



United States Department of the Interior



BUREAU OF LAND MANAGEMENT

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JUL 31 2018

In Reply Refer To:
3100 (NV920)

CERTIFIED MAIL 9171 9690 0935 0111 8478 98

DECISION

WildEarth Guardians : Protest of Parcels in the
Rebecca Fischer, Climate Guardian : June 12, 2018
2590 Walnut Street : Competitive Oil and Gas Lease Sale
Denver, CO 80205 :

Protest Dismissed Parcels Offered For Sale

On May 7, 2018, the Bureau of Land Management (BLM), Nevada State Office (NVSO), timely received a protest¹ from WildEarth Guardians (Guardians). Guardians protested all of the 166 parcels scheduled to be offered at the June 12, 2018 Competitive Oil and Gas Lease Sale (the Sale) and the Battle Mountain District Office's (BMDO) Oil and Gas Lease Sale Environmental Assessment (EA), DOI-BLM-NV-B020-2018-0017-EA.²

BACKGROUND

The BLM received 166 nominated parcels for the Sale through September 15, 2017. The 166 nominated parcels included land in Federal mineral estate located in the BLM Nevada's Battle Mountain District Office (BMDO). After the NVSO completed preliminary adjudication³ of the nominated parcels, the NVSO screened each parcel to determine compliance with national and state BLM policies, including BLM's efforts related to the management of Greater Sage Grouse on public lands.

On November 1, 2017, the NVSO sent a preliminary parcel list to the BMDO for review. This review included interdisciplinary team review by BLM specialists, field visits to nominated

¹ The protest is posted on the BLM website, located at: <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada>

² The EA is posted to the BLM's ePlanning website with links to the documents located at: <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada>

³ Preliminary adjudication is the first stage of analysis of nominated lands conducted by the State Office to prepare preliminary sale parcels for District/Field Office review. During preliminary adjudication, the State Office confirms availability of nominated lands for leasing pursuant to 30 U.S.C. § 181 *et seq.*, 43 CFR 3100 *et seq.*, and BLM policies. Once the State Office completes preliminary adjudication, it consolidates the nominated land available for leasing into a preliminary parcel list to send to the District/Field Office for National Environmental Policy Act (NEPA) analysis and leasing recommendations.

parcels (where appropriate), review of conformance with the Land Use Plans, and preparation of an EA documenting National Environmental Policy Act (NEPA) compliance.⁴ The preliminary parcel list was also posted in the NVSO Public Room on November 1, 2017 for public review. This public scoping period allowed the public an opportunity to provide comments before the BLM developed the EA. Scoping comments were then analyzed and incorporated into the EA. During preparation of the preliminary EA, BMDO notified the public of the proposed action by posting the project on eplanning⁵ and publishing a press release announcing a public comment period (January 16, 2017 through February 15, 2017). Once the comment period ended, the BMDO reviewed all comments (including the scoping comments) and summarized them into a single document. Guardians did not participate in commenting on this lease sale.

The EA tiered to the existing Land Use Plans (LUP)⁶, in accordance with the Code of Federal Regulations (CFR) at 40 CFR 1502.20:

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review . . . the subsequent . . . environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

The federal action, an oil and gas lease sale, is not a planning level action making resource allocation decisions, (analyzed in a Resource Management Plan), nor a specific implementation action (e.g., a permit to drill, analyzed in a site specific NEPA document).⁷ The federal action is to conduct an oil and gas lease sale and is supported by its own NEPA document. BLM described its purpose and need for the action in the EA as follows:

1.2 Purpose and Need for Action, and Decision to be Made

Oil and gas leasing is necessary to provide oil and gas companies with new areas to explore and potentially develop, and is recognized as an acceptable use of the public lands under FLPMA. Leasing is authorized under the Mineral Leasing Act of 1920, as amended and modified by subsequent legislation, and regulations found at 43 CFR part 3100. BLM authority for leasing public mineral estate for the development of energy resources, including oil and gas, is described in 43 CFR 3160.0-3. Offering parcels for competitive lease sale provides for orderly development of fluid mineral resources under BLM's jurisdiction in a manner consistent with multiple use management and consideration for the natural and cultural resources that may be present. This requires that adequate provisions are included with the leases to protect public health and safety and assure full

⁴ See BLM, H-1601-1, *Land Use Planning Handbook*, (Mar. 2005) (p. 42): “after the RMP is approved, any authorizations and management actions approved based on an activity-level or project-specific EIS (or EA) must be specifically provided for in the RMP or be consistent with the terms, conditions, and decisions in the approved RMP.” See also 43 CFR 1610.5-3.

⁵ Eplanning is the BLM national register for LUP and National Environmental Policy Act NEPA documents. The register allows you to review and comment online on BLM NEPA and planning projects.

⁶ The EA is in conformance with the Tonopah RMP (Tonopah Field Office), approved 1997, the Shoshone Eureka RMP (Mt. Lewis Field Office), approved in 1986, the Sage-Grouse RMPA, approved 2015, their associated Records of Decision, and all subsequent applicable amendments.

⁷ See BLM, H-1624-1, *Planning for Fluid Minerals Handbook*, (Feb. 2018)

compliance with the spirit and objectives of NEPA and other federal environmental laws and regulations.

This action is being initiated to facilitate Battle Mountain District's implementation of the requirements in Executive Order (EO) 13212 (2001) and the National Energy Policy Act (2005). The BLM is required by law to consider leasing of nominated areas if leasing is in conformance with the applicable BLM land use plan. The District must provide a recommendation to the Nevada BLM State Director who will decide which parcels will be included in the upcoming June 2018 Competitive Oil and Gas Lease Sale, and which stipulations will be applied, based on the analysis in this EA.

The BMDO EA considered two (2) alternatives:

- The “Proposed Action” alternative, which included offering all 166 nominated parcels that were sent to the BMDO for review, with stipulations from the existing RMPs.
- The “No Action” alternative, which considered rejecting all parcels nominated for the lease sale in June 2018. This alternative is included as a baseline for assessing and comparing potential impacts.

Additional alternatives were proposed in public comments, however they were not carried forward for further analysis as they would not have resulted in substantial additional protection, as the proposed action with stipulations and best management practices was found to provide adequate resource protection through the EA analysis. The proposed alternatives did not meet the Purpose and Need for the federal action and were not in compliance with BLM policy regarding the Land Use Planning process and the Oil and Gas leasing process. These alternatives were discussed in the EA, Appendix K: Summary of Comments and Responses.

On April 27, 2018, the NVSO published a *Notice of Competitive Oil and Gas Lease Sale for June 12, 2018*⁸ (Notice), resulting in a total of 166 parcels offered for lease. This protest challenges the EA and all of the 166 parcels described in the Notice.⁹

ISSUES

Guardians' protest generally alleges that the BLM failed to comply with the NEPA 42 U.S.C. § 4321 *et seq.*, the Minerals Leasing Act of 1920, as amended (MLA), 30 U.S.C. § 181 *et seq.*, and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.* The following addresses the Guardians' protest related to the Sale.

The BLM has reviewed the Guardians' protest in its entirety; the substantive protests are numbered and provided in bold with BLM responses following.

⁸ The Notice contains a memorandum of general sale information, the final parcel list, and the final stipulations.

⁹ The June 2018 Competitive Oil and Gas Lease Sale Protest and Decision are posted on the BLM website, located at: <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada>

I. The BLM's Environmental Assessment Violates NEPA and FLPMA.

A. The BLM Cannot Lease the Proposed Parcels Until the Battle Mountain RMP is Complete.

BLM Response:

BLM direction (IM 2018-034, Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews) states, “Through effective monitoring and periodic RMP evaluations, state and field offices will examine resource management decisions to determine whether the RMPs adequately protect important resource values in light of changing circumstances, updated policies, and new information (H-1601-1, sections V.A and B). The results of such reviews and evaluations may require a state/field office to update resource information through land use plan maintenance, amendment, or revision. It is BLM policy that existing land use plan decisions remain in effect until an amendment or revision is [completed and] approved. Therefore, the BLM will not routinely defer leasing when waiting for an RMP amendment or revision to be signed. Rather, when making leasing decisions, the BLM will exercise its discretion consistent with existing RMPs and the State Director should consult with the Washington Office (WO) before deciding to defer leasing of any parcels. When necessary, state/field offices will maintain or amend RMPs to accommodate changes in lease stipulations in accordance with guidance found in H-1610-1, Land Use Planning, sections VI.H and VII.B.”

The protestant would have BLM defer oil and gas lease sales pending RMP revision or amendment contrary to BLM's understanding of law, regulation and policy. BLM will continue to apply its land use plan and issue implementation decisions pursuant thereto. Failure to do so, as advanced by protestant, could result in a state of continued suspension in implementation of the land use plan, and could require revisions whenever a protest is received, which is contrary to the clear language of the statute.

Therefore, the above Guardians' protest has been considered, found to be without merit, and is dismissed.

B. The BLM Fails to Analyze a Range of Reasonable Alternatives.

BLM Response:

In the BLM NEPA Handbook H-1790-1, and in CEQ guidance, the BLM is directed in NEPA documents to evaluate the proposed action, the no action alternative as a baseline, and other “Reasonable Alternatives” which meet the BLM's Purpose and Need and are within the BLM's authority. The BLM is not required to evaluate alternatives which do not meet the agency's Purpose and Need, are not within the BLM's discretion, or which are precluded by law. Quarterly lease sales are required by the MLA, and the leasing of these nominated parcels conforms to the existing land use plan, which is not under revision in this action, and is not an appropriate protest point. In addition, as recognized by protestant, the two alternatives present a range of alternatives from leasing all of the proposed parcels to leasing none of them and everything in between. An alternative that is based on air quality effects is not a reasonable alternative inasmuch as air quality is an effect that applies to the entire range of alternatives. That is, air quality does not drive the alternative just as levels of habitat, range, or recreation do not directly drive alternatives. BLM manages its land pursuant to use, occupancy and development

of public land resources, while taking into consideration the effects of such use on other public land resources. Protestant's claim that BLM should identify alternatives based on an effect of public land use is contrary to the statute and the regulations that implement it.

In conclusion, the BLM did comply with NEPA, as stated above. Therefore, the above Guardians' protest has been considered, found to be without merit and is dismissed.

C. The BLM Improperly Defers Its Site-Specific NEPA Analyses to the Application Permit to Drill Stage.

BLM Response:

BMDO reviewed all 166 nominated parcels and did perform site-specific analysis on all parcels containing approximately 313,715 acres of public land, where the specialists had enough information and data to adequately analyze any potential direct or indirect impacts on affected present resources. After conducting onsite reviews for each parcel by a team of resource specialists and disclosing to the public any potential impacts to resources from leasing these lands, BMDO was able to recommend to the State Director the leasing of 166 nominated parcels, as mandated by regulations. BLM does make several references throughout the EA stating that once an APD is submitted, that additional site-specific NEPA analysis would be performed in addition to the leasing EA. This should not be misconstrued that the leasing EA is not site-specific. Each parcel is reviewed, scrutinized, and evaluated for any potential impacts, and whether they may directly or indirectly affect resources from the leasing activity. If there is scientific evidence that indicates that exploration and development of a particular parcel may have a substantial impact to a resource, it is not recommended for leasing, if no reasonable mitigation is available.

Protestant argues that leasing and drilling are interdependent, connected actions as defined by the CEQ regulations. However, as noted by the BLM, drilling may never take place on any particular lease and the lease of a parcel does not ensure development, as noted by Protestant. As such, the two independent activities do not meet the definition of a connected action. BLM does analyze a Reasonably Foreseeable Development scenario in the EA, which is based upon recent and historic development within the District and provides the best available estimate of future development and disturbance on the proposed lease parcels.

The BLM retains the ability to apply reasonable Conditions of Approval to the APD to protect resources and comply with federal laws such as NEPA, the Endangered Species Act, and the National Historic Preservation Act, at the APD stage. In addition, Onshore Order Number 1 allows the BLM to deny an APD for drilling a well on an issued lease if no actions can be identified that would protect these resources.

In conclusion, the BLM did conduct site-specific NEPA analyses, as stated above. Therefore, the above Guardians' protest has been considered, found to be without merit and is dismissed.

D. The BLM Fails to Take a “Hard Look” at the Impacts of Hydraulic Fracturing.

BLM Response:

The consequences of leasing in the BMDO, including the potential impacts of hydraulic fracturing, is addressed in Chapters 3 & 4 of the EA, and in the Hydraulic Fracturing Whitepaper, Appendix E. Protestants comments on hydraulic fracturing were addressed to the extent possible at this stage in the EA Appendix K, Summary of Comments and Responses. All resources present were analyzed for potential direct, indirect, and cumulative impacts from leasing, exploration, development, and production, including the potential effects of hydraulic fracturing on Air Quality, Water Quality and Quantity, and Human Health and Safety. Any subsequent oil and gas development activities would be subject to all applicable Federal, State, and local laws and regulations including the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Hazardous Waste regulations, OSHA regulations, and Nevada Hydraulic Fracturing regulations (which are some of the most stringent in the nation).

Protestants would have BLM amend the RMP before leasing, and analyze and issue all possible APDs before leasing so as to completely analyze the potential effects of those two very different stages of the oil and gas process. However, BLM analyzed the effects of the possible use of hydraulic fracturing in a manner appropriate to the lease stage with reference to future applications for permits to drill on an issued lease and based on the current RMPs. FLPMA provides BLM the authority to determine when and how to amend or revise an RMP and issue an implementing decision. Protestants seek to require BLM to address these steps in the oil and gas process before it engages in leasing, but their position is not supported by FLPMA.

Therefore, the above Guardians’ protest has been considered, found to be without merit and is dismissed.

E. The BLM Must Prepare an EIS.

BLM Response:

Guardians alleges that impacts from the proposed action are significant because the effects of leasing and hydraulic fracturing on the human environment will be highly controversial, the effects from the lease sale present highly uncertain or unknown risks, poses threats to public health and safety, and will adversely affect species and habitat. As such, Guardian’s argues that an EIS is required.

In accordance with the NEPA Handbook, “Proposed actions are analyzed in an EA if the actions are not categorically excluded, not covered in an existing environmental document, and not normally subject to an EIS.” An EA is used to determine if the action would have significant effects; if so, the BLM would need to prepare an EIS. An EA may demonstrate that a proposed action would have effects that are significant but could be reduced or avoided through mitigation. None of the issues or potential indirect impacts discussed in the EA meets the “context” and “intensity” considerations for significance as defined in the CEQ regulations at 40 CFR 1508.27.

The EA does not support the claim that there would be significant impacts from leasing or development, thus automatically requiring an EIS for leasing. The EA analyzes the action of

leasing the parcels, which has no direct impacts but increases the probability of future impacts on any parcel that is leased. BLM must evaluate potential effects of offering parcels for sale, without knowing which parcels will be leased or what exploration, development or production projects will be proposed on leased parcels in the future. Therefore the effects and cumulative effects analysis must focus on identifying resources that are present and may be affected; applying protective stipulations to prevent or mitigate negative impacts to resources of concern; and predicting the nature and magnitude of effects under an RFD scenario based on recent, current and likely activities. Based on the geographic location and resources, currently available lease stipulations and lease notices were applied to provide mitigation requirements to minimize potential impacts from leasing (EA at Appendix B). Once lease development is proposed, additional site-specific NEPA will be conducted to address any new resource issues and potential impacts specific to the project or site not addressed at the leasing stage.

The BLM does not consider the proposed action to be highly controversial, as courts have consistently specified that disagreement must be with respect to the character of the effects on the quality of the human environment in order to be considered to be “controversial” within the meaning of NEPA, rather than a mere matter of the unpopularity of a proposal. See *Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor*, 609 F.2d 342 (8th Cir. 1978), cert. denied, 446 U.S. 936 (“Mere opposition to federal project does not make project controversial so as to require environmental impact statement.”) There is not a substantial dispute within federal agencies, the State of Nevada government agencies, or the scientific community as to the effects of oil and gas leasing and development in Nevada, specifically. Finally, protestant argues that the effects of oil and gas leasing will impact the Ruby Mountains but none of the parcels are within these mountains, and as such, the area was not mentioned in the June 2018 EA.

In conclusion, an EIS is not required under NEPA and the above Guardians’ allegations have been considered and found to be without merit and are dismissed.

F. The BLM Fails to Fully Analyze and Assess the Cumulative Impacts of Greenhouse Gas Emissions that Would Result from Issuing the Proposed Lease Parcels.

BLM Response:

The EA addressed the potential impacts and environmental consequences to greenhouse gas emissions (GHG) and climate change to the extent possible at this stage in sections 3.2.1 and 4.2.1, including emissions from well drilling activities and an estimate of potential oil production and downstream CO₂ generated based on the Reasonably Foreseeable Development scenario. Additional analysis on the effects of hydraulic fracturing on Air Quality and Human Health and Safety is provided in the Hydraulic Fracturing White Paper. Any subsequent oil and gas development activities would be further analyzed at the APD permitting stage when additional project specific information is available and would be subject to all applicable Federal, State, and local laws and regulations including the Clean Air Act, Hazardous Waste regulations, and OSHA regulations.

The potential impacts of GHG emissions from oil and gas operations in Nevada are extremely low, based on the low amount of current production and projected production based on the reasonably foreseeable development scenario, as compared to State, National, and Worldwide consumption. If production drastically increases in the future, it could increase the affects from

GHG, and additional mitigation derived from project analysis may be required. The BLM's analysis in the EA of the effects of leasing and development is sufficiently detailed to support issuance of oil and gas leases.

Therefore, the above Guardians' protest has been considered, found to be without merit, and is dismissed.

G. The BLM Fails to Analyze the Costs of Reasonably Foreseeable Carbon Emissions Using Well-Accepted, Credible, GAO-Endorsed, Interagency Methods for Assessing Carbon Costs.

BLM Response:

The BMDO addressed the potential impacts and environmental consequences to air quality and climate change to the extent possible at this stage in the EA in sections 3.2.1 and 4.2.1, including an estimate of potential oil production and downstream CO₂ generated based on the Reasonably Foreseeable Development scenario. Additional analysis on the effects of hydraulic fracturing on Air Quality and Human Health and Safety is provided in the Hydraulic Fracturing White Paper. Any subsequent oil and gas development activities would be subject to all applicable Federal, State, and local laws and regulations including the Clean Air Act, Hazardous Waste regulations, and OSHA regulations.

Inherent in NEPA and the CEQ regulations is a "rule of reason" that allows agencies to determine, based on their expertise and experience, how to consider an environmental effect and prepare an analysis based on the available information. The usefulness of that information to the decision-making process and the public, and the extent of the anticipated environmental consequences are important factors to consider when applying that "rule of reason". NEPA does not require monetizing costs and benefits, the weighing of the merits and drawbacks of the various alternatives need not be displayed using a monetary cost-benefit analysis and should not be used when there are important qualitative considerations.

Therefore, the Guardians' allegation above has been considered, found to be without merit, and is dismissed.

II. The Proposed Leasing Appears to Violate the Mineral Leasing Act.

Guardians protests that the BLM violated its own statutory requirements for oil and gas leasing which only allows leasing where there is known or believed to be oil and gas deposits.

BLM Response:

The BLM is required by law under the Mineral Leasing Act of 1920, as amended, and under the regulations at 43 CFR 3100 to consider leasing areas that have been nominated for lease, if leasing is in conformance with the BLM Land Use Plan (LUP). Each BLM state office is required by regulations to hold quarterly sales if lands are available for competitive leasing, 43 CFR 3120.1-2(a). The BLM makes allocation decisions regarding opening or closing lands to fluid minerals leasing and creating and applying stipulations through the land use planning process and the Districts' RMPs. The proposed lease sale is in conformance with the District

RMPs, and the EA tiers to the District RMP EISs¹⁰. BLM is not required to determine whether the particular lease sale parcel would support viable development; that determination is left to industry and exceeds BLM statutory authority. The RMP(s) that underlie the activity in the June 2018 lease sale were issued in 1986 and 1997. They are not the proper subject of protest at this late date. In addition, leases require diligence in exploration and development and expire by their terms within their primary term if development and production does not occur.

The BLM complied with the Mineral Leasing Act and conducted the required NEPA review, as stated above. Therefore, the above Guardians' protest has been considered, found to be without merit, and is dismissed.

DECISION

To the extent that Guardians has raised any allegations not specifically discussed herein, they have been considered in the context of the above response and are found to be without merit. For this reason, and for those previously discussed, Guardians' protest of the Sale and the EA is dismissed and 166 parcels were offered for sale on June 12, 2018.

APPEAL INFORMATION

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and Form 1842-1 (enclosed). If an appeal is taken, a notice of appeal and/or request for stay must be filed in writing, on paper, in this office, either by mail or personal delivery within 30 days after the date of service. Notices of appeal and/or request for stay that are electronically transmitted (e.g., email, facsimile, or social media) will not be accepted as timely filed. The notice of appeal is considered filed as of the date our office receives the hard copy and places our BLM date stamp on the document.

If you wish to file a petition pursuant to regulation 43 CFR 4.21 (58 FR 4939, January 19, 1993) (request) for a stay (suspension) of the effectiveness of this decision 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 is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate office of the Solicitor (*see* 43 CFR 4.413) at the same time the original documents are filed with this office. 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 regulation, a petition for a stay of a decision pending appeal shall show sufficient justification 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,

¹⁰ The Tonopah RMP (Tonopah Field Office), approved 1997, the Shoshone Eureka RMP (Mt. Lewis Field Office), approved in 1986, the Sage-Grouse RMPA, approved 2015, their associated Records of Decision, and all subsequent applicable amendments.

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

If you have any questions regarding this decision, please contact Brian C. Amme, Deputy State Director, Minerals Division, at (775) 861-6585.


Michael C. Courtney
Acting State Director

Enclosure:

1- Form 1842-1

cc (electronic):

WO310 (S. Mallory)
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Lease Sale Book June 2018
Reading File: NV-922