



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Wyoming State Office

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In Reply Refer To:
3100 (921Mistarka)
February 2011 Protests

FEB 18 2011

CERTIFIED - RETURN RECEIPT REQUESTED

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DECISION

FEBRUARY 2011 OIL AND GAS SALE PROTEST OF 31 PARCELS PROTESTS DISMISSED IN PART 30 PARCELS TO BE ISSUED

We received three protests to the offering of 31 parcels on the February 1, 2011, competitive oil and gas lease sale located in the Bureau of Land Management (BLM) Wyoming State Office (WSO), Buffalo (BFO), Casper (CFO), Cody (CyFO), Lander (LFO), and Newcastle (NFO) Field Offices. Biodiversity Conservation Alliance (BCA); Center for Native Ecosystems (CNE); and Western Resource Advocates for National Audubon Society and Audubon Wyoming (Audubon) filed protests to this competitive oil and gas lease sale. The State Director elected to include all but one of the protested parcels in the competitive sale while the merits of the protests are considered.

DECISION:

The following one parcel was deferred prior to the February 2011 competitive oil and gas sale: WY-1102-003 as requested by Wyoming Game and Fish Department (WGFD) due to the parcel of land being involved in a land exchange. The remaining 30 parcels will be issued.

Discussion:

1. BCA, Audubon, and CNE argue that oil and gas development has led to and will continue to lead to fragmented wildlife habitats. BCA argues all of the associated oil and gas activities will disrupt habitats, destroy nesting and brooding grounds, and disturb wildlife. Protesters argue these lands serve as quiet, serene places of natural beauty and provide excellent recreational opportunities. Oil and gas exploration has jeopardized recreational, cultural and biodiversity values making the public lands impossible for the public to use and enjoy.

Audubon and CNE argue that the BLM has not conducted site-specific analysis of leasing and that the BLM incorrectly defers site-specific analysis to the project level or development stage. Audubon argues that the BLM must supplement its National Environmental Policy Act (NEPA) analysis before lease parcels can be issued. CNE argues that the BLM has not considered direct, indirect and cumulative impacts, adequate range of alternatives nor NEPA analysis before making an irretrievable and irreversible commitment of resources, in particular to explore the best ways to minimize impacts of the proposed leasing to greater sage-grouse, white-tailed prairie dogs, black-tailed prairie dogs, black-footed ferrets, and sensitive lands within wilderness study areas. The BLM has not analyzed the effectiveness of mitigation nor is the Finding of No Significant Impact (FONSI) based on the effectiveness of mitigation. WOC argues the 10th Circuit Court in its decision for *State of New Mexico v. Bureau of Land Management* at 717-718 states “[A]ssessment of all “reasonably foreseeable” impacts must occur at the earliest practical point, and must take place before an “irretrievable commitment of resources is made.” The court stated, “we conclude that issuing an oil and gas lease without [a no surface occupancy, or NSO] stipulation constitutes such a ‘irretrievable] commitment [of resources].”

BLM Response: The BLM has the responsibility to manage the public lands in accordance with the Federal Land Policy and Management Act (FLPMA). FLPMA requires the BLM to manage the public land and resources under the concept of multiple-use and sustained yield. Specifically, the concept of multiple-use and sustained yield includes: (1) the land and their various resource values are managed so they are utilized in a combination that best meets the present and future needs of the American people; (2) a combination of balanced and diverse resource uses taking into account the long-term needs of future generations for renewable and non-renewable resources including, but not limited to recreation, range, timber, minerals, watershed, wildlife and fish, natural scenic, and scientific and historic values; (3) the use of some land for less than all of the resources; (4) harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration given to the relative values of the resource and not necessarily to the combination of uses that gives the greatest economic return or the greatest unit output; and (5) to make the most judicious use of the land for some or all of the resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions. The BLM Wyoming manages its oil and gas

leasing program in accordance with FLPMA. FLPMA requires the BLM to develop and maintain Resource management Plans (RMPs). During preparation of the RMP, and prior to issuing any oil and gas leases, the BLM performs an environmental analysis under NEPA which discloses anticipated impacts that can result from leasing and subsequent oil and gas development on the environment, including the public lands and its resources. As a result, the BLM develops appropriate mitigation and protection measures, such as lease stipulations, before the BLM issues any oil and gas lease. FLPMA does not require the BLM to analyze every aspect of a transaction to make sure any actions by the BLM will protect the long-term viability of the public lands. Nevertheless, the BLM has prepared environmental assessments (EAs) not Determinations of Adequacy (DNAs) as alleged by CNE of the impacts of this lease sale and we disagree with the protesters' argument that the BLM has not performed sufficient NEPA analysis to disclose the potential impacts of oil and gas development before issuing an oil and gas lease.

According to the 10th Circuit Court of Appeals, site-specific NEPA analysis at the leasing stage may not be possible absent concrete development proposals. Whether such site-specific analysis is required depends upon a fact-specific inquiry. Often, where environmental impacts remain unidentifiable until exploration can narrow the range of likely drilling sites, the Application for Permit to Drill (APD) may be the first useful point at which a site-specific environmental appraisal can be undertaken (*Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 10th Cir., April 17, 1987). In addition, the Interior Board of Land Appeals (IBLA) has decided that, "the BLM is not required to undertake a site-specific environmental review prior to issuing an oil and gas lease when it previously analyzed the environmental consequences of leasing the land . . ." (*Colorado Environmental Coalition, et. al, IBLA 96-243, decided June 10, 1999*). However, when site-specific impacts are reasonably foreseeable at the leasing stage, NEPA requires the analysis and disclosure of such reasonably foreseeable site-specific impacts. (*N.M ex rel. Richardson v. BLM*, 565 F.3d 683, 718-19 (10th Cir. 2009)). Although certain site-specific impacts remain unforeseeable at this time, the analysis in the February 2011 Competitive Oil and Gas Lease Sale EAs provides additional disclosure and analysis of the environmental impacts associated with our decision to issue leases for these parcels.

BLM cannot and does not lease sensitive lands within wilderness study areas as alleged by CNE.

2. BCA argues that the BLM has given rights to develop minerals on split estate lands without taking steps to fully protect the rights and interests of the surface owner. BCA further argues Wyoming's rural heritage and lifestyle are threatened by the sale of the subject lease parcels. WOC argues BLM should attach a lease stipulation that requires the operator to comply with Washington Office (WO) Instruction Memorandum (IM) No. 2003-131, Permitting Oil and Gas on Split Estate Lands and Guidance for Onshore Oil and Gas Order No. 1.

BLM Response: We disagree with appellant's arguments that the BLM does not take steps to protect the rights and interests of the surface owner on split-estate lands.

In the case of the subject split-estate lands, the United States issued a patent, severing the surface estate from the mineral estate. This patent contains terms and conditions whereby the United States reserved the right to dispose of the minerals in accordance with the mineral land laws in force at the time of such disposal. Any person who has acquired from the United States the right to develop the mineral deposit, has the right to remove the minerals and occupy so much of the surface as may be required for all purposes reasonably incident to the development of the minerals.

The lands protested are available for oil and gas leasing in accordance with the existing applicable RMP. Decisions made in the applicable RMP Record of Decision (ROD) apply only to Federal lands, including lands where non-Federal surface overlies Federal mineral estate. However, the analysis conducted in the RMP Environmental Impact Statement (EIS) evaluated the effects that would occur in the entire area and its affected environment, regardless of land or mineral ownership (40 CFR 1502.15). The effects on non-Federal lands are included to provide a full disclosure of effects for the entire area. When the BLM analyzes the impacts to surface resources caused by drilling and production operations, the analysis includes impacts to both Federal and non-Federal surfaces.

Section 226(g) of the 1920 Mineral Lands Leasing Act (MLA) provides that a lessee cannot engage in any surface-disturbing activities before review and approval of an APD. This includes environmental and technical reviews. Therefore, a surface owner's interests and use of the surface will not be affected until the conclusion of these reviews. Surface owners are invited to participate in the onsite pre-drill inspections where most of the information to conduct the environmental analysis is gathered. In this manner, the surface owner can participate in development of the surface-use plan, reclamation requirements, and conditions of approval (COAs).

Prior to performing any surface-disturbing activities, the mineral lessee is required to contact the surface owner and (1) secure written consent or a waiver from the surface owner in the form of a surface owner agreement, or (2) provide payment to the surface owner for damages to crops and tangible improvements; or (3) provide a bond for the benefit of the surface owner to obtain payment for damages to crops and tangible improvements (Section 9 of the Stock Raising Homestead Act of December 29, 1916 (SRHA)). An APD cannot be considered complete or approved without proof that one of the three requirements listed above has been satisfied.

A notice of an APD must be posted in the local BLM office for at least 30 days prior to approval. This is another opportunity for the surface owner and/or the public to raise any concerns with the BLM regarding any split-estate or surface use issues.

WO IM No. 2003-131, Permitting Oil and Gas on Split Estate Lands and Guidance for Onshore Oil and Gas Order No. 1, was issued by the BLM Washington Office on April 2, 2003. This IM states that, in the case of split-estate lands, one bond (3104 Bond) is required for the oil and gas operations performed under 43 CFR 3160, and a second bond (3814 Bond) is required to satisfy

Section 9 of the SRHA, if no agreement between the surface owner and lessee or operator can be reached (43 CFR 3814).

WO IM No. 2003-131 states the BLM will not consider an APD administratively or technically complete until the Federal lessee or the operator complies with Onshore Oil and Gas Order No. 1 (Onshore Order No. 1). Compliance with Onshore Order No. 1 requires the Federal mineral lessee or its operator to enter into good-faith negotiations with the private surface owner to reach an agreement for the protection of surface resources and reclamation of the disturbed areas, or payment in lieu thereof, to compensate the surface owner for loss of crops and damages to tangible improvements, if any. The BLM will not approve an APD until the operator has complied with all of the requirements in Onshore Order No. 1, as well as the requirements in WO IM No. 2003-131. It is not necessary to attach a lease stipulation that requires the lessee to comply with applicable laws, regulations, and the BLM policy.

As indicated above, the mineral lessee has a statutory right to develop the mineral estate. The BLM recognizes the surface owner also has interest in how development will occur. The BLM will not approve surface-disturbing activities prior to ensuring the surface owner has been invited to participate in the onsite inspection as described above.

Every member of the public is invited to participate in the development of the BLM Land Use Plans (LUP) and the associated EIS. During preparation of every LUP, the BLM has requested and responded to public comments specifically related to oil and gas leasing (Draft RMP/EIS, Dear Reader Letter). The decision to lease and allocate lands is made at the LUP stage.

The decision in all the applicable RMPs/EISs is that the subject protested lands are available for leasing. We find the field manager is not required by NEPA to involve the public during preparation of every lease sale EA or DNA, particularly when the proposed activity is in conformance with the current LUP (H-1710-1, NEPA Handbook, Chapter IV.4.A, and Preparing Environmental Assessments).

The notice of sale can also be found at <http://www.wy.blm.gov/minerals/minerals.html>. The notice of sale has been on this website for every oil and gas lease sale we have conducted since August 1998. The February 2011 sale notice was posted on November 3, 2010, in the BLM public rooms statewide. The 90-day posting period complies with WO IM No. 2010-117, Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews. A press release was also prepared and sent to the general media on January 26, 2010. The notice of sale appears in the Cheyenne and Casper, Wyoming newspapers, and sometimes in the Billings, Montana, newspaper. The sale is announced on several Wyoming radio and TV stations. The notice of the sale is mailed out to all those who subscribe to receiving the notice. This subscription includes WOC and BCA. In addition, the BLM provides a copy of the notice of sale to anyone who requests a copy and it is available online on the oil and gas leasing page at www.blm.gov/wy

3. CNE protests one parcel, WY-1102-025, but gives no reasons for protesting the one parcel. This parcel is located in the Lysite Badlands in the LFO.

BLM Response: CNE has not provided any rationale for this protest. However, the BLM is aware that the Lysite Badlands has been nominated as a citizens' wilderness proposal. In past protest responses, the BLM has addressed and described the character of the area nominated by the different citizen groups as proposed wilderness. In those responses, the BLM has acknowledged that the Lysite Badlands may have the sufficient size, but does not have the naturalness, outstanding solitude or the outstanding primitive and unconfined recreation qualities sufficient to manage the area as wilderness. The Lysite Badlands was not recommended for management as wilderness in the Lander RMP revision. This area is moderate to high potential development for oil and gas. The original inventory of this area cited the following man-made intrusions (existing throughout the area): waste materials associated with uncompleted water wells, 15 miles of fence located in very noticeable locations, numerous noticeable two track ways providing access for reservoir maintenance and livestock grazing, five constructed reservoirs, drill holes associated with uranium exploration, and dry drill holes associated with oil and gas development. The cumulative effect of these intrusions shows the area does not meet the naturalness requirement. In compliance with Secretarial Order 3310 (SO 3310), in the amended Oil and Gas Lease Sale EA, January 2011, the BLM updated the wilderness inventory. LFO found that in addition to the impacts cited in the original inventory; there are also two producing gas wells with ancillary facilities and constructed roads operate within this nominated area. Additional two-track ways have also been established in the area over the last 22 years. The number and frequency of range improvements (pasture cross fencing and water improvements) has also increased. In addition, a large overhead transmission line runs through the southwestern end of the area. Finally, as the BLM's draft handbook 6300-1 states: "If, however, an outside impact of major significance exists, it should be noted in the overall inventory area description and evaluated for its direct effects on the area." The inventory area is: 1) adjacent and within sight of heavy oil and gas exploration, as well as the town of Moneta, and 2) within sight and the calculated area of exposure of the H₂S model for the Lost Cabin Gas Plant (as required by Onshore Order #6 entitled "H₂S Operations"). Flaring operations at the gas plant draw the visitors' attention for a number of miles. These adjacent impacts are omnipresent within the area and reduce perceived naturalness exponentially.

All parcels in the February 2011 Competitive Oil and Gas Sale were screened for wilderness characteristics and reviewed for compliance with SO 3310. None of the 31 parcels contained wilderness characteristics or qualified as Wildlands subject to the SO 3310. One of the tools used to help define wilderness characteristics within a parcel is the Wilderness Review Checklist ('wilderness screen'), which is based on the criteria in Section 603 of The Wilderness Act. The wilderness screen includes: is the parcel more than 5000 acres of roadless land, whether the imprint of man's work is substantially unnoticeable; whether there are outstanding opportunities for solitude or primitive recreation; and whether the parcel contains natural features of scientific, educational, scenic, or historic value; and finally, whether the parcel is in a citizens' proposed wilderness area. In addition to the wilderness screen, BLM also used the draft Manual (6300-1-Wilderness Inventory) for the documentation of inventory and presence or absence of wilderness

characteristics are also used for compliance with SO 3310. Based on these screens and inventories, the BLM determined that the Lysite Badlands lacks wilderness characteristics and that issuing a lease for parcel WY-1102-025 remains appropriate.

4. BCA protested the following four parcels because the parcels are located in big game crucial winter range and parturition areas: WY-1102-021, 023, 024, and 031. These parcels are located in CFO and LFO. BCA argues that offering the subject parcels is a violation of FLPMA because the BLM is required to consider and resolve inconsistencies between the BLM actions and State plans, as well as to prevent unnecessary or undue degradation of the public lands. BCA argues that although the subject crucial winter range parcels contain a stipulation prohibiting drilling between November 15 and April 30, and a stipulation prohibiting drilling between May 1 and June 30 for parturition, this is not a total prohibition on drilling during all of the stressful winter periods and the BLM almost invariably grants lease stipulation waivers. BCA argues that the BLM has violated NEPA because the BLM has not considered the new environmental information in a pre-leasing NEPA document where impacts will occur from offering oil and gas parcels for sale. BCA argues that the BLM has also violated NEPA by failing to consider NSO stipulation. NSO stipulations provide the only real protection for big game and habitat integrity.

BLM Response: The protest is incorrect in its characterization of FLPMA's requirements. Section 202 of FLPMA (Title 43, USC §1712), states:

when developing and revising land use plans, the Secretary of the Interior shall “(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning and management activities . . . with the land use planning and management programs of other Federal departments and agencies and of the States and local Governments within which the lands are located.”

The Secretary is also required to assist in resolving, to the extent practical, any inconsistencies between Federal and non-Federal plans.

The BLM Wyoming entered into a Memorandum of Understanding (MOU) (WY-131) with the WGFD (currently in revision). In accordance with the terms of the subject MOU, specifically Appendix 5G, the WSO will transmit a copy of every preliminary notice of competitive oil and gas lease sale list to the WGFD. The preliminary notice is sent to the WGFD approximately 5 months prior to the sale. All eight WGFD Field Offices have approximately 2 to 3 weeks to review the list. The WGFD Field Office will coordinate with their respective BLM Field Office to review wildlife data and to help ensure appropriate lease stipulations are included as specified in the applicable RMP. When the WGFD review is complete, the preliminary list is returned to the WSO. Any necessary changes will be incorporated into the final notice of competitive oil and gas lease sale list. The BLM Wyoming uses WGFD data to stipulate the oil and gas lease parcels. In accordance with the subject MOU, if the WGFD has concerns about any parcel located in a big game crucial winter range, or along a big game migration route, or in a

parturition area, the WGFD will forward their concerns to the BLM. The BLM did coordinate with the WGFD (as specified in FLPMA), reviewed their recommendations, applied appropriate comments, and met with WGFD on September 24, 2010.

In Wyoming Outdoor Council, et al., 171 IBLA 108, 121, (February 20, 2007), IBLA states: “In establishing that the BLM’s failure to impose the WGFD’s policies, plans, and guidelines, on leases covering the crucial winter range parcels amounts to a violation of section 302(b) of FLPMA, appellants would have to show, at a minimum, that issuance of the leases without incorporating WGFD’s policies, plans, and guidelines would result in adverse impacts to resource values of the parcels.” BCA has not demonstrated that offering these parcels for sale would result in adverse impacts to big game species and their habitat, and thus cause unnecessary and undue degradation to the parcels. Therefore, consistent with the subject IBLA decision, offering the subject parcels does not result in a violation of FLPMA. The BLM Wyoming has also coordinated with the WGFD during the preparation and revision of all BLM Wyoming RMPs. During the preparation and revision process, if leasing were determined not appropriate for any land the lands would be closed to leasing. If the land is open to leasing, mitigation will be developed and appropriate stipulations would be attached to the lease. We believe the stipulations that are attached to the subject protested parcels are adequate to protect big game crucial winter ranges, big game migration routes, and parturition areas. Stipulations are attached to a lease for valid reasons supported by the applicable RMP. Any temporary change (exception) or permanent change (modification or waiver) to a lease stipulation must also be consistent with the RMP and supported by NEPA analysis. This analysis is documented, and may include mitigation, monitoring, and other compliance measures. Any exception, modification, or waiver to wildlife-related stipulations is coordinated with the WGFD. Prior to making any wildlife lease stipulation exception decision, the BLM will take into account all relevant factors, including, but not limited to, the current condition of the animals in the area; are there any current or potential animal stress related problems; what are the current snow conditions; what are the short-term and long-term weather forecasts; what is the current and future wildlife forage availability situation; how many animals are using the area; etc.

Exceptions are granted only when relevant factors described above merit such a decision. Many times the lessee informally meets with the BLM to discuss possible exceptions. As a result, a lessee may withdraw from any further consideration an exception request because the exception criteria cannot be met. However, if the exception criteria can be met, the lessee will formally request an exception. The formal exceptions are tracked whereas the informal requests are not. This is why it appears the BLM grants a high percentage of formal exception requests. To date, the BLM Wyoming has never granted a wildlife lease stipulation modification or waiver.

The regulations at 43 CFR 3162.5-1(a) state in part:

“The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality. In that respect, the operator shall comply with the pertinent orders of the authorized officer and other

standards and procedures as set forth in the applicable laws, regulations, lease terms and conditions, and the approved drilling plan. . . Before approving any APD, the authorized officer shall prepare an environmental record of review or an environmental assessment, as appropriate.”

The BLM Wyoming attaches timing and surface use COAs to APDs, developed in coordination with the WGFD to protect big game habitat, including parturition habitat.

43 CFR 3162.5-1(b) states in part: “The operator shall exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources or surface improvements.” The current lease terms specify that the lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, water, to cultural, biological, visual, and other resources. The lessee shall take reasonable measures deemed necessary by the lessor to accomplish the intent of this section (Section 6 of the lease terms). The BLM Wyoming ensures that oil and gas lessees and operators comply with the above-described regulations and lease terms.

FLPMA gives the BLM authority and responsibility to manage the public land and resources under the concept of multiple-use and sustained yield. Prior to any surface-disturbing activity, the BLM will conduct an environmental review and/or assessment to analyze the anticipated impacts of the proposed activity. The BLM, through this environmental analysis, will impose restrictions and mitigation measures necessary to avoid unnecessary or undue impacts.

All parcels will be issued.

5. BCA argues offering parcels for sale located in areas with active RMP revisions does not comply with WO IM 2004-110, Change 1. The protested parcels are located in the BFO, CFO, CyFO, and LFO areas. The 13 protested parcels are WY-1102-017, 018, 019, 020, 022, 023, 024, 025, 026, 027, 028, 029, and 031. BCA argues that in accordance with the subject IM, specific consideration for lease sale deferral is to be given to certain categories of land that are “. . . designated in the preferred alternative of draft or final RMP revisions, or amendments as lands closed to leasing, lands open to leasing under no surface occupancy, lands open to leasing under seasonal or other constraints with an emphasis on wildlife concerns, or other potentially restricted lands.”

BLM Response: All the subject parcels protested by BCA in the February 2011 oil and gas parcel list are available and eligible for oil and gas leasing in accordance with the existing BFO, CFO, CyFO, and LFO RMPs. CyFO, LFO, and BFO began their revision process and are currently preparing their Draft Environmental Impact Statement (DEIS). The CFO ROD was signed in December 2007. Socioeconomics are an integral part of the NEPA analysis for each RMP revision.

Similar protest arguments were rejected in the IBLA Order dated July 31, 2002, Wyoming Outdoor Council, et al. (IBLA 2002-303). The Order cites Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140 (1992), wherein the Board rejected the argument that the BLM must suspend an action that is in conformance with an existing LUP when it decides to prepare a new plan. IBLA recognized that acceptance of protestor's position would seriously impair the BLM's ability to perform its land management responsibilities.

The IBLA also pointed out in their order dated July 31, 2002, that neither the BLM Handbook (H-1601-1), Land Use Planning, nor WO IM No. 2001-191, Processing of Applications for Permit to Drill, Site-Specific Permits, Sundry Notices, and Related Authorizations on Existing Leases, and Issuing New Leases During Resource Management Plan Development, absolutely preclude issuance of oil and gas leases while the underlying RMP is being amended. Rather, the BLM Handbook states existing decisions remain in effect during the amendment process and directs the BLM to review all proposed implementation actions through the NEPA process to determine whether the approval of a proposed action would harm resource values and limit the choice of reasonable alternatives in the LUPs being re-examined.

WO IM No. 2004-110 replaced all discussion pertaining to oil and gas leasing contained in WO IM No. 2001-191. WO IM No. 2004-110, Change 1, provides additional clarification of the guidance found in WO IM No. 2004-110. WO IM No. 2004-110, Change 1, provides that lands, which are open for leasing under an existing RMP, may be leased during a revision or amendment process when BLM management determines there are no significant new circumstances or information bearing on the environmental consequences of leasing that are not within the broad scope analyzed in an existing RMP EIS.

The Council of Environmental Quality (CEQ) regulations do not require postponing or denying a proposed action covered by the EIS for the existing land use plan in order to preserve alternatives during the preparation of a new LUP and EIS (40 CFR 1506.1(c) (2)), as long as the action does not prejudice the ultimate decision on the program or limit alternatives.

Prior to offering for sale any of the parcels, the Field Offices prepared EAs for the February 2011 oil and gas competitive sale to analyze whether the decision to issue leases for these parcels remained appropriate. Based on this analysis, the BLM once again concluded that the decision to offer these parcels for lease and issue leases remains appropriate.

All parcels will be issued.

6. BCA, Audubon, and CNE argue the BLM should apply a NSO stipulation to areas in all parcels within 3 miles of a Greater sage-grouse lek. CNE also argues that, although the Fish and Wildlife Service (FWS) decided not to list the Greater sage-grouse under the Endangered Species Act (ESA), the BLM should not offer oil and gas leases in Greater sage-grouse crucial habitat until the BLM analyzes how its oil and gas program is affecting

the Greater sage-grouse and Greater sage-grouse habitat. CNE requests that all lease parcels with sage-grouse habitat contain stipulations that fully comply with and adhere to the Sage-Grouse Habitat Management Guidelines for Wyoming (adopted July 24, 2007), the Greater sage-grouse core area protection EO 2010-4, and the “Recommendations for Development of Oil and Gas Resources within Important Wildlife Habitats.” CNE argues there are too many exemptions, exceptions, and loopholes that will render the BLM’s guidance issued in 2010 ineffective at stopping further population declines. CNE also argues several biologically important areas were excluded from the Governor’s core areas map, which leaves many habitat areas with minimal to no protection from oil and gas development. The following 17 parcels were protested because the parcels are located in potential Greater sage-grouse lek/breeding, nesting and winter habitat: WY-1102-006, 007, 008, 009, 010, 011, 012, 013, 015, 017, 021, 022, 023, 024, 025, 026, and 031. BCA is asking that these parcels be withdrawn because they contain important habitats and some parcels are in the 75 percent population core areas. If the BLM does not withdraw the parcels, BCA argues that a 3 mile NSO should be placed on all parcels containing leks and that all lease parcels with sage grouse leks, nesting, breeding, brood-rearing and winter habitats contain stipulations which fully comply with and adhere to the Sage-Grouse Habitat Management Guidelines for Wyoming adopted July 24, 2007. BCA argues BLM should do its best to keep largely unleased areas of public land in Core Areas unleased, regardless of mineral ownership patterns.

The protestors also argue the BLM has substantial and new information about the current condition of habitat and wildlife populations including big game as well as Greater sage-grouse. The BLM has not considered the new information in the environmental analyses for the current RMPs and has not analyzed in any applicable NEPA document the policy recommendations from the Greater sage-grouse Implementation Team to the Governor.

Audubon has specific objection to CFO parcel WY-1102-022 because this parcel was recommended for leasing in the EA. The EA states, “the parcel is not located within suitable Sage-grouse nesting habitat. . .” EA at 27. What does “suitable” habitat mean or explain how BLM determined the parcel lacks such habitat as all designated core areas is presumed to contain important sage-grouse habitat.

BLM Response: The BLM is a member of the Governor’s sage-grouse implementation team. The BLM Wyoming is well aware of the need to protect Greater sage-grouse and Greater sage-grouse habitat. The BLM attaches stipulations to leases and COAs to APDs, where appropriate, in order to restrict surface-use and surface-disturbing activities during certain times of the year, during certain times of the day, and within certain distances from active Greater sage-grouse leks, nesting habitat, and crucial winter habitat.

All BLM Wyoming field offices have addressed Greater sage-grouse and Greater sage-grouse habitat concerns in their respective RMPs. All BLM field offices have identified timing restrictions to protect the Greater sage-grouse mating season, Greater sage-grouse nesting and early brooding season, as well as the Greater sage-grouse crucial winter season. The BLM also

requires that oil and gas development avoid leks, nesting/early brooding habitat, and winter habitat. WY IM No. 2010-012 will require implementation of the updated sage-grouse protection measures, based on site-specific analysis, at the developmental stage as COAs on any leases with the ¼ mile and 2-mile protections currently used. In accordance with WY IM No. 2010-013, the BLM will perform a sage-grouse screen that will determine whether the parcel should be offered for sale. Part of the screening process is the use of the core maps (Version 3) developed by the Governor's sage-grouse implementation team and posted on the WGFD website: http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/index.asp.

The BLM regulations at 43 CFR 3101.1-2 specify that the lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove, and dispose of all the leased resources in the leasehold. The regulations, however, go on to subject this right to three reservations: (1) stipulations attached to the lease; (2) restrictions deriving from specific, non-discretionary statutes (such as ESA); and (3) reasonable measures (conditions of approval) to minimize adverse impacts to other resource values not addressed in the lease stipulations at the time operations are proposed. At a minimum, measures shall be deemed consistent with lease rights granted, provided they do not require relocation of proposed operations by more than 200 meters, or require that operations be sited off the leasehold.

The current lease terms specify that the lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, water, to cultural, biological, visual, and other resources. The lessee shall take reasonable measures deemed necessary by the lessor to accomplish the intent of these terms (Section 6). Assistant Director of Minerals, Realty and Resource Protection issued an Information Bulletin (IB) No. 2007-119 entitled "Existing Surface Management Authority for Oil and Gas Leases." This IB describes the legal authority for regulating environmental aspects of oil and gas operations under MLA and FLPMA. The BLM regulations at 43 CFR 3162.1(a) also state "The operating rights owner or operator, as appropriate, shall comply with applicable laws and regulations; with lease terms, Onshore Oil and Gas Orders, Notices to Lessee's (NTL's); and with other orders and instructions of the authorized officer. These include, but are not limited to conducting all operations in a manner . . . which protects other natural resources and environmental quality . . ." See also 43 CFR 3162.5-1(a). BLM Wyoming ensures that oil and gas lessees and operators comply with the above-described regulations, lease terms, and BLM policy.

The lessee clearly has a legal right to apply for permission to conduct oil and gas operations; however, as specified above, the BLM retains substantial authority over the lessee's siting of particular surface disturbances. The lessee does not have a right to engage in any surface-disturbing activities until the BLM analyzes the environmental impacts and processes an APD or Sundry Notice. With or without a NSO lease stipulation, at the APD stage, if a Greater sage-grouse lek or crucial Greater sage-grouse habitat is found within the lease, the BLM can and does use its authority to impose reasonable measures, COAs (site-specific mitigation) to minimize adverse impacts to the Greater sage-grouse as described above.

Issuing an oil and gas lease does not cause immediate surface-disturbance. Issuing an oil and gas lease does not jeopardize the continued existence of any listed or special status species or result in the destruction or adverse modification of critical habitat of such species. The lease may never result in drilling or surface-disturbing activities, especially when ESA is concerned. There is great uncertainty as to whether, when, and where a well would be drilled on a lease. Existing BLM policy protects the Greater sage-grouse and its habitat during all critical times of the year. The BLM has issued an updated sage-grouse policy (WY IM No. 2010-012) and is part of a modeling and mapping effort of sage-grouse habitat on a statewide basis. This extensive statewide mapping and modeling effort includes seasonal habitat types and areas identified by seasonal use. The mapping and modeling effort will allow the BLM and WGFD to identify and refine important Greater sage-grouse seasonal habitat information.

As described in the February 2011 Competitive Oil and Gas Lease Sale EAs, the BLM Wyoming has established a sage-grouse screen (WY IM No. 2010-013) that has been performed on all of the previously offered parcels. Screening criteria include: is the parcel outside of or in a sage-grouse core area; is the parcel located adjacent to an existing producing Federal lease; is the parcel located adjacent to a large block of unleased Federal surface; does the parcel contain a sage-grouse stipulation as required in the applicable RMP; and is the parcel located within one-mile of a producing well located either on a State, fee, or Federal lease. The BLM further considered sage-grouse habitat suitability, population density, geography, and topography.

Parcel 033 (WY-1102-022 as the Final Sale booklet number) is located in T. 36 N., R. 89 W., portions or all of secs 1, 2, 4 and 12 and T. 37 N., R. 89 W., sec. 20. This parcel is located in an area adjacent to 'Held by production' and does not have 11 square miles of unleased federal minerals, and is not located within two miles of the perimeter of any active sage-grouse lek. In addition, Parcel 33 (WY-1102-022) is located directly south of the Gun Barrel Unit. This 33,376-acre unit produced approximately 2.66 million barrels of oil and 110.45 million cubic feet of gas in 2010. Issuing a lease for Parcel 33 is consistent with BLM's overall objective in managing sage-grouse habitat and to consolidate landscape disturbances to minimize habitat loss and fragmentation given the nature of the parcel and surrounding development.

All parcels will be issued.

7. CNE points out that they have previously commented to the BLM WSO and individual BLM Wyoming Field Offices about the imperiled status of the white-tailed prairie dog, black-tailed prairie dog, and black-footed ferrets. CNE argues the BLM must re-examine and conduct new site-specific NEPA analysis of the oil and gas leasing program (including direct, indirect, and cumulative impacts; adequate range of alternatives; post-leasing developments; stipulations and mitigation measures and their effectiveness; and any new information) before issuing any new leases in white-tailed prairie habitats and citizen proposed Areas of Critical Environmental Concern (ACECs). CNE argues temporary management (no leasing) is required to preserve the values of these areas such as the potential ACECs.

CNE argues that the BLM Wyoming Field Offices have ignored all of their white-tailed prairie dog ACEC nominations. CNE argues they made their ACEC nominations because of their relevance and importance as some of the largest white-tailed prairie dog complexes and because of their value as recovery habitat for the species. The BLM is violating NEPA, FLPMA and the BLM Manual by not using ACECs to help conserve sensitive habitats and species.

CNE protests the following parcels: prairie dog habitat ACEC (WY-1102-006, 007, 008, and 009); white-tailed prairie dog habitat (024 and 031); black-tailed prairie dog habitat (003); and black-footed ferret potential reintroduction areas/potentially occupied habitat (006, 007, 008, and 009).

BLM Response: All the lands protested by CNE are available and eligible for oil and gas leasing in accordance with the existing applicable LUPs. These decisions remain in effect until they are properly amended or revised.

In May 2008, the FWS initiated a status review of the white-tailed prairie dog to determine if the species warrants protection under the ESA. In 2004, the FWS determined that a petition submitted by the CNE and others did not present substantial biological information indicating that listing may be warranted. In 2007, after questions were raised regarding whether the petition decision was based on the best science, the FWS announced the decision would be reconsidered. Subsequently, the CNE filed a lawsuit regarding the petition finding. In a stipulated settlement, the FWS agreed to submit to the Federal Register by May 1, 2008, a notice initiating a status review for the white-tailed prairie dog and submit the results of that status review to the Federal Register by June 1, 2010. The FWS and the plaintiffs agreed to a status review completion date of June 2010 to allow sufficient time to obtain solid data.

In March 2008, WildEarth Guardians filed a complaint against the FWS for failure to complete a finding on their August 2007 petition to list the black-tailed prairie dog. In a July 2008 stipulated settlement, the FWS agreed to submit a finding on the petition by November 30, 2008, and a status review finding by November 30, 2009. The FWS has completed a status review of the black-tailed prairie dog and has determined it does not warrant protection as a threatened or endangered species under the ESA. The FWS assessed potential impacts to the black-tailed prairie dog including conversion of prairie grasslands to croplands, large-scale poisoning, and sylvatic plague and has determined that these impacts do not threaten the long-term persistence of the species. Black-tailed prairie dogs occupy approximately 2.4 million acres across its range. The estimated population of black-tailed prairie dogs in the U.S. is approximately 24 million.

Shortly after the CNE (and others) petitioned the FWS to list the white-tailed prairie dog, the White-Tailed Prairie Dog Working Group of the 12-state Prairie Dog Conservation Team began development of the White-Tailed Prairie Dog Conservation Assessment, (WTPDCA). The WTPDCA was completed in August 2004. The WTPDCA states: "BLM land use planning efforts . . . are underway at this time in the white-tailed prairie dog range in Wyoming (Rawlins,

Pinedale, Casper, Kemmerer and Lander). . . Each of these land use planning efforts is currently, or will be, addressing white-tailed prairie dogs in the plan revisions, including ACEC nominations.” A BLM statewide programmatic biological evaluation has been prepared for white-tailed prairie dogs, the results of which will be incorporated into all the revised RMPs. The BLM participated in the review of the WTPDCA. The BLM also participates in strategies such as the Black-Tailed Prairie Dog Conservation Assessment and Strategy. The assessments, strategies, and guidance are valuable management tools that the BLM utilizes.

The State of Wyoming, through the WGFD, completed a draft conservation plan for black-tailed prairie dogs in Wyoming. This plan contains a large number of management recommendations and planned actions that apply to white-tailed prairie dogs. The BLM has referred to the State conservation plan to help focus white-tailed prairie dog management efforts (State Conservation Plan, page 58).

Whenever the BLM receives an APD, the BLM will consult with the FWS on a case-by-case basis when white-tailed prairie dog and other special status species’ habitat is an issue. The BLM, in cooperation with the FWS, will develop appropriate COAs in order to avoid adverse impacts to special status species’ habitat. For example, the BLM will avoid authorizing any surface-disturbing activities in prairie dog colonies. We do not agree that the BLM ignores or fails to consider impacts to special status species. The BLM manages all of the public resources in a manner that precludes the need to list any species in the future.

The BLM Wyoming is currently in the process of revising all of its LUPs over the next several years. During this revision effort, every Field Office will consider all ACEC. For example, the RFO recently analyzed CNE’s white-tailed prairie dog ACEC nomination in their draft RMP. However, since the proposed ACEC designation did not meet the relevance and importance criteria (as defined in the BLM Manual Section 1613), the ACEC designation was not advanced in the draft Rawlins RMP/EIS preferred alternative.

In every existing RMP and during every RMP revision, the BLM Wyoming prepares an EIS that analyzes whether to allow oil and gas leasing. The BLM analyzes the direct, indirect and cumulative impacts of leasing. The BLM Wyoming has closed many areas of public land to leasing as a result of that analysis. In areas that are open to leasing, the BLM has developed appropriate mitigation measures (lease stipulations and APD COAs) in order to prevent or reduce adverse impacts and monitors the effectiveness of the mitigation. We disagree with the protesters’ allegation that the BLM Wyoming needs to perform more NEPA analysis prior to leasing.

DNAs were not completed for this sale. The February 2011 Competitive Oil and Gas Lease Sale EAs were completed for parcels offered in the CFO, BFO, NFO, LFO, and the CyFO.

All parcels will be issued.

8. CNE argues the sale of the February 2011 lease parcels violates FLPMA. CNE argues that according to FLPMA: “In managing the public lands the [Secretary of Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” CNE argues that the BLM cannot proceed with the subject lease sale because there has been no determination whether special provisions may be necessary to prevent unnecessary or undue degradation; therefore, leasing would be arbitrary, capricious, and an abuse of discretion.

BLM Response: The regulations at 43 CFR 3162.5-1(a) state in part: “The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality. In that respect, the operator shall comply with the pertinent orders of the authorized officer and other standards and procedures as set forth in the applicable laws, regulations, lease terms and conditions, and the approved drilling plan . . . Before approving any APD, the authorized officer shall prepare an environmental record of review or an environmental assessment, as appropriate.”

43 CFR 3162.5-1(b) states in part: “The operator shall exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources or surface improvements.” As stated in WO IB No. 2007-119, “The Secretary has multiple authorities to base his decision to mitigate impacts stemming from oil and gas operations . . . It is, therefore, inappropriate to assume the ‘unnecessary or undue’ clause in FLPMA as the only or even primary authority for mitigating environmental impacts anticipated from permitted oil and gas activities.”

The current lease terms (Section 6) specify that the lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, water, to cultural, biological, visual, and other resources. The lessee shall take reasonable measures deemed necessary by the lessor to accomplish the intent of this section.

As indicated above, prior to any surface-disturbing activity, the BLM will conduct a site-specific EA or EIS to analyze the anticipated impacts of the proposed activity. Through this environmental analysis, BLM, if necessary, will impose appropriate site-specific restrictions and mitigation measures to avoid or limit unnecessary and undue impacts.

The BLM Wyoming prepares the EIS that analyses the direct, indirect and cumulative impacts of leasing. The RMP will also address whether leasing will be allowed in the planning area, and if so, where it can occur. In areas that are open to leasing, the BLM has developed appropriate mitigation measures (lease stipulations and APD COAs) in order to prevent or reduce adverse impacts and monitors the effectiveness of the mitigation. As IBLA noted in Wyoming Outdoor Council et al., 171 IBLA 108, 121-22, where a leasing decision comports with the provisions of the governing RMPs, a disagreement with the BLM’s approach does not suffice to overturn a decision to offer parcels for lease, nor would it violate section 202(c)(9) or section 302(b) of FLPMA. Here, BLM Wyoming has taken appropriate measures to ensure that the decision to offer these parcels was consistent with the applicable RMPs. The February 2011 Competitive

Oil and Gas Lease Sale EAs were completed for parcels in the CFO, BFO, NFO, LFO, and the CyFO. From those documents, several parcels were deferred from leasing. Given that the decision to offer the parcels complies with the applicable RMPs and with the Lease Sale EAs, the BLM Wyoming's oil and gas leasing program is neither arbitrary, capricious, nor an abuse of discretion.

All parcels will be issued.

9. BCA and CNE argue the BLM is failing to protect sensitive species as required. CNE argues the BLM has not adequately addressed or developed mitigation to protect sensitive species in its RMPs or in supplemental NEPA analyses. Issuing FONSI, therefore, is arbitrary and capricious. BLM is not fulfilling its guidance under Manuals 6840.06 and 1622.1 therefore oil and gas development authorized by the leasing of the protested parcels will contribute to the need to list sensitive species and other special status species.

CNE argues that the 2008 regulations under Section 6840 of the BLM Manual are illegal, inconsistent with ESA, and should be revoked.

CNE argues the BLM is not fulfilling its obligations for surveys and inventories to determine distribution and abundance of sensitive species; has not assessed the reasons for the current status; has not evaluated potential impacts of oil and gas leasing and activities on sensitive species; has not developed conservation strategies for sensitive species; has not monitored the populations and habitats of sensitive species, and is not requesting appropriate technical assistance from all other qualified sources for any of the sensitive species at issue in their protest.

BLM Response: We disagree that the BLM Wyoming is failing to protect sensitive plant and animal species. The threatened & endangered (T&E) species stipulation that BLM attaches to every oil and gas lease protects all special status species. Specifically, the stipulation states in part: "The lease area may now or hereafter contain plants, animals, or their habitats determined to be threatened, endangered, or other special status species. The BLM may recommend modifications to exploration and development proposals to further its conservation and management objectives to avoid the BLM-approved activity that will contribute to a need to list such a species or their habitat." Clearly, that stipulation, the lease terms (Section 6), and the regulations at 43 CFR 3162.5-1(a) give the BLM authority to require the operator to conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality, including imposing restrictions from specific, nondiscretionary statutes, such as the ESA. In addition, the BLM has participated in substantial special status species research and conservation efforts. The BLM has sponsored the preparation of species assessments that document the distribution, habitat, and threats to sensitive species. Please see the following internet page for more information:
<http://www.blm.gov/wy/st/en/programs/Wildlife.html>.

In accordance with the regulations at 43 CFR 3101.1-3, the authorized officer may require stipulations as conditions of lease issuance. Stipulations shall become part of the lease and shall supersede inconsistent provisions of the standard lease form. The BLM has determined that the CSU stipulation attached to these parcels is sufficient to protect T&E and special status species. The BLM will not approve any ground-disturbing activity that may affect any such species or critical habitat until it completes its obligations under applicable requirements of the ESA. This is true whether a lease contains a T&E stipulation or whether CNE agrees that the T&E stipulation is worded “strongly” enough.

All stipulations are attached to a lease for valid reasons and are supported by the applicable RMP and NEPA analysis. Development of RMPs and stipulations is subject to considerable input and review from the public, including cooperators such as the WGFD. Lease stipulations are based on the best scientific information available at the time they are developed. The BLM monitors the effectiveness of its lease stipulations and if the stipulation is no longer required to achieve the desired effect or outcome, the BLM may waive, modify, or approve an exception to an existing lease stipulation. *See*, 43 C.F.R. 3101.1-4. Upon a site-specific analysis of a development proposal, the BLM has the authority to impose reasonable measures to minimize adverse impacts on other resource values, including restricting the siting or timing of lease activities. *See, e.g. Yates Petroleum Corporation*, 176 IBLA 144 (2008). The BLM may also add new stipulations for future lease offerings when the RMP is revised or amended. The BLM continues to monitor oil and gas stipulations and other mitigation measures in order to verify their effectiveness in reducing impacts.

The BLM recognizes that information notices have no legal consequence except to give notice of existing requirements and may be attached to a lease by the authorized officer, at the time of lease issuance, to convey certain operational, procedural, or administrative requirements (43 CFR 3101.1-3).

BLM does not have a Manual 1622 (nor is there a section 1622 in the 43 CFRs), which CNE refers to as “Fish and Wildlife Habitat Management” that contains specific language for BLM’s requirements for the RMP process. Manual 6840 is the Special Status Species Management manual. This manual establishes the policy for management of species listed or proposed for listing pursuant to the ESA and Bureau sensitive species found on BLM-administered lands. The authorities for this manual come from the ESA of 1973 as amended; Sikes Act, Title II as amended; FLPMA, as amended; and several others (found at .03 in Manual 6840). As stated in response #4 above, the protest is incorrect in its characterization of FLPMA’s requirements. Section 202 of FLPMA (Title 43, USC §1712), states when developing and revising LUPs, the Secretary of the Interior shall “to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning and management activities . . . with the land use planning and management programs of other Federal departments and agencies and of the States and local Governments within which the lands are located.” The Secretary is also required to assist in resolving, to the extent practical, any inconsistencies between Federal and non-Federal plans. Among other things, this coordination is intended to prevent the likelihood of future listing as argued by CNE of a number of state-listed species.

WO IM No. 97-118 is no longer in effect having been issued over ten years ago. CNE's arguments that Manual 6840 is illegal, inconsistent with ESA or with the stated objectives of the special status species policy are without merit, as the BLM is in compliance with the requirements of the ESA.

The most current BLM Wyoming policy on sensitive species is WY-2010-027, entitled "Update of the Bureau of Land Management, Wyoming, Sensitive Species List-2010." This policy states that the information sources reviewed in the sensitive species screening process included but were not limited to Wyoming Natural Diversity Database Species of Concern, WGFD Species of Special Concern, Wyoming partners in Flight Bird Conservation Plan, etc. Only four species were deleted from the 2001 list while 11 species were added to the list for 82 species total. Goals listed for the sensitive species policy are: to maintain vulnerable species and habitat components in functional BLM ecosystems; ensure sensitive species are considered in land management decisions; prevent a need for species listing under ESA; and prioritize needed conservation work with an emphasis on habitat.

BLM works with and consults with a variety of federal agencies concerning threatened and endangered species and other special status species. BLM also uses data collected by these groups. Please visit the following webpages for information concerning threatened and endangered species as well as special status species (plants and animals):

http://www.blm.gov/wy/st/en/programs/plant_conservation/status.html

<http://www.blm.gov/wy/st/en/programs/Wildlife.html>

http://www.blm.gov/wy/st/en/programs/plant_conservation.html

10. CNE argues that leasing any of the parcels violates the ESA because: (1) ESA listed species may be present on several of the parcels; (2) the parcels have inadequate stipulations; (3) and the leases are being offered for sale without prior consultation with the Fish and Wildlife Service (FWS). CNE argues that BLM should perform Section 7 ESA consultation with the FWS before the BLM issues a lease, rather than waiting to consult with the FWS when an APD is submitted, i.e., before the BLM makes an irretrievable commitment of resources.

BLM Response: The BLM consults under Section 7 of the ESA with the FWS when the BLM prepares a RMP or a RMP revision. The BLM prepares a biological assessment (BA) and the FWS prepares a biological opinion (BO) once the BLM determines which lands will be available for leasing during preparation of a RMP or RMP revision. For instance, CFO has their BO in Appendix Z of the RMP ROD. KFO has their BO in Appendix T of the RMP ROD. PFO has their BO in Appendix 28 and RFO has their BO in Appendix 14.

The BLM has retained its authority after lease issuance to modify or deny the use of the lease in order to meet ESA requirements. The lessee does not have a right to engage in any surface-disturbing activities until the BLM analyzes the environmental impacts and processes an APD.

By regulation, lease terms, lease stipulations, and policy, the BLM may require modifications to or disapprove proposed activity that is likely to result in jeopardy to the continued existence of a proposed or listed species. The BLM will not approve any ground-disturbing activity that may affect any such species or critical habitat until it completes its obligations under applicable requirements of the ESA.

Issuing an oil and gas lease does not cause immediate surface disturbance. Issuing an oil and gas lease does not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of such species. It is far from certain that the lease will ever result in drilling or surface-disturbing activities, especially where T&E species are concerned. There is great uncertainty as to whether, when, and where a well would be drilled on a lease. We disagree with CNE's argument that the BLM violated the ESA because the BLM failed to consult with the FWS before the BLM offered specific parcels for sale. The operational stage is the point in time, when, in accordance with Section 7 of the ESA, the BLM is required to consider whether the proposed action (APD) is likely to jeopardize the continued existence of any endangered species. To carry out this requirement, the BLM must work closely with the FWS. The BLM must ask the FWS whether a listed species is present in the area of the proposed action. If the FWS responds affirmatively, the BLM must complete a BA. If the BLM's assessment indicates that the proposed action "may affect" listed species or critical habitat, the BLM must initiate formal consultation with the FWS. The BLM's "final" commitment of irreversible resources occurs at the APD approval stage, therefore, it is premature and impractical to engage in Section 7 ESA consultation procedures at the lease issuance stage when it is still uncertain whether a "may affect" issue even exists or ever will exist.

In District Court, District of Columbia, Wyoming Outdoor Council v. Bosworth, Case No. 1-01CV02340(RMU) (2003), WOC argued lease issuance triggers the ESA's formal consultation requirement. Specifically, WOC argued the Forest Service (FS) and the BLM failed to formally consult with the FWS before issuing six oil and gas leases in Wyoming (two FS leases, four BLM leases), therefore, the FS and the BLM violated the ESA. WOC pointed out that the FS and BLM were both aware that the Brent Creek area served as grizzly bear habitat and that lease issuance constituted an action that "may affect" grizzlies. WOC also argued that lease issuance threatens grizzlies because lease issuance is the irreversible and irretrievable point at which the lessee gains the legal right to undertake surface development, even if such development does not occur until years later. The District Court ruled that since WOC's claims ". . . rest upon contingent future events that may not occur as anticipated, or indeed may not occur at all, the court concludes that the Wyoming Outdoor Council's claims are not ripe." The District Court dismissed WOC's arguments and ruled that the irreversible commitment of resources does not occur at the point of lease issuance, but rather at the point when the BLM receives a site-specific proposal. The BLM is not required to consult at lease issuance, but rather at the APD stage.

11. CNE argues the BLM cannot rely on a DNA to lease nor did BLM analyze impacts of oil and gas development before issuing leases.

BLM Response: The BLM’s policy, WO IM No. 2001-062, Documentation of Land Use Plan Conformance and National Environmental Policy Act (NEPA) Adequacy, is to perform a DNA to verify whether leasing certain lands has been previously analyzed in an existing NEPA document. The BLM performs a DNA (“the hard look”) to determine if BLM can rely on existing NEPA documents for the proposed action of leasing parcels for oil and gas. The RMP is the document that authorizes the land allocation (lands open or closed to leasing). The RMP/EIS analyses the impacts of oil and gas development (leasing) on all the other resources (Chapter 4, Environmental Consequences). The BLM also prepares environmental documents (tiered to the RMP) that are site-specific to oil and gas field development. The IM is clear that BLM can rely on a DNA to determine whether leasing certain lands is still appropriate and in accordance with the RMP. The BLM analyzed the potential impacts of oil and gas development (leasing) to all other resources prior to offering the parcels for sale. Prior to offering for sale any of the parcels for the February 2011 oil and gas competitive sale, the Field Offices (BFO, CFO, NFO, LFO, and CyFO) prepared EAs not DNAs to analyze whether the decision to issue leases for these parcels remained appropriate. The Decision Records recommend the sale and subsequent issuance of the parcels in the February 2011 oil and gas competitive sale.

12. CNE argues that the BLM has broad discretionary authority to approve or disapprove mineral leasing of public lands.

BLM Response: We agree with CNE that the BLM has discretion whether to lease public lands. The Secretary of the Interior is vested by the Mineral Land Leasing Act of 1920, 30 U.S.C. § 181 et seq. (2000), as amended, with discretionary authority to lease or not lease public lands which are otherwise available for oil and gas leasing. This authority has been delegated to the State Director. If the State Director determines not to lease lands that are otherwise available for leasing as designated in the RMP, the justification must be rational and defensible, otherwise the decision will be found to be arbitrary and capricious. (Continental Land Resources, 162 IBLA 1 (June 16, 2004)).

Lands are nominated by an interested party to be included in the BLM Wyoming’s competitive oil and gas lease sale. The sales are now held quarterly (4 sales per year) in Wyoming. The nominations are checked to ensure the lands described in the nomination are available and eligible for leasing. The field office manager will conduct an EA to determine if leasing the nominated lands is appropriate. If there is new information available since the RMP ROD was signed, and the field manager believes it is no longer appropriate to lease the land, the field manager will recommend to the Wyoming Deputy State Director, Division of Minerals and Lands, to remove the parcel from the sale list. In summary, the BLM Wyoming has a process in place to determine whether any nominated land should be leased based on the best and most recent information. That process is followed for all lease sales, including the February 2011 sale.

13. CNE argues that the February 2011 Wyoming lease sale does not comply with any of the mandates of WO IM 2010-117. If the parcels were not under review prior to May 17, 2010, CNE requests those parcels be withdrawn from sale as well as those parcels under review prior to May 17, 2010, in order to comply with the mandates of WO IM 2010-117.

BCA argues BLM has not analyzed ‘leases’ on a case-by-case, site-specific basis, before leasing, as leasing reform states.

BLM Response: We disagree with your argument that the February 2011 oil and gas competitive lease sale did not comply with any of the mandates of WO IM 2010-117. No specific parcels were protested by either CNE or BCA.

Wyoming BLM has prepared the implementation plan and the timeline for accomplishing the tasks outlined in this IM. The implementation plan was submitted on August 16, 2010, and has not been officially approved. All BLM states have until May 2011 to implement all of the guidance in WO IM 2010-117 and BLM Wyoming intends to meet that schedule. The February 2011 incorporated aspects of the reforms referenced in WO IM 2010-117. Specifically, BLM Wyoming rotated the sale schedule and only included parcels in the High Plains and Wind River/Big Horn Basin Districts; prepared EAs to analyze the parcels and posted the sale notice 90-days prior to the sale.

BLM Wyoming is currently addressing the backlog of deferred parcels. We have begun the leasing EA process with the August and November 2010 competitive sales. The first sale to include the public comment period is May 2011 competitive oil and gas sale parcels. The High Desert District EA comment period for the May 2011 sale opened on October 6, 2010, and closed on November 5, 2010.

The leasing EA contains the affected environment components occurring within each of the parcels offered in Section 3.1 as well as components common to all of the parcels. Environmental impacts are described under Section 4. Section 5 contains a description of mitigating measures and residual impacts. Maps showing location of the parcels are in the EA as are the sage-grouse and wilderness screening information. The draft EA is located in the online BLM NEPA documents found at: <http://www.blm.gov/wy/st/en/info/NEPA/og-ea.html>

Decision:

One parcel, WY-1102-003 was deferred prior to the February 2011 competitive oil and gas sale pending completion of a BLM-WGFD land exchange. The remaining 30 parcels will be issued.

Appeal Information

This Decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and Form 1842-1 (copy attached). If an appeal is taken, your notice of appeal must be filed in this office within 30 days from your receipt of this Decision. The protestor has the burden of showing that the Decision appealed from is in error.

If you wish to file a petition for a stay of the effectiveness of this Decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed on the attached document. Copies of the notice of appeal and petition for a stay must be submitted to the Interior Board of Land Appeals and the appropriate Office of the Solicitor (see 43 CFR §4.413) at the same time the original documents are filed with this office. Copy of the notice of appeal and petition for a stay must also be submitted to each adversely affected party named in this decision 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 regulations, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

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

You will find attached to this decision a "Competitive Oil and Gas Lease Sale Results" which contains a list of persons who have purchased the protested parcels at the February 2011 sale and are, therefore, adverse parties who must be served with any pleadings.



Larry Claypool
Deputy State Director
Minerals and Lands

2 Attachments:

- 1 - Appeal Form (1842-1)
- 2 - February 2011 Oil and Gas Sale Results

cc:

State Offices

Field Offices

DSD (920)

DSD (930)

J. Weaver (923) e-mail of final and a letterhead copy

S. Moberley (923)

V. Mistarka (921) e-mail of final and a letterhead copy