 1976: Wilderness  
Act--Oil and Gas Leases: Drilling

Where BLM prepares an environmental assessment regarding the environmental impact of a proposed well to be drilled on a Federal oil and gas lease in an area inventoried for wilderness

suitability but not designated as a wilderness study area, BLM is not required to re-inventory the land for wilderness characteristics. The Federal Land Policy and Management Act, 43 U.S.C. § 1711(a) (2000), not the National Environmental Policy Act, controls the Secretary's wilderness inventory authority, and the Board has no supervisory authority over BLM to compel a reinventory.

7. Federal Land Policy and Management Act of 1976: Land Use Planning--Rights-of-Way: Oil and Gas Pipelines

Where BLM approves a right-of-way for a pipeline based on an environmental assessment which discusses impacts from the pipeline on a case-by-case basis in conjunction with its consideration of associated road development, the decision to approve the pipeline right-of-way may be affirmed.

APPEARANCES: W. Herbert McHarg, Esq., Moab, Utah, for appellants; James E. Karkut, Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Joe Glennon, Billings, Montana, for intervenor Retamco Operating Inc.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Southern Utah Wilderness Alliance (SUWA) appeals from an August 25, 2000, decision of the Deputy State Director (DSD), Utah State Office, Bureau of Land Management (BLM), affirming a July 3, 2000, Decision Record/Finding of No Significant Impact (DR/FONSI) issued by BLM's Vernal District Office. The decision approved an application for permit to drill (APD) the Rockhouse 11-31 well, with a right-of-way (ROW) for an access road to the well (UTU-76912), and an ROW for a pipeline (UTU-77673) on the basis of Environmental Assessment (EA) UT-080-1999-69.

Background and Statement of Relevant Facts

Based upon a February 24, 1997, competitive lease bid, on March 14, 1997, BLM issued oil and gas lease UTU-76281 to Retamco Operating, Inc., effective April 1, 1997. The lease covers 429.2 acres of land in lots 1-4, sec. 30, and the E1/2 W1/2 lots 1-4, sec. 31, in T. 10 S., R. 23 E., Salt Lake Meridian, in Uintah County, Utah. (Lease UTU-76281, submitted as attachment to Nov. 14, 2001, letter from BLM to IBLA.) The lease granted the "exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas" on the leased lands "together with the right

to build and maintain necessary improvements thereupon.” *Id.* The lease did not contain a stipulation prohibiting surface occupancy (a “no surface occupancy” (NSO) stipulation). *See* 43 CFR 3101.1-3. On October 19, 1998, Retamco submitted an APD for the Rockhouse 11-31 well in the NE1/4 SW1/4 sec. 31, dated September 15, 1998.<sup>1/</sup> The APD stated that a “10 Point Drilling Program” and “13 Point Surface Use Plan” were attached.<sup>2/</sup>

In March 1999, BLM announced its intention to prepare a statewide environmental impact statement (EIS) and multiple resource management plan amendments for a possible wilderness study area (WSA) designation of up to 136 wilderness inventory units on approximately 2.6 million acres of public lands within Utah. This acreage included an area identified as the White River Wilderness Re-Inventory Unit (WRU). *See* 64 FR 13439 (Mar. 18, 1999).<sup>3/</sup> The White River WRU comprises 15,800 acres in eastern Uintah County, approximately 30 miles south of Vernal, Utah. (EA at 10.) The Rockhouse well was proposed on lands located within the WRU.

On April 15, 1999, the Solicitor of the Department of the Interior sent a memorandum to the Utah State Director, BLM, with regard to the 1999 wilderness inventory lands:

While the planning process is being completed on lands found to have wilderness characteristics in the 1999 Wilderness Inventory, the management prescriptions of existing land management plans do not change. For example, if current land management plans have designated lands open for mineral leasing, they remain open for leasing. Management prescriptions may be changed only through amendment of the land management plans, following the procedures of section 202 of FLMPA and implementing regulations at 43 CFR Subpart 1610.

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<sup>1/</sup> Ultimately, Retamco transferred an 80% or 100% share of its working interest in the lease, or the entire lease, to Texacoma Oil and Gas Corporation of Dallas, Texas. (Retamco Brief at 2, 65; *c.f.*, Dec. 28, 1999, Letter of Texacoma to BLM (Purchase Contract for Lease, Mar. 1999).)

<sup>2/</sup> A copy of the APD without the referenced attachments was placed in the case file for UTU-77673, for the surface pipeline ROW.

<sup>3/</sup> Section 201(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1711(a) (2000), requires the Secretary of the Interior to maintain an inventory of all public lands and their resource values.

In completing its Environmental Assessment (EA) or Environmental Impact Statement (EIS) on any proposed action within inventory areas, the BLM should address whether the approval of the proposed action would harm existing wildlife characteristics so as to negate the eligibility of the lands for wilderness designation in the future. \* \* \* If BLM determines that the proposed action would harm wilderness characteristics so as to negate the eligibility of the lands for wilderness designation, the BLM must consider among its alternatives in its EA or EIS the no action alternative, which would preserve the land's eligibility for wilderness designation.

On August 31, 1999, Retamco submitted an amended "13 Point Surface Use Plan" for the Rockhouse well. This plan described the need for road and pipeline ROWs. A handwritten note in red ink on a copy of the lease attached to this Plan, noted that "[w]hen this APD was filed, it did not include a request for the pipeline. 9-14-99."

In November 1999, BLM halted its statewide Utah wilderness inventory review and shifted its focus to a regional approach, beginning with approximately 815,000 acres in the southeast portion of the State. See 64 FR 59787 (Nov. 3, 1999). This notice indicated that the White River WRU was one of four regional groupings deferred for future study. Id. at 59788.

In 2000, BLM prepared draft and final EAs for the APD for the Rockhouse 11-31 well, with necessary ROWs for an access road and a pipeline on lease UTU-72681. The proposed action included the Rockhouse well, and called for a four-inch surface steel pipeline of 11,000 feet in length and a road or road improvements 9,204 feet in length. The access road and pipeline would travel south from the well-site and the lease into secs. 5, 8, and 9 of T. 11 S., R. 23 E., Salt Lake Meridian. Approximately two thousand feet of the access road lie within the proposed White River WRU, in the above-described secs. 31 and 5. (EA at 10.) The pipeline location is depicted in Map A as lying along or within the same corridor as the access road. (EA at 3).

The EA considered the impact of the proposed well and road development on the White River WRU. The EA stated that during the consideration of the wilderness inventory, Departmental

policy is that while the planning process is being completed, the management prescriptions of existing land management plans still apply to these units, but the BLM will pay careful and particular attention to development proposals that could limit Congress' ability to

designate the units as wilderness. Therefore, BLM considers actions proposed in the inventory units on a case-by-case basis to determine the potential impacts on wilderness characteristics.

(EA at 11.)

The EA identified impacts to the WRU from the road and well as follows:

The proposal would directly disturb 5.8 acres or 0.0004 percent of the [WRU]. \* \* \* The proposed well and road would be noticeable for the life of the project or an estimated 30 years and for 15 to 20 years after the well is abandoned when the pinyon and juniper trees would reach sufficient size to blend into the existing landscape. Considering the topographic and vegetative screening of the disturbed areas by pinyon and juniper trees, the estimated indirect or offsite effect on naturalness is that the road and well pad intrusions would be noticeable on about one acre or 0.00006 percent of the inventory unit.

Noise from equipment and traffic on the access road would reduce the quality of the opportunity for solitude in a small portion of the inventory unit during the construction and drilling phases of the proposed action. However, this effect would be temporary and last only 44 days.

Over all, the drilling and production of the single proposed well would introduce intrusions on the natural appearance of the area as viewed from less than 1 percent of the 15,800-acre wilderness inventory unit. As a whole, the intrusions in the unit would remain substantially unnoticeable \* \* \* therefore the proposed action would not affect Congress's ability to designate the remainder of the inventory unit as a wilderness area.

(EA at 13.) The EA proposed by way of mitigation the use of noise muffling equipment and that drilling and other work take place outside of a 6 week period between May 1 and June 15, when recreation levels were high. Id.

The land on which the Rockhouse well would be sited is located within the Book Cliffs Resource Area (BCRA) governed by a 1985 RMP for the BCRA. The EA discussed the conformance of the proposed well and road with the RMP for the BCRA, stating that the "proposed action would be in conformance with the Book Cliffs Resource Management Plan (BCRMP) (1985) and the terms of the lease." (EA at 2.) The BCRMP is composed of a Book Cliffs Final Environmental Impact Statement (FEIS) and the Record of Decision (ROD) for the RMP. Those documents

addressed mineral resource development within the BCRA and assumed the drilling of up to 80 new oil and gas wells per year. (FEIS at 145.) The BCRMP indicated that both the existing management of the area in which the well and road would be located, and management chosen under the “balanced use” alternative, permitted oil and gas mineral development with standard conditions and no special restrictions. E.g., FEIS at 17, 36-37, 65-67.

The EA evaluated the environmental impacts of the proposed action and reasonable alternatives, including the “no action alternative,” and analyzed unavoidable adverse impacts of the proposed action and the no action alternative, as well as reasonably foreseeable future development scenarios and cumulative impacts on wilderness characteristics. With respect to the “no action alternative,” the EA stated:

Under the No Action Alternative, the APD would be denied and no ROW authorization would be issued. The constraint under this alternative is that a lease has already been issued which is contractual in nature. The applicant has been granted the right to drill somewhere on the lease, otherwise a “taking” would be created. The BLM does not have the authority to create a taking. Only Congress can create and resolve a taking situation.

(EA at 6-7.) Nonetheless, BLM evaluated the impacts a “no action” decision would have on the White River WRU, recreation, soil and watershed, and vegetation. The EA recognized that wilderness values of naturalness, primitive and unconfined recreation and solitude would continue as a result of the no action decision on the APD, but stated that these same values could be diminished in any event by existing land uses and uses authorized by the BCRMP. (EA at 17.) The EA identified impacts expected from current uses, even in the absence of the proposed well. Id. at 17-18.

The EA compared unavoidable adverse impacts of granting the APD and of the no action alternative.

#### Proposed Action

1. The wilderness characteristics would be degraded on 5.8 acres or 0.0004% of the White River [WRU] for the life of the well and for 15 to 20 years after rehabilitation occurs.
2. The Goblin City Viewshed would be degraded during the 44 day period when the well site is being constructed, drilled and completed. Increase[d] noise levels during this time could further degrade recreational experiences from Goblin City

overlook and the White River north of the proposed well location. [<sup>4/</sup>]

3. Should the proposed well become a producing well, workover operations could degrade recreational experiences from Goblin City overlook and the White River north of the well location for 20 days once every 10 years.
4. Should the proposed well become a producing well, the expectation of naturalness and quiet that many people seek would diminish by approximately 10% for the one year during drilling \* \* \*.
5. An additional 6.3 tons per year of sediment, 205 tons over the life of the project, would be added to the White River.
6. Approximately 500 juniper trees and associated vegetation would be lost for the life of the well and for another 15 to 20 years after reclamation takes place.

No Action Alternative

1. Wilderness values could be diminished by current, on-going public land uses including recreational activities such as float boating, hiking, camping, sightseeing, off highway vehicle (OHV) use, as well as grazing, mineral development, and other oil and gas actions.
2. The scenic views from the Goblin City overlook could gradually be degraded by the existing, ongoing public land uses mentioned above.
3. Sediment yields could gradually increase as other existing public land uses continue.
4. With the continuation of the public land uses mentioned above, the [pinyon pine and juniper] community would gradually

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<sup>4/</sup> "Goblin City" is a "series of stacked ridges, towers, and spires" 1.7 miles northeast of the proposed well. The "overlook" provides a 360 degree view of the landscape. (EA at 11.) The EA indicated that views and noise levels at the overlook would be impaired during a 44-day construction period. Id. at 17.

decline and the opportunity for noxious weed invasion would increase.

(EA at 18-19.)

The EA also considered the “lease exchange” alternative, but did not analyze this alternative in detail because the agency found, *inter alia*, that the alternative would be difficult to implement because Federal law requires that exchanged assets must be of equal value. BLM reasoned that because the proposed action was for an exploration well, the agency would be unable to establish a value for the lease in order to orchestrate an equal value exchange. *Id.* at 7-8.<sup>5/</sup> The EA considered closure of the White River area to future leasing but noted that closure of the area to future leasing would require amendment to existing land use planning documents that would not affect pre-existing rights granted in the Retamco lease. *Id.* at 8; *see also* FEIS at 65, 67.

The EA addressed reasonably foreseeable future development and cumulative impacts.<sup>6/</sup> The EA identified an EA prepared for a Wexpro Company Island Unit in Uintah County (Wexpro EA UT-080 1997-51), which “contains scenarios for expected development within Duchesne and Uintah Counties, Utah, and resultant cumulative impacts.” (EA at 19.) The EA for the Rockhouse well also identified two wells proposed by Lone Mountain Production on State sections within the WRU. (EA at 20.) BLM noted that “should the proposed or any other well on State lands in the area be successful,” up to an additional 50 gas wells could be drilled on existing State and Federal leases within the White River WRU. *Id.* The EA listed this potential among the cumulative impacts on wilderness resources. *Id.*<sup>7/</sup>

In considering cumulative impacts as a result of a productive well on the State or Federal leases, the EA stated that surface disturbance caused by such potential development would comprise roughly 35 percent of the unit, and encircle an additional 5 percent, which could limit Congress’ ability to designate a total of

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<sup>5/</sup> The EA analyzed the “lease suspension” alternative, but found that this option would have the same effect as the “no action alternative.” *See* EA at 7.

<sup>6/</sup> The EA also noted that proposed access routes for the drilling pad and pipeline crossed lands on which a proposal had been submitted to BLM by the Resource Development Group (RDG), a consortium of private interests holding Federal, state, and private oil and gas leases for development of natural gas within Uintah County, Utah. (EA at 2-3.) BLM identified this as a “related action” and stated that an EIS is being initiated for the proposed development.

<sup>7/</sup> The EA further described cumulative impacts on recreation, visual resources, and soils and vegetation. *Id.* at 21-22.

40 percent of the White River WRU as wilderness. *Id.* The EA also noted that the effect of such surface disturbance was also a potential consequence of the “no action” alternative because they could occur “with or without approval of the APD.” According to the EA, such oil and gas exploration and development on existing leases is expected and has the same potential irrespective of drilling on the Retamco lease. “Over time, these [wilderness] values could be expected to be degraded or lost.” *Id.*

The Final EA was released on July 3, 2000. On that same date, the Field Manager for the Vernal District Office, BLM, approved the APD for the Rockhouse well. The DR/FONSI was entitled “Application for Permit to Drill (APD) Rockhouse 11-31 Well.” Nonetheless, it approved the APD “with necessary rights-of-way (ROWS) for access and a pipeline, subject to provisions of the lease and Conditions of Approval (COAs)” in the DR/FONSI. As the rationale for the decision, the DR/FONSI states

BLM must meet its responsibility to protect resource values and uses on the public lands while recognizing valid existing rights (VERs) that it must respect.

\* \* \* Only 5.8 acres of surface disturbance are anticipated as a result of this decision. Impacts on wilderness character, and recreation and visual resources would be less than significant. Wilderness character of the White River Wilderness Inventory Unit will not be substantially degraded because naturalness will be degraded on less than 1 percent of the unit. Congress’ ability to designate the area as wilderness would not be compromised \* \* \*. The well pad and access road would not be visible from any major view points when mitigating measures are applied. Current recreational use of the Goblin City Overlook would be diminished by only about 12 visitors per year. None of the disturbed areas will be visible from the White River.

(DR/FONSI at 2.)

The DR/FONSI concluded that “[t]he APD is in conformance with the existing BLM land use plans for the area.” Recognizing the concern over potential major cumulative impacts of up to an additional 50 wells in the vicinity of the proposed well, the DR/FONSI stated:

Concern was expressed over potential major cumulative impacts of up to an additional 50 wells in the vicinity of the proposed well because the EA that was released for public comment erroneously described these impacts as unavoidable. This error has been corrected. Significant cumulative impacts are not likely to occur as a result of this

decision because the proposed well is exploratory and the potential for production is uncertain; there are no additional proposals for drilling on the other Federal leases adjacent to the proposed drilling site, and \* \* \* approval of this well does not automatically authorize any future drilling that would create cumulative impacts. BLM will progressively analyze past, present and future actions for cumulative impacts and monitor the level of significance of potential impacts based on the results of the individual drilling proposals. Should production and the potential for field development be established, and cumulative impacts are likely to occur, BLM will prepare an appropriate level of NEPA analysis and documentation for field development prior to approving additional APDs.

(DR/FONSI at 3, referring to the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000) (NEPA) (emphasis added).)

On July 17, 2000, SUWA petitioned for State Director Review (SDR) and a stay of the DR/FONSI approving the APD and ROWs. On July 27, 2000, BLM notified SUWA that its request for stay would not be addressed, as the Vernal District Office would take no action until the petition for SDR was decided. On August 25, 2000, the DSD affirmed the DR/FONSI permitting drilling and the ROWs for the road and pipeline. (SDR UT-00-5.) In response to SUWA's argument that the well and ROWs will have significant impacts that must be analyzed in an EIS, the DSD stated

[e]ffects of the projected development scenario, if this exploratory well should become a producer, were erroneously presented in the second version of the EA as direct, indirect and unavoidable impacts. The scope of the analysis for this EA is for a single well. Projections for development are analyzed as potential cumulative impacts rather than unavoidable impacts. Development is not proposed and analysis of direct, indirect and unavoidable impacts from foreseeable actions is not required, since approval of the proposed action does not automatically approve future proposals.

(SDR Decision at 3.)

In response to SUWA's claim that the proposed well violated the BCRMP because it constituted an approval in excess of 80 wells permitted in that RMP, the DSD responded

[t]he 80 wells per year figure of the [BCRMP] is not a management prescription. The figure is an assumption established as a reasonable estimate of activities for NEPA evaluation. The Record of Decision

(ROD) for the RMP EIS did not establish the figure as a “threshold” \* \* \*. The ROD also states that future oil and gas activities will continue to be subject to further environmental review.

(SDR Decision at 4.)

Concerning SUWA’s claim that the EA failed to adequately consider reasonable alternatives, specifically the no action alternative, the DSD wrote: “Federal leases carry certain rights which cannot be completely denied. In this case, the No Action alternative considers denial of the proposed applications and is included for comparative purposes.” Id.

On August 29, 2000, the Vernal District Office issued ROW’s UTU-76912 and UTU-77673 for the road and pipeline, respectively. On September 13, 2000, SUWA appealed to this Board and sought a stay of the SDR decision.

On December 6, 2000, we entered a stay on the grounds that SUWA had shown a likelihood of success on the merits with respect to two issues: (1) whether BLM had failed to adequately consider the “no action” alternative, and (2) whether the DR/FONSI was predicated on denying the existence of the cumulative impacts discussed in the draft EA, rather than considering the potential significance of those impacts. Based upon SUWA’s uncontradicted representations, issuance of the stay order was premised on the understanding that all activities leading to and including drilling the well had commenced and were completed in early October 1999. Accordingly, the order stayed only pipeline development.

The parties subsequently filed a number of motions. SUWA filed a motion for reconsideration to expand the scope of the stay order. BLM countered with a motion for reconsideration. Retamco filed a motion to intervene, for reconsideration, to dissolve the stay and to dismiss for lack of standing. By order dated August 2, 2001, we granted the motions to reconsider and to intervene, denied the motions to amend the stay, and took Retamco’s motion to dismiss under advisement. We granted various parties’ requests for more briefing, and ordered SUWA to respond with respect to standing.<sup>8/</sup> In considering the likelihood of success on the merits, we did not further address the issue of the “no action” alternative, but continued to express

<sup>8/</sup> In its entirety, the order ruled as follows: Motions to Reconsider Stay Granted; Motion to Dismiss Taken Under Advisement; Motion to Intervene Granted; Motion of Retamco Operation Inc. for Additional Time Granted; Appellant’s Requests for Immediate Review Denied; Appellant’s Request for Opportunity to Respond Granted; Motion to Expand Scope of Stay Denied; Motion to Dissolve Stay Denied; Motion to Vacate Stay Denied; Intervenor’s Request for Immediate Review Denied as Moot; Order to Appellant to Plead Standing; Briefing Ordered.

concern for BLM's consideration of "unavoidable" impacts, and whether cumulative affects were properly considered.

In a brief filed September 4, 2001, SUWA responded to Retamco's motion to dismiss which alleged that SUWA had failed sufficiently to allege standing. On November 14, 2001, BLM submitted lease records and documents for the case and provided a Response to our August 2, 2001, order. BLM submitted the BCRMP documents by computer diskette. On November 15, 2001, Retamco's counsel withdrew from the case, and the next day, Retamco waived any further pleadings authorized by this Board's order of August 2, 2001. SUWA filed a "Reply to BLM's Response to the Board's Order" on December 3, 2001.

### Analysis

[1] We deny Retamco's motion to dismiss for lack of standing. SUWA correctly cites 43 CFR 4.410(a) as the source of the requirement that an appellant have standing to appeal to the Board. (Nov. 14, 2001, SUWA Response to Retamco's Motion to Dismiss.) The appellant must be "a party to the case who is adversely affected by a decision" of BLM. 43 CFR 4.410(a). SUWA is correct that it was a party to this matter by virtue of its comments on the EA and its protest. (Nov. 14, 2001, SUWA Response to Retamco's Motion to Dismiss at 4.) Likewise, SUWA supports its assertion that the interests of its members would be "adversely affected" by the decision, by submitting affidavits of individual SUWA members verifying, inter alia, that they were involved in a 1986 proposal to establish the White River Canyon as a wilderness area, that they use lands affected by the activities authorized by the DR/FONSI and that they personally inventoried lands within the project area. Id., Exhibits A and B, Affidavits of Dr. Durant, and Chad Hamblin. Audubon Society of Portland, 128 IBLA 370, 373-74 (1994).

[2] In reviewing the merits, we begin with SUWA's challenges to the BLM decision as inconsistent with the BCRMP. SUWA alleges that BLM violated section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2000), in approving the APD and ROWs because the well and ROWs do not conform to the BCRMP approved in 1985. FLPMA section 302(a) requires the Secretary, in managing the public lands, to do so in accordance with applicable land use plans which the Secretary must establish under section 202, 43 U.S.C. § 1712 (2000). Likewise, 43 CFR 1610.5-3(a) requires that all future resource management authorizations and actions conform to approved plans. "Conformity or conformance" is defined in the regulations at 43 CFR 1601.0-5(b) to mean that "a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment."

Our review of the BCRMP gives little support to SUWA's allegation that the Rockhouse well is inconsistent with BLM's land use plan for the BCRA. The BCRMP demonstrates that BLM exhaustively reviewed the area in which the well is located. The Book Cliffs FEIS considered four management alternatives: current management, resource protection, commodity production, and balanced use. (FEIS at 15.) The ROD chose the balanced use alternative for the BCRA. For each alternative, however, BLM considered a management objective, utilizing its oil and gas category system, which consists of four management categories (1-4) for oil and gas exploration and development. (FEIS, Appendix 1.)

For all of the FEIS alternatives, BLM identified the site of the proposed Rockhouse well as available for oil and gas development under the least restrictive category, meaning that the location is open to exploration and development subject to standard stipulations only. (FEIS at 37, 46, 57, 67.)<sup>9/</sup> While areas adjacent to the proposed site of the Rockhouse well are, under both the resource protection alternative and balanced use alternative, subject to a more restrictive category 2, requiring special lease stipulations, the lease is nonetheless located in category 1 area which BLM considered in all alternatives to be open to oil and gas development subject to standard stipulations.<sup>10/</sup>

The RMP further discounts SUWA's allegations of a conflict with regard to visual resources and road development. The FEIS's analysis of visual resources does not identify concerns for the area in question. (FEIS at 31, 54, 65, Appendix 7; ROD at 7, 57.) The project location is not identified as containing a "scenic travel corridor" or an "overlook." (FEIS at 122; ROD at 57, 59.) In all cases, the area where the well and road are located are in areas open to off-highway vehicle (OHV) use. (FEIS at 53, 74; ROD at 58.) In no case did BLM identify a wilderness conflict for the area in question, or treat the project area as a wilderness location. *Id.*; FEIS at 82.

BLM correctly analyzed the "no action" alternative within the Book Cliffs FEIS as the "current management" alternative, thus considering "no action" for the land management plan as "no change" from existing use for oil and gas development. See 46 FR 18026, 18027 (Mar. 23, 1981) (Council on Environmental Quality's (CEQ's)

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<sup>9/</sup> According to the FEIS, for category 1 areas, consistent with 43 CFR Subpart 3100, lessees must prepare a 13 point surface use plan for purposes of environmental assessment, like the one presented by Retamco here. (FEIS at 366.)

<sup>10/</sup> BLM set forth special stipulations in the final 1985 ROD for the BCRMP for category 2 areas. (ROD at 18, 19, 22, 24, 25.) Categories 3 and 4 require NSO lease stipulations and prohibit leasing, respectively.

Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations, Question 3.) <sup>11/</sup> As the Solicitor noted correctly in the April 15, 1999, Solicitor Memorandum to the Utah State Director, BLM, "if current land management plans have designated lands open for mineral leasing, they remain open for leasing. Management prescriptions may be changed only through amendment of the land management plans \* \* \*." Thus, considering the Book Cliffs FEIS and ROD for the BCRMP, we find the application for the well to be consistent with the management plan. <sup>12/</sup>

SUWA asserts that the inconsistency between the RMP and the APD derives from the fact that the EA announced that approving the Rockhouse well would exceed 80 wells for the BCRA within the year and that this violates the terms of the RMP restricting the number of wells allowed. This assertion misstates both the RMP and the significance of the EA's comments on the issue. It is true that the BCRMP assumes that "[r]egardless of the alternative selected, approximately 40 to 80 wells would be drilled within the BCRA annually \* \* \*." (FEIS at 145.) By contrast, the EA states "more than 80 wells are being drilled on a yearly basis within the Vernal District Office boundaries." (EA at 2).

Nonetheless, having reviewed the RMP extensively, we agree with BLM that nothing within it establishes a limit on the number of wells within the BCRA, let alone the Vernal District Office boundaries. Rather, the general reference to the number of wells that might be anticipated or assumed annually in the BCRA does not constitute a term, condition or substantive limit on the number of wells BLM may authorize.

We agree with SUWA that the EA is not helpful on this issue. It states that "the drilling of wells which are covered under a field development EA are not counted under the 80 wells figure. The impacts of wells drilled under field development EAs are analyzed separately from the BCRMP within each document." (EA at 2.) But the DSD correctly concluded that "[t]he 80 wells per year figure of the [BCRMP] is not a management prescription. The figure is an assumption established as a reasonable estimate of activities for NEPA evaluation." (SDR Decision at 4.) We find no inconsistency between this conclusion and the BCRMP.

[3] Turning to SUWA's specific challenges to the EA, it is worth beginning with a recitation of precedent governing our review of EAs. In preparing an EA to assess whether an EIS is required under section 102(2)(C) of NEPA, 42 U.S.C.

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<sup>11/</sup> CEQ stated that considering the "no action" alternative in the case of land management plans to mean stopping existing authorized action is a "useless academic exercise." *Id.*

<sup>12/</sup> We address the pipeline issue separately below.

§ 4332(2)(C) (2000), an agency must take a “hard look” at the proposal being addressed, identifying relevant areas of environmental concern, so that it can make an informed determination as to whether the environmental impact is insignificant or impacts will be reduced to insignificance by mitigation measures. See Colorado Environmental Commission, 142 IBLA 49, 52 (1997); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1987). The Board will affirm a FONSI if the record establishes that BLM has engaged in a careful review of environmental consequences, all relevant environmental concerns have been identified, and the final determination is reasonable. Owen Severance, 118 IBLA 381, 392 (1991); Utah Wilderness Association, 80 IBLA at 78, 91 I.D. at 174.

A party challenging a FONSI must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Southern Utah Wilderness Alliance, 122 IBLA 6, 12 <sup>10/</sup> <sup>10/</sup> (1991); G. Jon & Katherine M. Roush, 112 IBLA 293, 297 (1990); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Utah Wilderness Association, 80 IBLA at 78, 91 I.D. at 174. “The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal.” Rocky Mountain Trails Association, 156 IBLA 64, 71 (2001), citing Larry Thompson, 151 IBLA 208, 217 (1999).

SUWA argues that BLM erred in its analysis of the potential cumulative impacts of drilling the exploratory well because it failed to consider the cumulative impact of drilling the well and of reasonably foreseeable additional oil and gas wells that might be drilled in the future should the well be successful. SUWA objects to BLM’s failure to maintain its view, as expressed in the draft EA, that such impacts were “unavoidable.”

In our previous orders, the Board was particularly concerned with changes from the draft EA to the final EA, DR/FONSI, and the SDR decision, in which the description of potential impacts from a successful well was converted from “unavoidable” to “cumulative,” which the SDR found to be so uncertain that they failed to rise to the level of “significance” within the meaning of NEPA. Our earlier orders queried whether BLM had incorrectly described the likelihood of significant cumulative impacts by changing this description. Noting that “[n]othing in the CEQ regulations or in common parlance suggests that ‘reasonably foreseeable’ equates to ‘unavoidable,’” we provided BLM an opportunity to further brief the sequence of events that led to changes in language. (Aug. 2, 2001, Order at 14.)

BLM has provided an extensive discussion of the chronology of events leading to these changing characterizations. (Nov. 14, 2001, Response to August 2, 2001, Order at 4-7.) As BLM explains it, the Vernal District Office issued three different EAs

in which it considered the Rockhouse well. In each draft of the EA, in the DR/FONSI, and in the DSD Decision, the discussion of impacts changed under the headings “unavoidable adverse impacts” and “reasonably foreseeable future impacts.” Only in the second draft did BLM describe the 50-well scenario as unavoidable. The final EA transferred that possible result to the “reasonably foreseeable” heading, due to the facts that the potential for production was unclear and that the 50-well scenario was likely to occur as a result of drilling elsewhere than on Retamco’s lease. The DR/FONSI explained:

Concern was expressed over potential major cumulative impacts of up to an additional 50 wells in the vicinity of the proposed well because the EA that was released for public comment erroneously described these impacts as unavoidable. This error has been corrected. Significant cumulative impacts are not likely to occur as a result of this decision because the proposed well is exploratory and the potential for production is uncertain; there are no additional proposals for drilling on the other Federal leases adjacent to the proposed drilling site, and \* \* \* approval of this well does not automatically authorize any future drilling that would create cumulative impacts.

(DR/FONSI at 3.)

While it is clear that the characterization of the impacts changed throughout the NEPA documentation process, BLM’s brief adequately explains its logic. In our initial review, we found the changed description of impacts confusing. Nonetheless, BLM’s job in developing multiple drafts and taking comments on environmental documents is to correct errors or misinformation within them, and to otherwise respond to comments and reconsider conclusions. Accordingly, this Board will not criticize BLM for the existence of such changes alone. Thus, the only issue is whether the decision documents comply with NEPA under the above-described precedent and the CEQ regulations implementing NEPA at 40 CFR Part 1500.

CEQ rule 40 CFR 1508.9(b) requires EAs to include brief statements of “environmental impacts” of a proposed action. “Effects and impacts as used in these regulations are synonymous” and include “direct,” “indirect,” and “cumulative” effects. 40 CFR 1508.8. “Indirect effects \* \* \* may include growth inducing effects and other effects related to induced changes in the pattern of land use \* \* \*.” 40 CFR 1508.8(b). A cumulative impact is

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from

individually minor but collectively significant actions taking place over time.

40 CFR 1508.7; see Southern Utah Wilderness Alliance, 122 IBLA 165, 169-70 (1992).

Considering this definition, we find that BLM correctly identified the cumulative “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” and correctly identified the potential construction of 50 new wells as a reasonably foreseeable future action. Further, BLM adequately concluded that the impact from the Rockhouse well was not so “significant” as to require an EIS at this juncture until more is known about its production potential, given that more information also would be derived from drilling nearby wells and that a further EIS would be undertaken should drilling justify broader development in the area.

SUWA takes issue with the final EA’s conclusion that the development of 50 new wells should be identified as “a reasonably foreseeable future action” from which cumulative impacts should be determined, rather than being described as an “unavoidable” consequence of the drilling of the Rockhouse well alone. SUWA contends that the possibility of 50 new wells as a direct result of drilling the Rockhouse well is “significant” and should compel the development of an EIS.

Having reviewed the BCRMP, we agree with BLM and, ultimately, the DSD, that the numbers and locations of future wells in the BCRA are dependent upon the uncertain nature of further exploration and development in the field. First, the fact that large areas of the BCRA are open and leased to oil and gas development supports the EA’s assertion that the potential for development in the vicinity derives from these factors and exists independent of the Rockhouse well, not as an unavoidable result of it. (EA at 19.) Two wells on State sections within the White River WRU might be drilled productively. (EA at 20.) The granting or denial of the Rockhouse well APD does not affect this potential. While the effect of the Rockhouse well’s drilling is appropriately considered within the cumulative impacts analysis, the fact that State and Federal lands are open to oil and gas leasing and development, and the existence of development plans identified in the Wexpro EA and for State lands, lend credence to BLM’s conclusion that the 50-well development scenario is not an “unavoidable” result of the approval of the APD for the Rockhouse well, but rather depends on development potential in nearby leased areas. At a minimum, SUWA has not provided evidence that this conclusion is wrong.<sup>13/</sup>

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<sup>13/</sup> SUWA provides a letter from the United States Environmental Protection Agency (EPA), to the Vernal District Office, BLM, stating the EPA’s concern that BLM was  
(continued...)

Second, we are persuaded by the BCRMP's analysis of the likelihood of oil and gas development in the vicinity of the proposed well that BLM correctly concluded that the potential for development was uncertain and therefore the cumulative impacts did not rise to the level of "significance" at this time. The BCRMP sought to quantitatively assess the potential for future oil and gas development throughout the BCRA in terms of two factors, favorability and certainty. (FEIS at 374, Appendix 4.) Figure 3-1 of the FEIS is a map that depicts these factors for oil and gas in the BCRA. Id. at 95. In the vicinity of the proposed well, favorability is rated as "2", while the certainty is "4".

The FEIS describes the category rating of "Favorability 2 (f2)":

The geologic environment of an area rated at the "f2" level for oil and gas is considered to have a potential only for small, widely scattered oil and gas pools. The size of recoverable hydrocarbon accumulations in such an environment would be anticipated to be less than 10 million barrels of oil, or, if gas, no more than 60 billion cubic feet. The cumulative thickness of sedimentary rocks in the "f2" geologic environment will generally be less than a few thousand feet thick. Such relatively thin stratigraphic sequence generally limits the volume of both favorable source and reservoir rocks; hence the expected small size and low frequency of oil and gas pools.

Id. at 374-375.

The certainty categories reflect the "degree of certainty of oil and gas occurrence \* \* \* based on the proximity of direct evidence that either supports or refutes the existence of the resource in the immediate environment of the area." (FEIS at 376.) "Certainty factor 4 (c4)" is the "highest level of oil and gas certainty" that minerals will or will not be found. Id. at 379. By way of example, the FEIS

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<sup>13/</sup> (...continued)

approving incremental project development for pipelines and wells. (Nov. 16, 2001, SUWA Response, Exhibit E, June 20, 2001, EPA letter to Vernal District Office.) While this letter surely provides a basis for general concern with the Vernal District Office's environmental compliance, it followed the challenged DR/FONSI and DSD decision by a year. Further, as BLM mentions in its pleadings, the Vernal District Office and the Utah State Office will be engaging in the development of a new RMP encompassing, inter alia, the BCRA, and also preparing an EIS for oil and gas development in the Uintah Basin, consistent with BLM's stated commitment in the EA to conduct an EIS for the basin. The EPA letter focuses on this process, and an upcoming meeting among EPA, the Vernal District Office, BLM, and the United States Fish and Wildlife Service.

described a category of c4, combined with a favorability category of f1: “the dual rating indicates with a high-degree of certainty that commercial quantities of oil and gas do not occur in or near the area.” *Id.* It follows that, here, where a “c4” certainty category is used with an “f2” favorability, the dual rating indicates with a high-degree of certainty that very small commercial quantities of oil and gas occur in or near the area.

The RMP and FEIS thus support the DSD’s conclusion that future development in geographic proximity to the proposed well was not certain. Further, the DSD explained that:

BLM will progressively analyze past, present and future actions for cumulative impacts and monitor the level of significance of potential impacts based on the results of the individual drilling proposals. Should production and the potential for field development be established, and cumulative impacts are likely to occur, BLM will prepare an appropriate level of NEPA analysis and documentation for field development prior to approving additional APDs.

(DR/FONSI at 3.) This assurance of further NEPA review resolves any questions as to what will happen when the “certainty” of the 50-well scenario ripens as a result of production from the Rockhouse or another well.

In a similar case before this Board brought by SUWA alleging shortcomings in cumulative impact and foreseeable development analysis, we rejected SUWA’s contentions and stated:

[A]t best, the amount and location of additional road building is dependent on the highly uncertain nature of further exploration and development in the Kane Creek Field, which in turn will depend on undetermined geology and the variable economic forces and fortunes of oil and gas operators in the area.

Southern Utah Wilderness Alliance, 127 IBLA 282, 289 (1993). Given the categories analyzed for the Rockhouse well site in the RMP, SUWA has not shown by objective proof error in BLM’s cumulative impacts analysis sufficient to warrant reversal of the DSD’s decision.

[4] SUWA objects to the EA’s conclusion that the RDG proposal to drill over 400 gas wells and construct several hundred miles of road is a related action, rather than a “connected action” requiring preparation of an EIS. CEQ regulations state that the scope of an EIS is determined by considering three types of actions including

“connected actions.” 40 CFR 1508.25(a)(1). That rule defines “connected actions” as meaning

that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

Id. In Glacier-Two Medicine Alliance, 88 IBLA at 145, we considered this definition to conclude that “the road and the associated development which are the subject of the APD [and] have no independent utility in the absence of production from any commercially feasible discovery on the land” are connected actions that must be included within the scope of the EA. SUWA does not show that the RDG proposal meets this definition or is interdependent with the APD for the Rockhouse well.

[5] SUWA also argues that BLM failed to consider reasonable alternatives to the proposed action, including the “no action” alternative. SUWA asserts as well that this alleged failure to address the no action alternative violated the Solicitor’s 1999 memorandum, because that memorandum stated that BLM must consider the no action alternative when analyzing actions that would potentially negate the eligibility of certain lands for wilderness designation. See Memorandum from Solicitor to Utah State Director, BLM (Apr. 15, 1999).

The obligation of Federal agencies to consider “no action” alternatives in NEPA documents other than an EIS derives from section 102(2)(E) of NEPA. That statutory provision requires agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E) (2000). CEQ regulations provide that Federal agencies shall, to the fullest extent possible, “[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 CFR 1500.2(e); 1502.14(a); 1508.9(b).

In Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9<sup>th</sup> Cir. 1988), cert. denied, 489 U.S. 1066 (1989), the United States Court of Appeals for the Ninth Circuit concluded that the obligation in section 102(2)(E) is “both independent of, and

broader than, the EIS requirement.” *Id.* at 1229. The court concluded that agencies bear the obligation to consider the no action alternative in preparing EAs. *Id.* at 1228-29. In Southern Utah Wilderness Alliance, 122 IBLA 334, 338-39 (1992), this Board held:

An EA must include a brief discussion of alternatives as mandated by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1988). *See* 40 CFR 1508.9(b); 516 DM 3.4(A). *See also Oregon Natural Resources Council*, 115 IBLA 179, 186 (1990); *In re Long Missouri Timber Sale*, 106 IBLA 83, 87 (1988). \* \* \* Among the alternatives which must be considered pursuant to this mandate is the no-action alternative. Bob Marshall Alliance v. Hodel, 852 F.2d at 1228.

Turning to the record, we find that SUWA errs in claiming that BLM failed to consider the alternative of “no action,” or, in this case, denying the APD. While what concerned us in our initial review of the record on the petition for stay was the seeming refusal to consider the “no action” option because of perceived concerns about a Fifth Amendment “taking,” in fact, the EA went on to address the alternative. (EA at 6-7.) As the DSD noted, that alternative analysis was “included for comparative purposes.” (SDR Decision at 4.) BLM concluded that a “no action” decision would avoid impacts from the development of the Rockhouse well on recreation, soils, watersheds, and vegetation. The EA also went on to consider the effects of the proposed action and the no action alternative on wilderness values. *Id.* at 17-18. The EA noted that the effect of taking no action on, or denying, the APD was not significantly different from granting the APD, given available land use and planned wells on State lands. *Id.* We find that this analysis is sufficient to meet BLM’s obligation to include a “brief” discussion of alternatives. *See, e.g., Robert P. Muckle*, 143 IBLA 328, 335 (1998); *In re Blackeye Timber Sale*, 98 IBLA 108, 111 (1987).

The discussion of the ability to consider the no action alternative in the DR/FONSI and EA has a genesis in the NEPA process and BLM regulations. BLM regulations, the courts and our precedent proceed under the notion that the issuance of a lease without an NSO stipulation conveys to the lessee an interest and a right so secure that full NEPA review must be conducted prior to the decision to lease. The courts have held that the Department must prepare an EIS before it may decide to issue such “non-NSO” oil and gas leases. The reason, according to the Ninth Circuit, is that a “non-NSO” lease “does not reserve to the government the absolute right to prevent all surface disturbing activities” and thus its issuance constitutes “an irretrievable commitment of resources” under section 102 of NEPA. Friends of Southeast’s Future v. Morrison, 153 F.3d 1059, 1063 (9<sup>th</sup> Cir. 1998), quoting Conner v. Burford, 848 F.2d 1441, 1448-51 (9<sup>th</sup> Cir. 1988). This commitment is reflected as well in BLM regulations:

A lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove, and dispose of all the leased resource subject to: Stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. \* \* \*

43 CFR 3101.1-2. The Board discussed this process most recently in Wyoming Outdoor Council, 157 IBLA 259, 264-65, 272-73 (2002) (Burski, J., concurring), rev'd on other grounds, Pennaco Energy, Inc. v. State of Wyoming, Case No. 02-CV-116-B (June 2, 2003).<sup>14/</sup>

Consistent with the above-stated precedent and 43 CFR 3101.1-2, we have held that an EA which is tiered to a final EIS need not restate the cumulative impacts analysis or a no action alternative that was already considered in the document to which the EA is tiered. Blue Mountains Biodiversity Project, 139 IBLA 258, 267 (1997); Oregon Natural Resources Council, 115 IBLA 179, 186 (1990); In re Long Missouri Timber Sale, 106 IBLA 83, 87 (1988), reconsideration denied (1989); In re Upper Floras Timber Sale, 86 IBLA 296, 311 (1985); see also Southern Utah Wilderness Alliance, 158 IBLA 212 (2003), and citations therein. Tiering is defined in the CEQ regulations as “coverage of general matters in broader [EISs] \* \* \* with subsequent narrower statements or environmental analyses \* \* \* incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.” 40 CFR 1508.28 (emphasis added). Conversely, where BLM has adopted a lease stipulation barring particular surface activity, this Board has permitted BLM to defer NEPA analysis of such impacts because BLM had the legal authority to prohibit them. In Glacier Two-Medicine Alliance, we stated:

This Board has previously recognized that environmental analysis is required prior to an irreversible commitment of resources to an action which will affect the environment. Sierra Club Legal Defense Fund,

<sup>14/</sup> As we stated at 264, “[w]hile the scope of the examination of \* \* \* impacts in a pre-leasing NEPA document will necessarily differ from that required in a site-specific NEPA analysis prepared for a proposed development project, NEPA mandates that those impacts must nevertheless be acknowledged and appropriately considered before the leasing decision is made.”

Inc., 84 IBLA 311, 92 I.D. 37 (1985). Hence, deferral of assessment of specific surface disturbing activities pending submission of a site specific plan of operations has been permitted where the Department has retained the authority to bar such activities if the impacts, even with mitigating measures, are unacceptable.

88 IBLA at 146.

This is not to say that BLM may evade its NEPA obligation and fail to identify cumulative impacts or the no action alternative in an EA. Southern Utah Wilderness Alliance, 122 IBLA at 339-40 (“cavalier” failure to address no action alternative requires reversal of DR/FONSI); Wyoming Outdoor Council, 147 IBLA 105, 115 (1998) (even though BLM’s authority to curtail oil and gas activity in a “non-NSO” lease was limited, it nonetheless considered the no action alternative). Rather, the tiering concept provides that, for alternatives and impacts already considered and answered with a conclusion to commit resources, BLM need not reconsider what amounts to a pre-existing decision. In the leasing context, this is particularly true because after a lease is issued, resources have been committed to a particular authorized land use, presumably after the agency considered and rejected the alternative of taking no action to lease.

The DSD’s analysis regarding “takings” does not adequately or correctly state the applicability of NEPA, BLM and CEQ regulations and precedent, and is not accurate shorthand for it. However, the DSD’s statement appears to have derived from the concepts and logic described above. Once the lease was issued, alternatives such as prohibiting surface occupancy by way of a no action alternative effectively have been considered and rejected prior to lease issuance.

The difficulty on this record, however, is determining how to apply such concepts here. According to the EA the lease was issued to Retamco not as a result of an EIS but rather based on an “administrative determination of NEPA adequacy [(DNA)] and plan conformance document.” (EA at 1.) No further information is provided regarding the allegedly adequate documents to which such a DNA related. We affirm here because BLM adequately, if briefly, considered the no action alternative in this EA. By contrast, SUWA has not shown effects of the “no action” alternative BLM should have considered and did not.

We must likewise reject SUWA’s argument that BLM violated the terms of the Solicitor’s memorandum dated April 15, 1999. That memorandum states: “If BLM determines that the proposed action would harm wilderness characteristics so as to negate the eligibility of the lands for wilderness designation, the BLM must consider among its alternatives in its EA or EIS the no action alternative, which would preserve the land’s eligibility for wilderness designation.” BLM did consider such an

alternative. Moreover, implicit in SUWA's suggestion is the notion that the memorandum meant to change existing law. Yet, the memorandum is not inconsistent with the laws and precedent discussed above, and acknowledged that "if current land management plans have designated lands open for mineral leasing, they remain open for leasing."

We note also that the EA, and DR/FONSI did consider the impacts on wilderness values from granting the APD. The EA concluded that "the road and well pad intrusions would be noticeable on about one acre or 0.00006 percent of the inventory unit," the "effect [of noise and equipment] would be temporary and last only 44 days," "drilling and production of the single proposed well would introduce intrusions on the natural appearance of the area as viewed from less than 1 percent of the 15,800-acre wilderness inventory unit," and "intrusions in the unit would remain substantially unnoticeable." (EA at 13.) Accordingly, BLM considered the effects on wilderness in the manner required by the Solicitor's memorandum.

[6] To the extent SUWA argues that the existence of the 1999 wilderness reinventory unit required BLM to alter existing land use authorizations under the RMP, this construction is inconsistent with the governing law and regulations, Board precedent construing it, and the Solicitor's memorandum. In 2003, we rejected a similar argument by SUWA that BLM was required either to inventory lands for wilderness characteristics or treat re-inventoried lands as wilderness before undertaking a land use decision authorized by the current RMP. Southern Utah Wilderness Alliance, 158 IBLA at 215, 216-17.<sup>15/</sup> There the Board noted that section 201(a) of FLPMA, 43 U.S.C. § 1711(a) (2000), not NEPA, controls the Secretary's wilderness inventory authority, and that the Board has no supervisory authority over BLM to compel a reinventory. The Solicitor's memorandum of April 15, 1999, is consistent, explicitly stating: "Management prescriptions may be changed only through amendment of the land management plans \* \* \*." Thus, we will not construe the Solicitor's memorandum to have added obligations in law that it expressly rejected.

[7] Our prior orders in this case implemented a stay of pipeline development. Thus, we turn to the issue of the pipeline.

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<sup>15/</sup> Though the issue has not been raised in this appeal, we note that in 2003 the Secretary entered into an agreement with the State of Utah in settlement of a dispute over the 1999 Utah Wilderness Inventory Report. State of Utah, et al v. Norton, et al, No. 2:96CV0870 B, Stipulation and Joint Motion to Enter Order Approving Settlement and To Dismiss the Third Amended and Supplemented Complaint, filed Apr. 11, 2003.

The original APD form did not mention a pipeline, but it referred to the attached “10 Point Drilling Program” and “13 Point Surface Use Plan,” required by 43 CFR Subpart 3100. See also FEIS at 366. Retamco amended the latter on August 31, 1999, to include the pipeline, which is described as a surface line. A Serial Register Page within UTU-77673 shows that NEPA analysis was initiated for the pipeline in 1999.

The EA contains a brief discussion and description of the road (EA at 3, “Access”) and pipeline (EA at 6, “If the Well Becomes a Producer”), but otherwise merges the description of the pipeline and road, as does the DR/FONSI. The extent of the EA’s separate analysis of the proposed pipeline appears at 6, where it states:

If the proposed well were to be capable of production, approximately 11,000 feet (2000 feet on lease and 9000 feet off lease) of 4" outside diameter surface steel natural gas pipeline would be laid adjacent to the access road as described above to a point in the SE NW of Sec. 8, T11S, R23E where the pipeline would join an existing surface natural gas transportation pipeline (see map A). The pipeline would be laid within six (6) months after the well is drilled and would take approximately 2 days to install. The pipe would be stored and welded together on the well location and dragged into place using a dozer or backhoe. All the equipment used to install the pipe would use the access road as a working surface. No wash crossings or road crossings would be necessary. The off-lease portion of the pipeline (9000 feet) would require a ROW. A temporary ROW width of 30 feet would be needed for installation of the pipeline. A permanent ROW width of 15 feet would then be required for maintenance over a period of 30 years.

(EA at 6 (emphasis added).) The EA adds that when the well is abandoned, the pipeline would be removed. Id. Map A shows the pipeline crossing sec. 5, T. 11 S., R. 23 E.

As the language emphasized above reveals, the EA appears to have anticipated a subsequent ROW. (EA at 6.) The same is true in other document records. A July 20, 2000, letter from BLM to Retamco states that the “proposed natural gas pipeline will require a right-of-way (R/W) grant. The APD will be used as the R/W application which we have assigned serial number UTU-77673. Any future correspondence regarding this R/W should reference this serial number.”

Under the balanced use alternative in the BCRMP, BLM chose 235 miles, or 93,000 acres, to be designated as ROW corridors. (FEIS at 21.) The RMP noted that pipelines could be located within a corridor, but that, in any event, ROWs for

pipelines required individual environmental review. *Id.* at 77, 158; ROD at iv. The ROD explains the objective of the RMP with respect to ROWs:

[ROWs] will be encouraged within identified corridors while protecting or mitigating other resource values. Additional corridors could be established if compatible with other resource uses.

(ROD at 28.) It is clear that the pipeline at issue here does not appear within one of the established corridors. *Id.* at 30. Thus, the RMP permitted ROWs outside of the corridors, subject to NEPA review on a case-by-case basis.

Applications for [ROWs] and corridors outside of designated corridors and exclusion areas will be considered individually.

\* \* \* \* \*

The issuance of ROWs will require district administrative and review support on a regular basis. Compliance with [NEPA] \* \* \* and other appropriate legislation will be included in this support. Some [ROWs] may require an amendment to this [RMP].

(ROD at 28.) <sup>16/</sup>

While the separate analysis of the pipeline in this record was minimal, it appears that BLM complied with NEPA, the RMP, and its regulations in granting ROW UTU-77673. The EA indicates that BLM intended the road access analysis to cover the pipeline access and, significantly, the public understood the project in those terms. Two public comments and BLM's responses mentioning the pipeline support this conclusion. *See* EA at 26 (BLM responds to comment that pipeline visibility would be limited by vegetative and topographic screening); 27 (comment regarding visibility of pipeline); 35 (comment that EA governs development of pipelines). Most importantly, SUWA does not meet its burden of showing that BLM failed to consider a substantial environmental question of material significance with particular regard to the pipeline. *Southern Utah Wilderness Alliance*, 122 IBLA at 12. Accordingly, we affirm BLM's decision granting the pipeline ROW and dissolve the stay as to that portion of the proposed project.

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<sup>16/</sup> The RMP presumes that all ROWs issued within the BCRA will be issued under general FLPMA regulations at 43 CFR Part 2800. These regulations require NEPA review before granting a pipeline ROW. 43 CFR 2802.4(d)(1); *see also* 43 CFR 2800.0-7 (pipelines within scope of regulations). The pipeline in this case was also issued pursuant to 43 CFR Subpart 2880.

Conclusion

To the extent that SUWA raises other arguments that are not explicitly addressed above, these arguments were considered but rejected. The decision of the DSD, SDR UT 00-5, is affirmed with respect to the authorization of the permit to drill the Rockhouse 11-31 well, ROW UTU-76912 for associated road development, and ROW UTU-77673 for associated pipeline development. SUWA fails to meet its burden of establishing that the decision was premised upon a clear error of law or demonstrable error of fact such that the analysis failed to consider a substantial environmental question of material significance.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Retamco's motion to dismiss is denied, and the decision appealed from is affirmed.

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Lisa Hemmer  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge