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**DECISION**

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**SEPTEMBER 1, 2016 OIL & GAS LEASE SALE PROTEST OF 36 PARCELS  
PROTEST DENIED**

**ALL PROTESTED PARCELS WILL BE ISSUED**

On May 20, 2016, the Bureau of Land Management (BLM), New Mexico State Office (NMSO) received a letter from the Center for Biological Diversity (CBD) protesting the offering of all 36 oil and gas lease sale parcels as described in the Notice of Competitive Lease Sale (Sale Notice) for the September 1, 2016 (previously July 20, 2016), Competitive Oil and Gas Lease Sale. The CBD letter was submitted jointly with the following parties: Friends of the Earth; Food and Water Watch; Great Old Broads for Wilderness; and Sierra Club.

Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club are parties to the protest submitted by CBD. If a protester did not submit written comments to the BLM, during the 30-day leasing Environmental Assessment (EA) comment period, or otherwise could not demonstrate standing, the BLM would deny any protest subsequently filed by that protester. The record shows that these parties to the protest submitted on behalf of CBD did not provide scoping comments or otherwise participate in the 30-day public comment period. Therefore, the issues raised by these parties as part of the CBD protest are subject to summary dismissal and will not be considered further in this protest decision.

The 36 parcels protested are located in Eddy and Lea Counties of southeast New Mexico. The parcels are unleased Federal mineral estate administered by the BLM Carlsbad Field Office (CFO) with the surface estate administered by either the BLM, New Mexico State Land Office, or private ownership. Altogether, the protested parcels aggregate approximately 13,876.08 acres.

## **BACKGROUND**

These parcels were nominated by interested parties in accordance with 43 CFR § 3120.3. After preliminary adjudication of the nominated parcels by the NMSO, the parcels were reviewed by the CFO, including an interdisciplinary review, field visits to nominated parcels, review of conformity with the land use decisions for the planning area, and preparation of an EA documenting National Environmental Policy Act (NEPA) compliance. The NMSO also reviewed each of the parcels, and confirmed land use plan conformance and conformance with national and state BLM policies.

The preliminary parcel list was posted for a two-week public scoping period starting on December 14, 2015. The CBD submitted scoping comments during this period. Prior to posting the Sale Notice for the parcels to be offered at the competitive sale, the BLM prepared an EA that tiered the analysis to the 1988 Carlsbad Resource Management Plan (RMP) and Final Environmental Impact Statement (FEIS), the 1997 Carlsbad RMP Amendment (RMPA) and FEIS for Oil and Gas Resources, and the 1997 Roswell Resource Area RMP and FEIS. The Special Status Species RMPA Record of Decision, signed in 2008, amends these plans in portions of Chaves, Eddy, Lea and Roosevelt Counties, New Mexico, with reference to Planning Areas as described in that document. The purpose of the leasing EA is to analyze specific parcels to determine what reasonably foreseeable impacts may occur from leasing. The EA augments the decisions made in the RMP with current on-the-ground information.

The 30-day public comment period on the EA and unsigned Finding of No Significant Impact (FONSI) commenced on February 8, 2016. The CBD did provide comments to the BLM during this period. On April 20, 2016, the 30-day protest period commenced. A total of two protests were received: one from the CBD and another from the WildEarth Guardians. Each protest will be responded to separately. The CBD requested that the 36 parcels be removed from the sale.

On April 20, 2016, the BLM posted the July 2016 Sale Notice for public review. The Sale Notice described the manner in which a member of the public could protest inclusion of lands in the planned sale (at pages vi-viii), including these requirements:

- A protest must state the interest of the protesting party in the matter.
- If the party signing the protest is doing so on behalf of an association, partnership or corporation, the signing party must reveal the relationship between them. For example, unless an environmental group authorizes an individual member of its group to act for it, the individual cannot make a protest in the group's name.

In the CBD's protest letter (page 3), the groups provided a summary of their organizations' general objectives. The protest letter was signed by one individual affiliated with the CBD (page 28), and provided a list of the names, addresses, and contact information for each of the four other groups, explaining (at page 2):

*This Protest is filed on behalf of the Center for Biological Diversity, Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club, and their boards and members...*

The BLM's regulations addressing protests of competitive oil and gas lease sales (at 43 CFR § 3120.1-3) do not describe any limitations as to who may protest inclusion of lands in a Sale Notice. The issue of standing for purposes of appealing a BLM decision to dismiss and deny lease sale protests was addressed by the Interior Board of Land Appeals (IBLA). In *Biodiversity Conservation Alliance et al.* (183 IBLA 97, decided January 8, 2013), the IBLA evaluated the standing of the appellants to challenge the BLM's decisions to dismiss and deny protests related to certain oil and gas lease sale parcels, and determined (183 IBLA 97, 108):

*... since the BLM decision at issue involves the leasing of several parcels of land for oil and gas purposes, each of the appellants must show an adverse effect as a result of the leasing of each parcel to which it objects, in order to be recognized as having standing to appeal the decision to lease that parcel.*

In the CBD protest of the 36 parcels from the September 2016 Lease Sale, none of the parties have provided to the BLM; "colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged" (183 IBLA 97, 107). The closest any of the groups come to establishing allegations of an adverse effect are within the description of the CBD's interests (CBD Protest at page 3), which states:

*The Center has over 1 million members and online activists, including those living in New Mexico who have visited these public lands in the Pecos District for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing.*

However, it is not clear whether this statement establishes CBD as a party to the case and as having a legally cognizable interest that would be adversely affected by the BLM's decision to issue any of the protested leases. Other groups' statements of interest are much less specific, and do not allege any particular interests in the lands proposed for leasing.

In addition, it is not clear that a legally cognizable interest can be demonstrated by the groups for those parcels located in the CFO where the surface estate is privately owned, but overlying Federal minerals, whereas any public entry without the consent of the surface owner would constitute a trespass. Of the 36 offered parcels, 18 parcels are located entirely on privately-owned surface estate (-002, -005, -013, and -022 thru -036), and three parcels are a combination of public and private surface estate (-015, -017, and -018).

Nonetheless, given the BLM's directions to the public in the Sale Notice regarding submittal of protests, the BLM has decided to answer the specific arguments made by the protestor. However, the BLM does so with the reservation that the protestors may not have standing to bring an appeal to the IBLA of our protest decision.

On June 27, 2016, the Sale Notice was amended due to a location change and date for the July 20, 2016, Competitive Oil and Gas Lease Sale. In order to provide the public with a 45-day notice of the lease sale changes, the sale was postponed to September 1, 2016. At the sale, all of the protest parcels were successfully bid upon, and the necessary monies were subsequently received by the BLM. Given the pending protest, the BLM has not issued the leases.

## **ISSUES**

The BLM has reviewed the protestor's arguments in their entirety; the protestor's substantive arguments are numbered and in bold, with BLM responses following.

### **1. BLM violates the National Environmental Policy Act**

#### **a. It is unlawful to proceed with the lease sale without undertaking a site-specific environmental assessment.**

#### **BLM Response:**

In the multi-step Federal oil and gas leasing regime, NEPA regulations "encourage" agencies "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." 40 CFR § 1502.20. In other words, "any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR § 1506.4. NEPA regulations provide that, whenever a broad EIS has been prepared (such as a program statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program (such as a site-specific action), "the subsequent statement or 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." 40 CFR § 1502.20. This tiering process is a common practice in the oil and gas context.

The multi-step oil and gas process in the CFO begins with the programmatic analysis of oil and gas development in the CFO 2008 RMP. Then, the CFO analyzes the known impacts of proposed leases, ensuring that any impacts of leasing are consistent with the RMP in an EA such as the one for the July 2016 lease sale. Then, if the lessee chooses to pursue development - which is not a given - additional site-specific NEPA analysis takes place when Applications for Permit to Drill (APDs) are submitted. Where the context and intensity of environmental impacts remain unidentifiable until oil and gas exploration activities are proposed, the APD is the first useful point at which a site-specific environmental appraisal can be undertaken. Approval of an

APD is not a foregone conclusion (See 43 CFR § 3162.3-1(h), authorizing the agency to explicitly disapprove applications for drilling permits).

Courts have upheld this approach, explaining that, “when BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken.” (*Park County Resource Council*, 817 F.2d 609 (1987)); (See also *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-CV-00037-RB-LFG, 2011 WL 7701433 (D.N.M. Aug. 3, 2011), “It would be highly unusual for every lease parcel to be developed, and until an APD is submitted, BLM cannot determine the extent or type of development planned and the emissions that will result.”). 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)).

Prior to issuing an APD, the BLM conducts site-specific environmental review, and any APD will include (at a minimum) public posting (see 43 CFR § 3162.3-1(g)). The BLM retains substantial authority to regulate environmental aspects of Federal oil and gas lease operations through approval (see 43 CFR § 3162.3) of APDs or Sundry Notices (SNs), and through the issuance of orders and instructions of the authorized officer (see 43 CFR § 3161.2). The BLM also controls the lessee’s or operator’s actions on the lease, as described in the regulations (such as 43 CFR § 3101.1-2 and 43 CFR § 3162.5-1(a)), on the BLM Lease Form 3100-11 (such as standard lease term Sec. 6), and under applicable laws such as the Federal Land Policy and Management Act of 1976 (FLPMA). In addition, BLM retains regulatory authority to completely deny access to a leased area.

For the BLM to provide a more site-specific and detailed analysis of the impacts from lease development activities for these protested parcels 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 leases would be developed. This speculation would likely be under or over-estimate impacts. The impacts associated with construction, drilling, production, abandonment, and reclamation of well locations can vary significantly in the area of the proposed leases.

Conducting a speculative exercise about the density, rate, and extent of drilling and the potential impacts from complex multi-year plans of operation on lease parcels may be inaccurate and misleading for the BLM and the public. Under the BLM’s NEPA Handbook H-1790-1 at page 59 states: the BLM is “not required to speculate about future actions.” (See also *Southern Utah Wilderness Alliance*, 159 IBLA 220 (June 16, 2003), “A future action need not be considered significant when the reasonably foreseeable future action is speculative.”).

We believe that the CBD seeks analysis of impacts that is speculative at the leasing stage, and is better addressed at the time a site-specific proposal to drill is received by the BLM. Therefore,

the BLM finds CBD's allegations that the BLM failed to comply with NEPA to be without merit and are therefore denied.

**b. BLM failed to take a hard look at any of the potential impacts of the proposed action raised in our previous comment letters on the sale.**

BLM Response:

NEPA requires the BLM to take a "hard look" at the environmental consequences of proposed actions. The CBD has provided no evidence that the BLM failed to take a hard look at the issues raised by the CBD from a previous comment letter. Therefore, the BLM finds CBD's protest that the BLM failed to take a hard look to be without merit and are therefore denied.

**i. BLM does not take a hard look at impacts to Lesser Prairie-Chicken.**

BLM Response:

The CFO has taken a hard look at the available information regarding the Lesser Prairie-Chicken (LPC). In December 2012, the U.S. Fish and Wildlife Service (USFWS) published a proposed rule to list the Lesser Prairie-Chicken as a threatened species. On April 10, 2014, the USFWS published their final rule listing the species as threatened, which became effective May 12, 2014. On September 1, 2015, a Federal District Court in Midland, Texas, ruled the USFWS did not follow its own rule for evaluating conservation efforts (Policy for Evaluation of Conservation Efforts When Making Listing Decisions) when it applied it to the range-wide conservation plan for the LPC. The Court also vacated the USFWS's final rule listing the LPC as a threatened species. On September 8, 2016, the USFWS received a petition requesting that they list the LPC as endangered under the Endangered Species Act. The petition presented substantial scientific or commercial information indicating that the requested action may be warranted; therefore, the USFWS initiated a status review. At the conclusion of the status review, USFWS will issue a finding as to whether or not the petitioned action is warranted. While this latest action is being analyzed, the BLM will continue to manage the LPC in accordance with BLM Manual 6840, Special Status Species Management, and the Pecos District Special Status Species Approved Resource Management Plan Amendment of 2008.

The 2008 RMPA defines occupied habitat as "all areas within 1.5 miles of an active lesser prairie-chicken site regardless of vegetation that has been active for one out of the last 5 years." The boundaries of all lease parcels discussed in the EA are greater than 1.5 miles from an LPC sighting or an LPC leak. A Biological Assessment for the lease parcels (included as Appendix 3 in the EA) determined that the lease sale "may affect - not likely to adversely affect the species." The rationale for the determination is that the offered parcels are not located within three miles of occupied LPC habitat. Based on the potential for these parcels to become occupied in the future, lease stipulations, conditions of approval, and requirements to use best management practices will be applied to each parcel as set forth in the 2008 RMPA. These conservation measures would avoid, reduce or remove future surface impacts as the leases are developed. Therefore, leasing of these parcels is in conformance with the management decisions, criterion, and appropriate lease stipulations.

Additionally, the CBD asserts that “once the lease is sold, it will be too late for BLM to ensure that sufficient protections will be in place to protect this species.” By ignoring the Application for Permit to Drill (APD) stage following the issuing of a lease, as well as the programmatic analysis in the 2008 Special Status Species RMPA, the CBD disregards the past analysis and the importance of site-specific plans in disclosing, assessing, and developing mitigation for impacts from actual oil and gas development.

The direct, indirect, and cumulative impacts from oil and gas development on wildlife resources are discussed in Chapter 4 of the EA. This analysis includes discussion of the short-term and long-term disturbance impacts. In summary, the analysis shows that the provided stipulations and the mitigation described in Chapter 4 of the EA would provide for the conservation of wildlife habitat. Therefore, the statement of reasons have found to be without merit and are therefore denied.

**ii. BLM does not take a hard look at impacts to water resources.**

BLM Response:

The CFO took a hard look at impacts to water resources both in the EA and in the 1997 RMPA. The CFO addressed potential impacts to water resources in Section 4.3.6 of the leasing EA. The EA analysis determined that there were no impacts to water resources from leasing the parcels; however, there could be indirect impacts to water resources from reasonably foreseeable oil and gas development on the leases, including groundwater contamination from inadequate casing and cementing of the wellbore; surface water contamination from accidental spills or releases of drilling fluids, hydraulic fracturing fluids, produced water, or chemicals used during development and production of a well, and groundwater depletion. The EA also concluded that “specific mitigation measures for the protection of surface and ground water would be addressed at the APD stage.” Mitigation commonly includes the use of a plastic-lined reserve pits, steel tanks or steel tank closed systems, or containment berms to reduce or eliminate seepage of drilling fluid and hydrofrac flow back water into the soil, surface water, and groundwater. Both surface and usable ground water is protected from drilling fluids and salt water zones by setting surface casing to isolate the aquifers from the rest of the borehole environment.” Further, contrary to the CBD’s contention that the lease stipulations included in the EA analysis are insufficient and are not supported by science (at page 12 of CBDs Protest), the CFO references the 1997 RMPA from which the lease stipulations (EA Appendix 1) were derived.

There are no verified instances of hydraulic fracturing adversely affecting groundwater in the Permian Basin of New Mexico. This can, in part, be attributed to the fact that the likely producing zones targeted are well below any underground sources of drinking water. The EA states that the typical depth of groundwater in the Permian Basin is 400 feet or less. If an APD is submitted proposing the drilling of a well, the actual depth to groundwater will be known and analyzed through site-specific analysis. Historically, oil and gas wells have been drilled in the Permian Basin in depths ranging from several hundred feet to over 20,000 feet, based off past records. The latest Reasonably Foreseeable Development Plan (RFD) (Engler, 2014) update covering the CFO, with supporting well data from IHS Markit, shows that the most likely

targeted formations that would be produced by these leases are the Bone Springs (7,000-11,000 feet deep), Wolfcamp (7,580-10,750 feet deep), Delaware Mountain group (2,500-8,500 feet deep), and the Yeso (3,000-7,000 feet deep). Based on the distance between the groundwater and the targeted formations in the protested leases, no adverse impacts to groundwater are expected to occur. The potential for drilling or hydraulic fracturing fluids or produced water to contaminate groundwater is significantly reduced if wells are properly cased and cemented as would be required in the APD approval-process per Onshore Oil and Gas Order No. 2, Drilling Operations. Please also reference the Protest Response 2.b. below, as the issue is similar to others stated by the CBD.

The BLM's obligation to address impacts to water resources persists past the leasing stage. The BLM is responsible for inspection and enforcement of wells and facilities that have a Federal lease nexus and to conduct regular regulatory inspections, such as, but not limited to, drilling, production, environmental compliance, production audits and abandonment inspections. If at any time during the life of the well, a well site is causing or has the potential to cause environmental damage such as surface contamination, the BLM has the authority to issue Written Orders of the Authorized Officer, Incidents of Non-compliance, citations, fines, and, in specific circumstances, cessation of operations when incidents of non-compliance occur.

Water quantity is addressed in the leasing EA made available for the protest period. The amount of water used during well development is highly dependent on a number of factors including but not limited to: vertical or horizontal well, length of well bore, closed-loop or reserve pit drilling system, type of mud, type of stimulation used (e.g. hydraulic fracturing or acidizing), formation being fractured, and use of recycled water or inert gases. The 2014 RFD update completed a detailed analysis on the water use for hydraulic fracturing. Engler analyzed New Mexico Oil Conservation Division records (over 400 records) in the Bone Spring Formation, and the average is 7.3 acre-ft/horizontal well. A quantitative analysis using the data from the RFD can be completed for hydraulic fracturing, once an APD is received. Therefore, the amount of water that used is too variable to quantify at the leasing stage.

The New Mexico Constitution establishes that all the water in the State belongs to the public and, to the extent that it is unappropriated, it is available for appropriation. The Office of the State Engineer is responsible for permitting all surface and groundwater withdrawals apart from water rights acquired before 1907 and small scale stock watering. Because of these statutes and state processes, the BLM does not seek to interfere with state regulation of permitted water wells, their intended uses, or their permitted allocation. The BLM requires full compliance with applicable state regulations.

No new evidence was presented that was not already considered in the leasing EA or that is regulated by Federal or State laws, rules, regulations, or policy. In conclusion, the BLM adequately addressed potential impacts to water resources from oil and gas development, including hydraulic fracturing, and the environmental consequences of how development may affect water quality and quantity. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at water impacts to be without merit and are therefore denied.



**iii. BLM does not take a hard look at impacts of fracking on air quality, water resources, soil, vegetation, wildlife, induced seismicity, brine well collapses, and releases of radionuclide waste into the biosphere.**

**BLM Response:**

The CFO took a hard look at the impacts of hydraulic fracturing. The EA acknowledges the possibility that if the leases are issued, and if an operator proposes to explore or develop a lease, hydraulic fracturing operations may be proposed. Further, Section 4.1 of the leasing EA states:

*“The act of leasing parcels would, by itself, have no impact on any resources in the CFO. All impacts would be linked to an undetermined future level of lease development. The anticipated level of full lease development is described in Table 2 in Section 2.3.1.”*

*“Assumptions used in the analysis regarding resource impacts are based on past development knowledge and practices and resource concerns specific to each individual parcel. Site-specific impacts would be addressed in a subsequent NEPA document when an APD is received.”*

Furthermore, in their protest, CBD states concerns of induced seismicity related to fracking. Earthquake logs from the U.S. Geologic Survey Earthquake Hazards Program for the state of New Mexico is a source of data that can be used to evaluate seismic activity and make predictions concerning the location and magnitude of future earthquakes. In southeast New Mexico only one area, Dagger Draw<sup>12</sup>, has had seismicity that has been contributed to the disposal of waste water through injection. The nearest parcel to Dagger Draw, parcel -002, is more than 30 linear miles away. Given the multiple locations for waste water disposal, and the uncertainty of disposal methods, site specific analysis would be conducted at the time of an APD submission in accordance with the NEPA and Onshore Oil and Gas Order No. 7. Additionally, waste water injection of hydraulic fracturing flowback water is regulated by the Environmental Protection Agency and delegated to the State of New Mexico for oversight and enforcement.

CBD also states that the BLM failed to addresses threats associated “with drilling near the WIPP.” The closest lease parcel boundary to the Waste Isolation Pilot Plant (WIPP) boundary is parcel -008 located approximately 7.6 miles east south-east from the WIPP. Using CBD’s own citation of “more than 500 oil and gas wells within 2.5 miles of the WIPP boundary,” and there being no known issues to the WIPP caused by oil and gas development, the offered parcels are three times further than the 2.5 mile distance of concern that was provided by the CBD.

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<sup>1</sup> Petersen, M.D., Mueller, C.S., Moschetti, M.P., Hoover, S.M., Rubinstein, J.L., Llenos, A.L., Michael, A.J., Ellsworth, W.L., McGarr, A.F., Holland, A.A., and Anderson, J.G., 2015, Incorporating induced seismicity in the 2014 United States National Seismic Hazard Model—Results of 2014 workshop and sensitivity studies: U.S. Geological Survey Open-File Report 2015–1070, 69 p., <http://dx.doi.org/10.3133/ofr20151070>.

<sup>2</sup> Sanford, Allan R., Mayeau, Tara M., Schlue, John W., Aster, Richard C., and Jaksha, Lawrence H., Earthquake catalogs for New Mexico and bordering areas II: 1999–2004. New Mexico Geology. November 2006, Volume 28, Number 4.

We disagree that the leasing EA does not adequately address impacts from hydraulic fracturing operations; we agree with the EA's conclusion that additional analysis is more appropriate at the time actual operations are proposed. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at the impacts of hydraulic fracturing to be without merit and are therefore denied.

**2. BLM must end all new fossil fuel leasing and hydraulic fracturing.**

**a. BLM must limit greenhouse gas emissions by keeping Federal fossil fuels in the ground.**

BLM Response:

Congress has expressly charged the BLM to develop federal oil and gas resources. *See, e.g.*, 30 U.S.C. § 181; 42 U.S.C. § 15922. It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional and local needs. This policy is based on law, including the FLPMA. It is during the preparation of an RMP that the BLM considers programmatically whether to open or close lands to oil and gas development, among the other multiple uses considered by the BLM. Halting all fossil fuel development in the area is not within the scope of this leasing EA. The following regulations, policy, and bulletin reiterate the BLM New Mexico State Office's requirements to hold regular competitive oil and gas lease sales:

- Mineral Leasing Act of 1920 as amended - Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 - "Lease sales shall be held for each State where eligible lands are available at least quarterly...."
- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform - "State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing."

Due to the BLM's obligation to comply with existing law, regulation, and policy, CBD's allegations have been found to be without merit and are therefore denied.

**b. BLM must consider a ban on new oil and gas leasing and fracking in a programmatic review and halt all new leasing and fracking in the meantime.**

BLM Response:

The request for a programmatic review is generally outside the scope of the leasing EA. It is in the development of an RMP that the BLM considers whether to open or close lands to oil and gas leasing, among the other multiple uses considered by the BLM in that RMP process. The leasing EA tiers to and incorporates by reference the RMP (as amended). As the BLM continues to demonstrate, when site-specific oil and gas lease exploration or development projects are received the BLM will determine the appropriate level of analysis for the circumstances, and will

ensure BLM's NEPA obligations are fulfilled. This allows for compliance with NEPA and avoids speculative guesses as to impacts at leasing stage.

Furthermore, the BLM New Mexico State Office is required to hold four competitive oil and gas lease sales per year, as stated above. The direct, indirect and cumulative impacts of oil and gas leasing and hydraulic fracturing are analyzed in the leasing EA. Appendix 2 of the leasing EA describes the following requirements to mitigate impacts from hydraulic fracturing:

- A series of tests are performed before operators or service companies perform a hydraulic fracturing treatment. These tests are designed to ensure that the well, casing, well equipment, and fracturing equipment are in proper working order and will safely withstand the application of the fracture treatment pressures and pump flow rates.
- To ensure that hydraulic fracturing is conducted in a safe and environmentally sound manner, the BLM approves and regulates all drilling and completion operations, and related surface disturbance on Federal public lands. Operators must submit Applications for Permit to Drill (APDs) to the agency. Prior to approving an APD, a BLM Carlsbad Field Office geologist identifies all potential subsurface formations that would be penetrated by the wellbore. This includes all groundwater aquifers and any zones that would present potential safety or health risks that may need special protection measures during drilling, or that may require specific protective well construction measures.
- Once the geologic analysis is completed, the BLM reviews the company's proposed casing and cementing programs to ensure the well construction design is adequate to protect the surface and subsurface environment, including the potential risks identified by the geologist and all known or anticipated zones with potential risks.
- During drilling, the BLM is on location during the casing and cementing of the ground water protective surface casing and other critical casing and cementing intervals. Before hydraulic fracturing takes place, all surface casing and some deeper, intermediate zones are required to be cemented from the bottom of the cased hole to the surface. The cemented well is pressure tested to ensure there are no leaks and a cement bond log is run to ensure the cement has bonded to the casing and the formation. If the fracturing of the well is considered to be a "non-routine" fracture for the area, the BLM would always be onsite during those operations as well as when abnormal conditions develop during the drilling or completion of a well.

CBD's requests for a ban on new oil and gas leasing have been considered, found to be without merit and are denied.

### **3. BLM must study the greenhouse gas (GHG) impacts of new leasing.**

- a. The effects of cumulative GHG emissions will inflict extraordinary harm to natural systems and communities**

BLM Response:

NEPA requires the BLM to analyze the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions of any agency or individual. The leasing EA analyzed the direct, indirect, and cumulative impacts of leasing the parcels in accordance with NEPA's requirements (40 CFR § 1508.7). Analysis of the effects of leasing and cumulative GHG emissions was included in the leasing EA. The emissions were estimated using representative parameters from typical development. The estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives. However, substantial uncertainty exists at the time the BLM offers a lease for sale regarding crucial factors that affect potential GHG emissions, including: well density; geological conditions; development type (vertical, directional, horizontal); hydrocarbon characteristics; equipment to be used during construction, drilling, production, and abandonment operations; and applicable regulatory requirements. Based on the analysis for this EA, mitigation measures were identified for the protection of air resources (at EA Section 4.3.1). Additional mitigation measures would be applied when actual operations are proposed on an issued lease through an APD or Sundry Notice (SN).

The lack of scientific tools designed to predict a single proposed action's impact on climate change at a regional or local scale limits the ability to assess its effect on global climate change.

It is difficult to discern with certainty what end uses for the fuels extracted from a particular leasehold might be reasonably foreseeable. There is also uncertainty with regard to the actual development that may occur as an indirect result of the proposed action. The BLM does not exercise control over the specific end use of the oil and gas produced from any individual federal lease. The BLM has no authority to direct or regulate the end use of produced oil and/or gas.

Even though the proposed action of leasing would not contribute to cumulative effects on air resources, future foreseeable development could contribute to cumulative GHG emissions. Language regarding the general cumulative impacts of GHG emissions was added to the Environmental Impacts section in the EA. Uncertainties regarding the numbers of wells and other factors result in a moderate to high degree of uncertainty and speculation with regard to GHG estimates at the leasing stage. At the APD stage, more site-specific information on oil and gas activities resulting in GHG effects would be described in detail. Also at the APD stage, the BLM would review and evaluate operations, require mitigation measures, and encourage operators to participate in the voluntary STAR program.

In BLM's review, the EA appropriately disclosed the direct, indirect, and cumulative impacts that the proposed action would have on GHGs, as well as, its acknowledgement to the uncertainty of the emission quantity of GHGs.

In conclusion, the BLM adequately addressed potential effects of cumulative GHG emissions to natural systems and communities based on the best information available. Therefore, CBD's statement of reasons have been found to be without merit, and are therefore denied.

**b. The EA ignores the social cost of carbon tool to analyze the cumulative contribution of increased oil and gas development on climate change.**

BLM Response:

The CBD argues that the BLM did not comply with NEPA because the agency did not determine the potential costs to society from the potential GHGs emitted from lease operations, particularly utilizing the Social Cost of Carbon (SCC) protocol.

Consistent with *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013), the BLM has used estimated GHG emissions associated with the proposed action as a reasonable proxy for the effects of climate change in this analysis. The BLM has placed these emissions in the context of relevant state emissions. This approach is also consistent with past BLM quantifications considering the incremental impacts of similar BLM leasing actions, as in *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013); *WildEarth Guardians v. BLM*, Civ. Case No. 1:11-cv-1481 (RJL) (D.D.C. Mar. 21, 2014).

The BLM finds that including monetary estimates of the SCC in its NEPA analysis for this proposed action would not be useful to its analysis. Determining the SCC is influenced by many factors, subject to great uncertainty. Estimating SCC is challenging because it is intended to model effects at a global scale on the welfare of future generations caused by additional carbon emissions occurring in the present. A federal Interagency Working Group (IWG) on the SCC convened by the Office of Management and Budget, developed estimates of the SCC, which reflect the monetary cost incurred by the emission of one additional metric ton of carbon dioxide. However, the BLM found that including complex monetary estimates of the SCC does not inform its decision making process.

Given the global nature of climate change, estimating SCC of an individual decision requires assessing the impact of the project on the global market for the commodity in question. While we are able to estimate the GHG emissions associated with typical development, we have not estimated the net effect of this action on global GHG emissions or climate change. Depending on the global demand for oil and gas, the net effect of any development associated with this project may be partially offset by changes in production in other locations. Accounting for this potential substitution affect is not addressed by the IWG protocol. As set forth in *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016), there is a lack of consensus on the appropriate discount rate leading to significant variation in output. SCC does not measure the actual incremental impacts of a project on the environment. And there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.

Further, the NEPA analysis for this proposed action does not include monetary estimates of any benefits or costs. The quantitative economic analysis is primarily a regional economic impact analysis, which is used to estimate impacts on economic activity, expressed as projected changes in employment, personal income, or economic output. These indicators are not benefits or costs, as defined in a benefit cost analysis. Without any other monetized benefits or costs reported,

monetized estimates of the SCC would be presented in isolation, without any context for evaluating their significance. This limits their usefulness to the decision maker.

Therefore, the statement of reasons have been found to be without merit and are therefore denied.

## **DECISION**

After a careful review, it has been determined that the protests to the 36 parcels in this sale will be denied for the reasons described above. All of the protested parcels described in the September 1, 2016 (previously July 20, 2016) Sale Notice will be offered for sale. As mentioned above, the sale date was amended due to the postponement of the sale for a change in location.

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 (Enclosure 1). If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from your receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. 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 of this Decision, pursuant to 43 CFR Part 4, the Petition 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 the 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.

/s/ Amy Lueders

Amy Lueders  
State Director

1 Enclosure  
1 - Form 1842-1

cc: w/o enclosure  
Office of the Solicitor  
Southwest Regional Office  
505 Marquette Avenue, N.W.  
Albuquerque, NM 87102

NMP000, James Stovall  
NMP020, Tye Bryson  
NM9210, Ross Klein  
NM9210, Fluids Adjudication

3100 (9210)

April 26, 2017

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

7013 1710 0001 6575 3612

Eleanor Bravo  
Southwest Organizer  
Food & Water Watch  
7804 Pan American Frwy. E NE#2  
Albuquerque, NM 87109

**DECISION**

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:

**SEPTEMBER 1, 2016 OIL & GAS LEASE SALE PROTEST OF 36 PARCELS  
PROTEST DENIED**

**ALL PROTESTED PARCELS WILL BE ISSUED**

On May 20, 2016, the Bureau of Land Management (BLM), New Mexico State Office (NMSO) received a letter from the Center for Biological Diversity (CBD) protesting the offering of all 36 oil and gas lease sale parcels as described in the Notice of Competitive Lease Sale (Sale Notice) for the September 1, 2016 (previously July 20, 2016), Competitive Oil and Gas Lease Sale. The CBD letter was submitted jointly with the following parties: Friends of the Earth; Food and Water Watch; Great Old Broads for Wilderness; and Sierra Club.

Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club are parties to the protest submitted by CBD. If a protester did not submit written comments to the BLM, during the 30-day leasing Environmental Assessment (EA) comment period, or otherwise could not demonstrate standing, the BLM would deny any protest subsequently filed by that protester. The record shows that these parties to the protest submitted on behalf of CBD did not provide scoping comments or otherwise participate in the 30-day public comment period. Therefore, the issues raised by these parties as part of the CBD protest are subject to summary dismissal and will not be considered further in this protest decision.

The 36 parcels protested are located in Eddy and Lea Counties of southeast New Mexico. The parcels are unleased Federal mineral estate administered by the BLM Carlsbad Field Office (CFO) with the surface estate administered by either the BLM, New Mexico State Land Office, or private ownership. Altogether, the protested parcels aggregate approximately 13,876.08 acres.



## **BACKGROUND**

These parcels were nominated by interested parties in accordance with 43 CFR § 3120.3. After preliminary adjudication of the nominated parcels by the NMSO, the parcels were reviewed by the CFO, including an interdisciplinary review, field visits to nominated parcels, review of conformity with the land use decisions for the planning area, and preparation of an EA documenting National Environmental Policy Act (NEPA) compliance. The NMSO also reviewed each of the parcels, and confirmed land use plan conformance and conformance with national and state BLM policies.

The preliminary parcel list was posted for a two-week public scoping period starting on December 14, 2015. The CBD submitted scoping comments during this period. Prior to posting the Sale Notice for the parcels to be offered at the competitive sale, the BLM prepared an EA that tiered the analysis to the 1988 Carlsbad Resource Management Plan (RMP) and Final Environmental Impact Statement (FEIS), the 1997 Carlsbad RMP Amendment (RMPA) and FEIS for Oil and Gas Resources, and the 1997 Roswell Resource Area RMP and FEIS. The Special Status Species RMPA Record of Decision, signed in 2008, amends these plans in portions of Chaves, Eddy, Lea and Roosevelt Counties, New Mexico, with reference to Planning Areas as described in that document. The purpose of the leasing EA is to analyze specific parcels to determine what reasonably foreseeable impacts may occur from leasing. The EA augments the decisions made in the RMP with current on-the-ground information.

The 30-day public comment period on the EA and unsigned Finding of No Significant Impact (FONSI) commenced on February 8, 2016. The CBD did provide comments to the BLM during this period. On April 20, 2016, the 30-day protest period commenced. A total of two protests were received: one from the CBD and another from the WildEarth Guardians. Each protest will be responded to separately. The CBD requested that the 36 parcels be removed from the sale.

On April 20, 2016, the BLM posted the July 2016 Sale Notice for public review. The Sale Notice described the manner in which a member of the public could protest inclusion of lands in the planned sale (at pages vi-viii), including these requirements:

- A protest must state the interest of the protesting party in the matter.
- If the party signing the protest is doing so on behalf of an association, partnership or corporation, the signing party must reveal the relationship between them. For example, unless an environmental group authorizes an individual member of its group to act for it, the individual cannot make a protest in the group's name.

In the CBD's protest letter (page 3), the groups provided a summary of their organizations' general objectives. The protest letter was signed by one individual affiliated with the CBD (page 28), and provided a list of the names, addresses, and contact information for each of the four other groups, explaining (at page 2):

*This Protest is filed on behalf of the Center for Biological Diversity, Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club, and their boards and members...*

The BLM's regulations addressing protests of competitive oil and gas lease sales (at 43 CFR § 3120.1-3) do not describe any limitations as to who may protest inclusion of lands in a Sale Notice. The issue of standing for purposes of appealing a BLM decision to dismiss and deny lease sale protests was addressed by the Interior Board of Land Appeals (IBLA). In *Biodiversity Conservation Alliance et al.* (183 IBLA 97, decided January 8, 2013), the IBLA evaluated the standing of the appellants to challenge the BLM's decisions to dismiss and deny protests related to certain oil and gas lease sale parcels, and determined (183 IBLA 97, 108):

*... since the BLM decision at issue involves the leasing of several parcels of land for oil and gas purposes, each of the appellants must show an adverse effect as a result of the leasing of each parcel to which it objects, in order to be recognized as having standing to appeal the decision to lease that parcel.*

In the CBD protest of the 36 parcels from the September 2016 Lease Sale, none of the parties have provided to the BLM; "colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged" (183 IBLA 97, 107). The closest any of the groups come to establishing allegations of an adverse effect are within the description of the CBD's interests (CBD Protest at page 3), which states:

*The Center has over 1 million members and online activists, including those living in New Mexico who have visited these public lands in the Pecos District for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing.*

However, it is not clear whether this statement establishes CBD as a party to the case and as having a legally cognizable interest that would be adversely affected by the BLM's decision to issue any of the protested leases. Other groups' statements of interest are much less specific, and do not allege any particular interests in the lands proposed for leasing.

In addition, it is not clear that a legally cognizable interest can be demonstrated by the groups for those parcels located in the CFO where the surface estate is privately owned, but overlying Federal minerals, whereas any public entry without the consent of the surface owner would constitute a trespass. Of the 36 offered parcels, 18 parcels are located entirely on privately-owned surface estate (-002, -005, -013, and -022 thru -036), and three parcels are a combination of public and private surface estate (-015, -017, and -018).

Nonetheless, given the BLM's directions to the public in the Sale Notice regarding submittal of protests, the BLM has decided to answer the specific arguments made by the protestor. However, the BLM does so with the reservation that the protestors may not have standing to bring an appeal to the IBLA of our protest decision.

On June 27, 2016, the Sale Notice was amended due to a location change and date for the July 20, 2016, Competitive Oil and Gas Lease Sale. In order to provide the public with a 45-day notice of the lease sale changes, the sale was postponed to September 1, 2016. At the sale, all of the protest parcels were successfully bid upon, and the necessary monies were subsequently received by the BLM. Given the pending protest, the BLM has not issued the leases.

## **ISSUES**

The BLM has reviewed the protestor's arguments in their entirety; the protestor's substantive arguments are numbered and in bold, with BLM responses following.

### **4. BLM violates the National Environmental Policy Act**

#### **c. It is unlawful to proceed with the lease sale without undertaking a site-specific environmental assessment.**

#### **BLM Response:**

In the multi-step Federal oil and gas leasing regime, NEPA regulations "encourage" agencies "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." 40 CFR § 1502.20. In other words, "any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR § 1506.4. NEPA regulations provide that, whenever a broad EIS has been prepared (such as a program statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program (such as a site-specific action), "the subsequent statement or 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." 40 CFR § 1502.20. This tiering process is a common practice in the oil and gas context.

The multi-step oil and gas process in the CFO begins with the programmatic analysis of oil and gas development in the CFO 2008 RMP. Then, the CFO analyzes the known impacts of proposed leases, ensuring that any impacts of leasing are consistent with the RMP in an EA such as the one for the July 2016 lease sale. Then, if the lessee chooses to pursue development - which is not a given - additional site-specific NEPA analysis takes place when Applications for Permit to Drill (APDs) are submitted. Where the context and intensity of environmental impacts remain unidentifiable until oil and gas exploration activities are proposed, the APD is the first useful point at which a site-specific environmental appraisal can be undertaken. Approval of an

APD is not a foregone conclusion (See 43 CFR § 3162.3-1(h), authorizing the agency to explicitly disapprove applications for drilling permits).

Courts have upheld this approach, explaining that, “when BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken.” (*Park County Resource Council*, 817 F.2d 609 (1987)); (See also *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-CV-00037-RB-LFG, 2011 WL 7701433 (D.N.M. Aug. 3, 2011), “It would be highly unusual for every lease parcel to be developed, and until an APD is submitted, BLM cannot determine the extent or type of development planned and the emissions that will result.”). 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)).

Prior to issuing an APD, the BLM conducts site-specific environmental review, and any APD will include (at a minimum) public posting (see 43 CFR § 3162.3-1(g)). The BLM retains substantial authority to regulate environmental aspects of Federal oil and gas lease operations through approval (see 43 CFR § 3162.3) of APDs or Sundry Notices (SNs), and through the issuance of orders and instructions of the authorized officer (see 43 CFR § 3161.2). The BLM also controls the lessee’s or operator’s actions on the lease, as described in the regulations (such as 43 CFR § 3101.1-2 and 43 CFR § 3162.5-1(a)), on the BLM Lease Form 3100-11 (such as standard lease term Sec. 6), and under applicable laws such as the Federal Land Policy and Management Act of 1976 (FLPMA). In addition, BLM retains regulatory authority to completely deny access to a leased area.

For the BLM to provide a more site-specific and detailed analysis of the impacts from lease development activities for these protested parcels 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 leases would be developed. This speculation would likely be under or over-estimate impacts. The impacts associated with construction, drilling, production, abandonment, and reclamation of well locations can vary significantly in the area of the proposed leases.

Conducting a speculative exercise about the density, rate, and extent of drilling and the potential impacts from complex multi-year plans of operation on lease parcels may be inaccurate and misleading for the BLM and the public. Under the BLM’s NEPA Handbook H-1790-1 at page 59 states: the BLM is “not required to speculate about future actions.” (See also *Southern Utah Wilderness Alliance*, 159 IBLA 220 (June 16, 2003), “A future action need not be considered significant when the reasonably foreseeable future action is speculative.”).

We believe that the CBD seeks analysis of impacts that is speculative at the leasing stage, and is better addressed at the time a site-specific proposal to drill is received by the BLM. Therefore,

the BLM finds CBD's allegations that the BLM failed to comply with NEPA to be without merit and are therefore denied.

**d. BLM failed to take a hard look at any of the potential impacts of the proposed action raised in our previous comment letters on the sale.**

BLM Response:

NEPA requires the BLM to take a "hard look" at the environmental consequences of proposed actions. The CBD has provided no evidence that the BLM failed to take a hard look at the issues raised by the CBD from a previous comment letter. Therefore, the BLM finds CBD's protest that the BLM failed to take a hard look to be without merit and are therefore denied.

**iv. BLM does not take a hard look at impacts to Lesser Prairie-Chicken.**

BLM Response:

The CFO has taken a hard look at the available information regarding the Lesser Prairie-Chicken (LPC). In December 2012, the U.S. Fish and Wildlife Service (USFWS) published a proposed rule to list the Lesser Prairie-Chicken as a threatened species. On April 10, 2014, the USFWS published their final rule listing the species as threatened, which became effective May 12, 2014. On September 1, 2015, a Federal District Court in Midland, Texas, ruled the USFWS did not follow its own rule for evaluating conservation efforts (Policy for Evaluation of Conservation Efforts When Making Listing Decisions) when it applied it to the range-wide conservation plan for the LPC. The Court also vacated the USFWS's final rule listing the LPC as a threatened species. On September 8, 2016, the USFWS received a petition requesting that they list the LPC as endangered under the Endangered Species Act. The petition presented substantial scientific or commercial information indicating that the requested action may be warranted; therefore, the USFWS initiated a status review. At the conclusion of the status review, USFWS will issue a finding as to whether or not the petitioned action is warranted. While this latest action is being analyzed, the BLM will continue to manage the LPC in accordance with BLM Manual 6840, Special Status Species Management, and the Pecos District Special Status Species Approved Resource Management Plan Amendment of 2008.

The 2008 RMPA defines occupied habitat as "all areas within 1.5 miles of an active lesser prairie-chicken site regardless of vegetation that has been active for one out of the last 5 years." The boundaries of all lease parcels discussed in the EA are greater than 1.5 miles from an LPC sighting or an LPC leak. A Biological Assessment for the lease parcels (included as Appendix 3 in the EA) determined that the lease sale "may affect - not likely to adversely affect the species." The rationale for the determination is that the offered parcels are not located within three miles of occupied LPC habitat. Based on the potential for these parcels to become occupied in the future, lease stipulations, conditions of approval, and requirements to use best management practices will be applied to each parcel as set forth in the 2008 RMPA. These conservation measures would avoid, reduce or remove future surface impacts as the leases are developed. Therefore, leasing of these parcels is in conformance with the management decisions, criterion, and appropriate lease stipulations.

Additionally, the CBD asserts that “once the lease is sold, it will be too late for BLM to ensure that sufficient protections will be in place to protect this species.” By ignoring the Application for Permit to Drill (APD) stage following the issuing of a lease, as well as the programmatic analysis in the 2008 Special Status Species RMPA, the CBD disregards the past analysis and the importance of site-specific plans in disclosing, assessing, and developing mitigation for impacts from actual oil and gas development.

The direct, indirect, and cumulative impacts from oil and gas development on wildlife resources are discussed in Chapter 4 of the EA. This analysis includes discussion of the short-term and long-term disturbance impacts. In summary, the analysis shows that the provided stipulations and the mitigation described in Chapter 4 of the EA would provide for the conservation of wildlife habitat. Therefore, the statement of reasons have found to be without merit and are therefore denied.

**v. BLM does not take a hard look at impacts to water resources.**

BLM Response:

The CFO took a hard look at impacts to water resources both in the EA and in the 1997 RMPA. The CFO addressed potential impacts to water resources in Section 4.3.6 of the leasing EA. The EA analysis determined that there were no impacts to water resources from leasing the parcels; however, there could be indirect impacts to water resources from reasonably foreseeable oil and gas development on the leases, including groundwater contamination from inadequate casing and cementing of the wellbore; surface water contamination from accidental spills or releases of drilling fluids, hydraulic fracturing fluids, produced water, or chemicals used during development and production of a well, and groundwater depletion. The EA also concluded that “specific mitigation measures for the protection of surface and ground water would be addressed at the APD stage.” Mitigation commonly includes the use of a plastic-lined reserve pits, steel tanks or steel tank closed systems, or containment berms to reduce or eliminate seepage of drilling fluid and hydrofrac flow back water into the soil, surface water, and groundwater. Both surface and usable ground water is protected from drilling fluids and salt water zones by setting surface casing to isolate the aquifers from the rest of the borehole environment.” Further, contrary to the CBD’s contention that the lease stipulations included in the EA analysis are insufficient and are not supported by science (at page 12 of CBDs Protest), the CFO references the 1997 RMPA from which the lease stipulations (EA Appendix 1) were derived.

There are no verified instances of hydraulic fracturing adversely affecting groundwater in the Permian Basin of New Mexico. This can, in part, be attributed to the fact that the likely producing zones targeted are well below any underground sources of drinking water. The EA states that the typical depth of groundwater in the Permian Basin is 400 feet or less. If an APD is submitted proposing the drilling of a well, the actual depth to groundwater will be known and analyzed through site-specific analysis. Historically, oil and gas wells have been drilled in the Permian Basin in depths ranging from several hundred feet to over 20,000 feet, based off past records. The latest Reasonably Foreseeable Development Plan (RFD) (Engler, 2014) update covering the CFO, with supporting well data from IHS Markit, shows that the most likely

targeted formations that would be produced by these leases are the Bone Springs (7,000-11,000 feet deep), Wolfcamp (7,580-10,750 feet deep), Delaware Mountain group (2,500-8,500 feet deep), and the Yeso (3,000-7,000 feet deep). Based on the distance between the groundwater and the targeted formations in the protested leases, no adverse impacts to groundwater are expected to occur. The potential for drilling or hydraulic fracturing fluids or produced water to contaminate groundwater is significantly reduced if wells are properly cased and cemented as would be required in the APD approval-process per Onshore Oil and Gas Order No. 2, Drilling Operations. Please also reference the Protest Response 2.b. below, as the issue is similar to others stated by the CBD.

The BLM's obligation to address impacts to water resources persists past the leasing stage. The BLM is responsible for inspection and enforcement of wells and facilities that have a Federal lease nexus and to conduct regular regulatory inspections, such as, but not limited to, drilling, production, environmental compliance, production audits and abandonment inspections. If at any time during the life of the well, a well site is causing or has the potential to cause environmental damage such as surface contamination, the BLM has the authority to issue Written Orders of the Authorized Officer, Incidents of Non-compliance, citations, fines, and, in specific circumstances, cessation of operations when incidents of non-compliance occur.

Water quantity is addressed in the leasing EA made available for the protest period. The amount of water used during well development is highly dependent on a number of factors including but not limited to: vertical or horizontal well, length of well bore, closed-loop or reserve pit drilling system, type of mud, type of stimulation used (e.g. hydraulic fracturing or acidizing), formation being fractured, and use of recycled water or inert gases. The 2014 RFD update completed a detailed analysis on the water use for hydraulic fracturing. Engler analyzed New Mexico Oil Conservation Division records (over 400 records) in the Bone Spring Formation, and the average is 7.3 acre-ft/horizontal well. A quantitative analysis using the data from the RFD can be completed for hydraulic fracturing, once an APD is received. Therefore, the amount of water that used is too variable to quantify at the leasing stage.

The New Mexico Constitution establishes that all the water in the State belongs to the public and, to the extent that it is unappropriated, it is available for appropriation. The Office of the State Engineer is responsible for permitting all surface and groundwater withdrawals apart from water rights acquired before 1907 and small scale stock watering. Because of these statutes and state processes, the BLM does not seek to interfere with state regulation of permitted water wells, their intended uses, or their permitted allocation. The BLM requires full compliance with applicable state regulations.

No new evidence was presented that was not already considered in the leasing EA or that is regulated by Federal or State laws, rules, regulations, or policy. In conclusion, the BLM adequately addressed potential impacts to water resources from oil and gas development, including hydraulic fracturing, and the environmental consequences of how development may affect water quality and quantity. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at water impacts to be without merit and are therefore denied.

**vi. BLM does not take a hard look at impacts of fracking on air quality, water resources, soil, vegetation, wildlife, induced seismicity, brine well collapses, and releases of radionuclide waste into the biosphere.**

**BLM Response:**

The CFO took a hard look at the impacts of hydraulic fracturing. The EA acknowledges the possibility that if the leases are issued, and if an operator proposes to explore or develop a lease, hydraulic fracturing operations may be proposed. Further, Section 4.1 of the leasing EA states:

*“The act of leasing parcels would, by itself, have no impact on any resources in the CFO. All impacts would be linked to an undetermined future level of lease development. The anticipated level of full lease development is described in Table 2 in Section 2.3.1.”*

*“Assumptions used in the analysis regarding resource impacts are based on past development knowledge and practices and resource concerns specific to each individual parcel. Site-specific impacts would be addressed in a subsequent NEPA document when an APD is received.”*

Furthermore, in their protest, CBD states concerns of induced seismicity related to fracking. Earthquake logs from the U.S. Geologic Survey Earthquake Hazards Program for the state of New Mexico is a source of data that can be used to evaluate seismic activity and make predictions concerning the location and magnitude of future earthquakes. In southeast New Mexico only one area, Dagger Draw<sup>34</sup>, has had seismicity that has been contributed to the disposal of waste water through injection. The nearest parcel to Dagger Draw, parcel -002, is more than 30 linear miles away. Given the multiple locations for waste water disposal, and the uncertainty of disposal methods, site specific analysis would be conducted at the time of an APD submission in accordance with the NEPA and Onshore Oil and Gas Order No. 7. Additionally, waste water injection of hydraulic fracturing flowback water is regulated by the Environmental Protection Agency and delegated to the State of New Mexico for oversight and enforcement.

CBD also states that the BLM failed to addresses threats associated “with drilling near the WIPP.” The closest lease parcel boundary to the Waste Isolation Pilot Plant (WIPP) boundary is parcel -008 located approximately 7.6 miles east south-east from the WIPP. Using CBD’s own citation of “more than 500 oil and gas wells within 2.5 miles of the WIPP boundary,” and there being no known issues to the WIPP caused by oil and gas development, the offered parcels are three times further than the 2.5 mile distance of concern that was provided by the CBD.

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<sup>3</sup> Petersen, M.D., Mueller, C.S., Moschetti, M.P., Hoover, S.M., Rubinstein, J.L., Llenos, A.L., Michael, A.J., Ellsworth, W.L., McGarr, A.F., Holland, A.A., and Anderson, J.G., 2015, Incorporating induced seismicity in the 2014 United States National Seismic Hazard Model—Results of 2014 workshop and sensitivity studies: U.S. Geological Survey Open-File Report 2015–1070, 69 p., <http://dx.doi.org/10.3133/ofr20151070>.

<sup>4</sup> Sanford, Allan R., Mayeau, Tara M., Schlue, John W., Aster, Richard C., and Jaksha, Lawrence H., Earthquake catalogs for New Mexico and bordering areas II: 1999–2004. New Mexico Geology. November 2006, Volume 28, Number 4.



We disagree that the leasing EA does not adequately address impacts from hydraulic fracturing operations; we agree with the EA's conclusion that additional analysis is more appropriate at the time actual operations are proposed. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at the impacts of hydraulic fracturing to be without merit and are therefore denied.

**5. BLM must end all new fossil fuel leasing and hydraulic fracturing.**

**c. BLM must limit greenhouse gas emissions by keeping Federal fossil fuels in the ground.**

BLM Response:

Congress has expressly charged the BLM to develop federal oil and gas resources. *See, e.g.*, 30 U.S.C. § 181; 42 U.S.C. § 15922. It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional and local needs. This policy is based on law, including the FLPMA. It is during the preparation of an RMP that the BLM considers programmatically whether to open or close lands to oil and gas development, among the other multiple uses considered by the BLM. Halting all fossil fuel development in the area is not within the scope of this leasing EA. The following regulations, policy, and bulletin reiterate the BLM New Mexico State Office's requirements to hold regular competitive oil and gas lease sales:

- Mineral Leasing Act of 1920 as amended - Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 - "Lease sales shall be held for each State where eligible lands are available at least quarterly...."
- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform - "State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing."

Due to the BLM's obligation to comply with existing law, regulation, and policy, CBD's allegations have been found to be without merit and are therefore denied.

**d. BLM must consider a ban on new oil and gas leasing and fracking in a programmatic review and halt all new leasing and fracking in the meantime.**

BLM Response:

The request for a programmatic review is generally outside the scope of the leasing EA. It is in the development of an RMP that the BLM considers whether to open or close lands to oil and gas leasing, among the other multiple uses considered by the BLM in that RMP process. The leasing EA tiers to and incorporates by reference the RMP (as amended). As the BLM continues to demonstrate, when site-specific oil and gas lease exploration or development projects are received the BLM will determine the appropriate level of analysis for the circumstances, and will

ensure BLM's NEPA obligations are fulfilled. This allows for compliance with NEPA and avoids speculative guesses as to impacts at leasing stage.

Furthermore, the BLM New Mexico State Office is required to hold four competitive oil and gas lease sales per year, as stated above. The direct, indirect and cumulative impacts of oil and gas leasing and hydraulic fracturing are analyzed in the leasing EA. Appendix 2 of the leasing EA describes the following requirements to mitigate impacts from hydraulic fracturing:

- A series of tests are performed before operators or service companies perform a hydraulic fracturing treatment. These tests are designed to ensure that the well, casing, well equipment, and fracturing equipment are in proper working order and will safely withstand the application of the fracture treatment pressures and pump flow rates.
- To ensure that hydraulic fracturing is conducted in a safe and environmentally sound manner, the BLM approves and regulates all drilling and completion operations, and related surface disturbance on Federal public lands. Operators must submit Applications for Permit to Drill (APDs) to the agency. Prior to approving an APD, a BLM Carlsbad Field Office geologist identifies all potential subsurface formations that would be penetrated by the wellbore. This includes all groundwater aquifers and any zones that would present potential safety or health risks that may need special protection measures during drilling, or that may require specific protective well construction measures.
- Once the geologic analysis is completed, the BLM reviews the company's proposed casing and cementing programs to ensure the well construction design is adequate to protect the surface and subsurface environment, including the potential risks identified by the geologist and all known or anticipated zones with potential risks.
- During drilling, the BLM is on location during the casing and cementing of the ground water protective surface casing and other critical casing and cementing intervals. Before hydraulic fracturing takes place, all surface casing and some deeper, intermediate zones are required to be cemented from the bottom of the cased hole to the surface. The cemented well is pressure tested to ensure there are no leaks and a cement bond log is run to ensure the cement has bonded to the casing and the formation. If the fracturing of the well is considered to be a "non-routine" fracture for the area, the BLM would always be onsite during those operations as well as when abnormal conditions develop during the drilling or completion of a well.

CBD's requests for a ban on new oil and gas leasing have been considered, found to be without merit and are denied.

## **6. BLM must study the greenhouse gas (GHG) impacts of new leasing.**

- c. The effects of cumulative GHG emissions will inflict extraordinary harm to natural systems and communities**

BLM Response:

NEPA requires the BLM to analyze the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions of any agency or individual. The leasing EA analyzed the direct, indirect, and cumulative impacts of leasing the parcels in accordance with NEPA's requirements (40 CFR § 1508.7). Analysis of the effects of leasing and cumulative GHG emissions was included in the leasing EA. The emissions were estimated using representative parameters from typical development. The estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives. However, substantial uncertainty exists at the time the BLM offers a lease for sale regarding crucial factors that affect potential GHG emissions, including: well density; geological conditions; development type (vertical, directional, horizontal); hydrocarbon characteristics; equipment to be used during construction, drilling, production, and abandonment operations; and applicable regulatory requirements. Based on the analysis for this EA, mitigation measures were identified for the protection of air resources (at EA Section 4.3.1). Additional mitigation measures would be applied when actual operations are proposed on an issued lease through an APD or Sundry Notice (SN).

The lack of scientific tools designed to predict a single proposed action's impact on climate change at a regional or local scale limits the ability to assess its effect on global climate change.

It is difficult to discern with certainty what end uses for the fuels extracted from a particular leasehold might be reasonably foreseeable. There is also uncertainty with regard to the actual development that may occur as an indirect result of the proposed action. The BLM does not exercise control over the specific end use of the oil and gas produced from any individual federal lease. The BLM has no authority to direct or regulate the end use of produced oil and/or gas.

Even though the proposed action of leasing would not contribute to cumulative effects on air resources, future foreseeable development could contribute to cumulative GHG emissions. Language regarding the general cumulative impacts of GHG emissions was added to the Environmental Impacts section in the EA. Uncertainties regarding the numbers of wells and other factors result in a moderate to high degree of uncertainty and speculation with regard to GHG estimates at the leasing stage. At the APD stage, more site-specific information on oil and gas activities resulting in GHG effects would be described in detail. Also at the APD stage, the BLM would review and evaluate operations, require mitigation measures, and encourage operators to participate in the voluntary STAR program.

In BLM's review, the EA appropriately disclosed the direct, indirect, and cumulative impacts that the proposed action would have on GHGs, as well as, its acknowledgement to the uncertainty of the emission quantity of GHGs.

In conclusion, the BLM adequately addressed potential effects of cumulative GHG emissions to natural systems and communities based on the best information available. Therefore, CBD's statement of reasons have been found to be without merit, and are therefore denied.

**d. The EA ignores the social cost of carbon tool to analyze the cumulative contribution of increased oil and gas development on climate change.**

BLM Response:

The CBD argues that the BLM did not comply with NEPA because the agency did not determine the potential costs to society from the potential GHGs emitted from lease operations, particularly utilizing the Social Cost of Carbon (SCC) protocol.

Consistent with *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013), the BLM has used estimated GHG emissions associated with the proposed action as a reasonable proxy for the effects of climate change in this analysis. The BLM has placed these emissions in the context of relevant state emissions. This approach is also consistent with past BLM quantifications considering the incremental impacts of similar BLM leasing actions, as in *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013); *WildEarth Guardians v. BLM*, Civ. Case No. 1:11-cv-1481 (RJL) (D.D.C. Mar. 21, 2014).

The BLM finds that including monetary estimates of the SCC in its NEPA analysis for this proposed action would not be useful to its analysis. Determining the SCC is influenced by many factors, subject to great uncertainty. Estimating SCC is challenging because it is intended to model effects at a global scale on the welfare of future generations caused by additional carbon emissions occurring in the present. A federal Interagency Working Group (IWG) on the SCC convened by the Office of Management and Budget, developed estimates of the SCC, which reflect the monetary cost incurred by the emission of one additional metric ton of carbon dioxide. However, the BLM found that including complex monetary estimates of the SCC does not inform its decision making process.

Given the global nature of climate change, estimating SCC of an individual decision requires assessing the impact of the project on the global market for the commodity in question. While we are able to estimate the GHG emissions associated with typical development, we have not estimated the net effect of this action on global GHG emissions or climate change. Depending on the global demand for oil and gas, the net effect of any development associated with this project may be partially offset by changes in production in other locations. Accounting for this potential substitution affect is not addressed by the IWG protocol. As set forth in *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016), there is a lack of consensus on the appropriate discount rate leading to significant variation in output. SCC does not measure the actual incremental impacts of a project on the environment. And there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.

Further, the NEPA analysis for this proposed action does not include monetary estimates of any benefits or costs. The quantitative economic analysis is primarily a regional economic impact analysis, which is used to estimate impacts on economic activity, expressed as projected changes in employment, personal income, or economic output. These indicators are not benefits or costs, as defined in a benefit cost analysis. Without any other monetized benefits or costs reported,

monetized estimates of the SCC would be presented in isolation, without any context for evaluating their significance. This limits their usefulness to the decision maker.

Therefore, the statement of reasons have been found to be without merit and are therefore denied.

## **DECISION**

After a careful review, it has been determined that the protests to the 36 parcels in this sale will be denied for the reasons described above. All of the protested parcels described in the September 1, 2016 (previously July 20, 2016) Sale Notice will be offered for sale. As mentioned above, the sale date was amended due to the postponement of the sale for a change in location.

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 (Enclosure 1). If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from your receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. 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 of this Decision, pursuant to 43 CFR Part 4, the Petition 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 the 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:

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

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

/s/ Amy Lueders

Amy Lueders  
State Director

1 Enclosure  
1 - Form 1842-1

cc: w/o enclosure  
Office of the Solicitor  
Southwest Regional Office  
505 Marquette Avenue, N.W.  
Albuquerque, NM 87102

NMP000, James Stovall  
NMP020, Tye Bryson  
NM9210, Ross Klein  
NM9210, Fluids Adjudication

3100 (9210)

April 26, 2017

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

7013 1710 0001 6575 3599

Marissa Knodel  
Climate Campaigner  
Friends of the Earth  
1101 15<sup>th</sup> Street NW, Floor 11  
Washington, DC 20005

**DECISION**

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:

**SEPTEMBER 1, 2016 OIL & GAS LEASE SALE PROTEST OF 36 PARCELS  
PROTEST DENIED**

**ALL PROTESTED PARCELS WILL BE ISSUED**

On May 20, 2016, the Bureau of Land Management (BLM), New Mexico State Office (NMSO) received a letter from the Center for Biological Diversity (CBD) protesting the offering of all 36 oil and gas lease sale parcels as described in the Notice of Competitive Lease Sale (Sale Notice) for the September 1, 2016 (previously July 20, 2016), Competitive Oil and Gas Lease Sale. The CBD letter was submitted jointly with the following parties: Friends of the Earth; Food and Water Watch; Great Old Broads for Wilderness; and Sierra Club.

Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club are parties to the protest submitted by CBD. If a protester did not submit written comments to the BLM, during the 30-day leasing Environmental Assessment (EA) comment period, or otherwise could not demonstrate standing, the BLM would deny any protest subsequently filed by that protester. The record shows that these parties to the protest submitted on behalf of CBD did not provide scoping comments or otherwise participate in the 30-day public comment period. Therefore, the issues raised by these parties as part of the CBD protest are subject to summary dismissal and will not be considered further in this protest decision.

The 36 parcels protested are located in Eddy and Lea Counties of southeast New Mexico. The parcels are unleased Federal mineral estate administered by the BLM Carlsbad Field Office (CFO) with the surface estate administered by either the BLM, New Mexico State Land Office, or private ownership. Altogether, the protested parcels aggregate approximately 13,876.08 acres.

## **BACKGROUND**

These parcels were nominated by interested parties in accordance with 43 CFR § 3120.3. After preliminary adjudication of the nominated parcels by the NMSO, the parcels were reviewed by the CFO, including an interdisciplinary review, field visits to nominated parcels, review of conformity with the land use decisions for the planning area, and preparation of an EA documenting National Environmental Policy Act (NEPA) compliance. The NMSO also reviewed each of the parcels, and confirmed land use plan conformance and conformance with national and state BLM policies.

The preliminary parcel list was posted for a two-week public scoping period starting on December 14, 2015. The CBD submitted scoping comments during this period. Prior to posting the Sale Notice for the parcels to be offered at the competitive sale, the BLM prepared an EA that tiered the analysis to the 1988 Carlsbad Resource Management Plan (RMP) and Final Environmental Impact Statement (FEIS), the 1997 Carlsbad RMP Amendment (RMPA) and FEIS for Oil and Gas Resources, and the 1997 Roswell Resource Area RMP and FEIS. The Special Status Species RMPA Record of Decision, signed in 2008, amends these plans in portions of Chaves, Eddy, Lea and Roosevelt Counties, New Mexico, with reference to Planning Areas as described in that document. The purpose of the leasing EA is to analyze specific parcels to determine what reasonably foreseeable impacts may occur from leasing. The EA augments the decisions made in the RMP with current on-the-ground information.

The 30-day public comment period on the EA and unsigned Finding of No Significant Impact (FONSI) commenced on February 8, 2016. The CBD did provide comments to the BLM during this period. On April 20, 2016, the 30-day protest period commenced. A total of two protests were received: one from the CBD and another from the WildEarth Guardians. Each protest will be responded to separately. The CBD requested that the 36 parcels be removed from the sale.

On April 20, 2016, the BLM posted the July 2016 Sale Notice for public review. The Sale Notice described the manner in which a member of the public could protest inclusion of lands in the planned sale (at pages vi-viii), including these requirements:

- A protest must state the interest of the protesting party in the matter.
- If the party signing the protest is doing so on behalf of an association, partnership or corporation, the signing party must reveal the relationship between them. For example, unless an environmental group authorizes an individual member of its group to act for it, the individual cannot make a protest in the group's name.

In the CBD's protest letter (page 3), the groups provided a summary of their organizations' general objectives. The protest letter was signed by one individual affiliated with the CBD (page 28), and provided a list of the names, addresses, and contact information for each of the four other groups, explaining (at page 2):



*This Protest is filed on behalf of the Center for Biological Diversity, Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club, and their boards and members...*

The BLM's regulations addressing protests of competitive oil and gas lease sales (at 43 CFR § 3120.1-3) do not describe any limitations as to who may protest inclusion of lands in a Sale Notice. The issue of standing for purposes of appealing a BLM decision to dismiss and deny lease sale protests was addressed by the Interior Board of Land Appeals (IBLA). In *Biodiversity Conservation Alliance et al.* (183 IBLA 97, decided January 8, 2013), the IBLA evaluated the standing of the appellants to challenge the BLM's decisions to dismiss and deny protests related to certain oil and gas lease sale parcels, and determined (183 IBLA 97, 108):

*... since the BLM decision at issue involves the leasing of several parcels of land for oil and gas purposes, each of the appellants must show an adverse effect as a result of the leasing of each parcel to which it objects, in order to be recognized as having standing to appeal the decision to lease that parcel.*

In the CBD protest of the 36 parcels from the September 2016 Lease Sale, none of the parties have provided to the BLM; "colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged" (183 IBLA 97, 107). The closest any of the groups come to establishing allegations of an adverse effect are within the description of the CBD's interests (CBD Protest at page 3), which states:

*The Center has over 1 million members and online activists, including those living in New Mexico who have visited these public lands in the Pecos District for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing.*

However, it is not clear whether this statement establishes CBD as a party to the case and as having a legally cognizable interest that would be adversely affected by the BLM's decision to issue any of the protested leases. Other groups' statements of interest are much less specific, and do not allege any particular interests in the lands proposed for leasing.

In addition, it is not clear that a legally cognizable interest can be demonstrated by the groups for those parcels located in the CFO where the surface estate is privately owned, but overlying Federal minerals, whereas any public entry without the consent of the surface owner would constitute a trespass. Of the 36 offered parcels, 18 parcels are located entirely on privately-owned surface estate (-002, -005, -013, and -022 thru -036), and three parcels are a combination of public and private surface estate (-015, -017, and -018).

Nonetheless, given the BLM's directions to the public in the Sale Notice regarding submittal of protests, the BLM has decided to answer the specific arguments made by the protestor. However, the BLM does so with the reservation that the protestors may not have standing to bring an appeal to the IBLA of our protest decision.

On June 27, 2016, the Sale Notice was amended due to a location change and date for the July 20, 2016, Competitive Oil and Gas Lease Sale. In order to provide the public with a 45-day notice of the lease sale changes, the sale was postponed to September 1, 2016. At the sale, all of the protest parcels were successfully bid upon, and the necessary monies were subsequently received by the BLM. Given the pending protest, the BLM has not issued the leases.

## **ISSUES**

The BLM has reviewed the protestor's arguments in their entirety; the protestor's substantive arguments are numbered and in bold, with BLM responses following.

### **7. BLM violates the National Environmental Policy Act**

- e. It is unlawful to proceed with the lease sale without undertaking a site-specific environmental assessment.**

#### **BLM Response:**

In the multi-step Federal oil and gas leasing regime, NEPA regulations "encourage" agencies "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." 40 CFR § 1502.20. In other words, "any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR § 1506.4. NEPA regulations provide that, whenever a broad EIS has been prepared (such as a program statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program (such as a site-specific action), "the subsequent statement or 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." 40 CFR § 1502.20. This tiering process is a common practice in the oil and gas context.

The multi-step oil and gas process in the CFO begins with the programmatic analysis of oil and gas development in the CFO 2008 RMP. Then, the CFO analyzes the known impacts of proposed leases, ensuring that any impacts of leasing are consistent with the RMP in an EA such as the one for the July 2016 lease sale. Then, if the lessee chooses to pursue development - which is not a given - additional site-specific NEPA analysis takes place when Applications for Permit to Drill (APDs) are submitted. Where the context and intensity of environmental impacts remain unidentifiable until oil and gas exploration activities are proposed, the APD is the first useful point at which a site-specific environmental appraisal can be undertaken. Approval of an

APD is not a foregone conclusion (See 43 CFR § 3162.3-1(h), authorizing the agency to explicitly disapprove applications for drilling permits).

Courts have upheld this approach, explaining that, “when BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken.” (*Park County Resource Council*, 817 F.2d 609 (1987)); (See also *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-CV-00037-RB-LFG, 2011 WL 7701433 (D.N.M. Aug. 3, 2011), “It would be highly unusual for every lease parcel to be developed, and until an APD is submitted, BLM cannot determine the extent or type of development planned and the emissions that will result.”). 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)).

Prior to issuing an APD, the BLM conducts site-specific environmental review, and any APD will include (at a minimum) public posting (see 43 CFR § 3162.3-1(g)). The BLM retains substantial authority to regulate environmental aspects of Federal oil and gas lease operations through approval (see 43 CFR § 3162.3) of APDs or Sundry Notices (SNs), and through the issuance of orders and instructions of the authorized officer (see 43 CFR § 3161.2). The BLM also controls the lessee’s or operator’s actions on the lease, as described in the regulations (such as 43 CFR § 3101.1-2 and 43 CFR § 3162.5-1(a)), on the BLM Lease Form 3100-11 (such as standard lease term Sec. 6), and under applicable laws such as the Federal Land Policy and Management Act of 1976 (FLPMA). In addition, BLM retains regulatory authority to completely deny access to a leased area.

For the BLM to provide a more site-specific and detailed analysis of the impacts from lease development activities for these protested parcels 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 leases would be developed. This speculation would likely be under or over-estimate impacts. The impacts associated with construction, drilling, production, abandonment, and reclamation of well locations can vary significantly in the area of the proposed leases.

Conducting a speculative exercise about the density, rate, and extent of drilling and the potential impacts from complex multi-year plans of operation on lease parcels may be inaccurate and misleading for the BLM and the public. Under the BLM’s NEPA Handbook H-1790-1 at page 59 states: the BLM is “not required to speculate about future actions.” (See also *Southern Utah Wilderness Alliance*, 159 IBLA 220 (June 16, 2003), “A future action need not be considered significant when the reasonably foreseeable future action is speculative.”).

We believe that the CBD seeks analysis of impacts that is speculative at the leasing stage, and is better addressed at the time a site-specific proposal to drill is received by the BLM. Therefore,

the BLM finds CBD's allegations that the BLM failed to comply with NEPA to be without merit and are therefore denied.

**f. BLM failed to take a hard look at any of the potential impacts of the proposed action raised in our previous comment letters on the sale.**

BLM Response:

NEPA requires the BLM to take a "hard look" at the environmental consequences of proposed actions. The CBD has provided no evidence that the BLM failed to take a hard look at the issues raised by the CBD from a previous comment letter. Therefore, the BLM finds CBD's protest that the BLM failed to take a hard look to be without merit and are therefore denied.

**vii. BLM does not take a hard look at impacts to Lesser Prairie-Chicken.**

BLM Response:

The CFO has taken a hard look at the available information regarding the Lesser Prairie-Chicken (LPC). In December 2012, the U.S. Fish and Wildlife Service (USFWS) published a proposed rule to list the Lesser Prairie-Chicken as a threatened species. On April 10, 2014, the USFWS published their final rule listing the species as threatened, which became effective May 12, 2014. On September 1, 2015, a Federal District Court in Midland, Texas, ruled the USFWS did not follow its own rule for evaluating conservation efforts (Policy for Evaluation of Conservation Efforts When Making Listing Decisions) when it applied it to the range-wide conservation plan for the LPC. The Court also vacated the USFWS's final rule listing the LPC as a threatened species. On September 8, 2016, the USFWS received a petition requesting that they list the LPC as endangered under the Endangered Species Act. The petition presented substantial scientific or commercial information indicating that the requested action may be warranted; therefore, the USFWS initiated a status review. At the conclusion of the status review, USFWS will issue a finding as to whether or not the petitioned action is warranted. While this latest action is being analyzed, the BLM will continue to manage the LPC in accordance with BLM Manual 6840, Special Status Species Management, and the Pecos District Special Status Species Approved Resource Management Plan Amendment of 2008.

The 2008 RMPA defines occupied habitat as "all areas within 1.5 miles of an active lesser prairie-chicken site regardless of vegetation that has been active for one out of the last 5 years." The boundaries of all lease parcels discussed in the EA are greater than 1.5 miles from an LPC sighting or an LPC leak. A Biological Assessment for the lease parcels (included as Appendix 3 in the EA) determined that the lease sale "may affect - not likely to adversely affect the species." The rationale for the determination is that the offered parcels are not located within three miles of occupied LPC habitat. Based on the potential for these parcels to become occupied in the future, lease stipulations, conditions of approval, and requirements to use best management practices will be applied to each parcel as set forth in the 2008 RMPA. These conservation measures would avoid, reduce or remove future surface impacts as the leases are developed. Therefore, leasing of these parcels is in conformance with the management decisions, criterion, and appropriate lease stipulations.

Additionally, the CBD asserts that “once the lease is sold, it will be too late for BLM to ensure that sufficient protections will be in place to protect this species.” By ignoring the Application for Permit to Drill (APD) stage following the issuing of a lease, as well as the programmatic analysis in the 2008 Special Status Species RMPA, the CBD disregards the past analysis and the importance of site-specific plans in disclosing, assessing, and developing mitigation for impacts from actual oil and gas development.

The direct, indirect, and cumulative impacts from oil and gas development on wildlife resources are discussed in Chapter 4 of the EA. This analysis includes discussion of the short-term and long-term disturbance impacts. In summary, the analysis shows that the provided stipulations and the mitigation described in Chapter 4 of the EA would provide for the conservation of wildlife habitat. Therefore, the statement of reasons have found to be without merit and are therefore denied.

**viii. BLM does not take a hard look at impacts to water resources.**

BLM Response:

The CFO took a hard look at impacts to water resources both in the EA and in the 1997 RMPA. The CFO addressed potential impacts to water resources in Section 4.3.6 of the leasing EA. The EA analysis determined that there were no impacts to water resources from leasing the parcels; however, there could be indirect impacts to water resources from reasonably foreseeable oil and gas development on the leases, including groundwater contamination from inadequate casing and cementing of the wellbore; surface water contamination from accidental spills or releases of drilling fluids, hydraulic fracturing fluids, produced water, or chemicals used during development and production of a well, and groundwater depletion. The EA also concluded that “specific mitigation measures for the protection of surface and ground water would be addressed at the APD stage.” Mitigation commonly includes the use of a plastic-lined reserve pits, steel tanks or steel tank closed systems, or containment berms to reduce or eliminate seepage of drilling fluid and hydrofrac flow back water into the soil, surface water, and groundwater. Both surface and usable ground water is protected from drilling fluids and salt water zones by setting surface casing to isolate the aquifers from the rest of the borehole environment.” Further, contrary to the CBD’s contention that the lease stipulations included in the EA analysis are insufficient and are not supported by science (at page 12 of CBDs Protest), the CFO references the 1997 RMPA from which the lease stipulations (EA Appendix 1) were derived.

There are no verified instances of hydraulic fracturing adversely affecting groundwater in the Permian Basin of New Mexico. This can, in part, be attributed to the fact that the likely producing zones targeted are well below any underground sources of drinking water. The EA states that the typical depth of groundwater in the Permian Basin is 400 feet or less. If an APD is submitted proposing the drilling of a well, the actual depth to groundwater will be known and analyzed through site-specific analysis. Historically, oil and gas wells have been drilled in the Permian Basin in depths ranging from several hundred feet to over 20,000 feet, based off past records. The latest Reasonably Foreseeable Development Plan (RFD) (Engler, 2014) update covering the CFO, with supporting well data from IHS Markit, shows that the most likely

targeted formations that would be produced by these leases are the Bone Springs (7,000-11,000 feet deep), Wolfcamp (7,580-10,750 feet deep), Delaware Mountain group (2,500-8,500 feet deep), and the Yeso (3,000-7,000 feet deep). Based on the distance between the groundwater and the targeted formations in the protested leases, no adverse impacts to groundwater are expected to occur. The potential for drilling or hydraulic fracturing fluids or produced water to contaminate groundwater is significantly reduced if wells are properly cased and cemented as would be required in the APD approval-process per Onshore Oil and Gas Order No. 2, Drilling Operations. Please also reference the Protest Response 2.b. below, as the issue is similar to others stated by the CBD.

The BLM's obligation to address impacts to water resources persists past the leasing stage. The BLM is responsible for inspection and enforcement of wells and facilities that have a Federal lease nexus and to conduct regular regulatory inspections, such as, but not limited to, drilling, production, environmental compliance, production audits and abandonment inspections. If at any time during the life of the well, a well site is causing or has the potential to cause environmental damage such as surface contamination, the BLM has the authority to issue Written Orders of the Authorized Officer, Incidents of Non-compliance, citations, fines, and, in specific circumstances, cessation of operations when incidents of non-compliance occur.

Water quantity is addressed in the leasing EA made available for the protest period. The amount of water used during well development is highly dependent on a number of factors including but not limited to: vertical or horizontal well, length of well bore, closed-loop or reserve pit drilling system, type of mud, type of stimulation used (e.g. hydraulic fracturing or acidizing), formation being fractured, and use of recycled water or inert gases. The 2014 RFD update completed a detailed analysis on the water use for hydraulic fracturing. Engler analyzed New Mexico Oil Conservation Division records (over 400 records) in the Bone Spring Formation, and the average is 7.3 acre-ft/horizontal well. A quantitative analysis using the data from the RFD can be completed for hydraulic fracturing, once an APD is received. Therefore, the amount of water that used is too variable to quantify at the leasing stage.

The New Mexico Constitution establishes that all the water in the State belongs to the public and, to the extent that it is unappropriated, it is available for appropriation. The Office of the State Engineer is responsible for permitting all surface and groundwater withdrawals apart from water rights acquired before 1907 and small scale stock watering. Because of these statutes and state processes, the BLM does not seek to interfere with state regulation of permitted water wells, their intended uses, or their permitted allocation. The BLM requires full compliance with applicable state regulations.

No new evidence was presented that was not already considered in the leasing EA or that is regulated by Federal or State laws, rules, regulations, or policy. In conclusion, the BLM adequately addressed potential impacts to water resources from oil and gas development, including hydraulic fracturing, and the environmental consequences of how development may affect water quality and quantity. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at water impacts to be without merit and are therefore denied.

**ix. BLM does not take a hard look at impacts of fracking on air quality, water resources, soil, vegetation, wildlife, induced seismicity, brine well collapses, and releases of radionuclide waste into the biosphere.**

**BLM Response:**

The CFO took a hard look at the impacts of hydraulic fracturing. The EA acknowledges the possibility that if the leases are issued, and if an operator proposes to explore or develop a lease, hydraulic fracturing operations may be proposed. Further, Section 4.1 of the leasing EA states:

*“The act of leasing parcels would, by itself, have no impact on any resources in the CFO. All impacts would be linked to an undetermined future level of lease development. The anticipated level of full lease development is described in Table 2 in Section 2.3.1.”*

*“Assumptions used in the analysis regarding resource impacts are based on past development knowledge and practices and resource concerns specific to each individual parcel. Site-specific impacts would be addressed in a subsequent NEPA document when an APD is received.”*

Furthermore, in their protest, CBD states concerns of induced seismicity related to fracking. Earthquake logs from the U.S. Geologic Survey Earthquake Hazards Program for the state of New Mexico is a source of data that can be used to evaluate seismic activity and make predictions concerning the location and magnitude of future earthquakes. In southeast New Mexico only one area, Dagger Draw<sup>56</sup>, has had seismicity that has been contributed to the disposal of waste water through injection. The nearest parcel to Dagger Draw, parcel -002, is more than 30 linear miles away. Given the multiple locations for waste water disposal, and the uncertainty of disposal methods, site specific analysis would be conducted at the time of an APD submission in accordance with the NEPA and Onshore Oil and Gas Order No. 7. Additionally, waste water injection of hydraulic fracturing flowback water is regulated by the Environmental Protection Agency and delegated to the State of New Mexico for oversight and enforcement.

CBD also states that the BLM failed to addresses threats associated “with drilling near the WIPP.” The closest lease parcel boundary to the Waste Isolation Pilot Plant (WIPP) boundary is parcel -008 located approximately 7.6 miles east south-east from the WIPP. Using CBD’s own citation of “more than 500 oil and gas wells within 2.5 miles of the WIPP boundary,” and there being no known issues to the WIPP caused by oil and gas development, the offered parcels are three times further than the 2.5 mile distance of concern that was provided by the CBD.

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<sup>5</sup> Petersen, M.D., Mueller, C.S., Moschetti, M.P., Hoover, S.M., Rubinstein, J.L., Llenos, A.L., Michael, A.J., Ellsworth, W.L., McGarr, A.F., Holland, A.A., and Anderson, J.G., 2015, Incorporating induced seismicity in the 2014 United States National Seismic Hazard Model—Results of 2014 workshop and sensitivity studies: U.S. Geological Survey Open-File Report 2015–1070, 69 p., <http://dx.doi.org/10.3133/ofr20151070>.

<sup>6</sup> Sanford, Allan R., Mayeau, Tara M., Schlue, John W., Aster, Richard C., and Jaksha, Lawrence H., Earthquake catalogs for New Mexico and bordering areas II: 1999–2004. New Mexico Geology. November 2006, Volume 28, Number 4.

We disagree that the leasing EA does not adequately address impacts from hydraulic fracturing operations; we agree with the EA's conclusion that additional analysis is more appropriate at the time actual operations are proposed. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at the impacts of hydraulic fracturing to be without merit and are therefore denied.

**8. BLM must end all new fossil fuel leasing and hydraulic fracturing.**

**e. BLM must limit greenhouse gas emissions by keeping Federal fossil fuels in the ground.**

BLM Response:

Congress has expressly charged the BLM to develop federal oil and gas resources. *See, e.g.,* 30 U.S.C. § 181; 42 U.S.C. § 15922. It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional and local needs. This policy is based on law, including the FLPMA. It is during the preparation of an RMP that the BLM considers programmatically whether to open or close lands to oil and gas development, among the other multiple uses considered by the BLM. Halting all fossil fuel development in the area is not within the scope of this leasing EA. The following regulations, policy, and bulletin reiterate the BLM New Mexico State Office's requirements to hold regular competitive oil and gas lease sales:

- Mineral Leasing Act of 1920 as amended - Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 - "Lease sales shall be held for each State where eligible lands are available at least quarterly...."
- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform - "State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing."

Due to the BLM's obligation to comply with existing law, regulation, and policy, CBD's allegations have been found to be without merit and are therefore denied.

**f. BLM must consider a ban on new oil and gas leasing and fracking in a programmatic review and halt all new leasing and fracking in the meantime.**

BLM Response:

The request for a programmatic review is generally outside the scope of the leasing EA. It is in the development of an RMP that the BLM considers whether to open or close lands to oil and gas leasing, among the other multiple uses considered by the BLM in that RMP process. The leasing EA tiers to and incorporates by reference the RMP (as amended). As the BLM continues to demonstrate, when site-specific oil and gas lease exploration or development projects are received the BLM will determine the appropriate level of analysis for the circumstances, and will



ensure BLM's NEPA obligations are fulfilled. This allows for compliance with NEPA and avoids speculative guesses as to impacts at leasing stage.

Furthermore, the BLM New Mexico State Office is required to hold four competitive oil and gas lease sales per year, as stated above. The direct, indirect and cumulative impacts of oil and gas leasing and hydraulic fracturing are analyzed in the leasing EA. Appendix 2 of the leasing EA describes the following requirements to mitigate impacts from hydraulic fracturing:

- A series of tests are performed before operators or service companies perform a hydraulic fracturing treatment. These tests are designed to ensure that the well, casing, well equipment, and fracturing equipment are in proper working order and will safely withstand the application of the fracture treatment pressures and pump flow rates.
- To ensure that hydraulic fracturing is conducted in a safe and environmentally sound manner, the BLM approves and regulates all drilling and completion operations, and related surface disturbance on Federal public lands. Operators must submit Applications for Permit to Drill (APDs) to the agency. Prior to approving an APD, a BLM Carlsbad Field Office geologist identifies all potential subsurface formations that would be penetrated by the wellbore. This includes all groundwater aquifers and any zones that would present potential safety or health risks that may need special protection measures during drilling, or that may require specific protective well construction measures.
- Once the geologic analysis is completed, the BLM reviews the company's proposed casing and cementing programs to ensure the well construction design is adequate to protect the surface and subsurface environment, including the potential risks identified by the geologist and all known or anticipated zones with potential risks.
- During drilling, the BLM is on location during the casing and cementing of the ground water protective surface casing and other critical casing and cementing intervals. Before hydraulic fracturing takes place, all surface casing and some deeper, intermediate zones are required to be cemented from the bottom of the cased hole to the surface. The cemented well is pressure tested to ensure there are no leaks and a cement bond log is run to ensure the cement has bonded to the casing and the formation. If the fracturing of the well is considered to be a "non-routine" fracture for the area, the BLM would always be onsite during those operations as well as when abnormal conditions develop during the drilling or completion of a well.

CBD's requests for a ban on new oil and gas leasing have been considered, found to be without merit and are denied.

## **9. BLM must study the greenhouse gas (GHG) impacts of new leasing.**

- e. The effects of cumulative GHG emissions will inflict extraordinary harm to natural systems and communities**

BLM Response:

NEPA requires the BLM to analyze the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions of any agency or individual. The leasing EA analyzed the direct, indirect, and cumulative impacts of leasing the parcels in accordance with NEPA's requirements (40 CFR § 1508.7). Analysis of the effects of leasing and cumulative GHG emissions was included in the leasing EA. The emissions were estimated using representative parameters from typical development. The estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives. However, substantial uncertainty exists at the time the BLM offers a lease for sale regarding crucial factors that affect potential GHG emissions, including: well density; geological conditions; development type (vertical, directional, horizontal); hydrocarbon characteristics; equipment to be used during construction, drilling, production, and abandonment operations; and applicable regulatory requirements. Based on the analysis for this EA, mitigation measures were identified for the protection of air resources (at EA Section 4.3.1). Additional mitigation measures would be applied when actual operations are proposed on an issued lease through an APD or Sundry Notice (SN).

The lack of scientific tools designed to predict a single proposed action's impact on climate change at a regional or local scale limits the ability to assess its effect on global climate change.

It is difficult to discern with certainty what end uses for the fuels extracted from a particular leasehold might be reasonably foreseeable. There is also uncertainty with regard to the actual development that may occur as an indirect result of the proposed action. The BLM does not exercise control over the specific end use of the oil and gas produced from any individual federal lease. The BLM has no authority to direct or regulate the end use of produced oil and/or gas.

Even though the proposed action of leasing would not contribute to cumulative effects on air resources, future foreseeable development could contribute to cumulative GHG emissions. Language regarding the general cumulative impacts of GHG emissions was added to the Environmental Impacts section in the EA. Uncertainties regarding the numbers of wells and other factors result in a moderate to high degree of uncertainty and speculation with regard to GHG estimates at the leasing stage. At the APD stage, more site-specific information on oil and gas activities resulting in GHG effects would be described in detail. Also at the APD stage, the BLM would review and evaluate operations, require mitigation measures, and encourage operators to participate in the voluntary STAR program.

In BLM's review, the EA appropriately disclosed the direct, indirect, and cumulative impacts that the proposed action would have on GHGs, as well as, its acknowledgement to the uncertainty of the emission quantity of GHGs.

In conclusion, the BLM adequately addressed potential effects of cumulative GHG emissions to natural systems and communities based on the best information available. Therefore, CBD's statement of reasons have been found to be without merit, and are therefore denied.

**f. The EA ignores the social cost of carbon tool to analyze the cumulative contribution of increased oil and gas development on climate change.**

BLM Response:

The CBD argues that the BLM did not comply with NEPA because the agency did not determine the potential costs to society from the potential GHGs emitted from lease operations, particularly utilizing the Social Cost of Carbon (SCC) protocol.

Consistent with *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013), the BLM has used estimated GHG emissions associated with the proposed action as a reasonable proxy for the effects of climate change in this analysis. The BLM has placed these emissions in the context of relevant state emissions. This approach is also consistent with past BLM quantifications considering the incremental impacts of similar BLM leasing actions, as in *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013); *WildEarth Guardians v. BLM*, Civ. Case No. 1:11-cv-1481 (RJL) (D.D.C. Mar. 21, 2014).

The BLM finds that including monetary estimates of the SCC in its NEPA analysis for this proposed action would not be useful to its analysis. Determining the SCC is influenced by many factors, subject to great uncertainty. Estimating SCC is challenging because it is intended to model effects at a global scale on the welfare of future generations caused by additional carbon emissions occurring in the present. A federal Interagency Working Group (IWG) on the SCC convened by the Office of Management and Budget, developed estimates of the SCC, which reflect the monetary cost incurred by the emission of one additional metric ton of carbon dioxide. However, the BLM found that including complex monetary estimates of the SCC does not inform its decision making process.

Given the global nature of climate change, estimating SCC of an individual decision requires assessing the impact of the project on the global market for the commodity in question. While we are able to estimate the GHG emissions associated with typical development, we have not estimated the net effect of this action on global GHG emissions or climate change. Depending on the global demand for oil and gas, the net effect of any development associated with this project may be partially offset by changes in production in other locations. Accounting for this potential substitution affect is not addressed by the IWG protocol. As set forth in *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016), there is a lack of consensus on the appropriate discount rate leading to significant variation in output. SCC does not measure the actual incremental impacts of a project on the environment. And there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.

Further, the NEPA analysis for this proposed action does not include monetary estimates of any benefits or costs. The quantitative economic analysis is primarily a regional economic impact analysis, which is used to estimate impacts on economic activity, expressed as projected changes in employment, personal income, or economic output. These indicators are not benefits or costs, as defined in a benefit cost analysis. Without any other monetized benefits or costs reported,

monetized estimates of the SCC would be presented in isolation, without any context for evaluating their significance. This limits their usefulness to the decision maker.

Therefore, the statement of reasons have been found to be without merit and are therefore denied.

## **DECISION**

After a careful review, it has been determined that the protests to the 36 parcels in this sale will be denied for the reasons described above. All of the protested parcels described in the September 1, 2016 (previously July 20, 2016) Sale Notice will be offered for sale. As mentioned above, the sale date was amended due to the postponement of the sale for a change in location.

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 (Enclosure 1). If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from your receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. 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 of this Decision, pursuant to 43 CFR Part 4, the Petition 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 the 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:

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

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

/s/ Amy Lueders

Amy Lueders  
State Director

1 Enclosure  
1 - Form 1842-1

cc: w/o enclosure  
Office of the Solicitor  
Southwest Regional Office  
505 Marquette Avenue, N.W.  
Albuquerque, NM 87102

NMP000, James Stovall  
NMP020, Tye Bryson  
NM9210, Ross Klein  
NM9210, Fluids Adjudication

3100 (9210)

April 26, 2017

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**  
7013 1710 0001 6575 3582

Elly Brown  
Staff Attorney  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA 94612

**DECISION**

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:

**SEPTEMBER 1, 2016 OIL & GAS LEASE SALE PROTEST OF 36 PARCELS  
PROTEST DENIED**

**ALL PROTESTED PARCELS WILL BE ISSUED**

On May 20, 2016, the Bureau of Land Management (BLM), New Mexico State Office (NMSO) received a letter from the Center for Biological Diversity (CBD) protesting the offering of all 36 oil and gas lease sale parcels as described in the Notice of Competitive Lease Sale (Sale Notice) for the September 1, 2016 (previously July 20, 2016), Competitive Oil and Gas Lease Sale. The CBD letter was submitted jointly with the following parties: Friends of the Earth; Food and Water Watch; Great Old Broads for Wilderness; and Sierra Club.

Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club are parties to the protest submitted by CBD. If a protester did not submit written comments to the BLM, during the 30-day leasing Environmental Assessment (EA) comment period, or otherwise could not demonstrate standing, the BLM would deny any protest subsequently filed by that protester. The record shows that these parties to the protest submitted on behalf of CBD did not provide scoping comments or otherwise participate in the 30-day public comment period. Therefore, the issues raised by these parties as part of the CBD protest are subject to summary dismissal and will not be considered further in this protest decision.

The 36 parcels protested are located in Eddy and Lea Counties of southeast New Mexico. The parcels are unleased Federal mineral estate administered by the BLM Carlsbad Field Office (CFO) with the surface estate administered by either the BLM, New Mexico State Land Office, or private ownership. Altogether, the protested parcels aggregate approximately 13,876.08 acres.

## **BACKGROUND**

These parcels were nominated by interested parties in accordance with 43 CFR § 3120.3. After preliminary adjudication of the nominated parcels by the NMSO, the parcels were reviewed by the CFO, including an interdisciplinary review, field visits to nominated parcels, review of conformity with the land use decisions for the planning area, and preparation of an EA documenting National Environmental Policy Act (NEPA) compliance. The NMSO also reviewed each of the parcels, and confirmed land use plan conformance and conformance with national and state BLM policies.

The preliminary parcel list was posted for a two-week public scoping period starting on December 14, 2015. The CBD submitted scoping comments during this period. Prior to posting the Sale Notice for the parcels to be offered at the competitive sale, the BLM prepared an EA that tiered the analysis to the 1988 Carlsbad Resource Management Plan (RMP) and Final Environmental Impact Statement (FEIS), the 1997 Carlsbad RMP Amendment (RMPA) and FEIS for Oil and Gas Resources, and the 1997 Roswell Resource Area RMP and FEIS. The Special Status Species RMPA Record of Decision, signed in 2008, amends these plans in portions of Chaves, Eddy, Lea and Roosevelt Counties, New Mexico, with reference to Planning Areas as described in that document. The purpose of the leasing EA is to analyze specific parcels to determine what reasonably foreseeable impacts may occur from leasing. The EA augments the decisions made in the RMP with current on-the-ground information.

The 30-day public comment period on the EA and unsigned Finding of No Significant Impact (FONSI) commenced on February 8, 2016. The CBD did provide comments to the BLM during this period. On April 20, 2016, the 30-day protest period commenced. A total of two protests were received: one from the CBD and another from the WildEarth Guardians. Each protest will be responded to separately. The CBD requested that the 36 parcels be removed from the sale.

On April 20, 2016, the BLM posted the July 2016 Sale Notice for public review. The Sale Notice described the manner in which a member of the public could protest inclusion of lands in the planned sale (at pages vi-viii), including these requirements:

- A protest must state the interest of the protesting party in the matter.
- If the party signing the protest is doing so on behalf of an association, partnership or corporation, the signing party must reveal the relationship between them. For example, unless an environmental group authorizes an individual member of its group to act for it, the individual cannot make a protest in the group's name.

In the CBD's protest letter (page 3), the groups provided a summary of their organizations' general objectives. The protest letter was signed by one individual affiliated with the CBD (page 28), and provided a list of the names, addresses, and contact information for each of the four other groups, explaining (at page 2):

*This Protest is filed on behalf of the Center for Biological Diversity, Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club, and their boards and members...*

The BLM's regulations addressing protests of competitive oil and gas lease sales (at 43 CFR § 3120.1-3) do not describe any limitations as to who may protest inclusion of lands in a Sale Notice. The issue of standing for purposes of appealing a BLM decision to dismiss and deny lease sale protests was addressed by the Interior Board of Land Appeals (IBLA). In *Biodiversity Conservation Alliance et al.* (183 IBLA 97, decided January 8, 2013), the IBLA evaluated the standing of the appellants to challenge the BLM's decisions to dismiss and deny protests related to certain oil and gas lease sale parcels, and determined (183 IBLA 97, 108):

*... since the BLM decision at issue involves the leasing of several parcels of land for oil and gas purposes, each of the appellants must show an adverse effect as a result of the leasing of each parcel to which it objects, in order to be recognized as having standing to appeal the decision to lease that parcel.*

In the CBD protest of the 36 parcels from the September 2016 Lease Sale, none of the parties have provided to the BLM; "colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged" (183 IBLA 97, 107). The closest any of the groups come to establishing allegations of an adverse effect are within the description of the CBD's interests (CBD Protest at page 3), which states:

*The Center has over 1 million members and online activists, including those living in New Mexico who have visited these public lands in the Pecos District for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing.*

However, it is not clear whether this statement establishes CBD as a party to the case and as having a legally cognizable interest that would be adversely affected by the BLM's decision to issue any of the protested leases. Other groups' statements of interest are much less specific, and do not allege any particular interests in the lands proposed for leasing.

In addition, it is not clear that a legally cognizable interest can be demonstrated by the groups for those parcels located in the CFO where the surface estate is privately owned, but overlying Federal minerals, whereas any public entry without the consent of the surface owner would constitute a trespass. Of the 36 offered parcels, 18 parcels are located entirely on privately-owned surface estate (-002, -005, -013, and -022 thru -036), and three parcels are a combination of public and private surface estate (-015, -017, and -018).



Nonetheless, given the BLM's directions to the public in the Sale Notice regarding submittal of protests, the BLM has decided to answer the specific arguments made by the protestor. However, the BLM does so with the reservation that the protestors may not have standing to bring an appeal to the IBLA of our protest decision.

On June 27, 2016, the Sale Notice was amended due to a location change and date for the July 20, 2016, Competitive Oil and Gas Lease Sale. In order to provide the public with a 45-day notice of the lease sale changes, the sale was postponed to September 1, 2016. At the sale, all of the protest parcels were successfully bid upon, and the necessary monies were subsequently received by the BLM. Given the pending protest, the BLM has not issued the leases.

## **ISSUES**

The BLM has reviewed the protestor's arguments in their entirety; the protestor's substantive arguments are numbered and in bold, with BLM responses following.

### **10. BLM violates the National Environmental Policy Act**

#### **g. It is unlawful to proceed with the lease sale without undertaking a site-specific environmental assessment.**

#### **BLM Response:**

In the multi-step Federal oil and gas leasing regime, NEPA regulations "encourage" agencies "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." 40 CFR § 1502.20. In other words, "any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR § 1506.4. NEPA regulations provide that, whenever a broad EIS has been prepared (such as a program statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program (such as a site-specific action), "the subsequent statement or 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." 40 CFR § 1502.20. This tiering process is a common practice in the oil and gas context.

The multi-step oil and gas process in the CFO begins with the programmatic analysis of oil and gas development in the CFO 2008 RMP. Then, the CFO analyzes the known impacts of proposed leases, ensuring that any impacts of leasing are consistent with the RMP in an EA such as the one for the July 2016 lease sale. Then, if the lessee chooses to pursue development - which is not a given - additional site-specific NEPA analysis takes place when Applications for Permit to Drill (APDs) are submitted. Where the context and intensity of environmental impacts remain unidentifiable until oil and gas exploration activities are proposed, the APD is the first useful point at which a site-specific environmental appraisal can be undertaken. Approval of an

APD is not a foregone conclusion (See 43 CFR § 3162.3-1(h), authorizing the agency to explicitly disapprove applications for drilling permits).

Courts have upheld this approach, explaining that, “when BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken.” (*Park County Resource Council*, 817 F.2d 609 (1987)); (See also *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-CV-00037-RB-LFG, 2011 WL 7701433 (D.N.M. Aug. 3, 2011), “It would be highly unusual for every lease parcel to be developed, and until an APD is submitted, BLM cannot determine the extent or type of development planned and the emissions that will result.”). 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)).

Prior to issuing an APD, the BLM conducts site-specific environmental review, and any APD will include (at a minimum) public posting (see 43 CFR § 3162.3-1(g)). The BLM retains substantial authority to regulate environmental aspects of Federal oil and gas lease operations through approval (see 43 CFR § 3162.3) of APDs or Sundry Notices (SNs), and through the issuance of orders and instructions of the authorized officer (see 43 CFR § 3161.2). The BLM also controls the lessee’s or operator’s actions on the lease, as described in the regulations (such as 43 CFR § 3101.1-2 and 43 CFR § 3162.5-1(a)), on the BLM Lease Form 3100-11 (such as standard lease term Sec. 6), and under applicable laws such as the Federal Land Policy and Management Act of 1976 (FLPMA). In addition, BLM retains regulatory authority to completely deny access to a leased area.

For the BLM to provide a more site-specific and detailed analysis of the impacts from lease development activities for these protested parcels 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 leases would be developed. This speculation would likely be under or over-estimate impacts. The impacts associated with construction, drilling, production, abandonment, and reclamation of well locations can vary significantly in the area of the proposed leases.

Conducting a speculative exercise about the density, rate, and extent of drilling and the potential impacts from complex multi-year plans of operation on lease parcels may be inaccurate and misleading for the BLM and the public. Under the BLM’s NEPA Handbook H-1790-1 at page 59 states: the BLM is “not required to speculate about future actions.” (See also *Southern Utah Wilderness Alliance*, 159 IBLA 220 (June 16, 2003), “A future action need not be considered significant when the reasonably foreseeable future action is speculative.”).

We believe that the CBD seeks analysis of impacts that is speculative at the leasing stage, and is better addressed at the time a site-specific proposal to drill is received by the BLM. Therefore,

the BLM finds CBD's allegations that the BLM failed to comply with NEPA to be without merit and are therefore denied.

**h. BLM failed to take a hard look at any of the potential impacts of the proposed action raised in our previous comment letters on the sale.**

BLM Response:

NEPA requires the BLM to take a "hard look" at the environmental consequences of proposed actions. The CBD has provided no evidence that the BLM failed to take a hard look at the issues raised by the CBD from a previous comment letter. Therefore, the BLM finds CBD's protest that the BLM failed to take a hard look to be without merit and are therefore denied.

**x. BLM does not take a hard look at impacts to Lesser Prairie-Chicken.**

BLM Response:

The CFO has taken a hard look at the available information regarding the Lesser Prairie-Chicken (LPC). In December 2012, the U.S. Fish and Wildlife Service (USFWS) published a proposed rule to list the Lesser Prairie-Chicken as a threatened species. On April 10, 2014, the USFWS published their final rule listing the species as threatened, which became effective May 12, 2014. On September 1, 2015, a Federal District Court in Midland, Texas, ruled the USFWS did not follow its own rule for evaluating conservation efforts (Policy for Evaluation of Conservation Efforts When Making Listing Decisions) when it applied it to the range-wide conservation plan for the LPC. The Court also vacated the USFWS's final rule listing the LPC as a threatened species. On September 8, 2016, the USFWS received a petition requesting that they list the LPC as endangered under the Endangered Species Act. The petition presented substantial scientific or commercial information indicating that the requested action may be warranted; therefore, the USFWS initiated a status review. At the conclusion of the status review, USFWS will issue a finding as to whether or not the petitioned action is warranted. While this latest action is being analyzed, the BLM will continue to manage the LPC in accordance with BLM Manual 6840, Special Status Species Management, and the Pecos District Special Status Species Approved Resource Management Plan Amendment of 2008.

The 2008 RMPA defines occupied habitat as "all areas within 1.5 miles of an active lesser prairie-chicken site regardless of vegetation that has been active for one out of the last 5 years." The boundaries of all lease parcels discussed in the EA are greater than 1.5 miles from an LPC sighting or an LPC leak. A Biological Assessment for the lease parcels (included as Appendix 3 in the EA) determined that the lease sale "may affect - not likely to adversely affect the species." The rationale for the determination is that the offered parcels are not located within three miles of occupied LPC habitat. Based on the potential for these parcels to become occupied in the future, lease stipulations, conditions of approval, and requirements to use best management practices will be applied to each parcel as set forth in the 2008 RMPA. These conservation measures would avoid, reduce or remove future surface impacts as the leases are developed. Therefore, leasing of these parcels is in conformance with the management decisions, criterion, and appropriate lease stipulations.

Additionally, the CBD asserts that “once the lease is sold, it will be too late for BLM to ensure that sufficient protections will be in place to protect this species.” By ignoring the Application for Permit to Drill (APD) stage following the issuing of a lease, as well as the programmatic analysis in the 2008 Special Status Species RMPA, the CBD disregards the past analysis and the importance of site-specific plans in disclosing, assessing, and developing mitigation for impacts from actual oil and gas development.

The direct, indirect, and cumulative impacts from oil and gas development on wildlife resources are discussed in Chapter 4 of the EA. This analysis includes discussion of the short-term and long-term disturbance impacts. In summary, the analysis shows that the provided stipulations and the mitigation described in Chapter 4 of the EA would provide for the conservation of wildlife habitat. Therefore, the statement of reasons have found to be without merit and are therefore denied.

**xi. BLM does not take a hard look at impacts to water resources.**

BLM Response:

The CFO took a hard look at impacts to water resources both in the EA and in the 1997 RMPA. The CFO addressed potential impacts to water resources in Section 4.3.6 of the leasing EA. The EA analysis determined that there were no impacts to water resources from leasing the parcels; however, there could be indirect impacts to water resources from reasonably foreseeable oil and gas development on the leases, including groundwater contamination from inadequate casing and cementing of the wellbore; surface water contamination from accidental spills or releases of drilling fluids, hydraulic fracturing fluids, produced water, or chemicals used during development and production of a well, and groundwater depletion. The EA also concluded that “specific mitigation measures for the protection of surface and ground water would be addressed at the APD stage.” Mitigation commonly includes the use of a plastic-lined reserve pits, steel tanks or steel tank closed systems, or containment berms to reduce or eliminate seepage of drilling fluid and hydrofrac flow back water into the soil, surface water, and groundwater. Both surface and usable ground water is protected from drilling fluids and salt water zones by setting surface casing to isolate the aquifers from the rest of the borehole environment.” Further, contrary to the CBD’s contention that the lease stipulations included in the EA analysis are insufficient and are not supported by science (at page 12 of CBDs Protest), the CFO references the 1997 RMPA from which the lease stipulations (EA Appendix 1) were derived.

There are no verified instances of hydraulic fracturing adversely affecting groundwater in the Permian Basin of New Mexico. This can, in part, be attributed to the fact that the likely producing zones targeted are well below any underground sources of drinking water. The EA states that the typical depth of groundwater in the Permian Basin is 400 feet or less. If an APD is submitted proposing the drilling of a well, the actual depth to groundwater will be known and analyzed through site-specific analysis. Historically, oil and gas wells have been drilled in the Permian Basin in depths ranging from several hundred feet to over 20,000 feet, based off past records. The latest Reasonably Foreseeable Development Plan (RFD) (Engler, 2014) update covering the CFO, with supporting well data from IHS Markit, shows that the most likely

targeted formations that would be produced by these leases are the Bone Springs (7,000-11,000 feet deep), Wolfcamp (7,580-10,750 feet deep), Delaware Mountain group (2,500-8,500 feet deep), and the Yeso (3,000-7,000 feet deep). Based on the distance between the groundwater and the targeted formations in the protested leases, no adverse impacts to groundwater are expected to occur. The potential for drilling or hydraulic fracturing fluids or produced water to contaminate groundwater is significantly reduced if wells are properly cased and cemented as would be required in the APD approval-process per Onshore Oil and Gas Order No. 2, Drilling Operations. Please also reference the Protest Response 2.b. below, as the issue is similar to others stated by the CBD.

The BLM's obligation to address impacts to water resources persists past the leasing stage. The BLM is responsible for inspection and enforcement of wells and facilities that have a Federal lease nexus and to conduct regular regulatory inspections, such as, but not limited to, drilling, production, environmental compliance, production audits and abandonment inspections. If at any time during the life of the well, a well site is causing or has the potential to cause environmental damage such as surface contamination, the BLM has the authority to issue Written Orders of the Authorized Officer, Incidents of Non-compliance, citations, fines, and, in specific circumstances, cessation of operations when incidents of non-compliance occur.

Water quantity is addressed in the leasing EA made available for the protest period. The amount of water used during well development is highly dependent on a number of factors including but not limited to: vertical or horizontal well, length of well bore, closed-loop or reserve pit drilling system, type of mud, type of stimulation used (e.g. hydraulic fracturing or acidizing), formation being fractured, and use of recycled water or inert gases. The 2014 RFD update completed a detailed analysis on the water use for hydraulic fracturing. Engler analyzed New Mexico Oil Conservation Division records (over 400 records) in the Bone Spring Formation, and the average is 7.3 acre-ft/horizontal well. A quantitative analysis using the data from the RFD can be completed for hydraulic fracturing, once an APD is received. Therefore, the amount of water that used is too variable to quantify at the leasing stage.

The New Mexico Constitution establishes that all the water in the State belongs to the public and, to the extent that it is unappropriated, it is available for appropriation. The Office of the State Engineer is responsible for permitting all surface and groundwater withdrawals apart from water rights acquired before 1907 and small scale stock watering. Because of these statutes and state processes, the BLM does not seek to interfere with state regulation of permitted water wells, their intended uses, or their permitted allocation. The BLM requires full compliance with applicable state regulations.

No new evidence was presented that was not already considered in the leasing EA or that is regulated by Federal or State laws, rules, regulations, or policy. In conclusion, the BLM adequately addressed potential impacts to water resources from oil and gas development, including hydraulic fracturing, and the environmental consequences of how development may affect water quality and quantity. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at water impacts to be without merit and are therefore denied.

**xii. BLM does not take a hard look at impacts of fracking on air quality, water resources, soil, vegetation, wildlife, induced seismicity, brine well collapses, and releases of radionuclide waste into the biosphere.**

**BLM Response:**

The CFO took a hard look at the impacts of hydraulic fracturing. The EA acknowledges the possibility that if the leases are issued, and if an operator proposes to explore or develop a lease, hydraulic fracturing operations may be proposed. Further, Section 4.1 of the leasing EA states:

*“The act of leasing parcels would, by itself, have no impact on any resources in the CFO. All impacts would be linked to an undetermined future level of lease development. The anticipated level of full lease development is described in Table 2 in Section 2.3.1.”*

*“Assumptions used in the analysis regarding resource impacts are based on past development knowledge and practices and resource concerns specific to each individual parcel. Site-specific impacts would be addressed in a subsequent NEPA document when an APD is received.”*

Furthermore, in their protest, CBD states concerns of induced seismicity related to fracking. Earthquake logs from the U.S. Geologic Survey Earthquake Hazards Program for the state of New Mexico is a source of data that can be used to evaluate seismic activity and make predictions concerning the location and magnitude of future earthquakes. In southeast New Mexico only one area, Dagger Draw<sup>78</sup>, has had seismicity that has been contributed to the disposal of waste water through injection. The nearest parcel to Dagger Draw, parcel -002, is more than 30 linear miles away. Given the multiple locations for waste water disposal, and the uncertainty of disposal methods, site specific analysis would be conducted at the time of an APD submission in accordance with the NEPA and Onshore Oil and Gas Order No. 7. Additionally, waste water injection of hydraulic fracturing flowback water is regulated by the Environmental Protection Agency and delegated to the State of New Mexico for oversight and enforcement.

CBD also states that the BLM failed to addresses threats associated “with drilling near the WIPP.” The closest lease parcel boundary to the Waste Isolation Pilot Plant (WIPP) boundary is parcel -008 located approximately 7.6 miles east south-east from the WIPP. Using CBD’s own citation of “more than 500 oil and gas wells within 2.5 miles of the WIPP boundary,” and there being no known issues to the WIPP caused by oil and gas development, the offered parcels are three times further than the 2.5 mile distance of concern that was provided by the CBD.

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<sup>7</sup> Petersen, M.D., Mueller, C.S., Moschetti, M.P., Hoover, S.M., Rubinstein, J.L., Llenos, A.L., Michael, A.J., Ellsworth, W.L., McGarr, A.F., Holland, A.A., and Anderson, J.G., 2015, Incorporating induced seismicity in the 2014 United States National Seismic Hazard Model—Results of 2014 workshop and sensitivity studies: U.S. Geological Survey Open-File Report 2015–1070, 69 p., <http://dx.doi.org/10.3133/ofr20151070>.

<sup>8</sup> Sanford, Allan R., Mayeau, Tara M., Schlue, John W., Aster, Richard C., and Jaksha, Lawrence H., Earthquake catalogs for New Mexico and bordering areas II: 1999–2004. New Mexico Geology. November 2006, Volume 28, Number 4.

We disagree that the leasing EA does not adequately address impacts from hydraulic fracturing operations; we agree with the EA's conclusion that additional analysis is more appropriate at the time actual operations are proposed. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at the impacts of hydraulic fracturing to be without merit and are therefore denied.

## **11. BLM must end all new fossil fuel leasing and hydraulic fracturing.**

### **g. BLM must limit greenhouse gas emissions by keeping Federal fossil fuels in the ground.**

#### BLM Response:

Congress has expressly charged the BLM to develop federal oil and gas resources. *See, e.g.*, 30 U.S.C. § 181; 42 U.S.C. § 15922. It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional and local needs. This policy is based on law, including the FLPMA. It is during the preparation of an RMP that the BLM considers programmatically whether to open or close lands to oil and gas development, among the other multiple uses considered by the BLM. Halting all fossil fuel development in the area is not within the scope of this leasing EA. The following regulations, policy, and bulletin reiterate the BLM New Mexico State Office's requirements to hold regular competitive oil and gas lease sales:

- Mineral Leasing Act of 1920 as amended - Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 - "Lease sales shall be held for each State where eligible lands are available at least quarterly...."
- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform - "State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing."

Due to the BLM's obligation to comply with existing law, regulation, and policy, CBD's allegations have been found to be without merit and are therefore denied.

### **h. BLM must consider a ban on new oil and gas leasing and fracking in a programmatic review and halt all new leasing and fracking in the meantime.**

#### BLM Response:

The request for a programmatic review is generally outside the scope of the leasing EA. It is in the development of an RMP that the BLM considers whether to open or close lands to oil and gas leasing, among the other multiple uses considered by the BLM in that RMP process. The leasing EA tiers to and incorporates by reference the RMP (as amended). As the BLM continues to demonstrate, when site-specific oil and gas lease exploration or development projects are received the BLM will determine the appropriate level of analysis for the circumstances, and will

ensure BLM's NEPA obligations are fulfilled. This allows for compliance with NEPA and avoids speculative guesses as to impacts at leasing stage.

Furthermore, the BLM New Mexico State Office is required to hold four competitive oil and gas lease sales per year, as stated above. The direct, indirect and cumulative impacts of oil and gas leasing and hydraulic fracturing are analyzed in the leasing EA. Appendix 2 of the leasing EA describes the following requirements to mitigate impacts from hydraulic fracturing:

- A series of tests are performed before operators or service companies perform a hydraulic fracturing treatment. These tests are designed to ensure that the well, casing, well equipment, and fracturing equipment are in proper working order and will safely withstand the application of the fracture treatment pressures and pump flow rates.
- To ensure that hydraulic fracturing is conducted in a safe and environmentally sound manner, the BLM approves and regulates all drilling and completion operations, and related surface disturbance on Federal public lands. Operators must submit Applications for Permit to Drill (APDs) to the agency. Prior to approving an APD, a BLM Carlsbad Field Office geologist identifies all potential subsurface formations that would be penetrated by the wellbore. This includes all groundwater aquifers and any zones that would present potential safety or health risks that may need special protection measures during drilling, or that may require specific protective well construction measures.
- Once the geologic analysis is completed, the BLM reviews the company's proposed casing and cementing programs to ensure the well construction design is adequate to protect the surface and subsurface environment, including the potential risks identified by the geologist and all known or anticipated zones with potential risks.
- During drilling, the BLM is on location during the casing and cementing of the ground water protective surface casing and other critical casing and cementing intervals. Before hydraulic fracturing takes place, all surface casing and some deeper, intermediate zones are required to be cemented from the bottom of the cased hole to the surface. The cemented well is pressure tested to ensure there are no leaks and a cement bond log is run to ensure the cement has bonded to the casing and the formation. If the fracturing of the well is considered to be a "non-routine" fracture for the area, the BLM would always be onsite during those operations as well as when abnormal conditions develop during the drilling or completion of a well.

CBD's requests for a ban on new oil and gas leasing have been considered, found to be without merit and are denied.

## **12. BLM must study the greenhouse gas (GHG) impacts of new leasing.**

- g. The effects of cumulative GHG emissions will inflict extraordinary harm to natural systems and communities**



BLM Response:

NEPA requires the BLM to analyze the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions of any agency or individual. The leasing EA analyzed the direct, indirect, and cumulative impacts of leasing the parcels in accordance with NEPA's requirements (40 CFR § 1508.7). Analysis of the effects of leasing and cumulative GHG emissions was included in the leasing EA. The emissions were estimated using representative parameters from typical development. The estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives. However, substantial uncertainty exists at the time the BLM offers a lease for sale regarding crucial factors that affect potential GHG emissions, including: well density; geological conditions; development type (vertical, directional, horizontal); hydrocarbon characteristics; equipment to be used during construction, drilling, production, and abandonment operations; and applicable regulatory requirements. Based on the analysis for this EA, mitigation measures were identified for the protection of air resources (at EA Section 4.3.1). Additional mitigation measures would be applied when actual operations are proposed on an issued lease through an APD or Sundry Notice (SN).

The lack of scientific tools designed to predict a single proposed action's impact on climate change at a regional or local scale limits the ability to assess its effect on global climate change.

It is difficult to discern with certainty what end uses for the fuels extracted from a particular leasehold might be reasonably foreseeable. There is also uncertainty with regard to the actual development that may occur as an indirect result of the proposed action. The BLM does not exercise control over the specific end use of the oil and gas produced from any individual federal lease. The BLM has no authority to direct or regulate the end use of produced oil and/or gas.

Even though the proposed action of leasing would not contribute to cumulative effects on air resources, future foreseeable development could contribute to cumulative GHG emissions. Language regarding the general cumulative impacts of GHG emissions was added to the Environmental Impacts section in the EA. Uncertainties regarding the numbers of wells and other factors result in a moderate to high degree of uncertainty and speculation with regard to GHG estimates at the leasing stage. At the APD stage, more site-specific information on oil and gas activities resulting in GHG effects would be described in detail. Also at the APD stage, the BLM would review and evaluate operations, require mitigation measures, and encourage operators to participate in the voluntary STAR program.

In BLM's review, the EA appropriately disclosed the direct, indirect, and cumulative impacts that the proposed action would have on GHGs, as well as, its acknowledgement to the uncertainty of the emission quantity of GHGs.

In conclusion, the BLM adequately addressed potential effects of cumulative GHG emissions to natural systems and communities based on the best information available. Therefore, CBD's statement of reasons have been found to be without merit, and are therefore denied.

**h. The EA ignores the social cost of carbon tool to analyze the cumulative contribution of increased oil and gas development on climate change.**

BLM Response:

The CBD argues that the BLM did not comply with NEPA because the agency did not determine the potential costs to society from the potential GHGs emitted from lease operations, particularly utilizing the Social Cost of Carbon (SCC) protocol.

Consistent with *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013), the BLM has used estimated GHG emissions associated with the proposed action as a reasonable proxy for the effects of climate change in this analysis. The BLM has placed these emissions in the context of relevant state emissions. This approach is also consistent with past BLM quantifications considering the incremental impacts of similar BLM leasing actions, as in *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013); *WildEarth Guardians v. BLM*, Civ. Case No. 1:11-cv-1481 (RJL) (D.D.C. Mar. 21, 2014).

The BLM finds that including monetary estimates of the SCC in its NEPA analysis for this proposed action would not be useful to its analysis. Determining the SCC is influenced by many factors, subject to great uncertainty. Estimating SCC is challenging because it is intended to model effects at a global scale on the welfare of future generations caused by additional carbon emissions occurring in the present. A federal Interagency Working Group (IWG) on the SCC convened by the Office of Management and Budget, developed estimates of the SCC, which reflect the monetary cost incurred by the emission of one additional metric ton of carbon dioxide. However, the BLM found that including complex monetary estimates of the SCC does not inform its decision making process.

Given the global nature of climate change, estimating SCC of an individual decision requires assessing the impact of the project on the global market for the commodity in question. While we are able to estimate the GHG emissions associated with typical development, we have not estimated the net effect of this action on global GHG emissions or climate change. Depending on the global demand for oil and gas, the net effect of any development associated with this project may be partially offset by changes in production in other locations. Accounting for this potential substitution affect is not addressed by the IWG protocol. As set forth in *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016), there is a lack of consensus on the appropriate discount rate leading to significant variation in output. SCC does not measure the actual incremental impacts of a project on the environment. And there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.

Further, the NEPA analysis for this proposed action does not include monetary estimates of any benefits or costs. The quantitative economic analysis is primarily a regional economic impact analysis, which is used to estimate impacts on economic activity, expressed as projected changes in employment, personal income, or economic output. These indicators are not benefits or costs, as defined in a benefit cost analysis. Without any other monetized benefits or costs reported,

monetized estimates of the SCC would be presented in isolation, without any context for evaluating their significance. This limits their usefulness to the decision maker.

Therefore, the statement of reasons have been found to be without merit and are therefore denied.

## **DECISION**

After a careful review, it has been determined that the protests to the 36 parcels in this sale will be denied for the reasons described above. All of the protested parcels described in the September 1, 2016 (previously July 20, 2016) Sale Notice will be offered for sale. As mentioned above, the sale date was amended due to the postponement of the sale for a change in location.

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 (Enclosure 1). If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from your receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. 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 of this Decision, pursuant to 43 CFR Part 4, the Petition 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 the 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:

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

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

/s/ Amy Lueders

Amy Lueders  
State Director

1 Enclosure  
1 - Form 1842-1

cc: w/o enclosure  
Office of the Solicitor  
Southwest Regional Office  
505 Marquette Avenue, N.W.  
Albuquerque, NM 87102

NMP000, James Stovall  
NMP020, Tye Bryson  
NM9210, Ross Klein  
NM9210, Fluids Adjudication

3100 (9210)

April 26, 2017

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

7013 1710 0001 6575 3605

Shelly Silbert  
Executive Director  
Great Old Broads for Wilderness  
Box 2924  
Durango, CO 81302

**DECISION**

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**SEPTEMBER 1, 2016 OIL & GAS LEASE SALE PROTEST OF 36 PARCELS  
PROTEST DENIED**

**ALL PROTESTED PARCELS WILL BE ISSUED**

On May 20, 2016, the Bureau of Land Management (BLM), New Mexico State Office (NMSO) received a letter from the Center for Biological Diversity (CBD) protesting the offering of all 36 oil and gas lease sale parcels as described in the Notice of Competitive Lease Sale (Sale Notice) for the September 1, 2016 (previously July 20, 2016), Competitive Oil and Gas Lease Sale. The CBD letter was submitted jointly with the following parties: Friends of the Earth; Food and Water Watch; Great Old Broads for Wilderness; and Sierra Club.

Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club are parties to the protest submitted by CBD. If a protester did not submit written comments to the BLM, during the 30-day leasing Environmental Assessment (EA) comment period, or otherwise could not demonstrate standing, the BLM would deny any protest subsequently filed by that protester. The record shows that these parties to the protest submitted on behalf of CBD did not provide scoping comments or otherwise participate in the 30-day public comment period. Therefore, the issues raised by these parties as part of the CBD protest are subject to summary dismissal and will not be considered further in this protest decision.

The 36 parcels protested are located in Eddy and Lea Counties of southeast New Mexico. The parcels are unleased Federal mineral estate administered by the BLM Carlsbad Field Office (CFO) with the surface estate administered by either the BLM, New Mexico State Land Office, or private ownership. Altogether, the protested parcels aggregate approximately 13,876.08 acres.

## **BACKGROUND**

These parcels were nominated by interested parties in accordance with 43 CFR § 3120.3. After preliminary adjudication of the nominated parcels by the NMSO, the parcels were reviewed by the CFO, including an interdisciplinary review, field visits to nominated parcels, review of conformity with the land use decisions for the planning area, and preparation of an EA documenting National Environmental Policy Act (NEPA) compliance. The NMSO also reviewed each of the parcels, and confirmed land use plan conformance and conformance with national and state BLM policies.

The preliminary parcel list was posted for a two-week public scoping period starting on December 14, 2015. The CBD submitted scoping comments during this period. Prior to posting the Sale Notice for the parcels to be offered at the competitive sale, the BLM prepared an EA that tiered the analysis to the 1988 Carlsbad Resource Management Plan (RMP) and Final Environmental Impact Statement (FEIS), the 1997 Carlsbad RMP Amendment (RMPA) and FEIS for Oil and Gas Resources, and the 1997 Roswell Resource Area RMP and FEIS. The Special Status Species RMPA Record of Decision, signed in 2008, amends these plans in portions of Chaves, Eddy, Lea and Roosevelt Counties, New Mexico, with reference to Planning Areas as described in that document. The purpose of the leasing EA is to analyze specific parcels to determine what reasonably foreseeable impacts may occur from leasing. The EA augments the decisions made in the RMP with current on-the-ground information.

The 30-day public comment period on the EA and unsigned Finding of No Significant Impact (FONSI) commenced on February 8, 2016. The CBD did provide comments to the BLM during this period. On April 20, 2016, the 30-day protest period commenced. A total of two protests were received: one from the CBD and another from the WildEarth Guardians. Each protest will be responded to separately. The CBD requested that the 36 parcels be removed from the sale.

On April 20, 2016, the BLM posted the July 2016 Sale Notice for public review. The Sale Notice described the manner in which a member of the public could protest inclusion of lands in the planned sale (at pages vi-viii), including these requirements:

- A protest must state the interest of the protesting party in the matter.
- If the party signing the protest is doing so on behalf of an association, partnership or corporation, the signing party must reveal the relationship between them. For example, unless an environmental group authorizes an individual member of its group to act for it, the individual cannot make a protest in the group's name.

In the CBD's protest letter (page 3), the groups provided a summary of their organizations' general objectives. The protest letter was signed by one individual affiliated with the CBD (page 28), and provided a list of the names, addresses, and contact information for each of the four other groups, explaining (at page 2):

*This Protest is filed on behalf of the Center for Biological Diversity, Friends of the Earth, Food and Water Watch, Great Old Broads for Wilderness, and Sierra Club, and their boards and members...*

The BLM's regulations addressing protests of competitive oil and gas lease sales (at 43 CFR § 3120.1-3) do not describe any limitations as to who may protest inclusion of lands in a Sale Notice. The issue of standing for purposes of appealing a BLM decision to dismiss and deny lease sale protests was addressed by the Interior Board of Land Appeals (IBLA). In *Biodiversity Conservation Alliance et al.* (183 IBLA 97, decided January 8, 2013), the IBLA evaluated the standing of the appellants to challenge the BLM's decisions to dismiss and deny protests related to certain oil and gas lease sale parcels, and determined (183 IBLA 97, 108):

*... since the BLM decision at issue involves the leasing of several parcels of land for oil and gas purposes, each of the appellants must show an adverse effect as a result of the leasing of each parcel to which it objects, in order to be recognized as having standing to appeal the decision to lease that parcel.*

In the CBD protest of the 36 parcels from the September 2016 Lease Sale, none of the parties have provided to the BLM; "colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged" (183 IBLA 97, 107). The closest any of the groups come to establishing allegations of an adverse effect are within the description of the CBD's interests (CBD Protest at page 3), which states:

*The Center has over 1 million members and online activists, including those living in New Mexico who have visited these public lands in the Pecos District for recreational, scientific, educational, and other pursuits and intend to continue to do so in the future, and are particularly interested in protecting the many native, imperiled, and sensitive species and their habitats that may be affected by the proposed oil and gas leasing.*

However, it is not clear whether this statement establishes CBD as a party to the case and as having a legally cognizable interest that would be adversely affected by the BLM's decision to issue any of the protested leases. Other groups' statements of interest are much less specific, and do not allege any particular interests in the lands proposed for leasing.

In addition, it is not clear that a legally cognizable interest can be demonstrated by the groups for those parcels located in the CFO where the surface estate is privately owned, but overlying Federal minerals, whereas any public entry without the consent of the surface owner would constitute a trespass. Of the 36 offered parcels, 18 parcels are located entirely on privately-owned surface estate (-002, -005, -013, and -022 thru -036), and three parcels are a combination of public and private surface estate (-015, -017, and -018).

Nonetheless, given the BLM's directions to the public in the Sale Notice regarding submittal of protests, the BLM has decided to answer the specific arguments made by the protestor. However, the BLM does so with the reservation that the protestors may not have standing to bring an appeal to the IBLA of our protest decision.

On June 27, 2016, the Sale Notice was amended due to a location change and date for the July 20, 2016, Competitive Oil and Gas Lease Sale. In order to provide the public with a 45-day notice of the lease sale changes, the sale was postponed to September 1, 2016. At the sale, all of the protest parcels were successfully bid upon, and the necessary monies were subsequently received by the BLM. Given the pending protest, the BLM has not issued the leases.

## **ISSUES**

The BLM has reviewed the protestor's arguments in their entirety; the protestor's substantive arguments are numbered and in bold, with BLM responses following.

### **13. BLM violates the National Environmental Policy Act**

- i. It is unlawful to proceed with the lease sale without undertaking a site-specific environmental assessment.**

#### **BLM Response:**

In the multi-step Federal oil and gas leasing regime, NEPA regulations "encourage" agencies "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." 40 CFR § 1502.20. In other words, "any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR § 1506.4. NEPA regulations provide that, whenever a broad EIS has been prepared (such as a program statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program (such as a site-specific action), "the subsequent statement or 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." 40 CFR § 1502.20. This tiering process is a common practice in the oil and gas context.

The multi-step oil and gas process in the CFO begins with the programmatic analysis of oil and gas development in the CFO 2008 RMP. Then, the CFO analyzes the known impacts of proposed leases, ensuring that any impacts of leasing are consistent with the RMP in an EA such as the one for the July 2016 lease sale. Then, if the lessee chooses to pursue development - which is not a given - additional site-specific NEPA analysis takes place when Applications for Permit to Drill (APDs) are submitted. Where the context and intensity of environmental impacts remain unidentifiable until oil and gas exploration activities are proposed, the APD is the first useful point at which a site-specific environmental appraisal can be undertaken. Approval of an



APD is not a foregone conclusion (See 43 CFR § 3162.3-1(h), authorizing the agency to explicitly disapprove applications for drilling permits).

Courts have upheld this approach, explaining that, “when BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken.” (*Park County Resource Council*, 817 F.2d 609 (1987)); (See also *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-CV-00037-RB-LFG, 2011 WL 7701433 (D.N.M. Aug. 3, 2011), “It would be highly unusual for every lease parcel to be developed, and until an APD is submitted, BLM cannot determine the extent or type of development planned and the emissions that will result.”). 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)).

Prior to issuing an APD, the BLM conducts site-specific environmental review, and any APD will include (at a minimum) public posting (see 43 CFR § 3162.3-1(g)). The BLM retains substantial authority to regulate environmental aspects of Federal oil and gas lease operations through approval (see 43 CFR § 3162.3) of APDs or Sundry Notices (SNs), and through the issuance of orders and instructions of the authorized officer (see 43 CFR § 3161.2). The BLM also controls the lessee’s or operator’s actions on the lease, as described in the regulations (such as 43 CFR § 3101.1-2 and 43 CFR § 3162.5-1(a)), on the BLM Lease Form 3100-11 (such as standard lease term Sec. 6), and under applicable laws such as the Federal Land Policy and Management Act of 1976 (FLPMA). In addition, BLM retains regulatory authority to completely deny access to a leased area.

For the BLM to provide a more site-specific and detailed analysis of the impacts from lease development activities for these protested parcels 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 leases would be developed. This speculation would likely be under or over-estimate impacts. The impacts associated with construction, drilling, production, abandonment, and reclamation of well locations can vary significantly in the area of the proposed leases.

Conducting a speculative exercise about the density, rate, and extent of drilling and the potential impacts from complex multi-year plans of operation on lease parcels may be inaccurate and misleading for the BLM and the public. Under the BLM’s NEPA Handbook H-1790-1 at page 59 states: the BLM is “not required to speculate about future actions.” (See also *Southern Utah Wilderness Alliance*, 159 IBLA 220 (June 16, 2003), “A future action need not be considered significant when the reasonably foreseeable future action is speculative.”).

We believe that the CBD seeks analysis of impacts that is speculative at the leasing stage, and is better addressed at the time a site-specific proposal to drill is received by the BLM. Therefore,

the BLM finds CBD's allegations that the BLM failed to comply with NEPA to be without merit and are therefore denied.

**j. BLM failed to take a hard look at any of the potential impacts of the proposed action raised in our previous comment letters on the sale.**

BLM Response:

NEPA requires the BLM to take a "hard look" at the environmental consequences of proposed actions. The CBD has provided no evidence that the BLM failed to take a hard look at the issues raised by the CBD from a previous comment letter. Therefore, the BLM finds CBD's protest that the BLM failed to take a hard look to be without merit and are therefore denied.

**xiii. BLM does not take a hard look at impacts to Lesser Prairie-Chicken.**

BLM Response:

The CFO has taken a hard look at the available information regarding the Lesser Prairie-Chicken (LPC). In December 2012, the U.S. Fish and Wildlife Service (USFWS) published a proposed rule to list the Lesser Prairie-Chicken as a threatened species. On April 10, 2014, the USFWS published their final rule listing the species as threatened, which became effective May 12, 2014. On September 1, 2015, a Federal District Court in Midland, Texas, ruled the USFWS did not follow its own rule for evaluating conservation efforts (Policy for Evaluation of Conservation Efforts When Making Listing Decisions) when it applied it to the range-wide conservation plan for the LPC. The Court also vacated the USFWS's final rule listing the LPC as a threatened species. On September 8, 2016, the USFWS received a petition requesting that they list the LPC as endangered under the Endangered Species Act. The petition presented substantial scientific or commercial information indicating that the requested action may be warranted; therefore, the USFWS initiated a status review. At the conclusion of the status review, USFWS will issue a finding as to whether or not the petitioned action is warranted. While this latest action is being analyzed, the BLM will continue to manage the LPC in accordance with BLM Manual 6840, Special Status Species Management, and the Pecos District Special Status Species Approved Resource Management Plan Amendment of 2008.

The 2008 RMPA defines occupied habitat as "all areas within 1.5 miles of an active lesser prairie-chicken site regardless of vegetation that has been active for one out of the last 5 years." The boundaries of all lease parcels discussed in the EA are greater than 1.5 miles from an LPC sighting or an LPC leak. A Biological Assessment for the lease parcels (included as Appendix 3 in the EA) determined that the lease sale "may affect - not likely to adversely affect the species." The rationale for the determination is that the offered parcels are not located within three miles of occupied LPC habitat. Based on the potential for these parcels to become occupied in the future, lease stipulations, conditions of approval, and requirements to use best management practices will be applied to each parcel as set forth in the 2008 RMPA. These conservation measures would avoid, reduce or remove future surface impacts as the leases are developed. Therefore, leasing of these parcels is in conformance with the management decisions, criterion, and appropriate lease stipulations.

Additionally, the CBD asserts that “once the lease is sold, it will be too late for BLM to ensure that sufficient protections will be in place to protect this species.” By ignoring the Application for Permit to Drill (APD) stage following the issuing of a lease, as well as the programmatic analysis in the 2008 Special Status Species RMPA, the CBD disregards the past analysis and the importance of site-specific plans in disclosing, assessing, and developing mitigation for impacts from actual oil and gas development.

The direct, indirect, and cumulative impacts from oil and gas development on wildlife resources are discussed in Chapter 4 of the EA. This analysis includes discussion of the short-term and long-term disturbance impacts. In summary, the analysis shows that the provided stipulations and the mitigation described in Chapter 4 of the EA would provide for the conservation of wildlife habitat. Therefore, the statement of reasons have found to be without merit and are therefore denied.

**xiv. BLM does not take a hard look at impacts to water resources.**

BLM Response:

The CFO took a hard look at impacts to water resources both in the EA and in the 1997 RMPA. The CFO addressed potential impacts to water resources in Section 4.3.6 of the leasing EA. The EA analysis determined that there were no impacts to water resources from leasing the parcels; however, there could be indirect impacts to water resources from reasonably foreseeable oil and gas development on the leases, including groundwater contamination from inadequate casing and cementing of the wellbore; surface water contamination from accidental spills or releases of drilling fluids, hydraulic fracturing fluids, produced water, or chemicals used during development and production of a well, and groundwater depletion. The EA also concluded that “specific mitigation measures for the protection of surface and ground water would be addressed at the APD stage.” Mitigation commonly includes the use of a plastic-lined reserve pits, steel tanks or steel tank closed systems, or containment berms to reduce or eliminate seepage of drilling fluid and hydrofrac flow back water into the soil, surface water, and groundwater. Both surface and usable ground water is protected from drilling fluids and salt water zones by setting surface casing to isolate the aquifers from the rest of the borehole environment.” Further, contrary to the CBD’s contention that the lease stipulations included in the EA analysis are insufficient and are not supported by science (at page 12 of CBDs Protest), the CFO references the 1997 RMPA from which the lease stipulations (EA Appendix 1) were derived.

There are no verified instances of hydraulic fracturing adversely affecting groundwater in the Permian Basin of New Mexico. This can, in part, be attributed to the fact that the likely producing zones targeted are well below any underground sources of drinking water. The EA states that the typical depth of groundwater in the Permian Basin is 400 feet or less. If an APD is submitted proposing the drilling of a well, the actual depth to groundwater will be known and analyzed through site-specific analysis. Historically, oil and gas wells have been drilled in the Permian Basin in depths ranging from several hundred feet to over 20,000 feet, based off past records. The latest Reasonably Foreseeable Development Plan (RFD) (Engler, 2014) update covering the CFO, with supporting well data from IHS Markit, shows that the most likely

targeted formations that would be produced by these leases are the Bone Springs (7,000-11,000 feet deep), Wolfcamp (7,580-10,750 feet deep), Delaware Mountain group (2,500-8,500 feet deep), and the Yeso (3,000-7,000 feet deep). Based on the distance between the groundwater and the targeted formations in the protested leases, no adverse impacts to groundwater are expected to occur. The potential for drilling or hydraulic fracturing fluids or produced water to contaminate groundwater is significantly reduced if wells are properly cased and cemented as would be required in the APD approval-process per Onshore Oil and Gas Order No. 2, Drilling Operations. Please also reference the Protest Response 2.b. below, as the issue is similar to others stated by the CBD.

The BLM's obligation to address impacts to water resources persists past the leasing stage. The BLM is responsible for inspection and enforcement of wells and facilities that have a Federal lease nexus and to conduct regular regulatory inspections, such as, but not limited to, drilling, production, environmental compliance, production audits and abandonment inspections. If at any time during the life of the well, a well site is causing or has the potential to cause environmental damage such as surface contamination, the BLM has the authority to issue Written Orders of the Authorized Officer, Incidents of Non-compliance, citations, fines, and, in specific circumstances, cessation of operations when incidents of non-compliance occur.

Water quantity is addressed in the leasing EA made available for the protest period. The amount of water used during well development is highly dependent on a number of factors including but not limited to: vertical or horizontal well, length of well bore, closed-loop or reserve pit drilling system, type of mud, type of stimulation used (e.g. hydraulic fracturing or acidizing), formation being fractured, and use of recycled water or inert gases. The 2014 RFD update completed a detailed analysis on the water use for hydraulic fracturing. Engler analyzed New Mexico Oil Conservation Division records (over 400 records) in the Bone Spring Formation, and the average is 7.3 acre-ft/horizontal well. A quantitative analysis using the data from the RFD can be completed for hydraulic fracturing, once an APD is received. Therefore, the amount of water that used is too variable to quantify at the leasing stage.

The New Mexico Constitution establishes that all the water in the State belongs to the public and, to the extent that it is unappropriated, it is available for appropriation. The Office of the State Engineer is responsible for permitting all surface and groundwater withdrawals apart from water rights acquired before 1907 and small scale stock watering. Because of these statutes and state processes, the BLM does not seek to interfere with state regulation of permitted water wells, their intended uses, or their permitted allocation. The BLM requires full compliance with applicable state regulations.

No new evidence was presented that was not already considered in the leasing EA or that is regulated by Federal or State laws, rules, regulations, or policy. In conclusion, the BLM adequately addressed potential impacts to water resources from oil and gas development, including hydraulic fracturing, and the environmental consequences of how development may affect water quality and quantity. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at water impacts to be without merit and are therefore denied.

**xv. BLM does not take a hard look at impacts of fracking on air quality, water resources, soil, vegetation, wildlife, induced seismicity, brine well collapses, and releases of radionuclide waste into the biosphere.**

**BLM Response:**

The CFO took a hard look at the impacts of hydraulic fracturing. The EA acknowledges the possibility that if the leases are issued, and if an operator proposes to explore or develop a lease, hydraulic fracturing operations may be proposed. Further, Section 4.1 of the leasing EA states:

*“The act of leasing parcels would, by itself, have no impact on any resources in the CFO. All impacts would be linked to an undetermined future level of lease development. The anticipated level of full lease development is described in Table 2 in Section 2.3.1.”*

*“Assumptions used in the analysis regarding resource impacts are based on past development knowledge and practices and resource concerns specific to each individual parcel. Site-specific impacts would be addressed in a subsequent NEPA document when an APD is received.”*

Furthermore, in their protest, CBD states concerns of induced seismicity related to fracking. Earthquake logs from the U.S. Geologic Survey Earthquake Hazards Program for the state of New Mexico is a source of data that can be used to evaluate seismic activity and make predictions concerning the location and magnitude of future earthquakes. In southeast New Mexico only one area, Dagger Draw<sup>9</sup><sup>10</sup>, has had seismicity that has been contributed to the disposal of waste water through injection. The nearest parcel to Dagger Draw, parcel -002, is more than 30 linear miles away. Given the multiple locations for waste water disposal, and the uncertainty of disposal methods, site specific analysis would be conducted at the time of an APD submission in accordance with the NEPA and Onshore Oil and Gas Order No. 7. Additionally, waste water injection of hydraulic fracturing flowback water is regulated by the Environmental Protection Agency and delegated to the State of New Mexico for oversight and enforcement.

CBD also states that the BLM failed to addresses threats associated “with drilling near the WIPP.” The closest lease parcel boundary to the Waste Isolation Pilot Plant (WIPP) boundary is parcel -008 located approximately 7.6 miles east south-east from the WIPP. Using CBD’s own citation of “more than 500 oil and gas wells within 2.5 miles of the WIPP boundary,” and there being no known issues to the WIPP caused by oil and gas development, the offered parcels are three times further than the 2.5 mile distance of concern that was provided by the CBD.

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<sup>9</sup> Petersen, M.D., Mueller, C.S., Moschetti, M.P., Hoover, S.M., Rubinstein, J.L., Llenos, A.L., Michael, A.J., Ellsworth, W.L., McGarr, A.F., Holland, A.A., and Anderson, J.G., 2015, Incorporating induced seismicity in the 2014 United States National Seismic Hazard Model—Results of 2014 workshop and sensitivity studies: U.S. Geological Survey Open-File Report 2015–1070, 69 p., <http://dx.doi.org/10.3133/ofr20151070>.

<sup>10</sup> Sanford, Allan R., Mayeau, Tara M., Schlue, John W., Aster, Richard C., and Jaksha, Lawrence H., Earthquake catalogs for New Mexico and bordering areas II: 1999–2004. New Mexico Geology. November 2006, Volume 28, Number 4.

We disagree that the leasing EA does not adequately address impacts from hydraulic fracturing operations; we agree with the EA's conclusion that additional analysis is more appropriate at the time actual operations are proposed. Therefore, the BLM finds CBD's allegations that the BLM failed to take a hard look at the impacts of hydraulic fracturing to be without merit and are therefore denied.

**14. BLM must end all new fossil fuel leasing and hydraulic fracturing.**

**i. BLM must limit greenhouse gas emissions by keeping Federal fossil fuels in the ground.**

BLM Response:

Congress has expressly charged the BLM to develop federal oil and gas resources. *See, e.g.*, 30 U.S.C. § 181; 42 U.S.C. § 15922. It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional and local needs. This policy is based on law, including the FLPMA. It is during the preparation of an RMP that the BLM considers programmatically whether to open or close lands to oil and gas development, among the other multiple uses considered by the BLM. Halting all fossil fuel development in the area is not within the scope of this leasing EA. The following regulations, policy, and bulletin reiterate the BLM New Mexico State Office's requirements to hold regular competitive oil and gas lease sales:

- Mineral Leasing Act of 1920 as amended - Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 - "Lease sales shall be held for each State where eligible lands are available at least quarterly...."
- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform - "State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing."

Due to the BLM's obligation to comply with existing law, regulation, and policy, CBD's allegations have been found to be without merit and are therefore denied.

**j. BLM must consider a ban on new oil and gas leasing and fracking in a programmatic review and halt all new leasing and fracking in the meantime.**

BLM Response:

The request for a programmatic review is generally outside the scope of the leasing EA. It is in the development of an RMP that the BLM considers whether to open or close lands to oil and gas leasing, among the other multiple uses considered by the BLM in that RMP process. The leasing EA tiers to and incorporates by reference the RMP (as amended). As the BLM continues to demonstrate, when site-specific oil and gas lease exploration or development projects are received the BLM will determine the appropriate level of analysis for the circumstances, and will

ensure BLM's NEPA obligations are fulfilled. This allows for compliance with NEPA and avoids speculative guesses as to impacts at leasing stage.

Furthermore, the BLM New Mexico State Office is required to hold four competitive oil and gas lease sales per year, as stated above. The direct, indirect and cumulative impacts of oil and gas leasing and hydraulic fracturing are analyzed in the leasing EA. Appendix 2 of the leasing EA describes the following requirements to mitigate impacts from hydraulic fracturing:

- A series of tests are performed before operators or service companies perform a hydraulic fracturing treatment. These tests are designed to ensure that the well, casing, well equipment, and fracturing equipment are in proper working order and will safely withstand the application of the fracture treatment pressures and pump flow rates.
- To ensure that hydraulic fracturing is conducted in a safe and environmentally sound manner, the BLM approves and regulates all drilling and completion operations, and related surface disturbance on Federal public lands. Operators must submit Applications for Permit to Drill (APDs) to the agency. Prior to approving an APD, a BLM Carlsbad Field Office geologist identifies all potential subsurface formations that would be penetrated by the wellbore. This includes all groundwater aquifers and any zones that would present potential safety or health risks that may need special protection measures during drilling, or that may require specific protective well construction measures.
- Once the geologic analysis is completed, the BLM reviews the company's proposed casing and cementing programs to ensure the well construction design is adequate to protect the surface and subsurface environment, including the potential risks identified by the geologist and all known or anticipated zones with potential risks.
- During drilling, the BLM is on location during the casing and cementing of the ground water protective surface casing and other critical casing and cementing intervals. Before hydraulic fracturing takes place, all surface casing and some deeper, intermediate zones are required to be cemented from the bottom of the cased hole to the surface. The cemented well is pressure tested to ensure there are no leaks and a cement bond log is run to ensure the cement has bonded to the casing and the formation. If the fracturing of the well is considered to be a "non-routine" fracture for the area, the BLM would always be onsite during those operations as well as when abnormal conditions develop during the drilling or completion of a well.

CBD's requests for a ban on new oil and gas leasing have been considered, found to be without merit and are denied.

## **15. BLM must study the greenhouse gas (GHG) impacts of new leasing.**

- i. The effects of cumulative GHG emissions will inflict extraordinary harm to natural systems and communities**

BLM Response:

NEPA requires the BLM to analyze the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions of any agency or individual. The leasing EA analyzed the direct, indirect, and cumulative impacts of leasing the parcels in accordance with NEPA's requirements (40 CFR § 1508.7). Analysis of the effects of leasing and cumulative GHG emissions was included in the leasing EA. The emissions were estimated using representative parameters from typical development. The estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives. However, substantial uncertainty exists at the time the BLM offers a lease for sale regarding crucial factors that affect potential GHG emissions, including: well density; geological conditions; development type (vertical, directional, horizontal); hydrocarbon characteristics; equipment to be used during construction, drilling, production, and abandonment operations; and applicable regulatory requirements. Based on the analysis for this EA, mitigation measures were identified for the protection of air resources (at EA Section 4.3.1). Additional mitigation measures would be applied when actual operations are proposed on an issued lease through an APD or Sundry Notice (SN).

The lack of scientific tools designed to predict a single proposed action's impact on climate change at a regional or local scale limits the ability to assess its effect on global climate change.

It is difficult to discern with certainty what end uses for the fuels extracted from a particular leasehold might be reasonably foreseeable. There is also uncertainty with regard to the actual development that may occur as an indirect result of the proposed action. The BLM does not exercise control over the specific end use of the oil and gas produced from any individual federal lease. The BLM has no authority to direct or regulate the end use of produced oil and/or gas.

Even though the proposed action of leasing would not contribute to cumulative effects on air resources, future foreseeable development could contribute to cumulative GHG emissions. Language regarding the general cumulative impacts of GHG emissions was added to the Environmental Impacts section in the EA. Uncertainties regarding the numbers of wells and other factors result in a moderate to high degree of uncertainty and speculation with regard to GHG estimates at the leasing stage. At the APD stage, more site-specific information on oil and gas activities resulting in GHG effects would be described in detail. Also at the APD stage, the BLM would review and evaluate operations, require mitigation measures, and encourage operators to participate in the voluntary STAR program.

In BLM's review, the EA appropriately disclosed the direct, indirect, and cumulative impacts that the proposed action would have on GHGs, as well as, its acknowledgement to the uncertainty of the emission quantity of GHGs.

In conclusion, the BLM adequately addressed potential effects of cumulative GHG emissions to natural systems and communities based on the best information available. Therefore, CBD's statement of reasons have been found to be without merit, and are therefore denied.



**j. The EA ignores the social cost of carbon tool to analyze the cumulative contribution of increased oil and gas development on climate change.**

BLM Response:

The CBD argues that the BLM did not comply with NEPA because the agency did not determine the potential costs to society from the potential GHGs emitted from lease operations, particularly utilizing the Social Cost of Carbon (SCC) protocol.

Consistent with *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013), the BLM has used estimated GHG emissions associated with the proposed action as a reasonable proxy for the effects of climate change in this analysis. The BLM has placed these emissions in the context of relevant state emissions. This approach is also consistent with past BLM quantifications considering the incremental impacts of similar BLM leasing actions, as in *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013); *WildEarth Guardians v. BLM*, Civ. Case No. 1:11-cv-1481 (RJL) (D.D.C. Mar. 21, 2014).

The BLM finds that including monetary estimates of the SCC in its NEPA analysis for this proposed action would not be useful to its analysis. Determining the SCC is influenced by many factors, subject to great uncertainty. Estimating SCC is challenging because it is intended to model effects at a global scale on the welfare of future generations caused by additional carbon emissions occurring in the present. A federal Interagency Working Group (IWG) on the SCC convened by the Office of Management and Budget, developed estimates of the SCC, which reflect the monetary cost incurred by the emission of one additional metric ton of carbon dioxide. However, the BLM found that including complex monetary estimates of the SCC does not inform its decision making process.

Given the global nature of climate change, estimating SCC of an individual decision requires assessing the impact of the project on the global market for the commodity in question. While we are able to estimate the GHG emissions associated with typical development, we have not estimated the net effect of this action on global GHG emissions or climate change. Depending on the global demand for oil and gas, the net effect of any development associated with this project may be partially offset by changes in production in other locations. Accounting for this potential substitution affect is not addressed by the IWG protocol. As set forth in *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016), there is a lack of consensus on the appropriate discount rate leading to significant variation in output. SCC does not measure the actual incremental impacts of a project on the environment. And there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.

Further, the NEPA analysis for this proposed action does not include monetary estimates of any benefits or costs. The quantitative economic analysis is primarily a regional economic impact analysis, which is used to estimate impacts on economic activity, expressed as projected changes in employment, personal income, or economic output. These indicators are not benefits or costs, as defined in a benefit cost analysis. Without any other monetized benefits or costs reported,

monetized estimates of the SCC would be presented in isolation, without any context for evaluating their significance. This limits their usefulness to the decision maker.

Therefore, the statement of reasons have been found to be without merit and are therefore denied.

## **DECISION**

After a careful review, it has been determined that the protests to the 36 parcels in this sale will be denied for the reasons described above. All of the protested parcels described in the September 1, 2016 (previously July 20, 2016) Sale Notice will be offered for sale. As mentioned above, the sale date was amended due to the postponement of the sale for a change in location.

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 (Enclosure 1). If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from your receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. 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 of this Decision, pursuant to 43 CFR Part 4, the Petition 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 the 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:

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

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

/s/ Amy Lueders

Amy Lueders  
State Director

1 Enclosure  
1 - Form 1842-1

cc: w/o enclosure  
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