



United States Department of the Interior



BUREAU OF LAND MANAGEMENT

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In Reply Refer To:
3100 (NV920)

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DECISION

Center for Biological Diversity : Protest of Parcels in the
Michael Saul, Senior Attorney : December 11, 2018
1536 Wynkoop Street, Suite 421 : Competitive Oil and Gas Lease Sale
Denver, CO 80202

Protest Dismissed Parcels Offered For Sale

On November 5, 2018, the Bureau of Land Management (BLM), Nevada State Office (NVSO), timely received a protest¹ from the Center for Biological Diversity, et al (CBD). CBD protested all of the 17 parcels scheduled to be offered at the December 11, 2018 Competitive Oil and Gas Lease Sale (the Sale). CBD also protested BLM's reliance on the following National Environmental Policy Act (NEPA) documents:

- a) Ely District Office: DOI-BLM-NV-L000-2018-0002-EA and FONSI
- b) Winnemucca District Office: DOI-BLM-NV-W010-2018-0033-DNA, which refers to the December 2005 Oil and Gas Lease Sale (supported by DOI-BLM-NV-020-05-EA-21)

The Ely District Office EA and the referenced Winnemucca District Office EA may be referred to as the "EAs" for ease in reading.²

BACKGROUND

The BLM received 17 nominated parcels for the December 2018 Lease Sale. The 17 nominated parcels³ included land in Federal mineral estate located in the BLM Nevada's Winnemucca District Office (WDO) and Ely District Office (EYDO). After the NVSO completed preliminary

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 EAs, DNA, and FONSI are 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 For the December 2018 lease sale, 14 parcels were offered within the Ely District Office boundary, and 3 parcels were offered within the Winnemucca District Office boundary. All parcels relied on NEPA analysis that BLM determined was adequate to support the proposed action. CBD protests the proposed action in its entirety; BLM therefore refers to all of the NEPA analysis above in support of the proposed action.

adjudication⁴ 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 July 13, 2018, the NVSO sent a preliminary parcel list to the WDO and EYDO for review. This interdisciplinary parcel review included internal scoping by a team of BLM specialists, review of GIS data, satellite imagery and other previously collected wildlife, habitat and other resource data, field visits to nominated parcels (where appropriate), review for conformance with the Land Use Plans, and review of the existing EA documents for NEPA compliance.⁵

The EAs tiered to the existing Land Use Plans (LUP),⁶ in accordance with the BLM's NEPA Handbook, H-1790-1, and 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 (which are analyzed in a Resource Management Plan NEPA document), 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 or existing NEPA documents.

The purpose for the federal action is to provide opportunities for private individuals or oil and gas companies with new areas to explore and potentially develop. Leasing is authorized under the Mineral Leasing Act of 1920 (MLA), as amended and modified by subsequent legislation, and regulations found at 43 CFR part 3100. Oil and gas leasing is recognized as an acceptable use of public lands under FLPMA. 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.

The need for the proposed action is to respond to the nomination of parcels by Expressions of Interest (EOIs) for leasing, consistent with the BLM's responsibility under the Mineral Leasing Act, as amended, to promote the development of oil and gas on the public domain. The public,

⁴ 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.

⁵ 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.

⁶ The EAs are in conformance with the Winnemucca District Resource Management Plan, approved in May 2015, the Ely District Resource Management Plan, approved in August 2008, the Nevada and Northeastern California Greater Sage-Grouse ARMPA, approved in September 2015, their associated Records of Decision, and all subsequent applicable amendments.

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

BLM, or other agencies may nominate parcels for leasing. The BLM is required by law to consider leasing of areas that have been nominated for lease if leasing is in conformance with the applicable BLM land use plan, FLPMA, and other applicable laws, regulations, and policies. Offering parcels for competitive oil and gas leasing provides for the orderly development of fluid mineral resources under BLM's jurisdiction in a manner consistent with multiple use management and consideration of 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 compliance with the spirit and objectives of NEPA and other federal environmental laws and regulations.

The EAs considered at least two (2) alternatives:

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

The EAs analyzed the proposed action and no action alternatives. These alternatives provided end marks for a spectrum of effects for analysis and comparison, ranging from no parcels offered to offering all nominated parcels. Additional alternatives were proposed in internal scoping and public comments; however, they were not all carried forward for further analysis as they would not provide a basis for evaluation of effects not encompassed by the analyzed range of alternatives. The additional 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 EAs in Public Involvement, Public Comments and Responses, and/or Alternatives sections.

On October 26, 2018, the NVSO published a *Notice of Competitive Oil and Gas Internet Lease Sale for December 11, 2018*⁸ (Notice), resulting in a total of 17 parcels offered for lease. This protest challenges the EYDO EA and FONSI, WDO DNA, and all of the 17 parcels described in the Notice.⁹

ISSUES

The CBD protest generally alleges that the BLM failed to comply with the NEPA 42 U.S.C. § 4321 *et seq.*, and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.* The following addresses CBD's protest related to the Sale.

The BLM has reviewed CBD's 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 December 2018 Competitive Oil and Gas Lease Sale Protests and Protest Decisions are posted on the BLM website, located at: <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada>

A. BLM's use of Determinations of NEPA Adequacy to authorize oil and gas leasing for parcels in Winnemucca District, and its failure to prepare an Environmental Impact Statement or Environmental Assessment for those parcels, violates the National Environmental Policy Act.

BLM Response:

CBD generally alleges that the BLM's use of DNAs violates NEPA because the proposed action is not adequately analyzed on a site-specific basis, thus requiring the BLM to prepare an Environmental Assessment or Environmental Impact Statement. The use of DNAs is governed by Department Manuals, the BLM NEPA Handbook, and BLM IMs. The key requirement for use of a DNA is that the proposed action is covered by adequate existing NEPA, because a DNA "does not itself provide NEPA analysis." If, through the lease parcel Interdisciplinary Parcel Review Team process, the authorizing official confirms that the proposed leasing action is adequately analyzed in an existing NEPA document, and is in conformance with the approved RMP, a DNA may be used to document NEPA compliance for the leasing decision. *See* Washington Office Informational Memorandum 2018-034, issued January 31, 2018; *and see* NEPA Handbook H-1790-1 section 5.1.

The parcels and numbers of acres in the Winnemucca DNA were different from those addressed in the 2005 EA only in site-specific location--the general location (the same valley), geography, and public land resource conditions were not different. In addition, the Proposed Action here, as well as in the 2005 EA was the same: BLM offered for sale similarly situated parcels for oil and gas leases. The 2005 EA was evaluated in compliance with NEPA and BLM Handbook 1790-01 for adequacy of environmental analysis and documented in the Determination of NEPA Adequacy worksheets. Additionally, the Ely and Winnemucca RMPs and FEIS and the EAs included extensive Public Involvement, Public Comments and Responses, and Alternatives sections.

At the lease sale stage, the BLM does not yet know 1) if a lease parcel proposed for an oil and gas lease sale will be purchased and result in the issuance of an oil and gas lease; 2) assuming a lease is issued for the proposed lease parcel, whether an Application for Permit to Drill (APD) will be submitted for that lease, and 3) what specific location and operating procedures for oil and gas development might be proposed for the lease parcel in the future. To provide a more site-specific and detailed analysis of the impacts from lease development activities would require the BLM to speculate on the density of drilling locations, the number, characteristics, and specifications of related production equipment, and the rate at which the lease would be developed, among other things. The BLM cannot speculate in this manner; to do so would likely either under-estimate impacts or over-estimate impacts. BLM's NEPA Handbook H-1790-1 section 6.8.3.4 states: "...you are not required to speculate about future actions."

Where the context and intensity of the environmental impacts remain unidentifiable until exploration and development activities are proposed, the APD is the first useful point at which a site-specific environmental appraisal can be undertaken (*Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987)). However, when site-specific impacts are reasonably foreseeable at the leasing stage, NEPA requires the analysis and disclosure of such reasonably foreseeable site-specific impacts (*N.M. ex rel. Richardson v. BLM*, 565 F.3d. 683, 719-19 (10th Cir. 2009)). Although certain site-specific impacts remain unforeseeable at this time, the analysis in the Ely and Winnemucca RMPs and FEISs provides

disclosure and analysis of the reasonably foreseeable environmental impacts associated with offering and issuing leases for these parcels.

In preparation of the Winnemucca DNA for the December 2018 Lease Sale, the BLM reviewed the existing Winnemucca RMP and FEIS, and the 2005 EA. The Winnemucca RMP and FEIS analyzed the potential impacts of oil and gas leasing, exploration, and development in the Winnemucca Resource Areas. The 2015 Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment (GRSG Plan Amendment) amended the Ely and Elko RMPs to address Greater Sage-Grouse. Under the GRSG Plan Amendment, mapped habitat for Greater Sage-Grouse (GRSG) is designated as Priority Habitat Management Area (PHMA), General Habitat Management Area (GHMA), or Other Habitat Management Area (OHMA). The proposed action conforms to applicable sections of the GRSG Plan Amendment. The EAs contained site-specific analysis of the proposed parcels for their respective lease sales, including analysis of resources and potential impacts in the areas of the nominated parcels.

The WDO and EYDO RMP and FEIS proposed and analyzed a Reasonably Foreseeable Development scenario (RFD) for Oil and Gas exploration and development. The RFD was based on known and potential oil and gas resources, and historic development in Nevada. The RFD was used to analyze potential and reasonably foreseeable direct, indirect, and cumulative impacts to other resources in the Resource Management Plans, and to make land use planning allocations and develop stipulations to prevent or reduce resource conflicts. Lengthy public comment periods were provided during the preparation of each of the two RMPs. Since neither the level of development in the RFDs or the impacts analyzed in the two FEISs have been exceeded, the RFD remains a valid analysis tool for ongoing oil and gas exploration and development. The area within which are found the 17 nominated parcels was analyzed in the FEISs and was allocated as open to oil and gas leasing in the RMPs with stipulations, thus the proposed action is in conformance with the RMPs. The BLM has no new data or information about changed circumstances that would require it to analyze the potential impacts of leasing in greater detail than that provided in the EAs, FEISs, and the analysis in the existing FEIS/RMP for the WDO and EYDO is comprehensive and sufficient. While the Protestant claims that BLM defers environmental analysis to the APD stage, and relies on environmental analysis from the RMP stage, Protestant ignores the environmental review that BLM relies on for the leasing stage of the oil and gas development process that is found in the EAs.

The Winnemucca DNA relies on environmental review adequate for this stage of the oil and gas development process. The above CBD protest point has been considered, found to be without merit and is dismissed.

B. IM 2018-034 violates the National Environmental Policy Act, Federal Land Policy and Management Act, and Administrative Procedure Act by requiring BLM's unlawful use of determinations of NEPA adequacy and unlawfully limiting public participation.

BLM Response:

The review of the nominated parcels for this lease sale under guidance in IM 2018-034 was consistent with existing federal laws and regulations including the Mineral Leasing Act, NEPA, FLPMA, APA, and the oil and gas regulations at 43 CFR 3100. The BLM Interdisciplinary Parcel Review teams reviewed the parcels and existing data (GIS, satellite imagery, files, and past EAs) for information on resources, and conducted field visits when necessary to verify or

acquire additional data. The parcels and numbers of acres in the Winnemucca DNA were different from those addressed in the 2005 EA only in site-specific location--the general location (the same valley), geography, and public land resource conditions were not different. In addition, the Proposed Action here, as well as in the 2005 EA was the same: BLM offered for sale similarly situated parcels for oil and gas leases. The 2005 EA was evaluated in compliance with NEPA and BLM Handbook 1790-01 for adequacy of environmental analysis and documented in the Determination of NEPA Adequacy worksheets. Additionally, the Ely and Winnemucca RMPs and FEIS and the EAs included extensive Public Involvement, Public Comments and Responses, and Alternatives sections.

The use of DNAs is governed by Department Manuals, the BLM NEPA Handbook, and BLM IMs. The key requirement for use of a DNA is that the proposed action is covered by adequate existing NEPA, because a DNA “does not itself provide NEPA analysis.” If, through the lease parcel Interdisciplinary Parcel Review Team process, the authorizing official confirms that the proposed leasing action is adequately analyzed in an existing NEPA document, and is conformance with the approved RMP, a DNA may be used to document NEPA compliance for the leasing decision. *See* NEPA Handbook H-1790-1 section 5.1.

The Preliminary Injunction issued by the District Court in *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB (D. Idaho Sept 21, 2018) applies only to parcels in designated Sage Grouse Habitat; “The preliminary injunction does not apply to BLM oil and gas lease procedures on federal lands that are not within federally-recognized boundaries encompassing greater sage-grouse habitat management areas.” As acknowledged by CBD in their protest, the BLM has postponed all parcels in recognized sage-grouse habitat in order to comply with the preliminary injunction.

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

C. BLM violated Section 7 of the Endangered Species Act by failing to ensure that agency actions will not jeopardize the continued existence of species listed under the Endangered Species Act, including the Railroad Valley springfish.

BLM Response:

The BLM did consider all of the threatened and endangered species known to be present on the parcels as well as BLM special status species lists for plants and animals including the Railroad Valley Springfish. The BLM did notify the USFWS of the parcels in the proposed lease sale during the internal scoping and corresponded with USFWS biologists to address any concerns. The BLM previously consulted with the USFWS regarding listed species in the WDO and EYDO, in accordance with the Endangered Species Act (ESA) in developing the Land Use Plans, Stipulations, and Lease Notices to be applied to parcels in the district, receiving a Biological Opinion.

The BLM also reinitiated formal Section 7 consultation in the EYDO in 2017, which resulted in the USFWS issuing a Programmatic Biological Opinion (BO) for additional Threatened and Endangered species not covered in the RMP BO and specifically addressing the impacts on all known threatened and endangered species present in the EYDO from oil and gas leasing, exploration, and development including hydraulic fracturing. The EAs, which tier to the RMPs

and FEISs, state that the BLM can take actions to protect critical habitat for threatened and endangered species and BLM sensitive species up to but not including the approval of actions if the action will jeopardize the species (jeopardy). A lease notice was attached to all 17 parcels to serve the lessee with notice that the lease and any future activities proposed on it are subject to the Endangered Species Act, and any attendant requirements for additional scrutiny, surveys, and potential mitigation to protect the specie(s) and or the specie's habitat. Stipulations and lease notices, like this one, serve a vital role at the leasing stage by putting the BLM, lessee, and the public on notice that developing this lease may be difficult and may require additional mitigation and conformance, or may result in the denial of development as proposed on the lease.

The EAs state that if lease development is proposed, additional project and site-specific NEPA will be conducted to address wildlife issues and potential impacts specific to the site not addressed at the leasing stage. If exploration and development are proposed that may affect Threatened and Endangered Species known to be present on specific parcels, consultation with USFWS will be reinitiated as needed. Furthermore, these activities would be subject to Best Management Practices (BMPs), state and federal regulations, and Conditions of Approval (COAs).

Additionally, potential impacts to surface and ground water quantity and quality are address in the EAs and in the Hydraulic Fracturing White Paper. Once lease development is proposed, the direct and other effects of the development project will be addressed and site-specific NEPA will be conducted to address any water resource issues and potential impacts specific to the site not addressed at the leasing stage.

The BLM performs project and site-specific NEPA review of all proposed projects (Federal actions); this would include any proposed consumptive use of water as it relates to proposed exploration and development. However, waters of the State of Nevada are managed by the NV Division of Water Resources and the NV State Engineer. BLM does not regulate groundwater. Any water required for drilling or completion operations would be acquired by the operator in accordance with State law from an existing permitted appropriation, or from a temporary diversion or water well permit from the NV State Engineer. Well construction on an issued federal lease must comply with BLM requirements, including Onshore Orders. Any proposed Hydraulic Fracturing (HF) project would be required to comply with the State of Nevada HF regulations, including casing and cementing design and disclosure of chemicals through FracFocus. HF and unconventional extraction methods are not widely used in Nevada; however, these may become more widely used with time and as more easily accessed resources become exhausted.

Oil reservoirs are substantially deeper than water resources in Nevada. Groundwater aquifers are protected through construction requirements, requiring their isolation, and through ongoing testing of the integrity of the well. Moreover, any subsequent oil and gas development activities would be subject to all applicable Federal, State, and local laws and regulations including the Clean Water Act, Safe Drinking Water Act, Hazardous Waste regulations, OSHA regulations, BLM Onshore Orders and other regulations and policies, and the State of Nevada Hydraulic Fracturing Rules.

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

DECISION

To the extent that CBD 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, CBD's protest of the Sale, EAs, DNA, and FONSI is dismissed and 17 parcels were offered for sale on December 11, 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,
- (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 Kemba K. Anderson, Acting Deputy State Director, Minerals Division, at (775) 861-6566.



Brian C. Amme
Acting State Director

Enclosure:

1- Form 1842-1

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