United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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In Reply Refer To:

SDR-922-09-01
MTM-62340; MTM-64473
MTM-83775; MTM-83776
MTM-88909
3165.3 (922.JA)

November 26, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DECISION

Leroy A. Spang, President	(	
Northern Cheyenne Tribe	(	
P.O. Box 128	(	SDR-922-09-01
Lame Deer, Montana 59043-0128	(	

AFFIRMED

The Northern Cheyenne Tribe (Northern Cheyenne) requests a State Director Review (SDR) of the September 30, 2008, Decision Records (DR) and Findings of No Significant Impact (FONSI) (Enclosures 1 and 2) approved by the Bureau of Land Management (BLM) Miles City Field Manager. The September 30, 2008, decisions are based on environmental assessments (EA), prepared in response to Plans of Development (POD) filed by Fidelity Exploration and Production Company (Fidelity) to develop existing federal oil and gas leases. A total of 34 Applications for Permit to Drill (APDs) are included with the Tongue River – Deer Creek North Federal Project (Deer Creek North) POD and 14 APDs are included with the Tongue River – Decker Mine East Federal Project (Decker Mine East) POD. Because the Miles City Field Manager's decision was issued under 43 CFR 3162.3-1, it is subject to SDR according to 43 CFR 3165.3(b).

The SDR request by the Northern Cheyenne was considered timely filed on October 28, 2008, in accordance with 43 CFR 3165.3(b), and assigned number SDR-922-09-01 (Enclosures 3).

BACKGROUND

Fidelity submitted two Coal Bed Natural Gas (CBNG) PODs for its Deer Creek North project area; the Deer Creek North and Deer Creek North Amendment PODs. The project area is

located within the CX Field (approved by the Montana Board of Oil and Gas Conservation (MBOGC)), Big Horn County of southeastern Montana, T. 9 S., R. 41 E.

Fidelity filed the Deer Creek North POD and Applications for Permit to Drill (APDs) for 170 wells (71 federal, 99 private) with the BLM on January 31, 2005. Prior to the BLM completing an analysis of the POD, the Federal District Court issued an Order, April 5, 2005, in Northern Plains Resource Council v. U.S. Bureau of Land Management, Nos. CV 03-69-BLG-RWA, CV 03-78-BLG-RWA (consolidated), allowing the BLM to approve a limited number of CBNG permits within a defined geographic area under specific conditions. This Order and other matters were subsequently appealed to the United States Court of Appeals for the Ninth Circuit. On May 31, 2005, the Ninth Circuit issued an injunction forbidding the BLM from approving any CBNG production projects in the Powder River Basin of Montana. This injunction was issued pending disposition of the appeal, or until further Order of the Court.

Fidelity then filed the Deer Creek North Amendment POD and APDs for an additional 178 wells (66 federal, 108 private and 4 state) with the BLM on April 4, 2006. This amendment was required as a result of Fidelity modifying their well spacing from approximately 160 acres/well to around 80 acres/well.

The MBOGC has sole jurisdiction of private and state wells. When an operator proposes drilling CBNG wells in the State of Montana, they are required to file an application before the MBOGC and present testimony on their application. The application provides required information identified in previous MBOGC Orders and also those identified under the January 2003 Montana Final Statewide Oil and Gas EIS and RMP Amendment of the Powder River and Billings Resource Management Plans (RMPs) (Statewide FEIS) and MBOGC's March 26, 2003, Record of Decision (ROD). The MBOGC then makes a ruling regarding whether the POD is reasonable based on the evidence presented. This type of approval is contingent upon the MBOGC's administrative staff environmental review in accordance with the Montana Environmental Policy Act. The MBOGC Order No. 87-2005 for the Deer Creek North POD, dated March 17, 2005, states, "…approval…is contingent upon completion of an environmental assessment." Order No. 508-2005 for the Deer Creek North Amendment POD, dated December 8, 2005, states, "the application…is granted as applied for subject to completion of an Environmental Assessment…" The MBOGC completed its process with approval of its EA for the Deer Creek North POD in August of 2005, and the Amended POD on January 18, 2006. Development of private and state leases, associated with the Deer Creek North and the Deer Creek North Amendment PODs, has occurred under approvals from the MBOGC while the injunctions were in effect forbidding the BLM from approving any CBNG production projects in the Powder River Basin of Montana.

The Ninth Circuit upheld the Federal District Court's April 5, 2005, Order for injunctive relief on September 11, 2007, in Northern Cheyenne v. Norton, 503 F.3d 836 (9th Cir. 2007). On October 29, 2007, the Ninth Circuit Court of Appeals lifted its May 31, 2005, injunction thus allowing the BLM to process and approve PODs and APDs based on the Federal District Court's April 5, 2005 Order. As a result, Fidelity and the BLM reviewed the two individual PODs, which share the same geographic area, and concurred that they required modification from their

"original" proposals. This determination was made due to the several years lapse from their submittal, much of the infrastructure had been constructed in association with the private and state wells and Fidelity changed its well completion to the "monobore" technology.[1] This changed the original applications for a total of 137 individual coal seam wells to 34 monobore wells. Fidelity resubmitted the Deer Creek North and Deer Creek North Amendment PODs into one project; the Deer Creek North POD, on May 7, 2008.

Fidelity's Deer Creek North POD includes the construction, drilling, production, and reclamation of 34 federal CBNG wells, construction of new infrastructure and use of existing infrastructure that is located on private, state and BLM administered surfaces. The use of existing infrastructure, including compressors, is a result of the private and state portions of the project including wells and associated infrastructure within the project area, already developed and in production. The federal project includes access roads, pipelines for water and gas, overhead and underground power lines, existing compressor facilities, produced water management using existing Montana Pollution Discharge Elimination System (MPDES) permits, and interim/final reclamation. The average production life of the project wells is expected to be 10-20 years with final reclamation to be completed 2 to 3 years after plugging of the wells.

Water produced by the Deer Creek North POD is proposed for disposal by the following water management options: (1) beneficially used for industrial uses (dust suppression) in the Spring Creek and Decker Coal Mines; (2) beneficially used by Fidelity for CBNG drilling, construction and dust suppression; (3) beneficially used by livestock and wildlife; (4) treated via ion exchange and discharged to the Tongue River using Fidelity's existing Montana Department of Environmental Quality (MDEQ) MPDES permit for treated water (MT0030724); and (5) discharged to the Tongue River using Fidelity's existing MDEQ direct MPDES permit (MT0030457).

Fidelity filed the Decker Mine East POD and APDs for 14 federal monobore wells with the BLM on January 3, 2007. The project area is also located within the CX Field (approved by the MBOGC), Big Horn County of southeastern Montana, T. 9 S., R. 40 E. and T. 9 S., R. 41 E.

Fidelity submitted its Decker Mine East POD to the MBOGC on December 13, 2006. The project included plans to drill 56 private wells. The MBOGC Order No. 406-2006, dated December 14, 2006, stated, "…the application…is granted as applied for, contingent upon completion of an environmental assessment." The MBOGC completed its process with approval of its EA for the Decker Mine East POD on February 23, 2007. Development of private and state leases, associated with the Decker Mine East POD, has occurred under approvals from the MBOGC while the injunctions were in effect forbidding the BLM from approving any CBNG production projects in the Powder River Basin of Montana.

[1] A commingled well (monobore) is designed and completed to produce gas and water from two or more coal beds from a single well bore.

Fidelity's Decker Mine East POD includes the construction, drilling, production, and reclamation of 14 federal CBNG wells, construction of new infrastructure and use of existing infrastructure, including compressors, that is located on private and BLM administered surface. The use of existing infrastructure results from the private wells/infrastructure, within the project area, already developed and in production. The federal project includes access roads, pipelines for water and gas, overhead and underground power lines, existing compressor facilities, produced water management using existing MPDES permits, and interim/final reclamation. The average production life of the project wells is expected to be 10-20 years with final reclamation to be completed 2 to 3 years after plugging of the wells.

Water produced by the Decker Mine East POD is proposed for management using the same suite of water management options as those proposed for the Deer Creek North POD.

The Miles City Field Office (MCFO) completed multiple reviews of the Deer Creek North and Decker Mine East PODs and the final deficiency letters were sent to Fidelity requesting additional information on July 28, 2006, and May 2, 2008. Fidelity completed filing additional information identified in the MCFO deficiency letters on January 26, 2007, and June 17, 2008. Onsite inspections of the drilling proposals and associated development proposals were conducted on February 23, 2005, June 28, 2006, and July 31, 2007. Two EAs were prepared in cooperation with the MDEQ. The Deer Creek North EA and unsigned FONSI were available for public review from August 13, 2008, to August 27, 2008. After consideration of public comments, FONSIs for the Deer Creek North and Decker Mine East PODs were approved on September 30, 2008. A total of 48 federal APDs were also approved on September 30, 2008. At the time of the BLM's approval, approximately 210 private and state wells were in place and producing CBNG within the Deer Creek North and Decker Mine East PODs.

STATE DIRECTOR REVIEW POINTS

The issues raised by the Northern Cheyenne in their SDR request are categorized and enumerated below, with supporting arguments in italicized text. The BLM's response to these issues follows each argument in plain text.

In reviewing specific challenges to the EA, our review will rely on precedent governing the Interior Board of Land Appeal's (IBLA) review of EAs (Southern Utah Wilderness Alliance, 159 IBLA 220, 234, 235 (2003)).

> "In preparing an EA to assess whether an EIS is required under section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C) (2000), an agency must take a "hard look" at the proposal being addressed, identifying relevant areas of environmental concern, so that it can make an informed determination as to whether the environmental impact is insignificant or impacts will be reduced to insignificance by mitigation measures. See Colorado Environmental Commission, 142 IBLA 49, 52 (1997); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174

(1987). The Board will affirm a FONSI if the record establishes that the BLM has engaged in a careful review of environmental consequences, all relevant environmental concerns have been identified, and the final determination is reasonable. Owen Severance, 118 IBLA 381, 392 (1991); Utah Wilderness Association, 80 IBLA at 78, 91 I.D. at 174.

A party challenging a FONSI must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Southern Utah Wilderness Alliance, 122 IBLA 6, 12 (1991); G. Jon & Katherine M. Roush, 112 IBLA 293, 297 (1990); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Utah Wilderness Association, 80 IBLA at 78, 91 I.D. at 174. "The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal." Rocky Mountain Trails Association, 156 IBLA 64, 71 (2001), citing Larry Thompson, 151 IBLA 208, 217 (1999)."

1. THE ENVIRONMENTAL ASSESSMENTS FOR THE PROJECTS IMPERMISSIBLY TIER TO THE 2003 FEIS AND 2006 DRAFT EIS

The Northern Cheyenne Argue:

The EA's reliance on the Statewide FEIS through extensive tiering to the environmental analysis in that programmatic document violates the National Environmental Policy Act (NEPA) and the U.S. District Court's decision rejecting the same reliance in BLM's approval of Fidelity's Badger Hills Project in 2004. Northern Plains Resource Council v. U.S. Bureau of Land Mgmt., No. CV 03-185-BLG-RWA (D. Mont. June 6, 2005) ("Badger Hills 1") Exhibit 1. The court's decision in that case is directly on point and binds BLM. It cannot be disregarded.

Response:

This issue was included as a comment on the Deer Creek North EA. The EA made available to the public with the FONSI and DR included a response to this comment. See Deer Creek North EA, Appendix I, at pages 26 and 27.

The U.S. District Court never ruled on the adequacy of the Badger Hills EA or any aspect of its consideration of environmental consequences. Instead, the court concluded the Badger Hills EA was insufficient because it tiered to the programmatic EIS (June 6, 2005 Order at 5). The court reached this finding based in part on the court's conclusions that "the FEIS has no legal force" and "the entire FEIS is put in question by plaintiffs' appeal to the Ninth Circuit…" Id. at 5 and 6. However, the Court's interpretation of the utility of the FEIS changed on September 11, 2007, when the Ninth Circuit upheld Judge Anderson's award of injunctive relief in Northern Cheyenne v. Norton, 503 F.3d 836 (9th Cir. 2007). The Ninth Circuit found:

> The partial injunction permits what appellants claim to seek: phased development rather than full-field development. The court found that the environmental impact statement basically complied with NEPA, except for its failure to consider phased development. The partial injunction fully remedies this failure. The District Court concluded that a partial injunction would not cause irreparable harm, because a drilling permit cannot issue without site-specific environmental assessment. And it considered the public interest in clean energy development as well as prevention of environmental harms.

The Ninth Circuit concluded that the partial injunction the BLM proposed "provides an equitable resolution consistent with the purposes of NEPA." Contrary to arguments from the Northern Cheyenne, the Ninth Circuit concluded that tiering to the programmatic Statewide FEIS was acceptable. Regardless of any arguments concerning the appropriateness of tiering to the Statewide FEIS, the cumulative impact of the site specific projects (Deer Creek North and Decker Mine East PODs) are fully analyzed in the EAs subject to this SDR request. Therefore, we conclude the documentation completed for the Deer Creek North and Decker Mine East PODs provide adequate site-specific environmental analysis in compliance with NEPA and consistent with the intent of the partial injunction issued by the District Court and affirmed by the Ninth Circuit.

2. APPROVAL OF THE PROJECT IS INCONSISTENT WITH THE GOVERNING RMP

The Northern Cheyenne Argue:

The RMP Amendment in the 2003 Statewide FEIS is not supported by adequate NEPA analysis, as the District Court found and the Ninth Circuit affirmed, and the SEIS has not yet been adopted as the governing RMP. Accordingly, the only RMP addressing CBM development that is supported by an adequate NEPA analysis is the 1994 RMP Amendment, which limits federal leaseholders to exploratory drilling and small scale development of CBM resources.

Under the circumstances, approval of the North Deer Creek and Decker Mine East PODs directly conflicts with federal law requiring that land use decisions be made consistent with a valid RMP supported by adequate NEPA analysis. As discussed above, the 1994 RMP does not authorize commercial production of CBM, and this project cannot lawfully be approved under FLPMA before the agency formally adopts the SEIS in the ROD.

Response:

For the reasons stated under issue Number 1 above, we conclude the Deer Creek North and Decker Mine East PODs are consistent with the Powder River RMP as amended, including the Statewide FEIS.

3. THE EA FAILS TO DEMONSTRATE THAT AIR EMISSIONS RESULTING FROM THE PROJECTS WILL NOT CAUSE OR CONTRIBUTE TO A VIOLATION OF THE CLASS I INCREMENTS FOR THE NORTHERN CHEYENNE RESERVATION.

The Northern Cheyenne Argue:

To satisfy NEPA's requirements, BLM must examine "sufficient information" to accurately determine whether CBM development under the Project is likely to violate the Class I "increments" established for the Reservation under the prevention of significant deterioration (PSD) provisions of the Clean Air Act, 42U.S.C. § 7473. Oregon Env'tl. Council v. Kunzman, 817 F.2d 484, 493 (9th Cir. 1987).

Under FLPMA, BLM's obligation to examine the increment consumption of the proposed CBM development is, unlike under NEPA, a substantive obligation as applied to BLM's approval of the Project. That is, the Project's operating parameters must "provide for compliance with applicable pollution control laws, including state and federal air, water, noise, or other pollution standards or implementation plans." 43 .U.S.C. § 1712(c)(8); 43 C.F.R. 1610.5-3.

Response:

The Statewide FEIS only noted the potential for impacts to the Reservation's Class I standards during the maximum impact period based on a 20-year reasonably foreseeable development scenario, and stated that mitigating measures would have to be required at the project permitting stage in order to assure compliance with air quality requirements (Statewide FEIS at p. 4-36, ROD at p. 15). The Statewide FEIS specifically did not include a regulatory increment consumption analysis because: 1) the PSD analyses is required when a proponent applies for a permit from the MDEQ or Environmental Protection Agency (EPA) involving a major source of emissions or when a permit application is submitted in an area near a major source of emissions, or, as is the case with the MDEQ as a result of the Statewide FEIS air quality analysis, a determination that CBNG compressor stations subject to air quality permits (Administrative Rule of Montana 17.8.743) must meet PSD increments for NO_X; and 2) the BLM does not have the authority or responsibility to conduct such an analysis. The EPA and MDEQ have regulations specific to PSD analyses and permits (MDEQ PSD regulations, including increment analysis, are described in Rule 17.8.801 et al. and Federal PSD regulations are found at 40 CFR 51 Subpart I). The MDEQ and EPA regulations do not allow for violations of PSD increments or National Ambient Air Quality Standards (NAAQS)/Montana Ambient Air Quality Standards (MAAQS). Source emission threshold levels set by the MDEQ for determining when an Air Quality Permit is necessary are also in place to make sure air quality impact contributing sources are reviewed for Best Available Control Technology (BACT) and compliance with applicable air quality standards.

The Deer Creek North and Decker Mine East PODs would continue to use the main sales compressor site for Fidelity's CBNG operations in Montana and six existing field compressor

locations that are currently processing CBNG from private and state wells. The Statewide FEIS ROD, Appendix B, page NCT-1 states:

> "Operators will be required to provide the information necessary for BLM to conduct an analysis of air quality impacts for all relevant parameters when submitting their exploration APDs or field development project plans. The BLM will use the information to determine the individual and cumulative impact on the Reservation's air quality; disclose the analysis results in the appropriate NEPA document; and consult with the Tribe when the analysis shows impacts from a specific drilling or development proposal."

The Northern Cheyenne provided similar comments regarding concerns about the air quality analysis completed for the Deer Creek North EA during the EA process. Responses to these comments are found on page 32 of Appendix I, which is attached to the Deer Creek North EA. Additional air quality modeling and PSD increment analyses have been completed to disclose direct, indirect and cumulative impacts from both the Deer Creek North and Decker Mine East PODs and CBNG development activities in Montana and applicable portions of Wyoming (see pages 4-6 through 4-14 in the Decker Mine East EA and pages 4-6 through 4-13 in the Deer Creek North EA). The air quality analysis completed for these projects shows that CBNG development, including the proposed actions; comply with the Class I and II PSD increments and NAAQS/MAAQS.

The primary concern identified by the Northern Cheyenne is the contribution from the Deer Creek North and Decker Mine East PODs of sulfur dioxide (SO_2) emissions and a need for the BLM to conduct additional analysis to determine how these emissions could affect PSD Class I increments for SO_2 . This claim is supported by findings from the PSD Class I increment analysis completed for the Roundup Power Project. As stated in the response to comments on the 2002 Draft EIS for the Roundup Power Project; "The predicted 3-hour and 24-hour SO2 Class I increments are exceeded in the [Northern Cheyenne Indian Reservation] Class I area as a result of Colstrip Units 3 and 4."

All emission inventory work and air quality modeling completed to date by the BLM and MDEQ for the Statewide FEIS, the 2006 Draft Supplemental EIS (SEIS) and 2007 Supplemental Air Quality Analysis completed for the SEIS, the EAs subject to this review, and the air quality permits issued by the State of Montana do not indicate concerns for potential impacts to SO_2 Class I and II PSD increments or NAAQS/MAAQS; and show SO_2 emissions from CBNG operations are minor. The only concerns related to SO_2 emissions are those related to potential effects to visibility because of the combination of pollutants that effect visibility impairment. As a result, the MDEQ and the BLM have determined there is no compelling reason at this time for additional analysis of SO_2 emissions beyond those already conducted.[2] In addition, the MDEQ

[2] The November 2007 Supplemental Air Quality Analyses and October 2008 Final Supplement to the Montana Statewide Oil and Gas Environmental Impacts Statement and Amendment of the Powder River and Billings

and the BLM have determined that oxides of nitrogen (NO_x) are the pollutant of concern (i.e., the most likely pollutant to violate any ambient standard or increment) from CBNG development. See page 4-10 of the Deer Creek North POD EA.

However, the Northern Cheyenne continue to disagree with the analysis the BLM and MDEQ are using to disclose air quality impacts. The Northern Cheyenne's opinion about the air quality analysis completed by the BLM and MDEQ is not supported by objective proof that demonstrates a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the actions under consideration by the MCFO.

4. THE EA'S ANALYSIS OF CUMULATIVE IMPACTS IS INADEQUATE

The Northern Cheyenne Argue:

The analysis of cumulative impacts is insufficient because while it examines the impacts of two future CBM development projects, it fails to address the cumulative impacts of the other nearby PODs that the EA itself considers "relevant in a cumulative effects analysis." Deer Creek North EA at 2-1l and Decker Mine East EA at 2-12.

The EA also fails to examine the cumulative impacts of other identifiable site-specific projects. For example, Pinnacle's Four Mile East and Four Mile West PODs have been included in a BLM map of BLM and State PODs in the Tongue River valley provided to the Tribe on June 12, 2008. Exhibit 4. This map shows that the location and boundary of the PODs is known. Thus, these projects are not "too vague" as BLM asserts. "If it is reasonably possible to analyze the environmental consequences [in a NEPA document,] the agency is required to perform that analysis." Kern, 284 F.3d at 1072. Given this information as well as the general parameters about well-spacing, monobore technology, and water production, it is "reasonably possible" for BLM to consider the cumulative impacts of these two PODs. As such, BLM's defense that the projects are "too early in the planning process" and are thus "speculative and vague" is without merit. EA at App. I Response to Comment 12. A project does not have to achieve the level of a submitted POD to be considered "reasonably foreseeable" for purposes of cumulative impacts analysis.

Response:

The Northern Cheyenne do not identify the cumulative impacts issues or specific cumulative actions that need to be considered except for projects that are also discussed or dismissed within the Deer Creek North and Decker Mine East EAs.

The Northern Cheyenne fail to recognize that the Deer Creek North and Decker Mine East

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Resource Management Plans propose future modeling to determine potential visibility impacts when a threshold amount of compressor horsepower is operating within the Montana portion of the Powder River Basin.

analysis of cumulative ground and surface water impacts includes a comprehensive consideration of past, present and future actions, including all the projects identified in the EAs as those that would be considered in the cumulative impact analysis. The analysis of cumulative impacts completed by the MCFO includes consideration of the state and private portions of projects and is consistent with the projection of increased numbers of producing CBNG wells discussed in the Deer Creek North EA at page 4-23. A substantial part of the analysis completed for surface water and groundwater is found in Chapter 3 of the Deer Creek North and Decker Mine East EAs to accurately describe the existing conditions (past and present actions). All of the CBNG projects that are already in operation in Montana and Wyoming that have the potential to affect the Tongue River and the potential area of groundwater drawdown are included in the analysis of the existing conditions (see Deer Creek North EA, pages 3-15 through 3-23 and pages 12 and 13, Appendix F Hydrology and Decker Mine East EA, pages 3-11 through 3-19 and pages 13 and 14, Appendix F).

The Northern Cheyenne argue that the Fourmile East and West PODs should be included in the cumulative impact analysis without identifying any cumulative issues of concern. No attempt is made to provide any reasons why the Fourmile East and West PODs should be considered in the cumulative impact analysis except that these projects have been identified on maps the BLM has shared with the Northern Cheyenne. No evidence is provided to demonstrate how the geographic scope of the Fourmile PODs warrant consideration of these projects as cumulative actions, or how the potential impacts of these projects could contribute to impacts that are also potential direct or indirect impacts from the North Deer Creek and Decker Mine East PODs.

The Fourmile East and West PODs were submitted to the MBOGC and orders were granted by the MBOGC. However, no actions have been taken to further the likelihood of these projects moving forward. At this time, the MBOGC orders are still contingent on completion of an environment assessment by the MBOGC staff. The MBOGC orders were granted in September and November 2006 and the Northern Cheyenne provide no evidence to indicate the Fourmile East and West PODs were reasonable foreseeable at the time the Deer Creek North and Decker Mine East EAs were prepared. No additional action has been taken to initiate the EA process for the Fourmile East or West PODs with the MBOGC.

We find the determination of the components of past, present and reasonably foreseeable future actions that were included as part of the cumulative impact analysis was fully informed and properly considered.

5. THE EA FAILS TO TAKE A HARD LOOK AT THE PROJECT'S IMPACTS

The Northern Cheyenne Argue:

The EA significantly under represents the potential impacts of the Deer Creek North POD if the 34 federal wells using monobore technology for this project are compared to the original 137 individual seam wells and the number of wells that were projected to be drilled in the region based on individual seam technology.

Because monobore technology changes the impact analysis with respect to produced water volume and rate, surface disturbance, and other factors, this technology and the differences between it and individual seam technology relied on for most of the assumptions in the Statewide FEIS and Draft SEIS must be analyzed in the EA. The BLM's failure to do so violates NEPA's hard look requirements.

Response:

The response to comments on the Deer Creek North EA clarifies that the water production rates used for the analysis are based on existing data from monobore wells in the area and groundwater drawdown is comparable to drawdown experienced from single coal completions.

The subject EAs also discuss surface disturbance impacts, CBNG production, and associated social and economic impacts expected from drilling monobore wells. We find the Deer Creek North and Decker Mine East EAs properly disclose the potential impacts that would be a result of the monobore drilling technology[3].

6. THE BLM FAILED TO ENSURE THAT THE PROJECT'S MANAGEMENT OF PRODUCED WATER COMPLIES WITH THE CLEAN WATER ACT; THE EA FAILS TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES; AND THE EA FAILS TO EVALUATE THE CONFLICT OF THE PROJECT WITH TRIBAL LAW

The Northern Cheyenne Argue:

The EA discuss the water quality of the Tongue River and states that "degradation of high quality water is not allowed unless authorized by [MDEQ] under 75-5-3033, MCA." EA at 3-15 to 3-16. Yet it is clear that discharge of CBM produced water continues to degrade the water quality of the Tongue River with respect to electrical conductivity (EC) and sodium adsorption ration (SAR) levels. While the end result of these discharges has not yet led to an exceedence of the River's water quality standards for these parameters, by BLM's own interpretation of Montana water law, the water quality is being degraded and must therefore satisfy the non-degradation review of MCA75-5-303(3). No such review has occurred. In fact, MDEQ has steadfastly refused to acknowledge its obligation to carry out such a review under both state and federal law, and the EA's assertion that MDEQ has done a nondegradation review, EA at 4-17, is incorrect. BLM should not approve a water management plan that authorizes such clear violations of the Clean Water Act's nondegradation principle.

[3] The Statewide FEIS and the December 2006 Draft Supplement to the Montana Statewide Oil and Gas Environmental Impacts Statement and Amendment of the Powder River and Billings Resource Management Plans require multiple coal seam development from a single well bore as part of Alternatives B and D. See Statewide FEIS, Table 2-2, page 2-18. However, the term "monobore" was not used to describe the technique in these documents.

The antidegradation requirement under the Clean Water Act's implementing regulations is not restricted to the permitting process, as BLM asserts. Indeed, the law requires for high quality waters, "that quality shall be maintained and protected unless the State [undertakes a thorough nondegradation review.]" 40 C.F.R. § 131.12(a)(2) emphasis added. This requirement is not limited to the pre-discharge permitting process, particularly when MDEQ never properly applied antidegradation review when issuing the Fidelity permits. Rather, it is an ongoing obligation, the nature of which is made clear in the Montana Water Quality Act's definition of "degradation" as "a change in water quality that lowers the quality of high-quality waters for a parameter." The prohibition on degradation, which is not fixed in time, must be examined by BLM under its obligation to comply with federal law.

In its comment letter, the Tribe proposed that BLM analyze an alternative similar to Alternative C, the proposed action with additional mitigation, but requiring Fidelity to use the full capacity of its "treatment" permit No. 30724 before discharging any produced water directly to the Tongue River under Permit No. 30457. This similar, but substantially improved, alternative would be consistent with BLM's description of the purpose and intent of Alternative C, the agency's preferred alternative, as adding mitigation measures to "avoid or reduce impacts to cultural, social and natural resources", BA at 2-1, and would achieve BLM's objective of "modify[ing] the proposed action…to ensure that undue environmental effects will not result from federal actions," EA at 1-2. It is also consistent with the stated purpose and need of the EA. EA at 1-1.

Although the EA was revised following the Tribe's comments to include a discussion of the Tribe's "Treatment as State" status and the surface water quality standards and nondegradation criteria adopted by the Tribe, EA at 3-21, there is no discussion in Chapter 4 about the likely violation of the Tribe's nondegradation standards caused by the Project.

Response:

Several claims described separately in the Northern Cheyenne's SDR request are combined as a single claim in this review. We have grouped these claims together because they are all premised on interpretations of an existing antidegradation (nondegradation) program and rules, and claims that the nondegradation criteria are applicable to the subject cases and are appropriate measures to use as NEPA significance factors, and finally are directly related to the Federal Land Policy and Management Act of 1976 (FLPMA) mandate to comply with applicable laws.

The language from page 3-21 of the Deer Creek North EA describes the BLM's interpretation of the relevance of State and Tribal nondegradation criteria to the BLM's analysis and how the EA will measure potential surface water quality impacts. In summary, the nondegradation provisions are applied by the National Pollutant Discharge Elimination System (NPDES) (or in this case MPDES since the State of Montana is delegated authority) issuing agency or Tribe,

delegated to implement the program, when a permit is requested for a "new or increased source" (ARM § 17.30.705).[4] The MDEQ's water quality information web site further clarifies that the Department (MDEQ) will ensure compliance with the nondegradation requirements before issuing permits, licenses or authorizations that are regulated by the Department. These criteria serve as a trigger during the permitting process, which may require the permitting agency to look more closely at a proposal, and then take appropriate action (i.e., issuance of a permit to degrade or denial of the proposed permit). These are triggers, and are not intended to be used in stream, and are not intended to be used for evaluation of existing discharges. The in stream standards are specifically developed in order to protect beneficial uses and, as such, it is more appropriate to use them to provide a significance threshold from a NEPA perspective (i.e., are beneficial uses affected) or to determine compliance with FLPMA's mandate to comply with applicable laws.

The Deer Creek North and Decker Mine East EAs include a rigorous analysis of surface water quality impacts. The results of the analyses indicate that the action alternatives would not cumulatively cause the beneficial uses of the Tongue River to become impaired due to comparisons with both Tribal and State SAR and EC standards, or any other standards included in the MDEQ analysis for the existing MPDES permits. See Deer Creek North EA at pages 4-18 through 4-20 and 4-36, and Decker Mine East EA at pages 4-19 through 4-21 and 4-35.

Alternatives in an EA shall "…include brief discussions…of alternatives as required by section 102(2)(E),…" (40 CFR 1508.9(b)). Section 102(2)(E) of the NEPA provides that agencies of the federal government shall "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

Similar comments were provided during the public comment period provided for the Deer Creek North EA. The BLM properly considered these comments by either making changes to the EA or including responses in the EA made available to the public with the FONSI and DR. The responses address many of the same issues related to concerns about the applicability of nondegradation criteria and specifically disclosed that Alternative C was not modified to require use of full capacity of the treatment permit because the analysis did not identify unresolved conflicts or impacts that required additional mitigation. See Deer Creek North EA, Appendix I at pages 29 through 32.

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[4] The Draft Northern Cheyenne Standards include a section that describes the scope of the antidegradation policy and review process. Section 1.4.2. states; "The Department will conduct some level of antidegradation review for all "regulated activities" (see definition in Section 3.1.1) that have the potential to affect existing water quality. The specifics of the review will depend upon the waterbody segment that would be affected, the tier of antidegradation applicable to that waterbody segment, and the extent to which existing water quality would be degraded." Definitions are actually found at Section 1.3.3. This section defines regulated activity to mean; "…any activity that requires a permit or a water quality certification pursuant to federal law (e.g. §402 NPDES permits, CWA §404 dredge and fill permits, FERC licenses, any activity requiring an CWA § 401 certification), and any other activities (which may include nonpoint sources of pollution) where tribal regulation specify that an antidegradation review is required."

The Northern Cheyenne continue to disagree with the analysis the BLM and MDEQ are using to disclose water quality impacts. The Northern Cheyenne's opinion about the water quality analysis completed by the BLM and MDEQ is not supported by objective proof that demonstrates a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the actions under consideration by the MCFO.

7. THE EA FAILS TO INCLUDE A DISCUSSION OF MITIGATION MEASURES FOR THE PROJECT'S IMPACTS TO WATER AND AIR QUALITY

The Northern Cheyenne Argue:

The EA fails altogether to discuss a mitigation measure that can easily be incorporated into Fidelity's proposed water management plan and would directly address the significant impact to surface water quality caused by this Project - full utilization of Fidelity's MPDES Permit No. 30724. Discussed more fully above, this permit requires treatment of produced water to in stream standards prior to discharge to the Tongue River. Although the permit's capacity of 1700 gpm is not fully utilized; BLM has authorized additional produced water to be discharged without treatment under Permit No. 30457. This failure to analyze or incorporate an obvious mitigation measure undermines the agency's conclusion that the conditions in Alternative C "contain all practicable means to avoid or minimize environmental harm." FONSI/DR at 6. There is no mitigation provided for air quality impacts.

Response:

The Northern Cheyenne's arguments regarding mitigation measures for potential impacts to surface water quality are directly linked to the arguments addressed under Issue 6. The arguments included with this claim do not provide any additional information to demonstrate these projects result in any significant impacts to surface water quality or air quality.

As previously stated, the results of the analyses for the Deer Creek North and Decker Mine East projects indicate that the action alternatives would not cumulatively cause the beneficial uses of the Tongue River to become impaired due to comparisons with both Tribal and State SAR and EC standards, or any other standards included in the MDEQ analysis for the existing MPDES permits. Likewise, the air quality analysis demonstrates that CBNG development, including the proposed actions; comply with the Class I and II PSD increments and NAAQS/MAAQS.

The Northern Cheyenne have not demonstrated an error of fact, a clear error of law, or a failure to evaluate a substantial environmental question. Claims that no mitigation is provided are not supported by the record. The Deer Creek North and Decker Mine East PODs are subject to the

design features of the proposed PODs, conditions of existing MDEQ issued MPDES permits and Air Quality Permits[5], and the additional mitigation measures required by the BLM[6]. No compelling arguments are provided to convince us there is a need to evaluate additional mitigation measures.

8. BLM'S FAILURE TO CONSULT WITH THE NORTHERN CHEYENNE TRIBAL HISTORIC PRESERVATION OFFICE (THPO) AFTER FIDELITY SUBMITTED A REVISED POD VIOLATED THE NATIONAL HISTORIC PRESERVATION ACT (NHPA).

The Northern Cheyenne Argue:

BLM made determinations of "no adverse effect" for both the 2006 Amended POD and the 2008 Revised/Combined POD. EA at App- I Response to Comment 53. But, while the agency did consult on the changes to the Project since 2005 with the SHPO, there was no consultation with, let alone notification of, the Northern Cheyenne THPO. This is not only contrary to the clear requirements of the NHPA, but undermines the assertions BLM has made regarding its intention to improve consultation with the Tribe. The absence of consultation, particularly when BLM was consulting with the THPO's state counterpart, violates the agency's obligation to make a "good faith effort" to consult with the Tribe.

We agree the BLM has an affirmative duty to make reasonable and good faith efforts to consult with the Tribe under the NHPA's Section 106 implementing regulations or the National Programmatic Agreement[7]. In this case the Northern Cheyenne agree proper consultation occurred on the original project filed with the BLM on January 31, 2005. There is also no dispute about the Northern Cheyenne's findings based on the consultation process completed for the original project. These findings are described on page 3-7 of the Deer Creek North POD EA.

The Northern Cheyenne claim Mr. Fisher, with the THPO, was not consulted on this project after April 2005. However, concerns questioning the adequacy of consultation for this project didn't surface until the Northern Cheyenne submitted comments on the Deer Creek North EA on August 26, 2008. This version of the Deer Creek North POD EA, documented the changes to the

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[5] For example, MDEQ Air Quality Permits include specific emission limitations, testing requirements and operational reporting requirements.

[6] For example, the approved POD requires that water or other non-saline dust suppressants with at least 50 percent control efficiency must be applied during well site, battery site and road construction. It also requires that dust inhibitors (surfacing materials, non-saline dust suppressants and water) must be used as necessary on unpaved roads that present a fugitive dust problem.

[7] The reason leading to the District Court's June 6, 2005 determination regarding the applicability of the 1997 National Programmatic Agreement no longer exists. The BLM has amended the Native American consultation section of its Manual. See BLM Manual - 8120 - TRIBAL CONSULTATION UNDER CULTURAL RESOURCE AUTHORITIES and Handbook - H-8120-1 - GUIDELINES FOR CONDUCTING TRIBAL CONSULTATION, both dated December 3, 2004.

POD since April 2005, details about the cultural resource inventories completed and properties identified, and the BLM's findings regarding effects to Historic Properties. The information regarding cultural resources found in the EA shared with the Northern Cheyenne by letter dated August 11, 2008, is similar to the information described in the letter to the State Historic Preservation Office (SHPO) on July 25, 2008.

As evidenced by the comments in the Northern Cheyenne's letter, there is an established relationship between the MCFO's archaeologist (Doug Melton) and THPO although specific procedures for the consultation process have not been worked out between the Northern Cheyenne and the MCFO. The Northern Cheyenne and MCFO continue to work on a memorandum of understanding (MOU) to identify specific consultation protocols. Consultation procedures are worked out between the MCFO archaeologist and THPO for each case at this time. This arrangement has been successful because of the established relationship previously described.

Although the Northern Cheyenne claim no contact was made between the MCFO and the THPO regarding the Deer Creek North POD after April 2005, the record indicates otherwise. On March 13, 2008, a consultation meeting was held between the Northern Cheyenne and the BLM. The status of the Deer Creek North POD was a specific topic on the agenda for this meeting (Enclosure 4). The combined elements of the Deer Creek North POD and the BLM's plans to complete an EA for this project were discussed. Mr. Fisher and Mr. Melton also discussed the cultural inventories completed for the project and Mr. Fisher's previous trip out to the field to evaluate cultural resources and their proximity to proposed development activities planned for the Deer Creek North POD. This discussion did not in any way indicate a desire or the need for additional consultation for the Deer Creek North POD.

On August 11, 2008, the MCFO sent a letter to Mr. Fisher (Enclosure 5). This letter described the Deer Creek North POD, included an internet site for viewing or downloading the EA and FONSI, and identified the BLM's period for public comment. As previously stated, the Northern Cheyenne did provide comments by letter dated August 26, 2008. There was no correspondence between the THPO and the MCFO before the August 26, 2008 letter indicating the need to revisit or modify the consultation efforts completed for this project.

On September 12, 2008, the MCFO received a Native American Consultation Response Form from the Northern Cheyenne THPO (Enclosure 6). Although undated and unsigned, Mr. Fisher's name is included on the form and it clearly indicates it was completed for the Deer Creek North POD. This form includes a condition under the "response" section to notify the SHPO and applicable Native American Tribes if archaeological materials or human remains are encountered during construction. This condition is part of the approved Deer Creek North POD.

The MCFO responded to the Northern Cheyenne's comments concerning the adequacy of consultation efforts in the EA made available to the public along with the FONSI and DR. See Deer Creek North EA, Appendix I at page 33. This response described the history of the project with respect to consultation efforts and why the MCFO determined consultation with the

Northern Cheyenne was appropriate for the specific circumstances surrounding the Deer Creek North POD.

While consultation could have included additional discussions and documentation between the MCFO and the Northern Cheyenne, we believe the events that took place in this case are unique and actions by both parties contributed to the final outcome. We believe the MCFO acted in good faith and in compliance with the NHPA in this case. However, the MCFO needs to provide a copy of the documentation it sent to the SHPO on July 25, 2008. This information should be provided to the Northern Cheyenne promptly upon receipt of this Decision.

DECISION

After careful review of the written SDRs, I affirm the September 30, 2008, DRs and FONSIs approved by the BLM Miles City Field Manager. The MCFO completed a careful review of environmental problems, all relevant environmental concerns have been identified, the final determination is reasonable and the Miles City Field Manager correctly determined an EIS was not necessary. The scope of the projects is appropriate. The analysis of the environmental impacts from the projects is comprehensive and the conclusion that these impacts, as the projects are designed with additional mitigation measures are not significant is correct. As stated above, the MCFO must provide a copy of the documentation and attachments it sent to the SHPO on July 25, 2008. This information must be provided to the Northern Cheyenne promptly upon receipt of this Decision.

This Decision may be appealed to the Board of Land Appeals Office of the Secretary, in accordance with the regulations contained in 43 CFR 4.400 and Form 1842-1 (Enclosure 7). If an appeal is taken, a Notice of Appeal must be filed in this office at the aforementioned address within 30 days from 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 3165.4(c), 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 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.

In case of an appeal, the adverse parties to be served are:

Fidelity Exploration & Production Company
Attn: Mike Keller
1700 Lincoln Street Suite 2800
Denver, Colorado 80203

/s/ Theresa M. Hanley

Theresa M. Hanley
Deputy State Director
Division of Resources

7 Enclosures
1-Deer Creek North POD FONSI and DR Dated September 30, 2008 (21 pp)
2-Decker Mine East POD FONSI and DR Dated September 30, 2008 (23 pp)
3-Northern Cheyenne Tribe SDR Request Dated October 28, 2008 - SDR-922-09-01 (19 pp)
4-Northern Cheyenne Tribe and the BLM Consultation Meeting Agenda and Minutes Dated March 13, 2008 (8 pp)
5-Deer Creek North POD EA Notice of Availability for Public Comment Letter Dated August 11, 2008 (3 pp).
6-Northern Cheyenne Tribe Native American Consultation Response Form (1 pp)
7-Form 1842-1 (2 pp)

cc: (w/encls.)
Miles City Field Office
Fidelity Exploration & Production Company, Attn: Mike Keller, 1700 Lincoln Street Suite 2800, Denver, Colorado 80203

cc: (w/o encls.)
WO-300, MIB, Rm 3222
WO-310, LS, Rm. 501
WO-200, MIB, Rm. 5650
WO-240, LS, Rm. 204
North Dakota Field Office
Great Falls Field Station
AKSO, ARSO, CASO, COSO, ESO, IDSO, NVSO, NMSO, ORSO, UTSO, WYSO
MT-923
MT-924

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