

INTERIOR BOARD OF LAND APPEALS

Southern Utah Wilderness Alliance

166 IBLA 270 (August 16, 2005)

Title page added by:
ibiadecisions.com

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2001-310

Decided August 16, 2005

Appeal from decision of the Utah State Office, Bureau of Land Management, denying in part a protest against a competitive oil and gas lease sale. UTU-79600, etc.

Affirmed in part; reversed and remanded in part.

1. Environmental Policy Act--Environmental Quality:
Environmental Statements--Mineral Leasing Act:
Environment--National Environmental Policy Act of 1969:
Environmental Statements--Oil and Gas Leases: Discretion
to Lease--Oil and Gas Leases: Competitive Leases

The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public lands for oil and gas purposes, because leasing without no-surface-occupancy stipulations constitutes an irreversible and irretrievable commitment to permit surface-disturbing activity, in some form and to some extent.

2. Environmental Policy Act--Environmental Quality:
Environmental Statements--Mineral Leasing Act:
Environment--National Environmental Policy Act of 1969:
Environmental Statements--Oil and Gas Leases: Discretion
to Lease--Oil and Gas Leases: Competitive Leases

In considering the potential impacts of oil and gas exploration and development when BLM proposes to lease public lands for oil and gas purposes, BLM may properly use "Documentation of Land Use Plan Conformance and NEPA Adequacy" worksheets (DNAs) to assess the adequacy of previous environmental review documents.

Although preparation of DNAs is a valid vehicle to determine whether previous NEPA documentation adequately considered the environmental effects of proposed oil and gas leasing, DNAs are not a replacement for EAs or EISs and cannot properly be used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--Mineral Leasing Act: Environment--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Competitive Leases

When BLM has denied a protest of the inclusion of parcels in an oil and gas lease sale, asserting that it has complied with the National Environmental Policy Act by preparing pre-leasing environmental review documents, but the pre-leasing documents contain only an outdated, brief review of environmental consequences, the BLM decision denying the protest will be reversed and the case remanded. However, where those pre-leasing documents adequately address the environmental consequences of issuing oil and gas leases both with and without special protective stipulations, BLM's decision denying the protest is properly affirmed.

4. Endangered Species Act: Generally--Environmental Policy Act--Environmental Quality: Environmental Statements--Mineral Leasing Act: Environment--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Competitive Leases

Where the record in an appeal from the denial of a protest of an oil and gas lease sale shows that BLM excluded some parcels from the sale when it determined that leasing them might have impacts on species that are candidates for listing as sensitive, threatened, or endangered, it follows that BLM determined that the parcels that remained in the sale would not have such impacts. In the absence of a showing to the contrary by a

protestant/appellant, BLM's determination that previous environmental review was adequate to determine any effects on such species will be affirmed on appeal.

5. Environmental Policy Act--Environmental Quality:
Environmental Statements--Mineral Leasing Act:
Environment--National Environmental Policy Act of 1969:
Environmental Statements--Oil and Gas Leases: Discretion
to Lease--Oil and Gas Leases: Competitive Leases

Even though existing land use plans and their associated environmental statements may not provide a separate analysis of the effects of coalbed methane (CBM) development, BLM may properly rely on those documents in support of a decision to offer a parcel of Federal land for competitive oil and gas leasing where there is no foreseeable likelihood of CBM development or where the impacts of CBM development do not differ significantly from the effects of oil and gas development already described in those documents.

APPEARANCES: Stephen H. M. Bloch, Esq., Salt Lake City, Utah, for appellant; Emily Roosevelt, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Southern Utah Wilderness Alliance (SUWA) has appealed from a decision by the Utah State Office, Bureau of Land Management (BLM), denying in part its protest against the offering of certain parcels in the May 22, 2001, competitive oil and gas lease sale.

On March 22, 2001, BLM gave notice that 71 parcels would be offered for oil and gas leasing in its May 22, 2001, sale. On March 16, 2001, the Deputy State Director for Natural Resources, Utah State Office, BLM, signed a Decision Record/ Finding of No Significant Impact (DR/FONSI) holding:

DECISION

Approximately 68,860 acres of public lands available for oil and gas leasing under [BLM] and an additional 26,197.30 acres within the [U.S. Forest Service, Department of Agriculture (FS)] * * * have been nominated to BLM for offering for the oil and gas lease sale to be held

on May 22, 2001. Based on findings, determinations, and recommendations from the BLM Utah Field Office Managers, and decisions of the FS Regional Office, Intermountain Region, I have decided to offer 95,057.30 Acres (71 parcels), with appropriate conditions and stipulations.

RATIONALE FOR THE DECISION

The lands to be offered are identified by parcel number and the lands not offered are described by land description on [a list attached to the DR/FONSI]. The list also identifies the specific conditions, terms, and stipulations applicable to each parcel that will be offered.

All of the parcels have been reviewed to determine if existing BLM and [FS] planning and NEPA documents adequately address the issues and environmental consequences of leasing at this time. My decision to offer parcels is based on the enclosed worksheets and findings that document land use plan conformance and NEPA adequacy (Determinations of NEPA Adequacy or DNAs). The record supports the conclusion that leasing of the offered parcels is in conformance with existing Federal agency land use plans and with applications of the terms, conditions and stipulations identified in the attached list, [and] would not result in unacceptable environmental consequences.

* * * * *

FINDING OF NO SIGNIFICANT IMPACT

Based on a site-specific review of the parcels to be offered for oil and gas lease sale, I have determined that[,] with implementation [of] the identified specific conditions, terms, and stipulations, leasing of the identified parcels would not result in significant impacts on the human environment other than already analyzed in existing NEPA documents.

No environmental assessment (EA) accompanied that DR/FONSI. As discussed below, it was instead supported by site-specific "Documentation of Land Use Conformance and NEPA Adequacy" worksheets, known as "DNA worksheets" or "DNAs."

On April 11, 2001, SUWA submitted supplemental and new information concerning the Utah Wilderness Coalition's (UWC's) pending proposal for a North

Cedar Mountains wilderness unit. ^{1/} SUWA submitted the information under BLM Manual H-6310-1 (“Wilderness Inventory and Study Procedures” (Jan. 10, 2001)), referred to as the wilderness inventory handbook (WIH). SUWA’s submission urged BLM to correct “several fatal errors in assessing this area’s wilderness qualities” made in its 1980 intensive wilderness inventory. (IBLA 2001-293 NA/SOR/Stay I, Ex. 1 at 2.) That action is relevant to the present appeal because, at the same time, SUWA requested that BLM withdraw four parcels (Parcels UT 011 through UT 014) from the May 22 sale until BLM initiated a plan amendment process and conducted a new inventory of the wilderness potential of the North Cedar Mountains wilderness proposal. Id. The four parcels were within the proposed wilderness area, and SUWA indicates that BLM did not anticipate imposing no surface occupancy (NSO) restrictions on them. (IBLA 2001-293 NA/SOR/Stay I at 3.)

On April 19, 2001, SUWA submitted more supplemental and new information, this concerning UWC’s Hart Point, Lockhart Basin, and Hatch Canyon proposed wilderness units, again so that BLM could revisit conclusions reached in previous inventories that the area lacked wilderness characteristics, as assertedly required by the WIH. (Notice of Appeal/Statement of Reasons/Request for Stay dated June 15, 2001, in Southern Utah Wilderness Alliance, IBLA 2001-293 (IBLA 2001-293 NA/SOR/Stay II), at 4.) SUWA also requested that BLM withdraw from the May 22 sale seven parcels (Parcels UT 029 through UT 034 and UT 044) that were either entirely or largely within those proposed wilderness units, until BLM initiated a plan amendment process and conducted a new inventory of their wilderness potential. (IBLA 2001-293 NA/SOR/Stay II at 4-5 and Ex. 2.)

On May 7, 2001, SUWA filed a protest against BLM’s listing of 54 parcels in the May 22, 2001, oil and gas lease sale, including the parcels in the proposed wilderness units. (Notice of Appeal/Statement of Reasons/Request for Stay dated June 21, 2001, in Southern Utah Wilderness Alliance, IBLA 2001-310 (IBLA 2001-310 NA/SOR/Stay), Ex. I-1.) The protest alleged that BLM had violated section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000), by failing to supplement existing environmental statements both to consider the impacts of development of coalbed methane (CBM) and to address new information concerning wildlife habitat. SUWA further alleged violations of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 through 1543 (2000), and the National Historic Preservation Act, 16 U.S.C. § 470(f) (2000).

^{1/} SUWA explained that it was a founding member of UWC, and that UWC’s proposal, in the form of proposed legislation before the United States Congress, included a 14,173-acre proposed wilderness unit in the North Cedar Mountains. (Notice of Appeal/Statement of Reasons/Request for Stay dated June 7, 2001, in Southern Utah Wilderness Alliance, IBLA 2001-293 (IBLA 2001-293 NA/SOR/Stay I), at 2-3 n.1.)

SUWA also asserted that BLM violated its WIH by not withdrawing from the sale the parcels in the proposed wilderness units.

On May 8, 2001, BLM's Salt Lake Field Office (SLFO) concluded that no further review of UWC's proposed North Cedar Mountains unit was warranted. (IBLA 2001-293 NA/SOR/Stay I Ex. 4.) Likewise, on May 11, 2001, BLM's Monticello Field Office (Monticello FO) concluded that no further review of SUWA's proposed Lockhart Basin and Hart Point units was warranted. (IBLA 2001-293 NA/SOR/Stay II Ex. 4.) ^{2/} SUWA filed separate notices of appeal of SLFO's and MFO's decisions, which were jointly docketed as Southern Utah Wilderness Alliance, IBLA 2001-293.

By decision dated May 22, 2001, BLM upheld SUWA's protest against the May 22 lease sale in part (withdrawing 11 of the parcels from the sale) and denied it in part (leaving the other 43 parcels in the sale). SUWA appealed that decision only to the extent that BLM denied their protest with respect to 28 specified parcels. (IBLA 2001-310 NA/SOR/Stay at 1.) ^{3/} SUWA's appeal from that decision was docketed as Southern Utah Wilderness Alliance, IBLA 2001-310.

^{2/} The Monticello FO's May 11, 2001, letter noted that the land affected by the Hatch Canyon unit was administered by the Moab Field Office (Moab FO), so that Monticello FO did not review information specific to that unit. Id.

^{3/} The 28 parcels identified in the SOR as remaining in this appeal are UT 001 through UT 004, UT 006, UT 011 through UT 014, UT 026 through UT 035, UT 043 through UT 047, UT 050, UT 053, UT 056, and UT 057. Id.

The record shows that BLM changed parcel numbers for some of the parcels from a "Preliminary No." to a "Final No." sometime after the conclusion of the February 2001 lease sale (to add parcels deleted from the earlier sale.) (May 22, 2001, Competitive Lease Sale List at 1.) It appears that appellant refers to the final parcel numbers in its protest and appeal.

However, the parcel numbers in BLM's DNA worksheets are the preliminary numbers. The sizes of some of the preliminarily configured parcels were changed prior to being finally numbered for inclusion in the sale. For example, the parcel with preliminary parcel number "UT 018" with a size of 2,094.09 acres that was addressed in DNA UT-070-2001-31 by the Price Field Office (PFO) was put in the May 2001 sale under final parcel number "UT 026" for 1,726.77 acres (eliminating lands in sec. 7, T. 13 S., R. 12 E., SLM, Utah).

References to parcels herein are to their final number unless otherwise indicated. For convenience, preliminary numbers will be referred to by adding a "p" to them. Thus, pUT-018 and UT-026 refer to the same parcel.

On June 25, 2001, SUWA and BLM filed a joint motion to dismiss the appeal docketed as Southern Utah Wilderness Alliance, IBLA 2001-293, without prejudice, but stipulated and agreed that “the underlying issues raised” in that appeal regarding the proposal for the North Cedar Mountains unit “may be raised before the Board” in the instant appeal. By order dated July 24, 2001, the Board granted the joint motion and dismissed the appeal.

SUWA argues on appeal that BLM’s issuance of oil and gas leases without imposing NSO stipulations ^{4/} constitutes an “irreversible and irretrievable commitment” of resources and that NEPA requires an analysis of the impacts of oil and gas development at the time leases are issued, citing, *inter alia*, Connor v. Burford, 848 F.2d 1441 (9th Cir. 1988) (Connor). (IBLA 2001-310 NA/SOR/Stay at 5-8.) SUWA asserts that, in determining that existing NEPA statements are adequate, BLM erred because it failed to consider changes in resources conditions and failed to take the “hard look” that NEPA requires. Id. at 8-11. In particular, SUWA observes that the U.S. Fish and Wildlife Service (FWS) has listed additional threatened and endangered species that are not addressed in existing land use plans and NEPA documents; it asserts that there is no evidence that BLM took a “hard look” with respect to those species. Id. at 11-15. SUWA further observes that BLM has adopted new lists of sensitive animal and plant species since its land use plans were prepared and that there has been no consideration of the effects of leasing the land on those species. Id. at 15-17. SUWA asserts that existing land use plans and NEPA documents do not analyze unique and significant effects of CBM extraction and development and that BLM erred in issuing leases without preparing an environmental impact statement (EIS) addressing those impacts. Id. at 18-21. Finally, SUWA asserts that BLM erred in rejecting UWC’s proposal for a North Cedar Mountain wilderness unit and in offering parcels within that area for leasing. Id. at 22-40.

[1] SUWA is correct that the appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public lands for oil and gas purposes, because leasing without NSO stipulations constitutes an irreversible and irretrievable commitment to permit surface-disturbing

^{4/} BLM did not give notice that any of the parcels at issue would be issued with NSO stipulations. Surface occupancy is limited in some parcels by special stipulations to protect sage grouse breeding, nesting, and winter habitat; crucial raptor nesting sites; critical deer winter range; live water or perennial streams; slopes in excess of 30 percent; and a sensitive recreation area.

Thus, all the parcels at issue in the present dispute are either Category 1 (open to leasing with standard stipulations as listed on the standard offer to lease and lease form) or Category 2 (open to leasing with special stipulations, *e.g.*, seasonal closures due to wildlife, watershed, and visual concerns).

activity, in some form and to some extent. Wyoming Outdoor Council, 164 IBLA 84, 103 (2004); Western Slope Environmental Resource Council, 163 IBLA 262, 285 (2004); Wyoming Outdoor Council, 156 IBLA 377, 379 (2002); Colorado Environmental Coalition, 149 IBLA 154, 156 (1999), and cases cited; see also Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988); ^{5/} Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983). It remains to determine whether BLM's environmental review was adequate.

Section 102(2)(C) of NEPA requires consideration of potential environmental impacts of a proposed action in an EIS if that action is a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2000). An environmental analysis (EA) is normally required to determine whether a proposed action is major or its effects significant, unless an agency has established a procedure under which a proposed action is categorically excluded from the requirement to prepare an EIS or EA pursuant to 40 CFR 1507.3(b)(2). An EA serves to "(1) [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI]; (2) [a]id an agency's compliance with [NEPA] when no [EIS] is necessary[; and] (3) [f]acilitate preparation of a statement when one is necessary." 40 CFR 1508.9.

As noted above, BLM did not prepare an EA here, although it expressly made a FONSI. Instead, BLM relied on existing environmental documents (prepared in connection with land use planning decisions covering the lands being leased) that it believed adequately analyzed the effects of the inclusion of these lands in the competitive lease sale. BLM documented that reliance in its DNA worksheets.

A proper analysis of the parties' NEPA arguments requires an understanding of the leasing process and its relationship to land use planning. To identify lands that are eligible for leasing, BLM first lists lands that were subject to oil and gas leases that have terminated, expired, been cancelled, or relinquished. See 43 CFR 3120.1-1(a). Thus, a lease offering usually accomplishes little change in the use of affected lands, because most of the offered parcels will have already been subject to oil and gas leases. See Southern Utah Wilderness Alliance, 122 IBLA 17, 19 (1992). The statutory requirement to conduct sales on a quarterly basis (at a minimum)

^{5/} In Connor, after finding that issuing leases without NSO stipulations constitutes an "irreversible and irretrievable commitment of resources," the Court stated: "If the Department chooses not to retain the authority to preclude all surface disturbing activities, then an EIS assessing the full environmental consequences of leasing must be prepared at the point of commitment—when the leases are issued." 848 F.2d at 1451. As discussed below, an extensive EA/FONSI may also suffice if prepared prior to leasing.

(30 U.S.C. § 226(b)(1)(A) (2000)) necessarily makes the issuance of oil and gas leases an activity of a routine and continuing character.

FLPMA requires BLM to develop “land use plans which provide by tracts and areas for use of the public lands.” 43 U.S.C. § 1712(a) (2000). BLM uses its land-use-planning process to determine, among other things, whether or not particular areas of land will be subject to mineral leasing. Thus, long prior to placing parcels up for oil and gas leasing, BLM ordinarily prepares land use plans considering which lands to make available for leasing.

Because the approval of a resource management plan (RMP) is considered a major Federal action significantly affecting the quality of the human environment (43 CFR 1601.0-6), an EIS is prepared to comply with NEPA. Cases such as Colorado Environmental Coalition, 162 IBLA 293, 296-97 (2004), Colorado Environmental Coalition, 161 IBLA 386, 397-98 (2004), and Southern Utah Wilderness Alliance, 159 IBLA 220, 242 (2003), illustrate how BLM uses the land-use-planning process to consider alternative uses of lands for leasing, no leasing, or leasing with special stipulations, as well as the effects of those alternatives. See also, Pennaco Energy v. USDI, 377 F.3d 1147, 1151-52 (10th Cir. 2004) (Pennaco). Some of the parcels at issue in this appeal are covered by RMPs; ^{6/} some parcels are not, being instead covered by transitional management framework plans (MFPs), ^{7/} the approval of which “was not deemed a major federal action significantly affecting the quality of the human environment and did not result in the preparation of an EIS that would

^{6/} Parcels UT-011 through UT-014 were proposed by the SLFO and, since these parcels cover lands in Tooele County, Utah, are apparently subject to the Pony Express RMP and Supplemental Oil and Gas EA. (DNA UT-070-2001-31 at unnumbered page 2, and List of Lands at 4-5).

Parcels UT-043 through UT-047, UT-050, UT-053, UT-056, and UT-057 (pUT-035 through pUT-039, pUT-042, pUT-045, pUT-048, and pUT-049) were proposed by the Moab FO and are covered by the Grand Resource Area RMP (July 1985) and the RMP Oil & Gas Supplemental EA (UT-060-89-025, December 1988). (DNA UT-062-1-064 at unnumbered pages 1 and 17-19.)

^{7/} Parcels UT-001 through UT-004 and UT-006 were proposed by the SLFO and, since they cover lands in Rich County, Utah, are covered by the Randolph MFP (January 1980) and the Bear River East Plan Amendment EA (September 1994). (DNA UT-020-2001-0048 at unnumbered page 2 and List of Lands 1-3.)

Parcels UT-026 through UT-035 (pUT-018 through pUT-027) were proposed by the PFO and are subject to the Price River MFP (September 1983; Supp. August 1984) and an EA on Cumulative Impacts on Oil and Gas Lease Categories (December 1988). (DNA UT-070-2001-31 at Attachment 1-1 through 1-5, and 1-6.)

qualify as a ‘pre-leasing’ EIS.” Southern Utah Wilderness Alliance, 164 IBLA 118, 124 (2004). ^{8/}

BLM described its NEPA compliance for oil and gas leasing in its May 22, 2001, decision:

The BLM’s oil and gas leasing program complies with NEPA through a tiered decision making process as provided for in the Counsel on Environmental Quality [(CEQ)] Guidelines for implementation of NEPA, found at 40 CFR § 1508.28, *Tiering*. This tiered process begins with preparation of a Land Use Plan (LUP), accompanied by a programmatic [EIS]. The EIS analyzes potential environmental impacts of the development of leases that may be offered under the plan. The LUPs categorize lands to be offered into one of four categories for purposes of stipulating conditions to be attached to leases for protection of the environment. Category 1 lease areas are those where no special stipulations are required to protect the environment. In Category 2 lease areas, special lease stipulations on timing of action or other conditions are required. In Category 3 areas, no surface occupancy is stipulated, and no leasing is allowed in Category 4 areas. ^[9/] This planning step is designed to ensure that the potential environmental consequences of lease development are analyzed and found acceptable prior to lease issuance.

(Decision dated May 11, 2001 (Decision) at 2.) This description refers to the land-use-planning-stage environmental process described immediately above. BLM continued:

Prior to offering lands for oil and gas lease sale, the BLM conducts a second, more site-specific tier of NEPA analysis based on the identified or nominated parcels. The BLM field offices prepare an appropriate level of NEPA documentation to insure that any lands offered for lease sale are in conformance with existing LUPs and that any changes in circumstances since the preparation of the LUP/EIS are

^{8/} In SUWA, 164 IBLA at 123-24, we recognized that an MFP may serve as the basis for decision-making under 43 CFR 1610.8(a)(1) until it is superseded by an RMP. However, when the Department published its land use planning regulations in 1979, it was made clear that MFPs would guide BLM actions only for a “transition period” until they were superseded by RMPs. See 43 CFR 1601.8(b) (1979).

^{9/} These four categories are used throughout BLM’s oil and gas environmental review system.

adequately considered. The BLM may change the lease category through amendment to the LUP and further NEPA analysis, if required, before offering the lease.

Id. This description refers to the pre-leasing environmental process that is under review in the current appeal and discussed more fully immediately below. BLM concluded: “Finally, prior to approving an application for permit to drill (APD), the BLM undertakes its most site-specific level of NEPA analysis to determine the impacts of the proposed development.” Id.

This case concerns the adequacy of BLM’s NEPA analysis at the point it describes in its decision as “[p]rior to offering lands for oil and gas lease sale.” BLM describes the environmental review provided at this point as “a second, more site-specific tier of NEPA analysis based on the identified or nominated parcels.” In performing this “tier” of “NEPA analysis,” BLM did not prepare an EIS or EA, but instead relied on DNA worksheets, which are in the record. One DNA was prepared by each BLM field office covering all of the parcels in the sale administered by that office.

For example, the DNA prepared by the Moab FO (UT-062-01-064-DNA) addresses 15 parcels, ^{10/} noting LUP “conformance” with the Grand Resource Area RMP (approved July 1985) and the RMP Oil & Gas Supplemental EA UT-060-89-025 (approved December 1988.) The DNA states that the “proposed action is in conformance with the applicable LUP because it is specifically provided for in * * * page 27 of the Grand RMP, which reads as follows: Adopt the oil and gas category system below, which will protect critical wildlife habitat, watersheds, and recreational use.” (UT-062-01-064-DNA at unnumbered 1.) The categories are not actually listed in the DNA, but they appear as follows in the referenced Grand RMP, along with acreage found suitable for each category within the RMP review area:

Category 1[:] Open to leasing with a set of standard stipulations[:]
1,156,560 acres[:;]
Category 2[:] Open to leasing with a choice of special stipulations to fit
protection needs[:] 563,808 acres[:;]
Category 3[:] Open to leasing, but with no surface occupancy
(directional drilling from outside the area is required)[:]
70,274 acres[:; and]
Category 4[:] No leasing[:] 28,912 acres

^{10/} UT-037 through UT-042, UT-051 through UT-057, UT-061, and UT-062 (pUT-029 through pUT-034, pUT-043 through pUT-049, pUT-055, and pUT-056).

Under the heading “Identify applicable NEPA documents and other related documents that cover the proposed action,” the DNA lists: “Final [EIS], Grand Resource Area (December, 1983); this document is part of the RMP; Grand Resource RMP (July, 1985); and RMP Oil & Gas Supplemental EA #UT-060-89-025 (December 1985).”

All of the DNAs addressed seven “NEPA adequacy criteria” in the form of stock questions, e.g.:

1. Is the current proposed action substantially the same action (or is a part of the action) as previously analyzed? Is the current proposed action located at a site specifically analyzed in an existing document? ^[11/]

The Moab FO DNA answered this question as follows: “Yes. The current proposal is substantially the same action as previously analyzed. The parcels recommended for lease sale are located within a large area specifically analyzed in the RMP (see for example p. 17-19, 21, 23-26, 28, 30, 31).” In the same question and answer style, the Moab FO DNA confirms that an appropriate range of alternatives was analyzed in the cited RMP; that the existing analysis is still valid despite new circumstances including substantial increases in “recreation, tourism, etc.”; that the methodology and approach used in the RMP/EIS are appropriate for the current proposal; that the RMP/EIS analyzed the potential impacts from oil and gas leasing, including reasonably foreseeable direct and indirect impacts of exploration and development, with site-specific impacts of leasing being mitigated by the stipulations found in the RMP; and that cumulative impacts from implementation of the proposed action are “far less than those estimated” in the Oil & Gas Supplemental EA, with additional connected, cumulative, or similar actions not anticipated in the area where the parcels are located.

The Moab FO DNA also discussed the “adequacy [of] public involvement and interagency review” of the existing environmental documents, there having been no such input concerning the preparation of the DNA itself.

The DNAs also list stipulations that will apply to various parcels. For example, the Moab FO DNA states, regarding Parcel pUT-035, that the “antelope habitat” stipulation would apply under which antelope habitat would be closed for fawning season and mitigation measures might be required, unless an exception was granted. Those special stipulations are consistent with the inclusion of those parcels as Category 2.

^{11/} This criteria in the DNAs of the PFO, SLFO, VFO, and Monticello FO omits the second portion of the question quoted below concerning location of the site.

It is significant in the context of the present appeal that BLM's DNAs listed some parcels for which BLM subsequently determined that adequate environmental review had not been done. Thus, DNA UT-046-01-012 by the Kanab FO listed parcels pUT-007 through pUT-010, but contained an attachment stating that "[c]learances and mitigating measures including possible time restrictions" would "be required to protect" a "designated migratory route for deer" and a "wintering area for [e]lk." On May 15, 2001, BLM noted that "restrictions [such] as conditions of approval" would not be "special stipulations," such that the parcels could not be considered as being issued under Category 1, but instead under Category 2. Since the lands covered by the parcel had been grouped under the area previously considered during environmental review as Category 1, the lands were withdrawn from the sale.

BLM also removed some parcels from the sale because the preceding environmental review had not considered all environmental effects. Thus, DNA UT-062-01-064 by the Moab FO listed parcels pUT-029 through pUT-035, all in T. 29 S., R. 21 E., SLM. However, by memo dated May 15, 2001, BLM indicated that it was necessary to identify "spotted owl areas" to be "stipulated as appropriate." Removal of the parcels from the sale gave the Moab FO a chance to undertake further review of those parcels. As discussed below, that action tends to show that BLM made a genuine review of the possible effects of oil and gas leasing of specific parcels on threatened and endangered species.

[2] Appellants have not directly challenged the adequacy of BLM's use of DNAs instead of EAs here. It might be argued that strict compliance with CEQ regulations would disallow DNAs, in favor of preparation of EISs or EAs/FONSIs "tiering" to previously-prepared NEPA studies on specific environmental questions. Indeed, in Pennaco, the Court noted that "DNAs, unlike EAs and FONSIs, are not mentioned in the NEPA or in the regulations implementing the NEPA."^{12/} Pennaco, 377 F.3d at 1162. Nevertheless, the Court expressly acknowledged that "agencies may use non-NEPA procedures to determine whether new NEPA documentation is required." Id. It is thus clear that although DNAs are not themselves documents that may be tiered to NEPA documents, they may nevertheless properly be used to determine the sufficiency of previously issued NEPA documents to address the environmental effects of a proposed action. The Board has declined to prohibit BLM from using DNAs as a means of assessing previously prepared NEPA studies considering environmental effects, provided that an EIS or EA had been prepared at the planning stage, either for an MFP or RMP. Southern Utah Wilderness Alliance, 164 IBLA at 121-23. We do not regard the preparation of DNAs as the preparation of an additional "tier" of NEPA review. Rather, as the Court held in Pennaco, DNAs are prepared to determine if previous NEPA review has adequately addressed the

^{12/} The court referred to 40 CFR 1508.10, which defines the term "environmental document" as including EAs, EISs, FONSIs, and notices of intent.

foreseeable effects of currently proposed actions. That view is consistent with BLM's policy for DNA use, set out in Instruction Memorandum (IM) No. 2000-34 ("Documentation of NEPA Adequacy (DNA) for Oil and Gas Leasing and Other Similar Actions"): "The DNA must be used to review the adequacy of existing NEPA documents—unless a decision has been made to prepare a new or supplemental EA or EIS for those parcels."

Accepting that preparation of DNA worksheets is a valid vehicle to determine whether previous NEPA documentation adequately considered the environmental effects of proposed oil and gas leasing, however, does not amount to accepting DNAs as a replacement for EAs or EISs. DNAs cannot properly be used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them.^{13/} The difference between a DNA and an EA/EIS is not in name only: Preparation of a DNA requires no public participation, while preparation of an EA/EIS does.

The basis of appellant's challenge is that BLM's DNAs are flawed because they do not acknowledge changes in resource conditions within the affected areas. (NA/SOR/Stay at 8.) To show that the relevant LUPs and associated environmental documents are outdated, SUWA points to the facts that FWS has listed additional threatened and endangered species (*id.* at 11) and that BLM has adopted revised animal and plant sensitive species lists (*id.* at 15) since BLM's LUPs were completed. Appellant also points to the effects of CBM extraction, a relatively recent resource development technique that could be seen as "new circumstances" or "unanticipated environmental impacts" (within the meaning of IM 99-149), so as to require additional environmental analysis beyond that referred to in the DNAs.

^{13/} BLM's policy statement in IM 99-147 ("Documentation of [LUP] Conformance and [NEPA] Adequacy") states the converse of this view, that the use of existing NEPA documents is appropriate when "resource conditions and circumstances have not changed." (NA/SOR/Stay in IBLA 2001-310, Ex. I-9 at 1.)

IM 99-147 also set out a policy of requiring BLM to establish an administrative record that documents that the decision maker clearly took a "hard look" at whether new circumstances, new information, or an unanticipated environmental impact warrant new analysis or supplementation of existing NEPA documents and whether the impact analysis is valid for the proposed action, even where the decision maker determines he or she can properly rely on existing NEPA documents. *Id.*

The applicability of IM 99-147 to land parcels proposed for oil and gas was clarified by IM 2000-034. The latter IM clarified that, for "NEPA documentation to be sufficient to support issuance of a[n oil and gas] lease, the analysis of effects of leasing and development must have been detailed enough to identify the types of stipulations that must be attached to leases to retain BLM's full authority to protect or mitigate effects to other resources." (IM 99-2000-034 at 2.)

[3] BLM maintains that it has complied with NEPA here, where its “tiered process” began with preparation of an LUP “accompanied by a programmatic EIS.” (Answer at 11.) BLM’s statement that its decision is supported by a pre-leasing EIS prepared in connection with an RMP may be true for most of the parcels in the May 2001 sale, but no EIS submitted in the record refers to the land in parcels UT-001 through UT-004, UT-006, or UT-026 through UT-035 (pUT-018 through pUT-027). As far as we can determine, none of these fifteen parcels is in an area covered by an RMP for which an EIS was prepared. Instead, they are in areas that were (at the time of the sale) governed by MFPs, the approval of which “was not deemed a major federal action significantly affecting the quality of the human environment and did not result in the preparation of an EIS that would qualify as a ‘pre-leasing’ EIS.” SUWA, 164 IBLA at 124. ^{14/}

A DNA does not necessarily have to refer to an EIS, as an EA could be used to determine environmental effects of a program-level action, provided that such EA was extensive, addressed the potential environmental impacts of issuing the leases, considered the option of not issuing leases, and found that there was no significant impact. See Pennaco, 377 F.3d at 1162; Park County Resource Council, Inc. v. U.S. Department of Agriculture (Park County), 817 F.2d 609, 621-24 (10th Cir. 1987). ^{15/} We see no reason why a DNA could not properly refer to an adequate EA fully considering all environmental effects of the proposed action addressed by that DNA. Thus, the question becomes whether the programmatic EAs covering the lands covered by these fifteen parcels are adequate for that purpose.

We address first the five parcels proposed by SLFO that are in Rich County, Utah, and are covered by the Randolph MFP (Parcels UT-001 through UT-004 and UT-006). The Randolph MFP plainly does not constitute adequate consideration of the environmental effects of oil and gas leasing. It contains only two pages and a large-scale map depicting “lease stipulation areas.” However, on May 26, 1994, the Salt Lake District Office, BLM, completed an EA/FONSI for a plan amendment for oil and gas leasing openly acknowledging the MFP’s lack of adequate NEPA documentation for oil and gas leasing, exploration, and/or development of the Federal oil and gas estate. (EA No. UT-020-91-32 at 3). The EA analyzed the potential environmental impacts for oil and gas leasing categories concerning all

^{14/} See n.7, *supra*.

^{15/} Unlike the approval of an MFP, the approval of an RMP is considered by regulation to be a major Federal action significantly affecting the quality of the human environment (see 43 CFR 1601.0-6), and an EIS is prepared as a step in the process of preparing the RMP. The approval of the MFPs was evidently not deemed a major Federal action significantly affecting the quality of the human environment, as nothing was prepared that would qualify as a “pre-leasing” EIS.

Federal surface/Federal minerals and all Private surface/Federal minerals within seven counties, including Rich County, Utah.

EA No. UT-020-91-32 utilizes the system of four categories for oil and gas leasing discussed above and addresses four alternatives of categorizing the entire Federal oil and gas mineral estate. Significantly to the present appeal, it addresses in some detail the environmental effects of issuing oil and gas leases on 102,139 acres categorized under Category 1 (open to leasing with a set of standard stipulations), 330,723 acres categorized under Category 2 (open to leasing with a choice of special stipulations to fit protection needs), and 530 acres categorized under Category 3 (open to leasing with NSO). (EA No. UT-020-91-32 at 4-5 (breakdown of category acreage) and 14-21 (discussion of environmental effects).) All of the five parcels covered by that EA fall into either Category 1 or 2. ^{16/} Therefore, the EA does adequately address the effects of oil and gas leasing of those lands. That consideration, we hold, was adequate to provide the requisite “hard look” at the leasing stage. In so concluding, we are mindful of the fact that there must be additional environmental review prior to the approval of any applications for permit to drill.

We cannot find, however, that BLM took the requisite “hard look” at the environmental effects of oil and gas leasing for parcels UT-026 through UT-035 (pUT-018 through pUT-027), which were proposed by the PFO. The relevant DNA cites to Environmental Assessment Supplement on Cumulative Impacts on Oil and Gas Categories (UT-066-89-15), a copy of which is in the record. ^{17/} (DNA UT-070-2001-31 at Attachment 1-1 through 1-5, and 1-6.) That document is outdated, having been prepared in 1988 and being based on assumptions concerning expected oil and gas activity only through the year 2000. (UT-066-89-15 at 2.) The consideration of environmental consequences is very brief, comprising less than two complete pages. *Id.* at 10-12. The limited scope of the identified environmental consequences is simply not credible. In sum, we cannot find that the EA to which the DNA referred was extensive or adequately addressed the potential environmental impacts of issuing the leases. Compare, Pennaco, 377 F.3d at 1162; Park County, *supra* at 621-24.

^{16/} Parcel UT-001 is Category 1; parcels UT-002 through UT-004 and UT-005 are Category 2.

^{17/} The DNA also cites to the Price River MFP itself (September 1983; Supp. August 1984). However, it appears that any consideration of the environmental effects of oil and gas leasing were removed from the MFP, having been superseded by the December 1988 EA Supplement expressly addressing effects of oil and gas leasing.

[4] Appellant asserts that BLM's environmental review is flawed because it does not take into account changes in the environment, with the result that BLM has not taken a "hard look" at the effects of oil and gas leasing on the current environment. Appellant states that BLM's "plans are largely outdated and do not accurately reflect the current Fish and Wildlife threatened and endangered species lists." (SOR at 11.) Focusing in particular on the DNAs prepared by BLM's Monticello, Price, and Moab Field Offices, SUWA asserts that "there is no evidence whatsoever to demonstrate that [those offices] took any look, let alone the required 'hard look.'" (SOR at 15.) SUWA further asserts that BLM has adopted revised lists of sensitive animal and plant species since the adoption of its land use plans, but has failed to consider that new information in its DNAs, thereby failing to take the required "hard look." (SOR at 15-17.)

In response, BLM states that its DNAs contain checklists indicating that its resource specialists reviewed current information and found that changed circumstances did not apply to the subject parcels. ^{18/} (Answer at 17.) Although checking an item could be seen as merely conclusory, the fact BLM made a genuine effort to determine which parcels presented new circumstances is shown by the fact seven parcels that included potential critical habitat for the Mexican spotted owl and the Utah prairie dog (both threatened species under the ESA) were removed from the sale. (Answer at 18; Decision at 2, 4.) ^{19/} BLM points out that appellant has not

^{18/} BLM explains its procedures, where it first requests a species list from FWS identifying listed species thought to be located in the counties where a planned action is to occur:

"[I]n this case, the responses included the counties covered by the land use plans developed by the three field offices. However, the listed species that FWS has identified as occurring within the respective counties may or may not actually occur in or near the subject lease sale parcels. It is up to the agency with jurisdiction over the protected species, namely the BLM field resource specialists, to complete a biological opinion in order to ascertain whether the listed species are actually within the action area and to evaluate the nature and extent of jeopardy posed to the species by the proposed action. See [16 U.S.C.] § 1536(b). Those agency specialists make such determinations through on-the-ground clearances, a review of relevant inventories and other studies, and any other relevant information. BLM completed this review, and the DNAs document that the proposed leasing did not impact any threatened or endangered species."

(Answer at 17.)

^{19/} BLM's May 22, 2001, competitive oil and gas lease sale final list states that parcels UT-007 through UT-010 were withdrawn because the DNA indicated that special timing and other restrictions would be necessary to protect various wildlife species.

(continued...)

provided any information that would either demonstrate that the changes with respect to listed species are relevant to any of the parcels in the appeal or support a finding that BLM erred in its DNAs. (Answer at 12-13.) We agree that, in the absence of such information, the fact that BLM withdrew parcels from the sale in order to further review effects on endangered or threatened species for some of the parcels adequately demonstrates that BLM considered and decided that there would not be effects on threatened and endangered species for other parcels.

[5] SUWA also contends that development of CBM has significantly different impacts and effects than the effects of conventional oil and gas development and asserts that BLM violates NEPA and errs by using DNAs that rely on existing land use plans containing no analysis of CBM development. (SOR at 18-20.) BLM contends that impacts of CBM development depend on specific geologic conditions and that, in Utah, those impacts do not differ significantly from other oil and gas development. (Answer at 20-23; Appendix F (Declaration of Robert A. Hendricks, Supervisory Petroleum Engineer, BLM).) BLM also contends that no further analysis of CBM development was required because no CBM development is reasonably foreseeable on the parcels subject to this appeal, referring to Appendix A of its May 22, 2001, decision. (Answer at 25-27.)^{20/}

^{19/} (...continued)

BLM's May 22, 2001, decision states that Parcel UT-010 was withdrawn to allow the Kanab Field Office to meet with FWS with respect to leasing within potential habitat for the Utah prairie dog, a threatened species listed under the ESA. (Decision at 2.) BLM's decision also indicates that parcels UT-037 through UT-042 were withdrawn to allow the Moab FO an opportunity to meet with FWS with respect to leasing within potential habitat for the Mexican spotted owl, also a threatened species listed under the ESA. *Id.* BLM stated that Parcel UT-043 was retained in the sale because its review indicated that the parcel is not located within potential Mexican spotted owl habitat, thus indicating that BLM engaged in a genuine review of the particulars of the various parcels.

^{20/} Appellant has moved to strike from the record Appendix A to BLM's decision as well as Appendix F to BLM's Answer, contending that "such post-hoc justifications" were not part of the record of the decision to proceed with the sale because the administrative record was "completed" before these documents were generated, citing cases where the Government was prevented from submitting new information on judicial review. (Motion to Strike and Reply to BLM Answer at 2-3.) In making this argument, appellant has confused judicial review with administrative review. In National Wildlife Federation, 145 IBLA 348, 362 (1998), we recognized that courts are limited in their review to the administrative record created before the agency under the arbitrary, capricious, or an abuse of discretion standard, but stated:

(continued...)

In support of its view that the impacts of CBM development differ significantly from those of conventional oil and gas development, appellant refers to CBM development in other areas such as the San Juan Basin and the Powder River Basin. In its review of this Board's decisions in Wyoming Outdoor Council (WOC I), 156 IBLA 347 (2002), and Wyoming Outdoor Council (On Reconsideration) (WOC II), 157 IBLA 259 (2002), the United States Court of Appeals for the Tenth Circuit stated that "[t]he hotly contested issue underlying [WOC I and II] is whether the environmental impacts of CBM development are significantly different than the environmental impacts of non-CBM oil and gas development." Pennaco, 377 F.3d at 1152. In Pennaco, the Court sustained this Board's view that, if pre-leasing environmental documentation does not contain any discussion of the impacts of CBM exploration and development, additional pre-leasing NEPA analysis is required when the effects of CBM development would be significantly different from conventional oil and gas development.

By its own terms, however, the Board's holding sustained in Pennaco may not be properly extended to require further NEPA analysis in cases where there is no foreseeable likelihood of CBM development or where the impacts of CBM development do not significantly differ from those that arise from conventional oil or gas development. In recent decisions, this Board has recognized that BLM may properly rely on existing land use documents and their associated environmental statements where there is no foreseeable likelihood of CBM development or where the impacts of CBM development do not differ significantly from the effects of oil and

^{20/} (...continued)

"[O]ur review authority is de novo in scope because it is our delegated responsibility to decide for the Department 'as fully and finally as might the Secretary' appeals regarding use and disposition of the public lands and their resources. 43 C.F.R. § 4.1; see Ideal Basic Industries v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); Forest Oil Corp., 141 IBLA 295, 306 (1997); Richard Bargaen, 117 IBLA 239, 245 n.3 (1991); United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983)."

Thus, the Board is not limited by the record before BLM at the time it denied appellant's protest in this case in determining the correctness of that decision. Wyoming Outdoor Council, 160 IBLA 387, 397-99 (2004). Although BLM must ensure that its decision is supported by a rational basis that is stated in the decision and demonstrated in the accompanying administrative record, e.g., Larry Brown & Associates, 133 IBLA 202, 205 (1995); Eddleman Community Property Trust, 106 IBLA 376, 377 (1989), we have also, as a matter of practice, allowed parties to supplement the record on appeal. Silverado Nevada, Inc., 152 IBLA 313, 322 (2000). We have accepted data submitted by BLM on appeal in support of its decision, emphasizing that it is our duty to have before us as complete a record as possible. Wyoming Outdoor Council, *supra*; In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983); see B. K. Killion, 90 IBLA 378, 381 (1986).

gas development already described in existing NEPA documents. Wyoming Outdoor Council, 164 IBLA at 103-105 (“In light of the apparent absence of any serious potential for CBM development, BLM properly relied on the RMP/EIS analysis contained in the RMP to fulfill its pre-leasing NEPA obligation.”); Western Slope Environmental Resource Council, 163 IBLA at 289-90 (“Given that the effects of CBM production in the Piceance Basin will not significantly differ from conventional oil and gas production, we do not fault BLM for not specifically analyzing the environmental impacts of CBM production in the Piceance Basin per se.”)

In Western Slope, 163 IBLA at 286, we reiterated our holding that appellants challenging a BLM decision bear the burden of demonstrating with objective proof that the decision is 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 proposed action, citing Native Ecosystems Council, 160 IBLA 288, 292 (2003); Lee Sprout, 160 IBLA 9, 12-13 (2003); Klamath Siskiyou Wildlands Center, 157 IBLA 322, 328 (2002); and Southern Utah Wilderness Alliance, 123 IBLA 302, 308 (1992). Mere differences of opinion provide no basis for reversal of a BLM decision, and appellants bear the burden of demonstrating error by a preponderance of the evidence. Id.

The appellants in Western Slope, like SUWA in the instant appeal, referred to unique impacts of CBM development in the San Juan and Powder River Basins, but the Board found that they had not shown that the impacts were likely to occur on the parcels in their appeal. 163 IBLA at 286. Citing evidence provided by the intervenors in the appeal, the Board found that “there is a great deal of evidence that the geologic realities” of the parcels in the appeal “are strikingly different from those found in the San Juan and Powder River Basins.” Id.

In this case, SUWA has likewise failed to sustain its burden. Appendix A to BLM’s decision sets forth BLM’s assessment for the likelihood of CBM development of the parcels in appellant’s protest. The Appendix states that there is no coal and a “zero” potential for CBM development in the following parcels in this appeal: UT-001 through UT-004, UT-006, UT-011 through UT-014, UT-044 through UT-047, UT-050, and UT-053. With respect to parcels UT-026 through UT-035, Appendix A states:

These parcels are located near the southern margin of the Book Cliffs Coal Field where coal beds occur in the Black Hawk Formation. Most of the lands in the parcels are south of the coal bed outcrops or a short distance north of the outcrops where no coal beds are present or, for those north of the outcrop, coals are very shallow. In the latter case any CBM that might have been present would have been lost through leakage at the outcrop. Deeper coal beds in the Ferron Sandstone have produced CBM several miles west of the parcels. However, Utah

Geological Survey data show that these coals thin and pinch out west of the area where the parcels are located. Potential for recoverable amounts of CBM in the parcels is zero to extremely low.

Appendix A describes parcel UT-043 and others in areas where “[t]hin discontinuous coal beds * * * occur in the cap rock to mesas and benches * * * at or very near the surface,” so that “[a]ny CBM that might have been present would have been lost through leakage.” Similarly, parcels UT-056 and UT-057 “are near the southeast margin of the Sego Coal Field where coal beds have been eroded away or are at the surface where CBM would have been lost through leakage.”

We turn now to appellant’s argument that BLM erred in rejecting its North Cedar Mountains wilderness proposal and including parcels UT 011 through UT 014 in the sale. Although BLM had previously considered but dropped the North Cedar Mountains unit from further wilderness consideration in 1980,^{21/} appellant contends BLM failed to consider its April 2001 proposal in a manner consistent with BLM Manual H-6310-1 “Wilderness Inventory and Study Procedures” (Jan. 10, 2001). BLM contends that its consideration of the new proposal was consistent with the Handbook, that the SFO properly concluded that there was no new information warranting further consideration of the area as wilderness, and that BLM properly denied SUWA’s protest of these parcels. The history of the wilderness review process, as well as developments since 2001 concerning the Secretary’s authority to consider new wilderness proposals in Utah, is explored in detail in our decision in Colorado Environmental Coalition, 162 IBLA 386, 391-96 (2004), which controls the disposition of this issue in this case. For the reasons set forth at the cited pages, we conclude that BLM properly declined to consider the wilderness proposal, the proposal did not preclude BLM from proposing parcels UT 011 through UT 014 for the May 2001 sale, and BLM is not required to consider wilderness issues on remand.

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 UT-026 through UT-035 (pUT-018 through pUT-027) and remanded for further action consistent with this opinion; as to all other parcels, BLM’s decision is affirmed.

David L. Hughes
Administrative Judge

^{21/} 45 FR 75602, 75604 (Nov. 14, 1980) (Unit UT-020-087).

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge