



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Utah State Office
440 West 200 South, Suite 500
Salt Lake City, UT 84101
<http://www.blm.gov/ut/st/en.html>



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May 20, 2014

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DECISION

Rocky Mountain Wild	:	Protest to the Inclusion of Certain
Matthew Sandler, Staff Attorney	:	Parcels in the May 20, 2014
1536 Wynkoop, Suite 303	:	Competitive Oil and Gas Lease Sale
Denver, Colorado 80202	:	
	:	
WildEarth Guardians	:	
319 South 6 th Street	:	
Laramie, Wyoming 82070	:	

Protest Dismissed

On February 14, 2014, the Bureau of Land Management (“BLM”) Utah State Office posted a Notice of Competitive Lease Sale (“NCLS”), which identified parcels of land located within the BLM Utah’s Richfield (“RFO”), Moab and Monticello Field Offices that would be offered at a competitive oil and gas lease sale scheduled for May 20, 2014. In a letter received by this office on March 13, 2014, Rocky Mountain Wild and WildEarth Guardians (together “RMW”) collectively protested two parcels (“Protested Parcels”)¹ included on the NCLS.

In protesting the inclusion of the Protested Parcels on the NCLS, RMW has generally alleged that the BLM failed to comply with agency directives related to the conservation of greater sage-grouse and violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1701 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* A detailed description of each

¹ In section I of its protest, which it titled “Protested Parcels”, RMW identifies parcels UTU90339 (UT0514-039) and UTU90346 (UT0514-059) as the two parcels protested. However, in section III.A of its protest, RMW refers to parcels UTU90330 (UT0514-015) and UTU90346 (UT0514-059) in discussing the parcels protested. The RMW protest letter does not include an affirmative clarification as the aforementioned discrepancy in the parcels protested. As such, this decision was based upon a consideration of parcels UTU90330 (UT0514-015), UTU90339 (UT0514-039), and UTU90346 (UT0514-059) and references in this decision to the “Protested Parcels” are references to all three aforementioned parcels.

substantive contention alleged in the RMW protest, as well as BLM's response to each of those contentions, is provided below.

For the reasons set forth below, I have determined that offering of the Protested Parcels at the competitive oil and gas lease sale scheduled for May 20, 2014, is in compliance with BLM policies related to the conservation of greater sage-grouse, NEPA, FLPMA, ESA and all other applicable laws, regulations and policies. Accordingly, the protest submitted by RMW is dismissed in its entirety.

RMW Protest Contention # 1: BLM failed to comply with mandates imposed by BLM Washington Office (WO) Instruction Memorandum (IM) 2012-043 (“WO-IM-2012-043”).

BLM Response: WO-IM-2012-043, *Greater Sage-Grouse Interim Management Policies and Procedures*, established interim management policies to be applied by BLM offices within greater sage-grouse habitat while the land use planning actions provided for in BLM WO IM 2012-044 (“WO-IM-2012-044”), *BLM National Greater Sage-Grouse Land Use Planning Strategy*, are being developed. WO-IM-2012-043 directed each BLM state office to coordinate with their respective state wildlife agency in order to identify lands constituting “preliminary priority habitat” (“PPH”) for greater sage-grouse, which it defined as follows: “Areas that have been identified as having the highest conservation value to maintaining sustainable greater sage-grouse populations. These areas would include breeding, late brood rearing, and winter concentration areas.” The IM also provides specific requirements and procedures that BLM offices must adhere to when authorizing oil and gas leasing within areas designated as PPH. It is this aspect of WO-IM-2012-043, the requirements and procedures applicable to oil and gas leasing within PPH, that RMW has specifically cited and relied upon in alleging that BLM failed to comply with the mandates of that IM.

RMW has alleged that the Protested Parcels are located upon lands that a 2011 Utah Division of Wildlife Resources (“UDWR”) map identified as PPH for greater sage-grouse. The BLM acknowledges that small portions² of the Protested Parcels are located upon lands that the 2011 UDWR map identified as “occupied habitat” for greater sage-grouse. The BLM further acknowledges that “occupied habitat” for greater sage-grouse, as designated by the aforementioned 2011 UDWR map, has been applied by BLM Utah to identify the boundaries of PPH under WO-IM-2012-043. However, after consulting with UDWR and reviewing the best and most current greater sage-grouse data available for the specific lands where the Protested Parcels are located, BLM determined that the Protested Parcels contain neither greater sage-grouse nor existing habitat for greater sage-grouse. This determination, and the rationale for this determination, has been documented in the Environmental Assessment that was prepared by the RFO for the May 20, 2014, competitive oil and gas lease sale (“Lease Sale EA”; DOI-BLM-UT-C020-2013-027-EA). Lease Sale EA at Ch. 5.2 (pg. 26), Appendices C (pg. 88) and E (pg. 101).

² Approximately 360 of the 1,361.4 acres within parcel UTU90339 (UT0514-039) and approximately 120 of the 852.6 acres within parcel UTU90346 (UT0514-059) overlap with lands that were identified as “occupied habitat” for greater sage-grouse by the 2011 UDWR map. There are no lands in parcel UTU90330 (UT0514-015) that were identified as “occupied habitat” for greater sage-grouse by the 2011 UDWR map.

With regard to oil and gas lease authorizations within PPH, WO-IM-2012-043 provides the following:

“[W]here a field office determines that it is appropriate to authorize a proposed leasing decision...BLM will document the reasons for its determination and require the lessee to implement measures to minimize impacts to sage-grouse habitat” and “[u]nless the BLM determines, in coordination with the respective state wildlife agency, that the proposed lease and mitigation measures would cumulatively maintain or enhance Greater Sage-Grouse habitat, the proposed lease decision must be forwarded to the appropriate BLM State Director, State Wildlife Agency Director, and [US]FWS representative for their review...”

In preparation for the May 2014 competitive oil and gas lease sale, BLM coordinated extensively with UDWR, the state agency with jurisdiction over wildlife in the State of Utah. This coordination included the exchange of data and consultation regarding both existing data as well as additional data collected in preparation of the Lease Sale EA. In addition to the 2011 UDWR map referenced above, BLM and UDWR exchanged and reviewed several other sources of greater sage-grouse data for the Protested Parcels, many of which included both more current and site-specific information than the 2011 UDWR map. Of particular note, in August 2013, staff from the BLM RFO conducted site-visits to the Protested Parcels during which the absence of greater sage-grouse and existing greater sage-grouse habitat on the Protested Parcels was identified.

Following reviews of BLM and UDWR greater sage-grouse data, as well as aforementioned site-visits to the Protested Parcels, which collectively represented the best and most current BLM and UDWR greater sage-grouse data available for the Protested Parcels, BLM made the determination that the Protested Parcels contained neither greater sage-grouse nor existing habitat for greater sage-grouse and, as a result, it was unlikely that leasing the Protested Parcels would negatively impact greater sage-grouse or greater sage-grouse habitat. This determination, which has been documented in the Lease Sale EA and in the administrative record for the May 20, 2014, competitive oil and gas lease sale, was based upon, to a large degree, information and analysis that was obtained through coordination actions with UDWR specifically for the May 20, 2014, competitive oil and gas lease sale. *See* Lease Sale EA at Ch. 5.2 (pg. 26), Appendices C (pg. 88) and E (pg. 101).

The BLM also coordinated with the United States Fish and Wildlife Service (“USFWS”) regarding leasing of the Protested Parcels and during this coordination USFWS did not identify any concerns related to greater sage-grouse. On May 19, 2014, BLM received concurrence from USFWS with respect to the BLM’s “not likely to adversely affect” determination for the May 20, 2014, competitive oil and gas lease sale.

Considering the aforementioned determinations by BLM and UDWR regarding greater sage-grouse, as well as the manner in which BLM coordinated and consulted with UDWR and USFWS during the process of making this determination, it is clear that BLM’s decision to lease the Protested Parcels was made in a manner that is consistent with the requirement under WO-IM-2012-043 to “determine, in coordination with the respective state wildlife agency, that the proposed lease...would cumulatively maintain or enhance Greater Sage-Grouse habitat.”

Furthermore, because UDWR, the agency with jurisdiction over wildlife in the State of Utah, both coordinated and concurred with BLM's determination that leasing of the Protested Parcels would not adversely impact greater sage-grouse, the provisions under WO-IM-2012-043, which require forwarding of proposed leasing decisions to the BLM State Director, State Wildlife Agency Director, and USFWS representative for review, do not apply. Nonetheless, it should also be restated that in deciding to offer the Protested Parcels for lease, BLM has coordinated with UDWR, USFWS and the BLM Utah State Director.

For the reason set forth above, RMW's protest contention #1 is dismissed.

RMW Protest Contention #2: BLM's decision to lease the Protested Parcels undermines the land use planning actions currently being developed in Utah pursuant to WO-IM-2012-044.

BLM Response: As previously noted, WO-IM-2012-044 provides guidance to BLM offices with respect to the development of land use plan amendments or revisions intended to provide for the long-term conservation of greater sage-grouse and its habitat. RMW has alleged that the BLM Utah's decision to lease the Protested Parcels undermines the greater sage-grouse land use planning actions currently being developed in Utah pursuant to WO-IM-2012-044.

First, it should be restated that based upon a review of the best and most current BLM and UDWR greater sage-grouse data available for the Protested Parcels, which includes the "new" data collected and analyzed during site-visits, BLM determined that neither greater sage-grouse nor habitat for greater sage-grouse exists within the Protested Parcels. Considering this determination, it seems both obvious and logical to conclude that leasing the Protested Parcels will not adversely impact greater sage-grouse and, therefore, could not possibly undermine any potential management alternative in a forthcoming sage-grouse land use planning decision.

Notwithstanding the seemingly obvious conclusion that leasing of the Protested Parcels would not undermine a pending sage-grouse land use planning decision, it is clear that BLM's decision to lease those lands is consistent with both statutorily imposed requirements and existing BLM policy with respect to oil and gas leasing during periods of time when an amendment or revision to an existing land use plan is being developed. Section 302(a) of FLPMA, 43 U.S.C. § 1732(a), requires BLM, in managing the public lands, to do so accordance with the applicable land use plans, which it has established. In *Center for Native Ecosystems*, 174 IBLA 174, 177 (2008), the Board, citing to WO-IM-2004-110, elaborated upon the requirements of section 302(a) by noting that it is BLM policy to follow management decisions within an existing land use plan while amendments or revisions to that plan are being prepared. As documented in Chapter 1.5 of the Lease Sale EA, BLM has determined that leasing of the Protested Parcels, under the conditions provided for in the NCLS, is in fact in conformity with the existing applicable land use plan. Furthermore, it should be pointed out that RMW has not contested the consistency of leasing the protested parcels with the *existing* land use plan.

Thus, on the basis that RMW has not provided, nor is this office aware of, any specific evidence that would support an assertion that leasing the Protested Parcels would either be inconsistent with the existing land use plan or undermine a pending sage-grouse land use planning action, RMW's protest contention #2 is dismissed.

RMW Protest Contention #3: BLM violated NEPA by failing to: (a) adequately analyze the direct, indirect, and cumulative impacts of leasing the Protested Parcels on greater sage-grouse, (b) adequately analyze the effectiveness of lease stipulation and other mitigating measures on preventing significant impacts to greater sage-grouse, and (c) consider the best available science regarding greater sage-grouse.

BLM Response: (a) Direct, indirect and cumulative impacts: NEPA requires BLM to take a "hard look" at the potential environmental impacts of proposed federal actions. *See e.g. Southern Utah Wilderness Alliance*, 159 IBLA 220, 234-35 (2003). This "hard look" must identify relevant areas of environmental concern, which includes the direct, indirect and cumulative impacts of the proposed action. 40 CFR 1508.8. RMW contends that BLM failed to take the requisite "hard look" at the impacts of leasing the Protested Parcels on greater sage-grouse.

Direct impacts are caused by the action and occur at the same time and place. Indirect impacts are also caused by the action, but may occur later in time or farther removed in distance. 40 CFR 1508.8. As previously described in detail in the responses to contentions #1 and #2, the BLM RFO did consider the direct and indirect impacts of leasing the Protested Parcels on greater sage-grouse. To summarize briefly, after reviewing BLM and UDWR greater sage-grouse data, examining and collecting additional data during visits to the Protested Parcels, and coordinating with UDWR, it was determined that greater sage-grouse and greater sage-grouse habitat are not present within the Protested Parcels and, therefore, leasing the parcels would have neither direct nor indirect impacts upon greater sage-grouse. This analysis and determination as to the direct and indirect impact of leasing the Protested Parcels on greater sage-grouse is documented in Appendix C (pg. 88) of the Lease Sale EA.

With regard to the cumulative impacts on greater sage-grouse of leasing the Protested Parcels, 40 CFR 1508.7 provides that a "cumulative impact is the impact...which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." The BLM Utah NEPA Guidebook provides further guidance regarding cumulative impacts analysis by noting that if the proposed action would not have any direct or indirect impacts on a particular resource, there would also be no cumulative impacts on that resource. BLM Utah NEPA Guidebook at 75 (July 2010). Thus, because it was determined that greater sage-grouse and its habitat do not exist within the Protested Parcels and, therefore, leasing the Protested Parcels would have neither direct nor indirect impacts on greater sage-grouse, it may also be concluded that a cumulative impacts analysis is unnecessary. For the reasons stated above, RMW's contention that BLM failed to adequately analyze the direct, indirect and cumulative impacts of leasing the protested parcels on greater sage-grouse is dismissed.

Effectiveness of lease stipulations and other mitigating measures: For the same reasons detailed in subsection (a) of this response, most notably, BLM's determination that the Protested

Parcels contain neither greater sage-grouse nor its habitat, it is obvious there is no need to evaluate the effectiveness of lease stipulations or other mitigating measures for the protection of greater sage-grouse, which are not present within the Protested Parcels. Accordingly, subsection (b) of RMW's protest contention #3 is also dismissed.

(c) Consideration of the best available science: RMW has alleged that the BLM failed to consider the "best available science" regarding greater sage-grouse when making its decision to lease the Protested Parcels. In support of this contention, RMW has cited to a UDWR sage-grouse map that was issued in 2011, the National Technical Team (NTT) report on greater sage-grouse conservation measures, which was issued on December 21, 2011 and included as Attachment 1 to WO-IM-2012-044, and "other more recent reports and studies" as the best available scientific information regarding greater sage-grouse for the Protested Parcels. However, RMW has not provided any specific points of data or scientific information from the NTT Report, or any of the other reports or studies broadly referenced in its protest, which it believes BLM failed to consider or that contradicts the analysis and ultimate determinations by BLM and UDWR with respect to the potential impacts to greater sage-grouse and greater sage-grouse habitat as a result of the specific action of leasing the Protested Parcels. The NTT report generally calls for the use of the best and most current information available. As previously stated, prior to making the decision to offer the Protested Parcels for lease, BLM reviewed both the best and most current BLM and UDWR sage-grouse data available for the Protested Parcel lands, which included the 2013 UDWR Sage-grouse Plan and an August 2013 site-visit to the Protested Parcels, both of which are more site-specific and current than any of the studies or reports specifically referenced by RMW in its protest. Thus, for the reasons discussed above RMW's protest contention #3(c) is also dismissed.

RMW Protest Contention # 4: BLM violated FLPMA by failing to "prevent unnecessary and undue degradation" to the lands under its management and by failing to meet its obligations under BLM Manual 6840.

BLM Response: As RMW has stated, FLPMA imposes upon BLM an affirmative obligation to "prevent unnecessary or undue degradation" to the lands under its management. 43 U.S.C. §1732(b). RMW contends that leasing of the Protested Parcels would have impacts upon habitat for greater sage-grouse that would constitute a violation of 43 U.S.C. §1732(b). RMW has also alleged that the decision to lease the Protested Parcels is a violation of BLM Manual Section 6840, which provides guidance on managing lands containing BLM special status species. However, the only rationale provided by RMW in support of its contentions that BLM violated 43 U.S.C. §1732(b) and BLM Manual Section 6840 is that "greater sage-grouse is a BLM special status species and BLM should not be leasing parcels within important habitat." RMW Protest Letter at pg. 11. While BLM agrees that the greater sage-grouse is a BLM-designated special status species, based upon a review of the best available and most current data for greater sage-grouse for the Protested Parcels, it was determined that the lands within the Protested Parcels do not contain greater sage-grouse or valuable greater sage-grouse habitat. Thus, considering that this office is neither aware of nor has RMW provided any evidence contradicting this determination by BLM with respect to greater sage-grouse, this component of RMW's protest is deemed to be without merit and is therefore dismissed.

RMW Protest Contention # 5: In offering the Protested Parcels for lease, BLM has violated the ESA.

BLM Response: RMW contends that BLM’s decision to offer the Protested Parcels for lease is in violation of the duties to consult and engage in recovery planning pursuant to the ESA. More specifically, RMW has alleged that BLM violated section 7 of the ESA by failing to consult with USFWS in order to ensure that its decision to lease the Protested Parcels included adequate protections for greater sage-grouse. RMW’s protest also appears to allege that BLM’s decision to lease the Protested Parcels is in violation of a requirement imposed by the ESA to develop and implement a conservation and recovery plan for greater sage-grouse.

In addressing this protest contention, the requirements and applicability of the ESA should first be clarified. As RMW has stated, the consultation requirements of the ESA are contained in section 7 of that statute. More specifically, section 7(a)(2) of the ESA requires federal agencies to consult with USFWS, either informally or formally, in order to ensure that their actions are not likely to “jeopardize” or result in the “adverse modification of habitat” for listed species. 16 U.S.C. § 1536(a)(2). As RMW has stated in its protest, the greater sage-grouse is a candidate species for listing under the ESA, not an ESA-listed species. Thus, the consultation requirements under section 7(a)(2) of the ESA clearly do not apply to greater sage-grouse.

Notwithstanding the ESA listing status of greater sage-grouse, it must also be reiterated that, although portions of the Protested Parcels were shown to be within “occupied habitat” for greater sage-grouse, as depicted by a 2011 UDWR map, after consulting with UDWR and reviewing greater sage-grouse data that was obtained subsequent to the preparation of that 2011 UDWR map, BLM determined that greater sage-grouse and its habitat are not present within the Protested Parcels. Thus, even it is assumed, *arguendo*, that the consultation requirements imposed by the ESA are applicable to a candidate species, such as the greater sage-grouse, the decision to lease the Protested Parcels would still not be subjected to the section 7 consultation requirements on account of greater sage-grouse because of BLM’s determination that the Protested Parcels contain neither greater sage-grouse that could be “jeopardized” nor greater sage-grouse habitat that could be “adversely” modified by leasing the Protested Parcels.

The assertion by RMW that the BLM’s decision to lease the Protested Parcels is in violation of a requirement under the ESA to “develop and implement plans for the conservation and survival” of greater sage-grouse is a misguided application of that statutory provision. A more complete description of the aforementioned statutory provision, which is contained in subsection 4(f) of the ESA, is as follows “[T]he Secretary shall develop and implement plans for the conservation and survival of endangered species and threatened species *listed pursuant to this section*,” 16 U.S.C. § 1533(f)(1) (emphasis added). In general, the purpose of section 4 of the ESA is to address various aspects of the procedures and requirements for listing species as endangered or threatened under the ESA. *See generally* 16 U.S.C. § 1533. The specific subsection cited in RMW’s protest, subsection 4(f), addresses the requirements and procedures for developing and implementing recoveries plans *following* a decision to list a particular species under the ESA. Both the decision to list species under the ESA and the subsequent development of a recovery plan pursuant to 16 U.S.C. § 1533(f) are responsibilities held by the USFWS and, in some

situations, the National Marine Fisheries Service, but not the BLM. Thus, as a listing decision has not been made for greater sage-grouse and because the development and implementation of conservation and recovery plans is responsibility held by USFWS, not BLM, any assertion by RMW that BLM's decision to lease the Protest Parcels violated obligations it had under section 4(f) of the ESA is an incorrect application of that provision of the ESA.

Finally, it should also be noted that BLM has coordinated with USFWS regarding leasing of the Protested Parcels and during this coordination USFWS did not identify any concerns related to greater sage-grouse. On May 19, 2014, BLM received concurrence from USFWS with respect to its determination that the May 20, 2014, competitive oil and gas lease sale is "not likely to adversely affect" listed species and designate critical habitat. More detailed information regarding BLM's coordination with USFWS for the May 2014 competitive oil and gas lease sale is contained in the administrative record for the May 2014 lease sale and in the Lease Sale EA at Ch. 5.2 (pg. 26) and Appendix C (pp. 87-89).

For the reasons stated above RMW's protest contention #5 is dismissed.

CONCLUSION

To the extent that RMW 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, RMW's protest of the inclusion on the NCLS of parcels UTU90330 (UT0514-015), UTU90339 (UT0514-039), and UTU90346 (UT0514-059) is dismissed in its entirety.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. Part 4 and Form 1842-1 (Enclosure 1). If an appeal is taken, the notice of appeal must be filed in this office (at the address shown on the enclosed Form) within 30 days from receipt of this decision. 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 pursuant to 43 C.F.R. Part 4, Subpart B § 4.21, during the time that your appeal is being reviewed by the Board, the petition must show sufficient justification based on the standards listed below. 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 regulations, a petition for a stay of a decision pending appeal shall be evaluated 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.

Copies of the notice of appeal, petition for stay, and statement of reasons also must be submitted to the Office of the Regional Solicitor, Intermountain Region, 125 South State Street, Suite 6201, Salt Lake City, Utah 84138, at the same time the original documents are filed in this office.

Please direct any questions regarding this decision to Justin Abernathy, Fluid Minerals Leasing Coordinator, at (801) 539-4067.

/s/ Kent Hoffman for

Juan Palma
State Director

Enclosure

1. Form 1842-1

cc: James Karkut, Office of the Solicitor, Intermountain Region,
125 South State Street, Suite 6201, Salt Lake City, UT 84138

bc: Lease Sale Book May2014

Reading File: UT-920

Central Files UT-950

JAbnernathy Date: 05/19/2014