



# United States Department of the Interior



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In Reply Refer To:  
3100 (NV922.q)

**AUG 11 2016**

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## DECISION

The Center for Biological Diversity : Protest to All Parcels in the  
My-Linh Le, Legal Fellow : June 14, 2016  
1212 Broadway #800 : Competitive Oil and Gas Lease Sale  
Oakland, CA 94612 :

### PROTEST DISMISSED PARCELS OFFERED FOR SALE

On April 15, 2016, the Bureau of Land Management (BLM), Nevada State Office (NVSO), timely received a protest (enclosed) from the Center for Biological Diversity (CBD). CBD protested the 42 parcels offered in the June 14, 2016 Competitive Oil and Gas Lease Sale (the Sale) and the Battle Mountain District Office's (BMD) Oil and Gas Lease Sale Environmental Assessment (EA), DOI-BLM-NV-B000-2016-0002-EA.<sup>1</sup>

### BACKGROUND

The BLM received nominated parcels for the Sale through September 18, 2015. The nominated parcels included land in Federal mineral estate located in the BLM Nevada's BMD. After the NVSO completed preliminary adjudication<sup>2</sup> of the nominated parcels, the NVSO screened each parcel to determine compliance with national and state BLM policies, including BLM's efforts related to the management of Greater Sage Grouse on public lands. With the signing of the Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment, and the decision of the U.S. Fish and Wildlife Service not to list the sage-grouse; the BLM is currently allowing leasing in Greater Sage Grouse habitat consistent with the Goals,

<sup>1</sup> The EA was revised June 13, 2016 to further address public comments and concerns and is located at: [http://www.blm.gov/nv/st/en/prog/minerals/leasable\\_minerals/oil\\_gas/oil\\_and\\_gas\\_leasing.html](http://www.blm.gov/nv/st/en/prog/minerals/leasable_minerals/oil_gas/oil_and_gas_leasing.html).

<sup>2</sup> Preliminary adjudication is the first stage of analysis of nominated lands conducted by the State Office to prepare preliminary sale parcels for Field Office review. During preliminary adjudication, the State Office confirms availability of nominated lands for leasing pursuant to 40 U.S.C. § 181 *et seq.*, 43 CFR 3100 *et seq.*, and BLM policies. Once the State Office completes preliminary adjudication, it consolidates the nominated land available for leasing into a preliminary parcel list to send to the Field Office for NEPA analysis and leasing recommendations.

Objectives, and Management Decisions in the Amendment, although none of the 42 parcels offered in this sale are in identified sage-grouse habitat.<sup>3</sup>

On November 5, 2015, the NVSO sent a preliminary parcel list to BMD for review. This review included interdisciplinary team review by BLM specialists, field visits to nominated parcels (where appropriate), review of conformance with the Land Use Plans, and preparation of an EA documenting National Environmental Policy Act (NEPA) compliance.<sup>4</sup> The BMD's preliminary EA was made available for a period of public review from January 13, 2016, to February 5, 2016.

The EA tiered to the existing Land Use Plans (LUPs)<sup>5</sup>, in accordance with the Code of Federal Regulations (CFR) at 40 CFR 1502.20:

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

The BLM described its purpose and need for the June 2016 Lease Sale in its EA as follows:

### ***1.2 Purpose and Need for Action***

*Oil and gas leasing is necessary to provide oil and gas companies with new areas to explore and potentially develop. Leasing is authorized under the Mineral Leasing Act of 1920, as amended and modified by subsequent legislation, and regulations found at 43 CFR part 3100. Oil and gas leasing is recognized as an acceptable use of the public lands under the Federal Land Policy and Management Act of 1976 (FLPMA). BLM authority for leasing public mineral estate for the development of energy resources, including oil and gas, is listed in 43 CFR 3160.0-3.*

*Offering parcels for competitive oil and gas leasing provides for the orderly development of fluid mineral resources under BLM's jurisdiction in a manner consistent with multiple use management and consideration for the natural and cultural resources that may be present. This requires that adequate provisions are included with the leases to protect public health and safety and assure full*

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<sup>3</sup> BLM Nevada- *Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment* (2015).

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

<sup>5</sup> The Tonopah RMP, approved on October 6, 1997, for the Tonopah Planning Area and the Shoshone Eureka RMP and associated Record of Decision (1986).

*compliance with the spirit and objectives of the National Environmental Policy Act (NEPA) and other federal environmental laws and regulations.*

*The BLM is required by law to consider leasing of areas that have been nominated for lease if leasing is in conformance with the BLM land use plan. The oil and gas parcels addressed in this EA cannot be considered for leasing without supplemental analysis of changes in environmental conditions that have occurred since the completion of the current Land Use Plan (LUP) (e.g., increased growth, locations of special status species, identification of traditional cultural properties).*

The EA considered two alternatives:

- The No Action alternative, which considered denying or rejecting all expressions of interest to lease (parcel nominations); and
- The “Proposed Action” alternative, which included offering 42 of the 64 nominated parcels that were sent to the BMD for review (a total of 22 complete or partial parcels deferred).

The EA also considered an additional alternative, which was eliminated from further analysis:

### ***2.3 Alternatives Considered but Eliminated from Further Analysis***

*The BMD staff considered leasing all 64 parcels that were nominated for leasing. However, during scoping, it was determined that there were specific resource conflicts and land use conflicts that would require deferring specific parcels. This Alternative has been eliminated from further analysis.*

On March 16, 2016, the NVSO published a *Notice of Competitive Oil and Gas Lease Sale for June 14, 2016*<sup>6</sup> (Notice), resulting in a total of 42 parcels offered for lease. This protest challenges the EA and all 42 parcels described in the Notice.

## **ISSUES**

CBD participated in the BMD’s public review of the EA, and provided comments to which the BMD responded in Appendix H of the EA (CBD #1-18). Several of the CBD’s arguments in the protest are substantially identical to the comments they provided the BMD during their review of the EA. For additional detail, refer to BMD’s responses in Appendix H of the EA.

CBD’s protest generally alleges that the BLM failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Minerals Leasing Act of 1920, as amended (MLA), 30 U.S.C. § 181 *et seq.*, and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.*

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<sup>6</sup> The Notice contains a memorandum of general sale information, the final parcel list, and the final stipulations.

The following addresses the CBD's protest related to the Sale. The BLM has reviewed the CBD's protest in its entirety; the substantive protests are numbered and provided in bold with BLM responses following.

**A. BLM's EA Violates the National Environmental Policy Act ("NEPA").**

BLM Response:

CBD alleges BLM violated NEPA (42 U.S.C. § 4321 *et seq.*) because BMD's two current Resource Management Plans (RMPs), the Tonopah Resource Management Plan (1997) and the Shoshone-Eureka Resource Management Plan (1986), do not address the emergence of new and significant information, including but not limited to that relating to the new and dangerous extraction methods of fracking and horizontal drilling, or the increased seismic risks from such extraction methods. Nor do the RMPs include any analysis of the foreseeable indirect impacts of greenhouse gas ("GHG") emissions from extraction, transport, and combustion of leasing federal fossil fuels on climate, public health, and wildlife resources.

Each RMP developed conservative Reasonable Foreseeable Development (RFD) scenarios for oil and gas exploration and development within the BMD. Even with new shale-oil drilling technology being deployed in Nevada, none of the disturbance or impact thresholds identified in the RMPs have been reached or surpassed, therefore, BLM considers the continuation of oil and gas leasing within the BMD viable on a case-by-case basis. The level of environmental analysis conducted by BMD for the Sale is consistent with the NEPA handbook H-1790-1 and the purpose and need for the action.

In conformance with federal regulation, reasonable mitigation is required to ensure that the proposed operations minimize adverse impacts to other resources, uses, and users, consistent with granted lease rights. *Id.* The operator "must" conduct operations to minimize adverse effects to surface and subsurface resources, prevent unnecessary surface disturbance, and conform to currently available technology and practice. *Id.* The operator is responsible for protecting cultural and historic resources, endangered species, and surface resources. *Id.* In general, but without site specificity at the lease stage, potential impacts from the use of Hydraulic Fracturing as one type of well stimulation technique are addressed at Appendix E of the EA. An analysis of site specific impacts at the lease stage from a possible use of Hydraulic Fracturing on a lease for which an APD has not been submitted or approved would amount to speculation. As BLM explains in the EA, the right of the leaseholder to use leased lands is subject to specific non-discretionary statutes and lease stipulations. *See* EA at p.7. If BLM determines impacts are unacceptable, appropriate mitigation is required or the proposal may be denied to prevent unnecessary or undue environmental degradation of resources. *Id.*, at App. H, CBD Response #4-9, 13, and draft Decision Record, p. 2-3 (If the [NEPA] evaluation indicates that environmental impacts would be unacceptable, either mitigation measures would be implemented as conditions of approval (COAs) to reduce the impact or the proposal could be denied to prevent unnecessary and undue degradation). *See also* BLM, *Onshore Oil and Gas Order No. 1, Approval of Operations*, 72 Fed. Reg. 10308, at 10334 (Mar. 7, 2007) (BLM will...3. Deny the permit if it cannot be approved and the BLM cannot identify any actions that the operator could take that would enable the BLM to issue the permit...).

In conclusion, the BLM did not violate NEPA process; therefore, the above CBD allegation has been considered, found to be without merit and is dismissed.

**i. It is Unlawful to Proceed with the Lease Sale without Undertaking a Site-Specific Environmental Assessment.**

**BLM Response:**

BLM did take a hard look at the specific parcels offered for oil and gas leasing, and the reasonably foreseeable impacts to the resources on these parcels. BMD reviewed all 64 nominated parcels and did perform site-specific analysis on 42 parcels containing 74,702 acres of public land, where the specialists had enough information and data to adequately analyze any potential direct or indirect impacts on affected resources present. After conducting onsite reviews for each parcel, by a team of resource specialists, and disclosing to the public any potential impacts to resources from leasing these lands, BMD was able to recommend to the State Director, the leasing of 42 nominated parcels in part or in whole, as mandated by regulations. BLM does make several references throughout the EA stating that once an APD is submitted, that additional site-specific NEPA analysis would be performed in addition to the leasing EA. This should not be misconstrued that the leasing EA is not site-specific. Each parcel is reviewed, scrutinized, and evaluated for any potential impacts, and whether they may directly or indirectly affect resources. If there is scientific evidence that indicates that exploration and development of a particular parcel may have a substantial impact to a resource, it is not recommended for leasing, if no reasonable mitigation is available. Twenty-two parcels were deferred from further analysis because of a multitude of reasons, such as: limited seasonal access, additional information/data was needed for proper analyses, and more time is required to address Native American concerns.

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

**ii. BLM Failed to Issue a Finding of "No Significant Environmental Impact" or any Convincing Statement of Reasons as to why the Project's Impacts are Insignificant.**

**BLM Response:**

The BLM has prepared a Finding of No Significant Impact (FONSI) and Decision Record which will be signed prior to the issuance of any leases. Therefore, the above CBD's protest has been considered, found to be without merit and is dismissed.

**iii. BLM violated its statutory duty to prepare an Environmental Impact Statement (EIS) under NEPA.**

### BLM Response:

CBD alleges that since a FONSI was not issued at the time of the release of the Final Draft EA, that BLM must conduct an EIS. CBD also alleges that impacts from the proposed action are significant because the effects of leasing and HF on the human environment will be highly controversial, the effects from the lease sale present highly uncertain or unknown risks, poses threats to public health and safety, and will adversely affect species and habitat. As such, CBD argues that an EIS is required.

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

The EA does not support the claim that there would be significant impacts from leasing or development, thus automatically requiring an EIS. Based on the geographic location and resources, currently available lease stipulations and lease notices were applied to provide mitigation requirements to minimize potential impacts from leasing (EA at Appendix B). Once lease development is proposed, additional site-specific NEPA will be conducted to address any new resource issues and potential impacts specific to the project or site not addressed at the leasing stage.

The BLM does not consider the proposed action to be highly controversial, as courts have consistently specified that disagreement must be with respect to the character of the effects on the quality of the human environment in order to be considered to be "controversial" within the meaning of NEPA, rather than a mere matter of the unpopularity of a proposal. See *Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor*, 609 F.2d 342 (8th Cir. 1978), cert. denied, 446 U.S. 936 ("Mere opposition to federal project does not make project controversial so as to require environmental impact statement.") There is not a substantial dispute within federal agencies, the State of Nevada government agencies, or the scientific community as to the effects of oil and gas leasing and development in Nevada, specifically.

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

### **B. BLM Failed to Take a Hard Look at any of the Potential Impacts of the Proposed Action Raised in our February 5, 2016 Comment Letter.**

BLM Response:

BMD did review and consider all substantive comments made by government agencies, tribes, special interest groups, and members of the public by either providing a response to comments (Appendix H) or by addressing the comments directly within the EA analysis. Many comments are based on environmental issues that occur in other states and not in Nevada specifically. Thus trying to correlate or compare resource issues from other states may not be appropriate for most issues. For example, many air and water concerns in other states are related to shallow natural gas operations. Nevada currently does not have any commercially producing natural gas well fields and wells are typically drilled between 3,100 and 12,000 feet deep. At this time, no Nevada oil wells have been horizontally drilled, unlike other states.

BLM has performed its due diligence by providing additional information and expanding analysis language in the Final EA to adequately address the substantive comments received by CBD on February 5, 2016. Therefore, BLM has considered the allegation above and find it to be an opinion, without merit, and is dismissed.

**i. BLM does not Consider Potential Impacts to Greater Sage-Grouse Populations and Habitat in the EA.**

BLM Response:

The BLM conducted a thorough analysis on potential impacts to the greater sage grouse from oil and gas exploration and development in the September 2015 Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment that amended the BMD's two RMPs. This amendment defines mitigation and implementation strategies necessary to protect the bird's habitat. BMD followed these instructions through the leasing process, by attaching stipulations to leases and leasing outside of habitat first before considering leasing within habitat. No parcels were located in known sage grouse habitat, therefore their habitat is unaffected by the proposed action.

It is reasonable and sufficient for the BLM to state that the proposed action is in conformance with the sage grouse RMP. Therefore, CBD allegation above is found to be an opinion, without merit, and is dismissed.

**ii. BLM does not Consider Potential Impacts to Any of the Other Sensitive Species in the EA**

BLM Response:

BMD did consider all of the BLM special status species lists for plants and animals in Appendix D, which includes most if not all of the species referenced by CBD in their comments and protest letter. In the EA it states that the BLM can take actions to protect critical habitat for sensitive species that are not on the lists and even not approve actions, if actions are or may be detrimental to the populations. The EA states that a Lease Notice was attached to all 42 parcels to serve the lessee with notice that the lease is subject to additional scrutiny, surveys, and potential mitigation

to protect the specie(s) and or the specie's habitat from impacts caused by oil and gas exploration and development. Stipulations and Lease Notices, like this one, serve a vital role at the leasing stage by putting the BLM, lessee, and the public on notice that developing this lease may be difficult and may require additional mitigation and conformance.

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

**iii. BLM Must Consider Long-Term Impacts of Oil Infrastructure on Pronghorn**

BLM Response:

BLM considers long term impacts to all wildlife species, including Pronghorn Antelope, from oil and gas exploration and development. Currently, there are no areas of Pronghorn Antelope habitat identified that requires specific habitat protection. Although Pronghorn do not require the same protection measures as does a sensitive, threatened, or endangered species, BLM coordinates closely with NDOW to meet the goal of sustainability for the species and to identify areas of sensitivity for the species. If such areas are identified, the BLM, in consultation with NDOW, would propose specific mitigation to ensure the habitat would be protected.

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

**C. BLM Must End All New Fossil Fuel Leasing and Hydraulic Fracturing**

BLM Response:

The BLM appreciates CBD's comments and opinion on banning leasing and fracking until a programmatic review is conducted. This request is outside the scope of the proposed action. Therefore, the above CBD comment has been considered, found to be unreasonable and without merit, and is dismissed.

**i. BLM Must Limit Greenhouse Gas Emissions By Keeping Federal Fossil Fuels In the Ground**

BLM Response:

The BLM appreciates CBD's comments and opinion on banning leasing and fracking until a programmatic review is conducted. This request is outside the scope of the proposed action. Therefore, the above CBD comment has been considered, found to be unreasonable and without merit, and is dismissed.

**ii. 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 BLM appreciates CBD's comments and opinion on banning leasing and fracking until a programmatic review is conducted. This request is outside the scope of the proposed action. Therefore, the above CBD comment has been considered, found to be unreasonable and without merit, and is dismissed.

**iii. BLM Must Study the Greenhouse Gas Impacts of New Leasing****BLM Response:**

BLM has added new language to the EA to incorporate the potential effects of greenhouse gases (GHG) from oil and gas leasing, exploration, and development. The potential impacts of GHG from oil and gas operations in Nevada are extremely low, based on the low amount of current production. If production drastically increases in the future, it could increase the affects from GHG, and additional mitigation derived from analysis may be required.

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

**iv. The Significant Public Health Impacts of Increased Fracking Compel Consideration of No-Leasing and No-Fracking Alternatives****BLM Response:**

The BLM considered a No Action Alternative (no leasing), which would not offer any of the nominated parcels for sale. The BLM is not required to consider "No-fracking Alternative" because it is outside the scope of the leasing EA. The effects of increased drilling and development including HF on public health were considered in the EA under Air Quality, Water Quality and Waste, Hazardous and Solid.

Any subsequent oil and gas development activities would be subject to all applicable Federal, State, and local laws and regulations including the Clean Air Act, Safe Drinking Water Act, Hazardous Waste regulations, and OSHA regulations.

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

**DECISION**

To the extent that CBD has raised any allegations not specifically discussed herein, they have been considered and are found to be without merit. For this reason, and for those previously discussed, CBD's protest of the Sale and the EA is dismissed and all 42 parcels were offered for sale on June 14, 2016.

## APPEAL INFORMATION

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

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

### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

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

*/s/ Marci L. Todd*

*for* John F Ruhs  
State Director

### Enclosures:

- 1- The Center for Biological Diversity Protest dated Apr 15, 2016
- 2- DOI-BLM-NV-B000-2016-0002-EA (revised June 13, 2016); revised to further address public comments and concerns
- 3- Form 1842-1

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