



February 17, 2012

Via fax: (505) 954-2010

Bureau of Land Management
New Mexico State Office
301 Dinosaur Trail
Santa Fe, NM 87508

RE: Protest of Oil and Gas Lease Sale

Pursuant to 43 C.F.R. § 3120.1-3, the Center for Biological Diversity (“Center”) submits this protest regarding the January 18, 2012 Notice of Competitive Lease Sale of Oil and Gas (“notice”). This protest is timely because it is submitted on or before the close of business on February 21, 2012.¹

The notice describes 29 parcels of public land managed by the Carlsbad, Farmington and Oklahoma Field Offices to be offered for lease on April 18, 2012 at the New Mexico State Office.

Each of the three field offices drafted an environmental assessment (“EA”) describing a proposed action to offer parcels for lease within its domain. Each EA fails to mention the existence of the other two and each neglects to disclose cumulative effects of similar actions with common timing and geography, including past and foreseeable oil and gas lease sales and developments.²

¹ The January 18, 2012 lease sale notice states on **page vii**, “We must receive a protest no later than close of business on February 21, 2012.” However, the BLM indicates on its web page for the “April 18, 2012 Lease Sale” that “Last day to submit protest” is on “2/17/2012.” See http://www.blm.gov/nm/st/en/prog/energy/oil_and_gas/lease_sale_notices/2012_lease_sales/april_2012_lease_sale.html (accessed 17 Feb. 2012). The protest is timely regardless of which deadline the BLM will enforce.

² The Center commented on each EA by letter dated December 29, 2011. The BLM simultaneously posted each EA on its website for public review, and the content of each EA is largely identical to and duplicative of the other two. See http://www.blm.gov/nm/st/en/prog/energy/oil_and_gas/lease_sale_notices/2012_lease_sales/april_2012_lease_sale.html (accessed 17 Feb. 2012) (website contains “EA and unsigned FONSI” documents made available on “1/18/12,” after the “30 day public review” period during which the Center supplied the BLM with comment on the original “EA & unsigned FONSI” documents for the same proposed actions.).

Center interest

The Center, represented by undersigned staff, is a 501(c)(3) non-profit public interest environmental advocacy organization headquartered in Tucson, Arizona, with a field office in Albuquerque, New Mexico. The Center works to secure a future for all species, great and small, hovering on the brink of extinction. It does so through science, law and creative media, with a focus on protecting the lands, waters and climate that species need to survive. The Center has approximately 42,000 members, many of whom reside in New Mexico and Oklahoma. Members and staff of the Center use and enjoy, and will continue to use and enjoy, lands managed by the New Mexico State Office, including those currently proposed for oil and gas leasing, to observe and appreciate native flora and fauna and to derive aesthetic, recreational, scientific, conservation and subsistence benefits from biological diversity supplied by public lands that will be affected by the action at protest. More, the Center actively seeks Endangered Species Act (ESA) protection for wildlife occurring on the specific lands proposed for leasing, including the lesser prairie chicken and dunes sagebrush lizard. The Center also maintains procedural and legal interests in government compliance with environmental laws. The interests of the Center will be irreversibly harmed if the BLM accepts bids or payments that legally bind participants in a competitive sale to accept leases and develop them. Although the BLM may, in theory, decline to permit oil and gas drilling on leased parcels if it would result in undue harm to the environment, this is unheard of in practice, and the pivotal decision affecting Center interests is the one made to offer the parcels for lease.

Statement of Reasons

1. Failure to establish purpose and need for action on parcels to be offered for lease.

The three EAs prepared for the April 18, 2012 competitive lease sale contain identical statements regarding the purpose and need that underlay the proposed actions and alternatives. Each EA contains this statement, repeated verbatim, on page two:

The purpose is to consider opportunities for private individuals or companies to explore for and develop oil and gas resources on public lands through a competitive leasing process.

The need of the action is established by the BLM's responsibility under the MLA, as amended, to promote the development of oil and gas on the public domain. The MLA also establishes that deposits of oil and gas owned by the United States are subject to disposition in the form and manner provided by the MLA under the rules and regulations prescribed by the Secretary of the Interior, where consistent with the FLPMA, the National Environmental Policy Act (NEPA) of 1969, as amended (Public Law 91-90, 42 USC 4321 et seq.), and other applicable laws, regulations, and policies.

The BLM will decide whether or not to lease the nominated parcels and, if so, under what terms and conditions.

None of the EAs identifies a site-specific purpose or need for the proposed actions or alternatives. Rather, the BLM generally recites policy without relating it to the specific location of parcels to be offered for lease, or the timing or content of the proposed actions. It never

answers the question, “Why here and now?” Therefore, dismissal of the no-action alternative in each EA would be arbitrary and capricious.

Nothing in the Minerals Leasing Act (MLA), the Federal Lands Policy and Management Act (FLPMA), or the applicable resource management plans requires the BLM to proceed with the proposed actions or alternatives at this time. The BLM already is in compliance with the MLA and FLPMA by virtue of having offered more than 1,300 leases in New Mexico that have gone unused by the oil and gas industry.³

The proposed actions would exacerbate the existing supply glut of oil and gas permits. There is no showing of a market need for the oil and gas supply to be extracted from the parcels proposed for leasing. It is not clear from information provided why any purpose or need exists for this action at this time.

The failure to establish a purpose and need for action on the specific parcels to be offered for lease violates the National Environmental Policy Act.

2. Failure to consider economic impact of proposed actions.

It is remarkable, given the alleged purpose and need for action quoted above, that the BLM omits from its assessment any consideration of the economic impact of the proposed actions, including impacts to market supply of oil and gas. None of the EAs under review mention the surplus of oil and gas permits currently available to industry. The only mention of fossil fuel supply from public lands is as follows:

It is an assumption that the No Action Alternative (no lease option) may result in a slight reduction in domestic production of oil and gas. This would likely result in reduced Federal and state royalty income, and the potential for Federal lands to be drained by wells on adjacent private or state lands. Consumption is driven by a variety of complex interacting factors including energy costs, energy efficiency, availability of other energy sources, economics, demography, and weather or climate. If the BLM were to forego leasing and potential development of those minerals, the assumption is the public’s demand for the resource would not be expected to change. Instead, the undeveloped resource would be replaced in the short- and long-term by other sources that may include a combination of imports, using alternative energy sources (e.g. wind, solar), and other domestic production. This displacement of supply would offset any reductions in emissions achieved by not leasing the subject tracts in the short-term.

Carlsbad EA at 30; Farmington EA at 24; Oklahoma EA at 16. The identical language used in each assessment demonstrates the thoughtless and formulaic approach that the BLM brings to its oil and gas leasing program. It “assumes” many things, but presents no information supporting those assumptions or the implicit contention that the proposed actions would benefit domestic oil

³ See D.O. Williams, “Report: New Mexico second in the nation in unused oil, gas drilling permits,” *New Mexico Independent*, July 26, 2011. Available at: <http://newmexicoindependent.com/70870/report-new-mexico-second-in-the-nation-in-unused-oil-gas-drilling-permits> (accessed Dec. 29, 2011). (New Mexico ranks second in the nation in the number of inactive oil and gas permits issued by the BLM, with 1,307 issued but not drilled. The number is greater than 6,500 nationally.)

and gas production. The BLM does not disclose the existence of a large surplus of unused oil and gas leases on public lands in the action area. Therefore, economic effects of the proposed actions are unknown. A decision to lease the nominated parcels based on this failure to consider any factual basis underlying the purpose and need for action would be arbitrary and capricious.

3. Failure to comply with resource management plan standards for special status species.

All of the parcels managed by the Carlsbad Field Office that are to be offered for oil and gas leasing comprise habitat of lesser prairie chicken. *See* Carlsbad EA at 7-10 and 12-13. The chicken is a candidate for federal protection under the ESA, and a proposed listing rule from the U.S. Fish and Wildlife Service is imminent.⁴ Suitable habitat within the range of the chicken has decreased by more than 90 percent since the 1880s.⁵ Oil and gas development that destroys or fragments chicken habitat contributes to the need for listing under the ESA.⁶ “Due to population decreases and unpredictable weather cycles the [lesser prairie chicken] is currently a candidate for federal listing, and potentially may become extirpated from Eddy and southern Lea counties.” Carlsbad EA at 24.

The BLM is required to manage the chicken as a “special status species.”⁷ *Id.* at 23. Special status species include candidates for federal listing under the ESA, which are to be managed as “Bureau sensitive species.”⁸ Actions authorized, funded, or carried out by the BLM must not contribute to the need to list candidate species under the ESA. *See* Bureau Manual 6840.06. In 2008, the BLM amended its resource management plan (RMP) for the Pecos District, including the Carlsbad Field Office, by allocating public lands in the range of the chicken to discrete management areas based on the existence or potential existence of chicken populations. In some areas, the amended RMP prohibits new oil and gas leases in suitable chicken habitat. In

⁴ *See* 76 Fed. Reg. 66393 (Oct. 26, 2011).

⁵ *See* 63 Fed. Reg. 31402 (June 9, 1998).

⁶ *Id.*

⁷ The BLM defines “special status species” as “collectively, federally listed or proposed and Bureau sensitive species, which include both Federal candidate species and delisted species within 5 years of delisting.” BLM Manual 6840 (Release 6-125, 12/12/2008). Available at: http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2009/IM_2009-039.html (accessed Dec. 29, 2011).

⁸ “Bureau sensitive” species are “native species found on BLM-administered lands for which the BLM has the capability to significantly affect the conservation status of the species through management, and either: (1) There is information that a species has recently undergone, is undergoing, or is predicted to undergo a downward trend such that the viability of the species or a distinct population segment of the species is at risk across all or a significant portion of the species range; or (2) The species depends on ecological refugia or specialized or unique habitats on BLM-administered lands, and there is evidence that such areas are threatened with alteration such that the continued viability of the species in that area would be at risk.” BLM Manual 6840. “Bureau sensitive species will be managed consistent with species and habitat management objectives in land use and implementation plans to promote their conservation and to minimize the likelihood and need for listing under the ESA.” *Id.*

other areas with suitable habitat, it requires the BLM to stipulate best management practices in new leases to minimize the need for ESA listing. *See* Amended RMP at 11-12.

The BLM deferred some parcels from the proposed action and preferred alternative in the Carlsbad EA that occur within an Isolated Population Area (IPA) designated by the amended Pecos District RMP because habitat evaluations must precede offering those parcels for lease. *See* Carlsbad EA at 14; *see also* Resource Management Plan Amendment Record of Decision (RMPA ROD) at 12. The Center noted in comments that the Carlsbad EA subject to public review did not disclose the management status of any of the parcels where the BLM proposed lease stipulations related to lesser prairie chicken. In response to the Center's comment, the BLM now acknowledges that all of all of the parcels to be offered for by the Carlsbad Field Office fall within IPA. *See* Carlsbad EA at 24. It further discloses that Habitat Evaluation Areas overlap the parcels to be offered for lease:

The 2008 BLM Special Status Species Resource Management Plan Amendment identified 17 Habitat Evaluation Areas (HEAs) for the management of lesser prairie-chicken habitat. The purposes of the HEAs are to focus LPC survey efforts, maximize rangeland restoration and historic oil field reclamation, and establish habitat building blocks on which to expand LPC habitat management.

Parcels -003, -004, -005, -006, -007, -008, -009, -012, -013, -014, -015, -016, and -017 include suitable habitat for lesser prairie-chicken. All thirteen of these parcels are located within the Isolated Population Area (IPA). The management for the IPA is discussed in the 2008 Special Status Species RMPA on page 12.

Id. All of the parcels are within IPA, which overlaps one of the 17 HEA designated by the amended Pecos District RMP. That plan states:

Habitat suitability analyses will be conducted in the 17 Habitat Evaluation Areas (see Map 1). These areas will be prioritized for reclamation potential and for potential to re-established connectivity to adjacent isolated habitat blocks. Until the evaluation of an area is complete, new oil and gas leasing will be deferred. It may be determined, through the suitability analysis process, that these areas will be discretionarily closed to future oil and gas leasing. Criteria for closing these areas or making them available for lease can be found in Appendix 3.

RMPA ROD at 12. Habitat evaluation must be completed before parcels within any HEA may be offered for lease. Presumably, an evaluation was done for the Carlsbad parcels at protest. However, the Carlsbad EA contains no information about the method, result or other content of the habitat evaluation, including any findings on reclamation potential, habitat connectivity, or suitability for oil and gas development. Such information is required by the amended RMP and BLM Manual 6840 to demonstrate that oil and gas leasing in suitable habitat of lesser prairie chicken will not contribute to its listing under the ESA. Leasing parcels in chicken habitat without disclosure of habitat evaluation results would be arbitrary and capricious.

4. Failure to take a hard look at impacts to special status species.

a. Carlsbad FO

i. Lesser prairie chicken

As described above, habitat evaluation must be completed before parcels within any HEA designated by the amended Pecos District RMP may be offered for lease in suitable habitat of lesser prairie chicken. Presumably, an evaluation was done for the Carlsbad parcels at protest. However, the Carlsbad EA contains no information about the method, result or other content of the habitat evaluation, including any findings on reclamation potential, habitat connectivity, or suitability for oil and gas development. Such information is required by the amended RMP and BLM Manual 6840 to demonstrate that oil and gas leasing in suitable habitat of lesser prairie chicken will not contribute to its listing under the ESA. Leasing parcels in chicken habitat without disclosure of habitat evaluation results would be arbitrary and capricious.

ii. Dunes sagebrush lizard

Approximately 1,500 acres to be offered for lease under the preferred alternative of the Carlsbad Field Office are habitat of dunes sagebrush lizard. *See* Carlsbad EA at 8-9, 12-13 and 25. The lizard is a candidate for federal protection under the ESA, and the FWS formally proposed its listing.⁹ Suitable habitat within the range of the lizard has decreased by more than 40 percent since 1982. Oil and gas development that destroys or fragments lizard habitat contributes to the need for listing under the ESA.

The BLM asserts that the impact to lizard of new oil and gas drilling in suitable habitat would be “minimal” because lease stipulations would include a 200-meter buffer of development from occupied sites. Carlsbad EA at 40. However, the agency also admits that new infrastructure, including new roads and pipelines apart from well pads, could increase habitat fragmentation:

Construction in sand dune complexes that are suitable habitat or occupied habitat could reduce the size of habitat available to the species or extirpate sand dune lizard populations from the area. This could be avoided as long as infrastructure associated with oil and gas development is moved out of occupied or suitable sand dune lizard habitat.

Id. Habitat fragmentation is a primary source of endangerment to the species. Mitigation measures required by the amended RMP are not adequate to prevent extinction of the lizard given the likelihood of cumulative effects to populations from continued development on non-federal lands.¹⁰ Clearly, the impact of oil and gas development, even with required mitigation measures in lizard habitat, is scientifically uncertain and controversial, meriting preparation of an environmental impact statement (EIS).¹¹

The Carlsbad EA fails to consider or disclose cumulative effects of oil and gas drilling that the BLM already has approved on parcels where suitable lizard habitat exists. It also fails to

⁹ *See* 75 Fed. Reg. 77801 (Dec. 14, 2010).

¹⁰ *Id.*

¹¹ *See* 40 C.F.R. § 1508.27(b).

demonstrate that the current leasing proposal is consistent with assumptions about foreseeable development outlined in the amended RMP.

b. Oklahoma FO

The Oklahoma EA also fails to demonstrate RMP compliance regarding special status species, or that the BLM took the required hard look at impacts to those species. The BLM admits that there “may be impacts” to special status species, including lesser prairie chicken and other threatened or endangered species. *See* Oklahoma EA at 33-34 (“Environmental Assessment Checklist” and “Appendix 1 – Biological Evaluation”). However, the agency fails to specify what species exist or what impacts may occur on the parcels to be offered for lease. It states that field investigation to determine presence or absence of special status species will be conducted on those parcels prior to BLM approval of applications for a permit to drill. *See id.* at 34 (“[S]ite-specific analysis and mitigation if necessary would occur once the parcels are leased and an Application for Permit to Drill is submitted.”).

The BLM may not defer taking a hard look at the environmental impacts of its leasing decisions to special status species until after leases are conducted and high bidders are identified. NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.¹² Leasing a parcel of land is the first step in the oil and gas exploration and development process on federal lands. Once a lease is issued, the lessee has contractual rights and the BLM does not have the right to deny an application for permit to drill.¹³ Moreover, simply offering a parcel for lease is a *per se* irretrievable commitment of resources because a high bidder may not decline to accept a lease upon award by the BLM.¹⁴ Clearly, leasing these parcels will establish a precedent for future actions like exploration and drilling, with potentially significant effects. Making these lands available for oil and gas exploration and drilling also represents a decision in principle about future consideration, committing the land to oil and gas development, with irreversible effects. A finding of “no effect” or of “no significant impact” is arbitrary and capricious when the BLM admits that it has not conducted field investigation to determine presence or absence of special status species or their use of habitat on parcels to be offered for lease.

The FLPMA requires the BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands” and to “minimize and adverse impacts on the environmental, scientific, cultural, and other resources and values (including fish and wildlife habitat) of the public lands involved.” 43 U.S.C. §§ 1732(b) and 1732(d)(2)(a). The ESA further provides that each “Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any” agency action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat. 16 U.S.C. § 1536(a)(2). Consultation must be completed prior to the lease sale of parcels that host habitat for threatened or endangered species. *See* 50 C.F.R. §§ 402.13 and 402.14. It is

¹² *See* 40 C.F.R. § 1500.1(b).

¹³ *See* 43 C.F.R. § 3101.1-2.

¹⁴ *See* 43 C.F.R. § 3120.5-3.

not clear that the BLM has completed consultations that are required for actions that it admits “may affect” ESA-listed species.

Conclusion

Pursuant to 43 C.F.R. § 3120.1-3, “The authorized officer may suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.” The Center respectfully requests that the authorized officer(s) reviewing this protest suspend the offering of all parcels described in the January 18, 2012 lease sale notice until the BLM remedies the violations of environmental law and policy identified in the statement of reasons above. Please send me your decision on this protest and a statement of my appeal rights in writing at the address shown below.

Sincerely,

A handwritten signature in black ink, appearing to read "Jay Lininger", with a stylized flourish at the end.

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