



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Utah State Office
P.O. Box 45155
Salt Lake City, UT 84145-0155
<http://www.blm.gov/ut/st/en.html>



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February 22, 2010

DECISION

| | | |
|--------------------------------|---|---------------------------------------|
| Lauren McCain | : | |
| Prairie Protection Director | : | |
| WildEarth Guardians | : | Protest to the Inclusion of Parcels |
| 1536 Wynkoop, Suite 301 | : | UT0210-003 and UT0210-004 in the |
| Denver, Colorado 80202 | : | February 23, 2010 Competitive Oil and |
| | : | Gas Lease Sale |
| Megan Mueller, Staff Biologist | : | |
| Center for Native Ecosystems | : | |
| 1536 Wynkoop, Suite 303 | : | |
| Denver, Colorado 80202 | : | |

Protest Denied

On January 8, 2010, the Bureau of Land Management (BLM) provided notice (Notice of Competitive Lease Sale) that four parcels of land would be offered in a competitive oil and gas lease sale scheduled for February 23, 2010. In a letter received at the BLM on February 8, 2010, WildEarth Guardians (WEG) filed a protest on its behalf and on behalf of the Center for Native Ecosystems¹ (CNE) on the inclusion of two parcels in the sale. The protested parcels are on public lands administered by the BLM's Cedar City Field Office, identified as UTU87790 (UT0210-003) and UTU87791 (UT0210-004). For the reasons set forth below, the protest is denied.

¹ Lauren McCain signed the protest on behalf of both WEG and CNE. However, there is no indication that Ms. McCain is a full-time employee of, an officer of, or an attorney for CNE. Consequently, without some evidence that Ms. McCain is authorized to represent CNE before the Department, only WEG is recognized as a party to this protest. See 43 C.F.R. § 1.3(b)(3) (2004); *Sigma M. Exploration, Inc.*, 145 IBLA 182, 186(1996) ("An individual who is not an attorney may practice in regard to a matter in which he represents himself, a member of his family, a partnership of which he is a member, or a corporation, business trust, or association of which he is an officer or full-time employee. The regulation does not authorize practice by an "agent" or an individual performing a service for a client other than as an attorney.").

Protest Issues Raised

WEG protests the inclusion of the two above-referenced parcels because it claims that Utah prairie dogs would be significantly impacted by oil and gas activities and that the mitigation measures that would be employed for any future oil and gas activity on the parcels are insufficient to protect the species and its recovery. WEG asserts that this would violate the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the Endangered Species Act (ESA).

NEPA Issues:

WEG argues that the BLM failed to take a “hard look” at potential impacts of leasing and consider significant new information on Utah prairie dogs. WEG claims that none of the NEPA documents to which the proposed leasing action is tiered consider significant new information, some of which was provided by WEG in prior leasing comments and protests, or contain adequate analysis of impacts.

BLM Response:

The WEG protest asserts direct, indirect, and cumulative impacts have not been adequately analyzed and that site-specific NEPA is required for leasing of the protested parcels. Although WEG alleges that significant new information was provided to the BLM and none of it was considered in any of the NEPA documents relied upon, the BLM did consider the information but did not determine it “significant” in the context of NEPA.² The BLM prepared a programmatic environmental assessment (EA) in 2008 (*Environmental Assessment for Oil and Gas Leasing in the Eastern Portion of the Cedar City Field Office*, UT-040-08-036) in order to supplement prior analysis. This EA considers new information and assesses impacts that could result from oil and gas leasing actions, and provides analysis and rationale for areas where future leasing could be considered.

The WEG protest incorrectly states that the EA only analyzed impacts on certain parcels and failed to address adjacent lands. The analysis in the EA was not limited to specific parcels, as it addressed existing resources over a large area and contains an analysis of impacts from various leasing alternatives, with a stated intent to be used as a basis for reviewing subsequent parcel-specific proposals. Additionally, contrary to the WEG allegation, the EA considered an adequate range of alternatives including—leasing according to the prescriptions in the existing land use plan, not leasing, and leasing with additional protective measures, including no surface occupancy. WEG also alleges that the NEPA document fails to analyze the effectiveness of proposed mitigation measures. However, the EA contains an analysis of impacts, addresses the effectiveness of proposed mitigation specific to Utah prairie dogs and other ESA-listed species, and discloses that these measures were developed in coordination with USFWS.

A Finding of No Significant Impact (FONSI) and Amended Decision Record (approved September 9, 2009) identified those areas where leasing will be deferred until an environmental impact statement (EIS) and plan revision are completed, and those areas where the EA-level analysis is sufficient to conclude that no significant affects are expected from further leasing. Proposed leasing of the protested parcels is consistent with the amended decision. This

² The *Environmental Assessment for Oil and Gas Leasing in the Eastern Portion of the Cedar City Field Office*(EA #UT-040-08-036, BLM, Aug. 2008) includes Appendix C, Response to Public Comments, which details each comment received, including those provided by WEG, and provides the BLM’s response describing the extent to which changes were made to the EA, or the rationale for not making changes.

decision was subject to a 30-day appeal period, and no appeals were filed. Challenges to the FONSI and decision record will not be considered as part of this protest.

A Determination of NEPA Adequacy (DNA) is an appropriate means for the BLM to assess whether existing NEPA documents adequately analyze the anticipated impacts of an action so that the agency may proceed without performing further NEPA review. See Pennaco Energy v. U.S. Dep't of the Interior, 377 F.3d 1147, 1162 (10th Cir. 2004); Colorado Env'tl. Coal. 173 IBLA 362, 372 (2008); Ctr. for Native Ecosystems, 170 IBLA 331, 345-46 (2006); S. Utah Wilderness Alliance, 166 IBLA 270, 282-83 (2005). Based on its review, the Cedar City Field Office prepared a DNA for the subject parcels documenting its determination that the existing analysis sufficiently assessed the environmental consequences of leasing and adequately covers the protested parcels.³

FLPMA Issues:

WEG asserts that the BLM has failed in its responsibility to prevent unnecessary or undue degradation and to mitigate impacts, as required by FLPMA, in proposing to lease the protested parcels.

BLM Response:

WEG correctly recognizes that FLPMA requires BLM to prevent unnecessary or undue degradation in its management of the federal public lands. However, WEG's contention that BLM has violated FLPMA relies entirely on its unsupported assumption that the sale of the protested parcels will cause unnecessary or undue degradation to the lands underlying the subject parcels. However, nothing in the NEPA analyses BLM relied on in determining which parcels to include in the sale in any way supports this assumption, and the WEG protest provides no evidence to show otherwise. The mere issuance of leases does not constitute unnecessary or undue degradation of the public lands. See Colorado Env'tl. Coalition, et al., 165 IBLA 221, 229 (2005) (oil and gas development is not per se unnecessary or undue degradation). Further, for one to show that oil and gas development would have this detrimental effect, one must at a minimum show that a lessee's operations would be conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology. See id. at 229. WEG's mere assertion that leasing of the protested parcels will cause unnecessary or undue degradation is groundless.

In compliance with existing law and policy, the BLM protects Threatened and Endangered (T&E) species from future oil and gas activity that might result from leasing by applying a T & E stipulation⁴ to every lease parcel. Additionally, species-specific T&E lease notices, such as the Utah prairie dog lease notice, are applied as needed. At the time of leasing, since there is no way of knowing if or where the impacts of development would potentially occur, the lease stipulation identifies BLM's authority for preventing impacts to listed species. Species-specific lease notices identify the parcels where species or habitat (existing or potential) may exist and the conservation measures that may be used to protect the species or habitat like the Utah prairie dog, should they be affected by future development. Although Section 7 of the ESA applies to future lease development as a matter of law, the stipulation and notice provide full disclosure to potential lessees that specific T&E species, habitat or potential habitat exist on the

³ The Cedar City Field Office relied upon the *Cedar Beaver Garfield Antimony Environmental Impact Statement/Resource Management Plan* (BLM, Oct. 1986) and *Environmental Assessment for Oil and Gas Leasing in the Eastern Portion of the Cedar City Field Office* (EA #UT-040-08-036, BLM, Aug. 2008).

⁴ Instruction Memorandum WO- 2002-174 provides national direction for the use of this stipulation.

subject parcels. If future development is proposed and conservation measures outlined in the lease notice are applied, the scope of Section 7 consultation could be minimized at the development stage. However, if these measures are found to be inadequate, the BLM retains the authority to deny the proposal. The language for the T&E stipulation and notice are illustrated below:

Threatened and Endangered Species Stipulation

“The lease area may now or hereafter contain plants, animals or their habitats determined to be threatened, endangered, or other special status species. BLM may recommend modifications to exploration and development proposals to further its conservation and management objective to avoid BLM-approved activity that would contribute to a need to list such species or their habitat. BLM may require modifications to or disapprove proposed activity that is likely to result in jeopardy to the continued existence of a proposed or listed threatened or endangered species or result in the destruction or adverse modification of a designated or proposed critical habitat. BLM will not approve any ground-disturbing activity until it completes its obligations under applicable requirements of the Endangered Species Act as amended, 16 U.S.C. 1531 et seq. including completion of any required procedure for conference or consultation.”

Lease Notice - T&E 08 - Utah Prairie Dog

“The lessee/operator is given notice that lands in this lease may contain historic and/or occupied Utah prairie dog habitat, a threatened species under the Endangered Species Act. Avoidance or use restrictions may be placed on portions of the lease. Application of appropriate measures will depend whether the action is temporary or permanent, and whether it occurs when prairie dogs are active or hibernating. A temporary action is completed prior to the following active season leaving no permanent structures and resulting in no permanent habitat loss. A permanent action continues for more than one activity/hibernation season and/or causes a loss of Utah prairie dog habitat or displaces prairie dogs through disturbances, i.e. creation of a permanent structure. The following avoidance and minimization measures have been designed to ensure activities carried out on the lease are in compliance with the Endangered Species Act. Integration of, and adherence to these measures will facilitate review and analysis of any submitted permits under the authority of this lease. Following these measures could reduce the scope of Endangered Species Act, Section 7 consultation at the permit stage.

Current avoidance and minimization measures include the following:

1. Surveys will be required prior to operations unless species occupancy and distribution information is complete and available. All Surveys must be conducted by qualified individual(s).
2. Lease activities will require monitoring throughout the duration of the project. To ensure desired results are being achieved, minimization measures will be evaluated and, if necessary, Section 7 consultation reinitiated.
3. Where technically and economically feasible, use directional drilling or multiple wells from the same pad to reduce surface disturbance and eliminate drilling in prairie dog habitat.
4. Surface occupancy or other surface disturbing activity will be avoided within 0.5 mile of active prairie dog colonies.
5. Permanent surface disturbance or facilities will be avoided within 0.5 mile of potentially suitable, unoccupied prairie dog habitat, identified and mapped by Utah Division of Wildlife Resources since 1976.
6. The lessee/operator should consider if fencing infrastructure on well pad, e.g., drill pads, tank batteries, and compressors, would be needed to protect equipment from burrowing activities. In addition, the operator should consider if future surface disturbing activities would be required at the site.
7. Within occupied habitat, set a 25 mph speed limit on operator-created and maintained roads.
8. Limit disturbances to and within suitable habitat by staying on designated routes.
9. Limit new access routes created by the project.

Additional measures to avoid or minimize effects to the species may be developed and implemented in consultation with the U.S. Fish and Wildlife Service between the lease sale stage and lease development stage to ensure continued compliance with the ESA.”

ESA Issues:

WEG contends that the BLM and the U.S. Fish and Wildlife Service (USFWS) have failed to meet the requirements of the ESA with respect to Utah prairie dogs.

BLM Response:

The WEG protest does not consider applicable lease stipulations or notices that may be relevant to its protest allegations. All of the species or habitat identified on or near the protested parcels have been considered and are addressed with applicable lease stipulations and/or notices. The BLM coordinated extensively with and requested comments from experts in the USFWS and the Utah Division of Wildlife Resources (DWR) on the February 2010 Oil and Gas Lease Sale list on a parcel-specific basis. The review by the two agencies' field specialists, energy coordinators and NEPA specialists considered the effects of oil and gas leasing activity on aquatic and terrestrial species and habitats, including Utah prairie dogs. The USFWS and DWR each provided comments on a parcel-specific basis and all recommendations were incorporated into the final parcel list. The USFWS and DWR also affirmed that adequate protection was afforded to all relevant species or habitat.

The WEG protest also alleges that the BLM has failed to meet its obligations under the ESA for the Utah prairie dog. This obligation was fulfilled when the BLM completed statewide formal programmatic consultation with the USFWS for lease notices, resulting in a memorandum from the USFWS concurring with the "not likely to adversely affect" (NLAA) determination from the BLM for Utah T&E species including the Utah prairie dog. After communicating with the USFWS for the February 2010 lease sale as discussed above, the BLM applied the Utah prairie dog lease notice per the statewide programmatic Section 7 consultation and has fulfilled its obligation under the ESA for the leasing process. The BLM will further carry out its obligation under ESA at the development stage by completing consultation with the USFWS, if needed.

To the extent that WEG has raised any allegations not discussed above, they have been considered and are found to be without merit. In conclusion, for the above-stated reasons, the CNE Protest is denied.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. Part 4 and the enclosed Form 1842-1. If an appeal is taken, the notice of appeal must be filed in this office (at the address shown on the enclosed Form) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay pursuant to 43 C.F.R. Part 4, Subpart B § 4.21, during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay must show sufficient justification based on the standards listed below. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant's success on the merits;

3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

Copies of the notice of appeal, petition for stay, and statement of reasons also must be submitted to each party named in this decision and to the Office of the Regional Solicitor, Intermountain Region, 125 South State Street, Suite 6201, Salt Lake City, Utah 84138, at the same time the original documents are filed in this office.

/s/ Selma Sierra

Selma Sierra
State Director

Enclosure

Form 1842-1 (2pp)

cc: John Steiger, Office of the Solicitor, Intermountain Region,
125 South State Street, Suite 6201, Salt Lake City, UT 84138

bcc: Protest Book
Reading File: UT-910, UT-930, UT-922, UT-952
Central Files
WO-310, 501LS
Field Offices: Cedar City