

MAY 20 2013

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

PAID  
RECEIPT# \_\_\_\_\_

May 20<sup>th</sup>, 2013

*Via Facsimile (505-954-2010) and hand delivery*

**RE: Protest of the Bureau of Land Management's Decision to Offer Twelve Parcels in the Las Cruces District for the July 2013 Oil and Gas Lease Sale (DOI-BLM-NM-L000-2012-0156-EA)**

Pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3, New Mexico Wilderness Alliance, The Wilderness Society, Sierra Club, New Mexico Wildlife Federation, and the Southwest Environmental Center (collectively, "Protesting Parties") protest the Bureau of Land Management's decision to offer twelve parcels in the Las Cruces District Office ("LCDO") in the New Mexico State Office's July 2013 oil and gas lease sale, although our concerns remain the same for the twenty-seven parcels the BLM is proposing to defer to the January 2014 lease sale. The parcels subject to this protest are referred to as the "Protested Parcels" throughout this protest.

**INTERESTS OF THE PARTIES**

*New Mexico Wilderness Alliance* (NMWA) is dedicated to the protection, restoration, and continued enjoyment of New Mexico's wild lands and Wilderness areas. NMWA represents more than 5,000 members and supporters who are concerned about the preservation of open spaces and public lands in New Mexico, including those offered for leasing by the BLM in the July 2013 lease sale.

*The Wilderness Society* (TWS) protects wilderness and inspires Americans to care for our wild places. TWS represents more than a half million members and supporters nationwide, all of whom have a great interest in the protection and enhancement of the natural values and recreational opportunities provided by our public lands, including lands that are included in or may be affected by New Mexico's July 2013 lease sale.

*The Rio Grande Chapter of the Sierra Club* has an overarching concern for Global Warming impacts, including drought in the Southwest. The Rio Grande Chapter works through active volunteer members and friends to support science based land and wildlife management programs and policies. The Chapter empowers its members with active participation opportunities in both the public processes of sound land use and wildlife management policy formulation and the hands-on personal experience of opens spaces and wildlife appreciation in New Mexico.

*New Mexico Wildlife Federation* dedicated to protecting New Mexico's wildlife, habitat and outdoor way of life. It brings diverse groups together, focusing on common interests, to make the big changes that make a difference for its members. It is the voice for New Mexico's conservation-minded sportsmen and outdoor enthusiasts.

*The Southwest Environmental Center* works to protect and restore wildlife and their habitats in the southwest border region through advocacy, education and on-the-ground restoration projects. Its 2000 members, most of whom live in southern New Mexico, enjoy a variety of outdoor activities on public lands managed by the BLM LCDO, including parcels included in this proposed lease sale.

### **AUTHORIZATION TO FILE THIS PROTEST**

Judy Calman is Staff Attorney for NMWA. Nada Culver is Senior Counsel and Director of TWS's BLM Action Center. They are authorized to file this protest on behalf of the Protesting Parties and their members.

### **STATEMENT OF REASONS**

#### **LCDO DOES NOT HAVE A VALID LEASING PLAN WHICH WILL SUPPORT LEASING.**

As acknowledged by the BLM in the Environmental Assessment (EA) it prepared for the July 2013 lease sale, "[t]he decision as to what public land and minerals are open for leasing and what leasing stipulations may be necessary...is made during the land use planning process" (EA for July 2013 Competitive Oil and Gas Lease Sale, page 2). However, the BLM has admitted that the analysis within the 1986 White Sands Resource Management Plan (RMP) is "insufficient for management of the [oil and gas] resource" in Otero County, where all parcels subject to this protest are located, and a federal court struck down a subsequent oil and gas leasing amendment. Therefore, because LCDO lacks a legally acceptable leasing plan, LCDO lacks authority to offer any new leases before an adequate leasing plan is created.

#### **I. LCDO determined in 1998 that the White Sands RMP could not support leasing because it did not comply with applicable laws, guidance, and manuals.**

The White Sands RMP was issued in 1986 to cover planning decisions in Otero and Sierra counties. Because of a general lack of interest in oil and gas development, a comprehensive leasing plan was not included in that RMP's EIS. In 1992, BLM Handbook 1624 was updated, and the BLM was directed to determine which lands overlying Federal fluid minerals were suitable and available for leasing and subsequent development, and how those leased lands would be managed. In 1998, increased interest in potential gas development in Otero County prompted the BLM to review the 1986 RMP, and the agency determined it was required to do an RMP Amendment.

The BLM noted in its Federal Register notice to prepare an Amendment in 1998 that:

Previous environmental and planning documents were prepared to address fluid minerals leasing for this area (public land in Sierra and Otero Counties), including...the White Sands RMP completed in 1986. However, large increases in oil and gas lease nominations in 1998 prompted the BLM to review the RMP. It was found to lack information to make leasing decisions commensurate with the increased leasing nominations and potential subsequent exploration and development (63 Federal Register 55404 (October 15<sup>th</sup>, 1998)).

The goal of the RMP Amendment process was to “determine which public land and fluid minerals should be available for leasing, and what requirements (stipulations) may be needed to protect other resource values” (63 Federal Register 55404 (October 15<sup>th</sup>, 1998)). It set out to answer questions such as which areas should be closed to leasing, which areas should be open, and which leasing stipulations from the White Sands RMP were still appropriate to use.

The BLM was clear in its determination that the White Sands RMP was an inadequate tool to guide leasing decisions within the two counties according to the BLM’s requirements by law and its guidance. Indeed, in its subsequent Draft RMP Amendment in 2000, the agency stated that, “[g]iven the lack of direction in the existing 1986 RMP and the increased level of interest in exploration, it was determined that an amendment to the 1986 RMP is *required* to guide leasing decisions on public land in order to comply with the 1992 supplemental guidelines” (Draft RMP and EIS for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties, Purpose and Need, page 1-1 (2000) (emphasis added)).

The BLM has repeatedly and plainly acknowledged that it can no longer use the White Sands RMP to guide new leasing decisions. The fact that one of the goals of the RMP Amendment process was specifically to determine which portions of the old plan could still be used underscores this point. Additionally, the BLM determined in the Draft EIS for the RMP Amendment in 2000 that the No Action Alternative, which would have meant not having a leasing plan and reviewing leases on a case-by-case basis (exactly what LCDO is proposing here), would be inconsistent with its own policies, and that Alternative was eliminated (See *New Mexico v. BLM*, 565 F.3d. 683 at 690 (10<sup>th</sup> Cir. 2009)).

Finally, the BLM again acknowledged the need for a new plan in its recently issued Draft Tri-County RMP, when it stated, “[t]he BLM has previously determined that these planning decisions (White Sands and Mimbres RMPs) are insufficient for management of this resource and that there is a need to develop a management strategy for oil and gas leasing in the Tri-County planning area *prior to any further leasing* (Draft Tri-County RMP, Section 1.8.1, page 1-16 (emphasis added)). Thus, the BLM may not rely on the White Sands RMP to support the proposed leasing decision.

## **II. The 10<sup>th</sup> Circuit Court of Appeals invalidated LCDO’s revised plan in 2009, and precluded LCDO from offering new leases until an acceptable replacement plan was established.**

After the Final EIS for the RMP Amendment was issued in 2004, litigation ensued between the BLM, the State of New Mexico, and environmental groups. The Court determined

that the leasing plan issued by LCDO was not sufficient to comply with NEPA or FLPMA, because it did not fully analyze its selected alternative, its range of alternatives was too narrow, and it did not adequately consider potential impacts to the Salt Basin Aquifer.

The Court ordered the agency to complete a new analysis, and confirmed that such an analysis would have to be completed before the BLM would be allowed to lease under a new plan (*New Mexico v. BLM*, 565 F.3d. 683 (10<sup>th</sup> Cir. 2009)). It additionally noted that, “[i]f the agency wishes to allow oil and gas leasing in the plan area it must undertake additional analysis...but it retains the option of ceasing such proceedings entirely” (*Id.* at 698). Notably, the Court agreed with the BLM’s internal conclusion that the 1986 White Sands RMP could not be used to support leasing in the two counties.

### **III. LCDO did not propose an acceptable plan in its Draft Tri-County RMP, and cannot tier the EA for these leases to the White Sands RMP.**

On April 12<sup>th</sup>, 2013, LCDO issued a Draft RMP/EIS for the Tri-County area, which includes Otero, Sierra, and Dona Ana counties. Oil and gas leasing is not addressed in the Draft RMP; instead, the BLM proposes to defer all oil and gas leasing within the planning area until an RMP Amendment is completed within five years. As stated in Section 1.8.1 of the Draft RMP, “analysis of oil and gas leasing and development will take place in an RMP Amendment accompanied by suitable programmatic NEPA analysis...[u]ntil the programmatic NEPA analysis and the RMP Amendment are completed, oil and gas leasing in the Tri-County Planning Area will be deferred”.

In our meetings with the LCDO since the Draft RMP was issued, the agency contends two things with regards to this statement. First, it contends that the referenced “deferral” will not begin until after the record of decision (ROD) for the Tri-County RMP is signed, and that until such time, their leasing decisions may be governed by the White Sands RMP. Second, it contends that the deferral does not refer to the sale of individual leases, but rather to leasing decisions on a landscape level. We strongly contest both of these assertions.

With regards to deferral only taking place after the ROD is signed for the RMP, we believe it would be improper to admit that a new leasing plan for oil and gas is required for Otero County, and then assert that the need is miraculously on hold for an unspecified number of years until there is a Final RMP for the Tri-County area. That the White Sands RMP is obsolete has been remarkably well-established, both by the Tenth Circuit and the BLM itself. In other words, to acknowledge in the Draft RMP that LCDO is required to do an RMP Amendment in order to be in compliance with law, guidance, and a court order, and then attempt to return to the archaic plan for a short-term leasing spree is arbitrary, capricious, and an abuse of agency discretion.

Regarding what LCDO means to defer, we believe it would be disingenuous to tell the public that the sentence, “oil and gas leasing in the Tri-County Planning Area will be deferred” means anything other than its plain meaning. If LCDO meant “landscape level” leasing decisions, it should have said so in the Draft RMP. As it stands, it has stated to the public that leasing itself will be deferred in Otero County until a plan-level analysis of leasing is completed, and it must comply with that commitment.

Because the White Sands RMP was invalidated by the 10<sup>th</sup> Circuit Court of Appeals, and LCDO itself, the agency cannot rely on the 1986 plan for its leasing decisions. Because no valid plan has been subsequently issued by LCDO, it cannot offer new leases in Otero County.

## **THE EA DID NOT CONSIDER SITE-SPECIFIC IMPACTS OF THE LEASES, AS REQUIRED BY LAW AND BLM GUIDANCE.**

As discussed above, by tiering this EA to the invalid 1986 White Sands RMP in order to establish authority for offering these parcels in the July 2013 lease sale, LCDO is effectively issuing leases without an acceptable accompanying EIS. This means that at the very least, LCDO was required to complete an EIS for the sale of these parcels, including an analysis of site-specific impacts.

NEPA and BLM guidance documents require adequate analysis of site-specific impacts before leases may be offered, or at least as soon as potential impacts are “reasonably foreseeable,” as they are here (See 40 C.F.R. § 1502.22; See also BLM Instruction Memorandum 2010-117, *Oil and Gas Leasing Reform*). NEPA analyses must be completed “at the earliest practicable point” and “before any irretrievable commitment of resources” (42 U.S.C. § 4332(2)(C)(v); *Pennaco Energy, Inc. v. U.S. Dep’t of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004)). The Tenth Circuit established that issuing a lease without a No Surface Occupancy (NSO) stipulation constitutes an irretrievable commitment of resources (*New Mexico v. BLM*, 565 F.3d. 683 at 718 (10<sup>th</sup> Cir. 2009)). None of the parcels offered for lease here contain an NSO stipulation; surface disturbance will occur when any of the leases are developed, meaning there has been an irretrievable commitment of resources requiring site-specific NEPA analysis.

Further, the EA issued for the July 2013 lease sale does not consider recent developments in federal courts and is therefore deficient. For example, in the recent case of *Center for Biological Diversity v. Bureau of Land Management* (N.D. Cal. March 31, 2013), the BLM was found to have violated NEPA by issuing leases without analyzing the effects of hydraulic fracturing (fracking) while relying on a 2006 RMP. Like LCDO, in that case the BLM claimed that an EIS was not necessary at the leasing stage because they had tiered their EA to the 2006 RMP, even though the 2006 RMP had not accounted for a recent increased interest in developing the area. The Court reiterated that an EIS and site-specific analysis is required before leasing parcels without NSO stipulations, and also noted that because fracking technologies and uses have improved and changed in the last decade, older RMPs may not be used to determine the impacts of fracking in areas of new leasing. The LCDO does not mention fracking impacts at all in its lease sale EA, and is attempting to tier its analysis to an RMP which is twenty years older than the one invalidated by the recent court decision.

In the EA for the July 2013 lease sale, LCDO relies on old lease stipulations from the 1986 White Sands RMP without any adequate site-specific analysis at any of the individual parcels. As required by the Tenth Circuit, the BLM is required to complete a leasing plan with site-specific analysis before offering any of the parcels for lease.

## **CONCLUSION**

For the foregoing reasons, the BLM must defer the Protested Parcels from the July 2013 lease sale and should commit to continuing to defer these parcels until an actual, compliant oil and gas leasing plan can be completed. The BLM recently took such a step for the Taos and Rio Puerco field offices (deferring leasing until the completion of adequate RMPs) and must now do so for

LCDO.<sup>1</sup> We would be happy to discuss these comments with you in further detail or to answer any questions you may have regarding the information we have provided, and we look forward to your response.

Sincerely,



Judy Calman  
Staff Attorney  
New Mexico Wilderness Alliance  
142 Truman St. NE #B-1  
Albuquerque, NM 87108  
505-843-8696 x 102

Nada Culver  
Senior Counsel and Director, BLM Action Center  
The Wilderness Society  
1660 Wynkoop Street, #850  
Denver, CO 80202  
303-650-5818 Ext. 117

---

<sup>1</sup> See

[http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/0/og\\_sale\\_notices\\_and/2012/january\\_2012.Par.134.26.File.dat/RPFO\\_Parcels\\_Jan2012.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/0/og_sale_notices_and/2012/january_2012.Par.134.26.File.dat/RPFO_Parcels_Jan2012.pdf) (Rio Puerco) and  
[http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/0/og\\_lease\\_sale\\_nominated/july\\_2011.Par.55809.File.dat/TaFO%20Parcels%20July%202011.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/0/og_lease_sale_nominated/july_2011.Par.55809.File.dat/TaFO%20Parcels%20July%202011.pdf) (Taos).