United States Department of the Interior

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September 21, 2006

IBLA 2006-208	:	WY-0604-147, et al.
WYOMING OUTDOOR COUNCIL, ET AL.	:	Competitive Oil and Gas Lease Sale
	:	Petition for Stay Granted

ORDER

Wyoming Outdoor Council (WOC), The Wilderness Society (TWS), and Greater Yellowstone Coalition (GYC) have appealed from and petitioned for a stay of the effect of a May 30, 2006, decision of the Wyoming Deputy State Director, Minerals and Lands, Bureau of Land Management (BLM), denying their protest of the offering of 11 parcels at BLM's April 4, 2006, competitive oil and gas lease sale. [1/] All the parcels are located on lands within Management Area 24 (MA 24) of the Bridger-Teton National Forest, which falls under the surface management jurisdiction of the Forest Service (FS), U.S. Department of Agriculture. BLM and two high bidders at the sale, Stanley Energy, Inc. (Stanley) and Hanson & Strahn, Inc. (H&S), have opposed the petition for stay.

The May 30, 2006, decision, which considered a number of protests filed concerning a total of 44 parcels in the April sale, addressed the protest filed by appellants herein in 3 paragraphs at pages 10 and 11 of the decision, stating at page 11 that FS did not find any "new issues or information changing the current leasing decisions and the Forest Plan direction" and that a "more detailed NEPA analysis" would be required, if an application for permit to drill were filed.

Under 43 CFR 4.21(b)(1), a petition for a stay must show sufficient justification based on the relative harm to the parties if the stay is granted or denied; the likelihood of the appellant's success on the merits; the likelihood of immediate and irreparable harm if the stay is not granted; and whether the public interest favors the granting of the stay. The party requesting the stay has the burden of showing

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[1/] The parcels at issue are designated as WY-0604-147 and WY-0604-150 through 159. Two other organizations, Biodiversity Conservation Alliance and Wyoming Wilderness Association, joined in the protest. Those organizations did not participate in the present appeal.

that a stay is warranted by satisfying each of the criteria specified in the rule. 43 CFR 4.21(b)(2); Wyoming Outdoor Council, 156 IBLA 377, 383 (2002).

In their petition for stay, appellants address each of the criteria. Concerning their likelihood of success on the merits, they assert that BLM violated section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), by failing to prepare supplemental NEPA analysis to address significant new information prior to leasing the parcels in question. Appellants identify such information as air quality impacts likely to result from leasing, the listing of the Canada lynx (Lynx canadensis) as a threatened species under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531-1543 (2000), impacts to the Sublette mule deer herd unit from surrounding oil and gas development projects, and impacts to the Colorado cutthroat trout from oil and gas development. Appellants also charge that prior to leasing BLM was required to consult with the U.S. Fish and Wildlife Service (FWS) regarding the potential adverse effects to Canada lynx, in compliance with section 7(a) of the ESA, as amended, 16 U.S.C. § 1536(a) (2000).

Appellants raised some of the same objections in Wyoming Outdoor Council, IBLA 2006-184, a case in which BLM denied a protest of the offering of one parcel (WY-0512-176) at BLM's December 6, 2005, competitive oil and gas lease sale in Wyoming. That parcel encompassed 1,280 acres on Federal land in secs. 20 and 29, T. 35 N., R. 114 W., Sixth Principal Meridian, Sublette County, Wyoming, within MA 24 of the Bridger-Teton National Forest. In an order dated July 10, 2006, the Board concluded that the appellants had satisfied their burden of showing that a stay was warranted based on the criteria set forth in 43 CFR 4.21(b)(1). We held that they had established a likelihood of success on the merits of their NEPA challenge on the basis of deficiencies in the Worksheet, Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA), which ostensibly served as the basis for BLM's denial of the appellants' protest, but which had been prepared on March 7, 2006, three months following the offering of the parcel at the December 6, 2005, sale. [2/] The same DNA, prepared prior to the April 2006 sale, is applicable to the parcels in question in the present appeal. [3/]

[2/] A DNA is not a NEPA document. Pennaco v. U.S. Department of [the] Interior, 377 F.3d 1147, 1162 (10th Cir. 2004). BLM personnel utilize DNAs "to assess whether existing NEPA documents provide an adequate assessment for a proposed action (e.g., issuance of a competitive oil and gas lease) such that no new NEPA analysis is needed." Wyoming Outdoor Council (On Reconsideration), 157 IBLA 259, 276 (2002) (Burski, Administrative Judge, concurring).

[3/] The DNA identifies the proposed action as "Leasing (w/in MA 12, 22, 23, 24, 25,

(continued...)

Not surprisingly, appellants now contend that, for the same reasons expressed by the Board in that order, the Board "should stay issuance of these April 2006 Wyoming Range leases as well." (Reply in Support of Petition for Stay (Reply at 2.) On the other hand, BLM and the high bidders, Stanley and H&S, seek a different result in this case, alleging that appellants have failed to satisfy the criteria for a stay. With regard to the Board's reasoning in the prior order, BLM states that the Board did not have the benefit of "a substantive response filed by BLM," the Board only had an "admittedly * * * incomplete record," and "the Board relied only on this five-page [DNA] worksheet as being BLM's independent determination of NEPA compliance." (BLM Response to Petition for Stay (Response) at 16-17.)

BLM and the high bidders have presented extensive briefing concerning the existing documentation that, they assert, supports leasing without further NEPA analysis. BLM offers the August 18, 2006, Declaration of Vickie Mistarka, the BLM employee who prepared the DNA worksheet, as evidence of the process she engaged in before and during preparation of the worksheet. (Response, Attachment F.)

As we have stated many times, NEPA is a procedural statute. It does not require that an agency elevate environmental concerns above other considerations. Rather, it mandates that the agency take a hard look at the environmental consequences of a proposed action and reasonable alternatives thereto before approving the action. Wyoming Outdoor Council (On Reconsideration), 157 IBLA at 267, and cases cited. Even when the lands proposed for oil and gas leasing are under the surface management jurisdiction of another agency, BLM has an independent obligation to ensure compliance with section 102(2)(C) of NEPA because, when the surface management agency consents to lease, the Secretary of the Interior has "the final authority and discretion to decide to issue a lease." 43 CFR 3101.7-2(b); see Wyoming Outdoor Council, 159 IBLA 388, 414 (2003). BLM may adopt an EA prepared by FS, but it must have independently reviewed that EA and determined that it satisfied NEPA. See Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d 43, 46 (D.C. Cir. 1999); Colorado Environmental Coalition, 125 IBLA 210, 220 (1993).

On March 2, 1990, FS issued a Record of Decision approving the Land and Resource Management Plan for the Bridger-Teton National Forest (B-T Plan), which was based on a Final Environmental Impact Statement (FEIS). (Administrative

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[3/] (...continued)
26, 31, 32, 49)" and the location of the proposed action as "B-T NF [Bridger-Teton National Forest," and describes the proposed action as "USFS Ogden proposes to lease on the Jackson, Big Piney and Kemmerer Ranger Districts. FS has consented to offer 71 parcels totaling 128,066A [acres] over several sales."

Record (AR) at Tab 35.) [4/] As part of that ROD and FEIS, FS included a forest-wide oil and gas leasing analysis and leasing availability decision. [5/] Thereafter, FS developed environmental assessments (EAs) related to oil and gas leasing for various management areas within the Bridger-Teton National Forest, including one in 1993 for MA 24 ("Environmental Assessment for Making the Oil and Gas Leasing Decision for Specific Lands Within the Horse Creek (MA 24) Management Area"). (AR at Tab 28.) The 1993 MA 24 EA stated that it documented site-specific environmental analysis conducted to ensure that the decision to lease specific lands was consistent with the B-T Plan FEIS. It noted that no proposal or plans of operations for oil and gas wells had been submitted for approval within MA 24, but that, if such a proposal were received, additional site-specific NEPA environmental analysis would be necessary. It further noted at page 1:

> Environmental analyses which support oil and gas leasing decisions must project and analyze the type and amount of post-leasing activity that is reasonably foreseeable. This description of reasonably foreseeable development is revised, as appropriate, as projects become more site-specific, and as more information about the oil and gas resource becomes available. [6/]

On August 5, 1993, the Forest Supervisor, Bridger-Teton National Forest, issued a "Notice of Decision and Finding of No Significant Impact" (NOD/FONSI) for the MA 24 EA stating that he decided to authorize oil and gas leasing on 73,800 acres of land within MA 24, subject to certain stipulations and notices. [7/] (AR at Tab 28.)

[4/] The AR forwarded to the Board by BLM contains a series of documents indexed and tabbed at numbers 1-36. Where appropriate, references to such documents will be to "Tab" and the number.

[5/] Prior to issuance of that decision, the BLM Wyoming State Director issued a Record of Decision on Jan. 31, 1990, adopting the FEIS. He stated that "[l]easable minerals will be managed by the BLM in compliance with the Plan * * *." (AR at 36.)

[6/] This statement is consistent with the requirement, as expressed by this Board, that "[t]he appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public lands for oil and gas purposes * * *." Southern Utah Wilderness Alliance, 166 IBLA 270, 276 (2005), vacated in part on reconsideration, 166 IBLA 270A (2006).

[7/] Those stipulations were a No Surface Occupancy Stipulation for "areas mapped on Forest Plan O&G Lease Stipulation Map," a Timing Stipulation for "wildlife winter ranges and calving/fawning areas mapped in 1992," and a Bridger-Teton Stipulation to identify Forest Plan standards and guidelines applicable to all authorized leasing

(continued...)

On December 12, 1993, BLM issued a Record of Decision adopting the MA 24 EA, stating that oil and gas leasing would be managed by BLM in accordance with the B-T Plan and the 1993 MA 24 EA. (AR at Tab 27.)

Prior to listing of the Canada lynx as a threatened species in 2000, the FWS had completed a biological opinion for the Bridger-Teton National Forest finding that oil and gas leasing would have no effect on Threatened and Endangered (T&E) species or their critical habitats. (AR at Tab 19.) Thereafter, FS and BLM reinitiated formal consultation and, on October 25, 2000, FWS determined that oil and gas leasing was not likely to jeopardize the continued existence of the lynx. (AR at Tab 25 at 53.) It noted that no critical habitat had been designated for the lynx.

Thereafter, in January 2004 FS prepared a supplemental biological assessment (Supplemental BA) to address potential impacts on all listed T&E species, including the Canada lynx, for oil and gas leasing in the Bridger-Teton National Forest. (AR at Tab 21.) FS also prepared a supplemental biological evaluation (Supplemental BE) for the same purpose for sensitive plants and animals, including the Colorado cutthroat trout. Each found no impact on such species from leasing. (AR at Tab 21 at 21; AR at Tab 22 at 15-18.) Neither document considered the impacts of lease development. (AR at Tab 21 at 7; AR at Tab 22 at 13.) Nor is either document a NEPA document.

In February 6, 2004, the Bridger-Teton National Forest Air Quality Specialist prepared a document styled "Air Quality Supplemental Information Report for Gas Leasing in MAs 12, 22, 23, 24, 25, 26, 31, 32, and 49 on the Bridger-Teton National Forest" (2004 Air Quality SIR). Therein, he explained that, since 1990 to 1993, when the EAs for the MAs had been prepared, new issues and concerns had arisen. He continued:

> [T]he Forest decided that several issues needed to be reviewed and addressed in a Supplemental Information Report (SIR) prior to issuing leases in these areas. The SIR is being completed to insure these concerns are adequately addressed and that potential environmental

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[7/] (...continued)
areas. The "Lease Notices" were intended, where applicable, to, inter alia, "emphasize Forest Plan requirements for Threatened and Endangered species, Sensitive species, and visual quality objectives." (NOD/FONSI at 7.) We note that, with regard to lease notices, BLM regulations provide at 43 CFR 3101.1-3 that "[a]n information notice has no legal consequences" and "[i]nformation notices shall not, be the basis for denial of lease operations."

> impacts are disclosed to the decision makers and the public. This report is specific to air quality related issues.

(2004 Air Quality SIR at 1.)

He stated that, based on conversations with Regional Air Quality staff and the Environmental Protection Agency (EPA), [8/]

> we decided that given the programmatic level of this analysis and the understanding that more detailed NEPA analysis will be required if the Forest Service is ever presented with an Application for Permit to Drill (APD), that the impacts to air quality could be demonstrated not to have a significant impact on air quality by tiering our discussions to the Pinedale Anticline EIS. [9/] This approach is reasonable because the 90 wells authorized in the 9 management areas were included in the Pinedale Anticline Modeling, the Pinedale anticline project is not fully developed (700 producing well pads) and more detailed NEPA analysis will be required if an APD is ever presented to Forest for processing.

Id.

In a February 25, 2004, "Supplementary Information Report Oil and Gas Leasing Decisions on Specific Lands Management Areas 12, 22, 23, 24, 25, 26, 31, 32, and 49" (2004 SIR), FS concluded at page 1 that "NEPA [documentation] completed is still current and no further effects would come from the processing of oil and gas lease requests." The next sentence of the 2004 SIR on the same page noted, however:

> Three issues were raised since the release of the original documents that warranted review. Since release of the decisions, the USDI Fish and Wildlife Service (FWS) listed the Canada lynx under the

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8/ What may have been discussed and communicated to FS by EPA officials is in question. See Petition for Stay (Petition) at 22-23; Petition, Ex. 32.

9/ An SIR has the same status as a DNA; it is not a NEPA document. See Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 565-66 (9th Cir. 2000). We have stated that "[i]t is thus clear that although DNAs are not themselves documents that may be tiered to NEPA documents, they may nevertheless properly be used to determine the sufficiency of previously issued NEPA documents to address the environmental effects of a proposed action." Southern Utah Wilderness Alliance, 166 IBLA at 282. FS could not properly tier the 2004 Air Quality SIR to any NEPA document.

> Endangered Species Act (ESA) in March 2000. In addition, air quality surfaced as an issue in the project area, as well as the question of whether the Reasonable Foreseeable Development (RFD) assessment remains accurate. [10/]

After reviewing those issues, FS concluded that "the new information and its effects would be within the context of the Environmental Analyses and Decision Notices," and that there was "no need to correct, supplement, or revise the environmental documents for the decision." Id.

Prior to offering the parcels in question for lease, a single BLM employee prepared a DNA, the deficiencies of which the Board highlighted in the July 10, 2006, order in IBLA 2006-184. In an attempt to explain away those deficiencies BLM offers Mistarka's Declaration, dated August 18, 2006. (Response, Attachment F.) Therein, she relates that she is a "Physical Scientist for the Branch of Fluids" in the BLM Wyoming State Office. (Mistarka Declaration at unnumbered page 1, unnumbered ¶ 1.) She states that she reviewed the 1993 MA 24 EA for "NEPA adequacy"; that "[t]here are nine MAs with 10 wells authorized in each MA"; that "[a]ir quality was looked at most recently in 1999 in the Draft EIS for the Pinedale Anticline Oil and Gas Exploration and Development Project"; and that the 90 wells were included in the Cumulative Impact Area shown on the map on page 3-38 of that Draft EIS, in the Far-Field air quality analysis on pages 4-73 to 4-75, and in Chapter 5 under Cumulative Impacts on pages 5-15 to 5-20. Id. at unnumbered page 2, unnumbered ¶ 8. She further states that she

> reviewed the Jonah document [Final Air Quality Technical Support Document for the Jonah Infill Drilling Project Environmental Impact Statement] to see if it included the Forest Service MAs. I used the document to see if anything had changed that might preclude leasing. No federal standards are being exceeded so leasing will add nothing to the air quality impacts that could occur from present day activities. AR Index number 15 contains selected pages I reviewed for leasing on the B-T. I inadvertently forgot to list both the Pinedale Anticline DEIS and Technical Report (AR Index number 26) and the Jonah Infill Final Air Quality Technical Support document (AR Index number 15) on the DNA but did mention that I reviewed them in the protest decision. [11/]

10/ As in IBLA 2006-184, appellants do not pursue the RFD issue on appeal.

11/ It appears that, in addition to preparing the DNA, Mistarka also drafted the May 30, 2006, decision (see AR at Tab 3), and she is apparently referencing the statement at page 11 of the decision that "[t]hese same wells from the nine MAs[,]

(continued...)

Appellants vigorously dispute FS and BLM reliance on the Pinedale Anticline Draft EIS "to provide a valid current NEPA analysis of potential air quality impacts resulting from the challenged leasing * * *." (Reply at 11.) Appellants state that that document established an RFD for existing and future development of 1,944 wells, but that "3,086 wells are already in place." [12/] Id. Appellants also claim that "BLM and the Forest Service have already determined that the Pinedale Anticline EIS is out of date and must be supplemented before it can be used to support air quality analyses in this area," that "BLM is on record in the Questar Year-Round Drilling EA that the Pinedale Anticline EIS is out of date with respect to its nitrogen oxides analyses," and that "the Pinedale Anticline EIS did not even consider well drilling in MA 24." [13/] Id.

Neither Stanley nor H&S mount much of a defense of BLM's reliance on the Pinedale Anticline Draft EIS. Instead, they focus on the Jonah Infill documents, which indicate that development of 10 wells in MA 24 was included in the modeling for the Jonah Infill Development Project EIS. See Jonah Infill Final Air Quality Technical Support Document for the Jonah Infill Development Project EIS, Vol. 1, pages 16-18, Appendix C at C-40.

We have held, in challenges to Federal oil and gas lease sales on the basis that pre-leasing NEPA documents did not address the impacts of coal bed methane (CBM) exploration and development, that BLM may utilize post-leasing NEPA documents and other environmental information to inform its opinion regarding the necessity to complete new NEPA analysis, and that, when all relevant existing information shows that the impacts from potential CBM exploration and development are not significantly different than the impacts from conventional oil and gas leasing, which

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[11/] (...continued)
including ten wells projected for MA 24, were also included in the Jonah Infill modeling completed in 2005."

[12/] "Within the Pinedale Field Office Area and on adjacent USFS lands (hereafter referred to as the Pinedale RMP [Resource Management Plan] Area, see Figure 5-2, reasonably foreseeable development for existing and future projects is 1,944 wells which would be drilled in the next 10 to 15 years." (Pinedale Anticline Draft EIS at 5-4.)

[13/] "Reasonably foreseeable development on the Bridger-Teton National Forest in areas adjacent to the Pinedale Field Area would occur in Management Areas (MA) 21 (Hoback Basin) and 72 (Upper Green River) (see Figure 5-1). BLM (1998d) estimates that 10 wells could be drilled in each of these two MAs (assuming the USFS allows access and leasing within the MAs) in the next 10 to 15 years." (Pinedale Anticline Draft EIS at 5-4.)

had been analyzed in the pre-leasing NEPA documents, it is proper to conclude that those pre-leasing NEPA documents constitute a hard look at leasing, despite the fact that CBM exploration and development were not analyzed or even mentioned therein. Wyoming Outdoor Council, 160 IBLA 387, 402-03 (2004); see Western Slope Environmental Resource Council, 163 IBLA 262, 285 (2004). On the other hand, when the impacts from CBM exploration and development are significantly different that those associated with conventional oil and gas exploration and development, and those impacts have not been analyzed in any pre-leasing document, we have reversed the dismissal of a protest to the sale of Federal oil and gas leases. Wyoming Outdoor Council, 156 IBLA 347, 359 (2002). [14/]

In this case, the record shows that little, if any, attention was given to air quality issues in any pre-leasing NEPA document. The air quality documents relied on by BLM and the high bidders in this case to inform BLM's judgment are post-leasing project-level NEPA documents, which do not include reasonable alternatives relevant to a pre-leasing environmental analysis. [15/] The pre-leasing document found by both FS and BLM to constitute a "hard look" at leasing the parcels in question is the 1993 MA 24 EA. However, as the FS noted in the 2004 Air Quality SIR at page 1, "[i]n the 1990's air quality was considered a minor issue, and not much attention was given to the subject in NEPA analysis listed above [B-T Plan FEIS and 1993 MA 24 EA]."

Regarding the Canada lynx, which was designated a threatened species subsequent to completion of the 1993 MA 24 EA, Mistarka explained that she reviewed the Supplemental BA and the Supplemental BE, as well as "other Canada lynx information documents that BLM/FS had been working on," in finding that "the analyses and information present to show the FS did adequate NEPA and ESA work to support a leasing decision." (Mistarka Declaration at unnumbered page 3, unnumbered ¶ 11.) She stated that "[a]t this point in time, the only information

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[14/] The District Court for the District of Wyoming reversed the Board's decision in that case and the decision in Wyoming Outdoor Council (On Reconsideration), supra, denying reconsideration thereof. Pennaco Energy Inc. v. U.S. Department of [the] Interior, 266 F.Supp.2d 1323 (D.Wyo. 2003). However, on appeal the Tenth Circuit Court of Appeals in Pennaco Energy, Inc. v. U.S. Department of [the] Interior, 377 F.3d 1147 (10th Cir. 2004), reversed the District Court's decision and remanded it with instructions to reinstate the Board's decision.

[15/] While H&S cites Pennaco Energy, Inc., 377 F.3d at 1159-60, as "holding that agencies may satisfy NEPA by looking at multiple documents" (H&S Response at 11), the court therein did not allow a post-leasing project level document, the Wyodak EIS, to satisfy a pre-leasing NEPA obligation because of that document's "failure to consider the pre-leasing options." Id. at 1160.

stating that there is lynx in Wyoming is a National Park Service documenting [sic] a mother lynx with kittens in Yellowstone National Park. Canada lynx may use some areas of the B-T to travel to mountains north and south of the B-T." (Mistarka Declaration at unnumbered page 3, unnumbered ¶ 9.)

Appellants provide evidence that Mistarka, the only BLM employee who worked on the DNA, was not adequately informed about available relevant information concerning the Canada lynx at the time she completed the DNA. Appellants assert that Mistarka's statement, quoted above, shows that she had no knowledge that "[a] biological study in 2005 confirmed actual lynx presence within the challenged lease parcels," citing page 11 of Ex. 38 to their Petition for Stay, a document titled "Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report." (Reply at 16, 21; see Petition at 32 n.14, 51.) They state the "study observed that the Wyoming Range drainages where the challenged leasing would occur exhibit 'particularly high' activity of the lynx's essential prey, the snowshoe hare." (Reply at 16, quoting Ex. 38 at 8.) Appellants note that, on February 28, 2005, FS issued a "News Release" concerning that study, titled "Endeavor Wildlife Research Biologists Confirm Canada Lynx Presence on Bridger-Teton National Forest." Id. at 21, attached Ex. 9. Thus, even assuming that Mistarka had sufficient background to evaluate the documents relating to the Canada lynx that she cited in her Declaration, appellants have shown that her knowledge of available relevant information was incomplete.

Based on a preliminary review of the record and the pleadings filed by the parties, we conclude that appellants have carried their burden to establish that they are likely to succeed on the merits of their appeal regarding NEPA compliance by BLM, without further resort to their specific arguments concerning the Sublette mule deer herd and the Colorado cutthroat trout. In addition, we need not decide whether appellants have shown a likelihood of success on the merits of their ESA argument.

In light of the determination that appellants have established a likelihood of success on the merits of their NEPA claim, the balance of harms, as well as the public interest, favors granting a stay in this case until resolution of this appeal on its merits.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for stay is granted.

Bruce R. Harris
Deputy Chief Administrative Judge

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