



WYOMING OUTDOOR COUNCIL, *ET AL.*

173 IBLA 226

Decided December 31, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

WYOMING OUTDOOR COUNCIL, *ET AL.*

IBLA 2007-142 & 2007-246

Decided December 31, 2007

Appeals from two decisions of the Acting Deputy State Director, Minerals and Lands, Wyoming, Bureau of Land Management, affirming, on State Director Review, five Findings of No Significant Impact/Decision Records of the Field Manager, Buffalo Field Office, approving five plans of development for Federal oil and gas leases in and near the Fortification Creek Area of the Powder River Basin. SDR WY-2007-04 & WY-2007-06.

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Drilling

BLM's decision to approve a coalbed natural gas plan of development will be deemed to comply with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000), where BLM has, in an environmental assessment tiered to a programmatic environmental impact statement, taken a hard look at the environmental consequences of such action and reasonable alternatives thereto, considering all relevant matters of environmental concern, and made a convincing case that no significant impact will result therefrom which was not already addressed in the environmental impact statement or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. BLM's decision not to prepare a new environmental impact statement will be affirmed where the appellant does not demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the

proposed action, or otherwise based its decision on a clear error of law or demonstrable error of fact.

APPEARANCES: Bruce Pendery, Esq., Wyoming Outdoor Council, Logan, Utah, for appellants; Jack D. Palma, II, Esq., and Hadassah M. Reimer, Esq., Cheyenne, Wyoming, for Williams Production RMT Co.; Keith S. Burron, Esq., Cheyenne, Wyoming, for Petro-Canada Resources (USA), Inc.; Dana Jacobsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The Wyoming Outdoor Council and others have appealed from decisions by the Acting Deputy State Director, Minerals and Lands, Wyoming, Bureau of Land Management (BLM), dated December 7, 2006, and May 23, 2007, affirming, on State Director Review (SDR) (WY-2007-04 and WY-2007-06) five Findings of No Significant Impact/Decision Records (FONSI/DRs) of the Field Manager, Buffalo (Wyoming) Field Office (BFO), BLM.¹ The FONSI/DRs approved five Plans of Development (PODs) for Federal oil and gas leases in and near the Fortification Creek Area (FCA) in the center of the Powder River Basin, in northeastern Wyoming. BLM based each of the FONSI/DRs on a separate Environmental Assessment (EA) prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000).²

¹ The appeals from the December 2006 and May 2007 SDR decisions were docketed, respectively, as IBLA 2007-142 and IBLA 2007-246. Both appeals were filed by the Wyoming Outdoor Council on behalf of itself and the Natural Resources Defense Council, National Wildlife Federation (NWF), Biodiversity Conservation Alliance, Powder River Basin Resource Council, and Wyoming Wilderness Association. The Wyoming Chapter of the Sierra Club joined in both appeals and originally was identified in IBLA 2007-142 simply as Sierra Club. The Wyoming Wildlife Federation also joined in both appeals. However, as it was not named in the notice of appeal and only later appeared in the statement of reasons (SOR) filed in IBLA 2007-142, Wyoming Wildlife Federation's appeal in IBLA 2007-142 is untimely, and is hereby dismissed. For ease of reference, we will refer to appellants in both appeals as "appellants."

The SDR requests were pursued by all of the appellants, except NWF, in the case of SDR WY-2007-04, which challenged the September 2006 FONSI/DRs. The Wilderness Society also joined in both SDR requests, but did not appeal from the December 2006 or the May 2007 SDR decision.

² The FONSI/DR and EA for each POD are joined into a single continuously

(continued...)

Appellants principally are concerned that BLM failed to consider adequately potential individual and cumulative impacts of coalbed natural gas (CBNG) activity on the Fortification Creek elk herd which inhabits the prairie grasslands of the FCA.

Finding that it is in the public interest, and acknowledging the statement of non-opposition by Williams Production RMT Co. (Williams) and the lack of opposition by Petro-Canada Resources (USA), Inc. (Petro-Canada) and BLM, we hereby grant appellants' request for expedited consideration.

I. Factual and Procedural Background

The five PODs at issue are the Michelena, Mooney Draw, Carr Draw V Addition 1, Meadow Draw A, and Hollcroft-Stotts Draw.³ Together, they proposed the drilling and development of 128 wells for the recovery of CBNG, which would disturb a total of 32 acres of public land both inside and just outside the FCA.⁴ All CBNG activity was intended to counteract drainage by nearby wells on private and State lands and was planned to take place within existing Federal leases, in an area

² (...continued)

paginated document. Each FONSI/DR and EA will be cited simply as "EA." Since the EAs for the Michelena, Mooney Draw, Carr Draw V Addition 1, and Meadow Draw A PODs are "virtual duplicates of each other," SOR (IBLA 2007-142) at 7 n.1, we cite to the EA for the Michelena POD, when referring to the EAs for these PODs, unless otherwise stated. The EAs are identified as follows: Michelena (WY-070-06-295); Mooney Draw (WY-070-06-316); Carr Draw V Addition 1 (WY-070-06-306); Meadow Draw A (WY-070-06-365); and Hollcroft-Stotts Draw (WY-070-07-021).

³ The Hollcroft-Stotts Draw POD, approved in a Jan. 25, 2007, FONSI/DR, is the subject of IBLA 2007-246, and the remaining PODs, approved in Sept. 29, 2006, FONSI/DRs, are the subject of IBLA 2007-142.

⁴ The PODs are located entirely (Meadow Draw A) or partially (Michelena, Mooney Draw, and Hollcroft-Stotts Draw) inside the FCA, or immediately outside the FCA (Carr Draw V Addition 1). The total number of CBNG wells (proposed/approved) under the PODs is broken down as follows: Michelena (12/3 wells); Mooney Draw (34/28 wells); Carr Draw V Addition 1 (64/50 wells); Meadow Draw A (10/6 wells); and Hollcroft-Stotts Draw (8/5 wells). Some of the approved wells would be grouped together at the same site, thus providing for the total number of sites as follows: Michelena (1); Mooney Draw (12); Carr Draw V Addition 1 (25); Meadow Draw A (3); and Hollcroft-Stotts Draw (5). Drilling and completing each well was estimated to take one month, followed by production for 10 years, and then reclamation of the disturbed lands.

which already is the subject of considerable oil and gas drilling/development.⁵ The PODs are situated in relative close proximity, around the edges of the triangle-shaped FCA, with the Meadow Draw A, Michelena, and Mooney Draw PODs located, respectively, at its northern, southwestern, and southeastern points. Each POD was proposed by a different oil and gas lessee or operator.⁶

After completing scoping, BLM prepared the EAs and, in each, considered three alternatives: Alternative A, no action; Alternative B, the Proposed Action, which would provide for CBNG drilling/development and associated infrastructure both inside and outside the year-long range of the Fortification Creek elk herd in the FCA; and Alternative C, the Environmentally Preferred Alternative, a modified version of Alternative B that would exclude CBNG activity within the year-long elk range.

In its EAs, as tiered to a January 2003 Final Environmental Impact Statement (FEIS) for the 2000 Resource Management Plan Amendments for the Powder River Basin Oil and Gas Project (RMP Amendments) (WY-070-02-065),⁷ BLM considered the likely impacts of CBNG drilling/development on what it describes as a “geographically isolated prairie elk herd,” which currently numbers 230 and ranges across the FCA, considered its “core use area,” and adjacent areas. Environmental Report: Coalbed Natural Gas Effects on the Fortification Creek Area Elk Herd, dated September 2007 (CBNG ER) (attached to Appellants’ Notice of Supplemental Information) at iii, 4; *see* FEIS at 3-135 (Figure 3-14 (Elk Ranges)); EA (Michelena) at 19-21, 31-32; EA (Hollcroft-Stotts) at 22-23, 37-39.

Elk habitat encompasses a total of 131,168 acres of public surface estate and 160,409 acres of State and private surface estate, both inside and outside the FCA. FEIS at 3-134 (Table 3-41 (Distribution of Elk Ranges (Fortification Creek only) by Surface Owner)). Such habitat consists of year-long range (totaling 122,930 acres),

⁵ Each of the PODs is situated near existing CBNG wells on private and State lands in the Project area. BLM Answer (IBLA 2007-142) at 10; *see* Decision, dated Dec. 7, 2006 (2006 SDR Decision), at 17; BLM Scoping Notice, dated May 23, 2006, at 1; and BLM Answer (IBLA 2007-142) at 20.

⁶ The proponents and original dates of submission of the PODs are as follows: Michelena (Black Diamond Energy, Inc., June 16, 2005); Mooney Draw (Petro-Canada, Apr. 12, 2005); Carr Draw V Addition 1 (Williams, Mar. 15, 2006); Meadow Draw A (Medallion Exploration, Aug. 22, 2005); and Hollcroft-Stotts Draw (Pennaco Energy, Inc., Mar. 21, 2005).

⁷ The 2003 Record of Decision (ROD) for the RMP Amendments recognized that, prior to approval of individual wells and/or PODs for wells and associated infrastructure, “site-specific environmental analyses will be conducted and will be tiered to the FEIS.” ROD at 6.

within which are smaller overlapping crucial winter (totaling 38,233 acres), parturition (calving) (totaling 59,291 acres), and winter year-long ranges (totaling 71,123 acres), all of which were designated by the Wyoming Game and Fish Department (WGFD).⁸ FEIS at 3-134 (Table 3-41); 2006 SDR Decision at 10. These ranges encompass substantial parts of the five PODs at issue.⁹ It is undisputed that the elk generally do not venture outside their ranges. See 2006 SDR Decision at 10.

The record reveals that BLM has long recognized the importance of the elk herd and its habitat in the FCA. In 1975, BLM issued the Northeast Wyoming Management Framework Plan (MFP), designating the FCA as the “Fortification Creek Special Management Area” (SMA), “to protect the fragile watershed, aesthetic values, and wildlife habitat.”¹⁰ 2006 SDR Decision at 3. In 1982, BFO issued an “Oil and Gas Surface Protection Plan, Fortification Creek Area” (Oil and Gas Plan) that, based on a 1980 Oil and Gas Leasing EA (WY-061-0-29), provided, *inter alia*, for the imposition of restrictions on oil and gas activity in the SMA for the protection of elk, including precluding new surface-disturbing activity in crucial seasonal ranges, at certain critical times.

BLM carried the measures of the 1982 Oil and Gas Plan forward for the FCA when it promulgated the October 1985 RMP, which authorizes oil and gas leasing and exploration/development in the Buffalo Resource Area. 2006 SDR Decision at 3-4; 2007 SDR Decision at 3; see EA (Michelena) at 17 (“The 1985 Resource Management Plan incorporated decisions from [the 1982 Oil and Gas Plan]”), 18. In the RMP Amendments, BLM proposed amending the October 1985 RMP and other

⁸ The crucial winter and parturition ranges are identified by BLM as crucial seasonal ranges for the elk.

⁹ The five PODs are situated, respectively, *inside/outside the year-long elk range*, as follows: Michelena (515/1,740 acres); Mooney Draw (211/1,469 acres); Carr Draw V Addition 1 (1,442/3,616 acres); Meadow Draw A (91/425 acres); and Hollcroft-Stotts Draw (1,970/2,322 acres). The PODs also encompass, to a much lesser extent, other elk ranges, as follows: Parturition (Michelena); Winter Year-Long (Mooney Draw); Crucial Winter and Parturition (Carr Draw V Addition 1); and Crucial Winter and Winter Year-Long (Hollcroft-Stotts Draw).

¹⁰ BLM states that Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.* (2000), and implementing regulations do not provide for the designation or management of SMAs, and the RMP, which replaced the MFP, did not designate or continue the designation for the SMA. BLM concludes that “there no longer is a[n] SMA in the FCA.” Decision, dated May 23, 2007 (2007 SDR Decision), at 3; see 2006 SDR Decision at 3-4; BLM Answer (IBLA 2007-142) at 24. BLM, however, refers to the SMA in its FEIS and most of its EAs. See FEIS at 3-244; EA (Michelena) at 17.

BLM and Forest Service land use plans to consider more extensive CBNG and conventional oil and gas exploration/development and associated infrastructure than had been included in the land use plans, proposing drilling and development of 39,367 CBNG wells and 3,200 conventional oil and gas wells, over a 10-year period, subject to operational requirements and mitigation measures.

As indicated, BLM addressed potential environmental impacts, including effects on elk in its January 2003 FEIS and, relying on that FEIS, approved RMP Amendments for BLM-administered public lands in the Powder River Basin of Wyoming.¹¹

In the course of addressing the proposed RMP Amendments, BLM also considered designating the “Fortification Creek Elk Area,” which encompasses part of the FCA, as an Area of Critical Environmental Concern (ACEC) pursuant to sections 103(a) and 202(c) of FLPMA, 43 U.S.C. §§ 1702(a), 1712(c) (2000).¹² BLM did so based on its conclusion that the area met the eligibility criteria for ACEC designation of 43 C.F.R. § 1610.7-2, owing to wildlife (including elk) and other natural resource values. *See* RMP Amendments ROD at 10; EA (Michelena) at 31. In adopting the RMP Amendments, BLM deferred a final decision regarding ACEC designation, stating that “no interim management” was necessary “to maintain the

¹¹ The ROD for the RMP Amendment, issued July 30, 2003, states, at page 6, that these amendments did not change decisions concerning which lands are available for oil and gas leasing and exploration/development, but that “[a]ll other aspects of the 1985 RMPs concerning management of oil and gas and related activities are hereby replaced with the provisions contained in the RMPs as amended.”

¹² Of the PODs at issue, only the Hollcroft-Stotts Draw POD is located within the proposed ACEC. The others are situated from 0.5 to 4 miles outside the ACEC. EA (Michelena) at 28; EA (Mooney) at 32; EA (Meadow) at 27; “Oil and Gas Stipulation Issues Fortification Creek Area” Map, dated November 2006; BLM Answer (IBLA 2007-142) at 23-24. And, while approximately 590 acres of the Hollcroft-Stotts Draw POD overlap the proposed ACEC, no approved activity will occur within the ACEC: “[T]he proposed ACEC . . . is approximately 0.45 miles from the nearest well.” BLM Answer (IBLA 2007-246) at 22 (*quoting* EA (Hollcroft-Stotts) at 59); *see* 2007 SDR Decision at 19. ACECs are defined as areas of the public lands “where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.” 43 U.S.C. § 1702(a) (2000).

relevance or importance criteria considerations,”¹³ but that, when approving APDs, it would consider imposing new or existing site-specific mitigation measures in order “to ensure protection of values for meeting the relevance and importance criteria.” RMP Amendments ROD at 10.

As noted, BLM tiered the EAs at issue to the FEIS, and determined that, if CBNG drilling/development occurred within any of the elk ranges in the FCA, the construction and operation of well pads/drill sites and associated infrastructure likely would adversely affect the elk herd, by eliminating or degrading available forage and other habitat components and by displacing and harassing elk. EA (Michelena) at 31-32; EA (Hollcroft-Stotts) at 37-39; FEIS at 3-132 to 3-140, 4-179 to 4-186, 4-201, 4-204 to 4-211, 4-215. The FEIS estimated that all CBNG activity proposed in the RMP Amendments would reduce the overall effectiveness of elk habitat on private, State, and public lands in the FCA by approximately four percent of year-long range, two percent of winter year-long range, and one percent of each of the crucial winter and parturition ranges, over the life of the Powder River Basin Oil and Gas Project. FEIS at 2-81, 4-182, 4-201. Conceding the difficulty of making such predictions, BLM concluded that, as a result of the Powder River Basin Oil and Gas Project, the number of elk in the FCA and elsewhere in the Powder River Basin of Wyoming would likely decline, but not to the point that the viability of the elk population would be threatened “in the [Powder River Basin Oil and Gas] Project Area or across the range of the species as a whole.” FEIS at 4-207.

While the PODs would overlap with certain elk ranges, BLM states that under Alternative C none of the proposed CBNG wells would be situated within a crucial winter or parturition range of the FCA, and thus those wells are not subject to the timing restrictions on drilling/development contained in the existing Federal leases. 2006 SDR Decision at 4, 5, 7; 2007 SDR Decision at 6; BLM Answer (IBLA 2007-142) at 7, n.4. All of the proposed wells would also be located *near, but not within, the year-long range*. 2006 SDR Decision at 2-3; 2007 SDR Decision at 2; BLM Answer (IBLA 2007-142) at 9.

In each of his five FONSI/DRs, the Field Manager approved Alternative C, which had the collective effect of authorizing the drilling/development of 92 wells and the construction/operation of 18 impoundments for the storage, treatment, and discharge of water produced during drilling operations. He based those decisions on

¹³ On Aug. 20, 2007, following the filing of these appeals, BLM published notice of its intention to amend the October 1985 RMP, by, *inter alia*, designating an area in the FCA as an ACEC, and providing management guidance for the ACEC. See 72 Fed. Reg. 46511 (Aug. 20, 2007). BLM also announced its intent to undertake NEPA review.

BLM's consideration of the likely impacts of the proposed activity and alternatives in each of the five EAs, as tiered to the FEIS.¹⁴

Importantly, from the standpoint of protecting the elk herd, the Field Manager decided to approve CBNG wells which would be situated only *outside the elk herd's year-long range*, deferring the approval of any wells inside that range until BLM completed a "cumulative effects analysis" for elk. EA (Michelena) at 1. He stated that BLM had not addressed, in its EAs or FEIS, the cumulative impacts specific to the Fortification Creek elk herd that likely would result if CBNG drilling/development and associated infrastructure were allowed within the year-long range of the FCA. EA (Michelena) at 1, 2; EA (Hollcroft-Stotts) at 2. The Field Manager concluded that, by siting all of the wells and associated facilities outside the year-long range, BLM could reasonably conclude that CBNG activity will not significantly affect the elk herd. EA (Michelena) at 1, 28; EA (Mooney) at 2, 32; EA (Carr) at 2, 31; EA (Meadow) 1, 27; EA (Hollcroft-Stotts) at 2.

The Field Manager determined that Alternative C conformed with the 1985 RMP, as amended by the 2003 RMP Amendments. After considering all of the context and intensity (or severity of impact) criteria set forth in 40 C.F.R. § 1508.27, he concluded that the approved CBNG drilling/development and associated infrastructure, under each of the PODs, was not likely to significantly impact the human environment. He thus determined that BLM was not required to prepare an EIS under section 102(2)(C) of NEPA.

Appellants sought SDR of all five of the Field Manager's FONSI/DRs. In his December 2006 and May 2007 SDR decisions, the Acting Deputy State Director affirmed the five FONSI/DRs, finding no merit in any of the objections raised by appellants and concluding that the decisions to approve CBNG drilling/development comply "with NEPA, FLPMA, applicable laws and regulations." 2006 SDR Decision at 24; 2007 SDR Decision at 22. He agreed with BLM's general assessment that since all of the approved CBNG drilling/development and related construction activity will occur outside the elk herd's year-long range (and generally further from crucial seasonal ranges, where the elk tend to concentrate), and, at worst, will only displace elk a distance of from 0.5 to 1.25 miles from any area of disturbance, any negative impacts to the herd will be "minimal to nonexistent." 2006 SDR Decision at 8; 2007 SDR Decision at 21. He also agreed with the Field Manager's decision to defer the approval of CBNG activity inside the year-long range, since likely cumulative impacts to the Fortification Creek elk herd from activity inside the year-long range of

¹⁴ An approved POD and a set of APDs are included with each FONSI/DR. The POD and APDs were approved subject to General Conditions of Approval (COA), and project-specific Drilling Plan and Surface Use Plan COAs. No new road construction or improvement would be permitted to occur inside elk range.

the FCA had not been fully assessed. See 2006 SDR Decision at 4, 5, 8, 11, 24; 2007 SDR Decision at 21.

Appellants filed timely appeals.¹⁵ By order dated July 30, 2007, we consolidated the two appeals, at appellants' request.¹⁶ They did not seek a stay of either BLM decision.¹⁷

Appellants challenge BLM's decisions to approve CBNG drilling and development under the PODs as violating environmental review requirements under section 102(2)(C) of NEPA. Appellants claim that BLM failed to consider adequately the potential individual and cumulative impacts of CBNG activity on the elk herd inhabiting the FCA, which they describe as the last remaining Great Plains elk herd in the United States and argue that, given the likelihood of significant cumulative impacts to the elk herd, BLM should have prepared an EIS.¹⁸

¹⁵ By orders dated Apr. 9, and May 1, 2007, in IBLA 2007-142, we granted requests to intervene by Williams and Petro-Canada. They have not sought to intervene in IBLA 2007-246. No other proponents of the PODs have sought to intervene.

¹⁶ Appellants filed an SOR for each of their appeals and intend that the SOR filed in IBLA 2007-246 also serve, in part, as their reply to the Answers filed by BLM, Williams, and Petro-Canada in IBLA 2007-142. Because the two SORs are virtually identical with respect to the arguments regarding BLM's consideration of likely impacts to elk, we will cite only to the initial SOR in IBLA 2007-142. BLM, Williams, and Petro-Canada have filed responses to appellants' SOR/Reply.

¹⁷ BLM asks the Board to dismiss the appeal in IBLA 2007-142 as moot to the extent that it challenges approval of the Michelena POD, since the operator has drilled the three approved wells and "constructed all the infrastructure necessary for development of the wells." Answer (IBLA 2007-142) at 13. Since it is not clear that all activity approved under the POD has taken place, we deny the request to dismiss that appeal.

¹⁸ Referring to 222 wells originally proposed by BLM in conjunction with the Michelena, Mooney Draw, Carr Draw V Addition 1, Meadow Draw A, Hollcroft-Stotts Draw, Deer Creek, Camp John Beta, and Tincom Butte Alpha PODs, appellants assert that the combined impacts of the PODs should be considered in a single EIS. SOR (IBLA 2007-142) at 18. The record indicates that BLM prepared EAs, tiered to the FEIS, with respect to all of the PODs, except Deer Creek and Camp John Beta, and thus has already considered the cumulative impacts of these six PODs (at least to the extent that CBNG activity would occur *outside* the year-long range), and deferred the approval of any action *inside* that range until the cumulative effects there are assessed. Moreover, we find no evidence that BLM has approved or is considering

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Appellants ask the Board to reverse BLM's decisions, which would require BLM to reconsider the approval of CBNG drilling/development in the PODs, in conjunction with complying with NEPA and "other applicable law." SOR (IBLA 2007-142) at 19; SOR (IBLA 2007-246) at 40.

II. Analysis

[1] Section 102(2)(C) of NEPA requires consideration of the potential environmental impacts of a proposed action in an EIS if that action is a major Federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (2000). When BLM concludes, by issuing a DR/FONSI, that it is not necessary to prepare an EIS before undertaking a proposed action, and proceeds on the basis of an EA tiered to a programmatic EIS, that decision will be deemed to comply with section 102(2)(C) of NEPA where the record demonstrates that BLM has considered all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result which was not already addressed in the EIS or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982); *Nez Perce Tribal Executive Committee*, 120 IBLA 34, 36 (1991). An appellant challenging such a decision must demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. *Southern Utah Wilderness Alliance*, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); *Red Thunder*, 117 IBLA 167, 175, 97 I.D. 203, 267 (1990); *Sierra Club*, 92 IBLA 290, 303 (1986).

Where, in assessing environmental impacts, BLM relies on the professional opinion of its technical experts, concerning matters within the realm of their expertise and their opinions are reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert. *Fred E. Payne*, 159 IBLA 69, 77-78 (2003). A mere difference of opinion, even among experts, will not suffice to show that BLM failed to fully comprehend the nature or scope of likely impacts.¹⁹ *Id.* at 78.

¹⁸ (...continued)

approval of the Deer Creek and Camp John Beta PODs, which, unlike the other PODs, are situated entirely or almost entirely within the year-long range.

¹⁹ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts").

In deciding whether BLM has taken a hard look at the likely environmental consequences of a proposed action, we are guided by a “rule of reason.” As expressed in *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (quoting *Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992)):

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. . . . So long as an EA contains a “reasonably thorough discussion of . . . significant aspects of the probable environmental consequences,” NEPA requirements have been satisfied. *Sierra Club v. United States Department of Transportation*, 664 F.Supp. 1324, 1338 (N.D. Ca. 1987) . . . quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).^[20]

A. BLM Adequately Considered Likely Environmental Impacts

1. Elk Herd

While conceding that all of the proposed drilling/development under selected Alternative C will take place outside the year-long range of the Fortification Creek elk herd, appellants argue that “significant impacts *very likely will extend into the occupied range.*” SOR (IBLA 2007-142) at 8 (emphasis added); *see id.* at 3. They assert that BLM “arbitrar[il]y” selected the year-long range boundary as the spatial extent of adverse impacts of CBNG drilling/development on the elk herd. *Id.* at 8; *see id.* at 4.²¹

Appellants assert that BLM’s opinion regarding the absence of any impacts to the elk herd from CBNG activity outside the year-long range “has no basis in biological reality[.]” SOR (IBLA 2007-142) at 8. In support, they rely on the analysis

²⁰ *See National Wildlife Federation*, 150 IBLA 385, 396 (1999) (“[W]hether BLM is able to know and quantify precisely the ‘ultimate effects’ of development . . . is a very different question from whether BLM adequately considered and made a reasoned assessment of environmental impacts,” which is sufficient to establish compliance with section 102(2)(C) of NEPA).

²¹ Appellants also claim that BLM failed to consider adequately adverse impacts which “may well extend into *crucial* elk wintering and parturition areas,” where approved CBNG activity will occur in close proximity to these areas. SOR (IBLA 2007-246) at 19, 36. However, they fail to specify what these impacts are, or establish that they are likely to be significant.

and opinion of Dr. A. William Alldredge, a wildlife biologist and retired professor in the Department of Fishery and Wildlife Biology at Colorado State University, as stated in two letters to appellants, dated May 3, and July 19, 2007. They conclude: “It is a simple thing to limit drilling a well to an area outside the elk range, it is a far more problematic thing to claim that the noise, smells, sights of humans and their vehicles, and other impacts that affect elk and elk behavior stop at such a line[.]” *Id.* at 16.

Appellants state that Alldredge concluded that CBNG drilling/development outside the year-long range is likely to have “severe impacts” on elk. SOR (IBLA 2007-142) at 9. He noted that elk are likely to avoid areas of their range “within 1.7 miles of development on the periphery of elk yearlong range,” thus resulting in an overall “reduction in [the] carrying capacity of the yearlong range,” which “could approach” 1,000 acres for each mile of range boundary subjected to drilling/development. Ex. 5 to SOR (IBLA 2007-246), May 3 Letter at 2. He further noted that, because the elk “do not appear to have alternative habitats available,” such a reduction would result in a corresponding “reduction in elk numbers if the current population is at carrying capacity,” as well as an “over-use and decline in quality of remaining habitats [and] . . . increased disease and stress in elk.” *Id.* at 2, 3. Appellants have “little doubt that the elk population is at or near carrying capacity,” since it already exceeds, at 230, the population objective of 150 set by the WGFD. SOR (IBLA 2007-142) at 9, n.5. Alldredge postulated the likely absence of alternative habitats, based on the likelihood that “past development has restricted elk to the currently defined yearlong range[.]” Ex. 5, May 3 Letter at 3. He stated that, if the population is at or below carrying capacity, “[d]evelopment of CBNG on the periphery of elk yearlong range” may lower elk numbers, but “the elk population will likely survive[.]” *Id.* at 5.

Appellants’ assertion that BLM unjustifiably determined that there will be “no impacts” to the elk herd because all CBNG drilling/development will occur outside the year-long range boundary misrepresents the record. SOR (IBLA 2007-142) at 10. The EAs, as tiered to the FEIS, clearly reveal that BLM not only considered the possibility of impacts to the elk herd from development outside the year-long range, but also projected that *any* CBNG drilling/development in Wyoming’s Powder River Basin “would cause a decrease in habitat effectiveness for elk, which may result [through displacement] in [a] decreased [elk] population,” and that this effect “may be more severe where the population is near carrying capacity.” EA (Hollcroft-Stotts) at 38; *see* FEIS at 4-182 to 4-185, 4-207; EA (Michelena) at 31-32. Although BLM determined that greater impact to the species would occur if CBNG activity takes place entirely inside the year-long range, BLM was plainly cognizant of the possibility that there would be impacts if activity occurred along the periphery (just inside or outside) of that range, and reported the same in the EA. *See* EA (Michelena) at 31-32; EA (Hollcroft-Stotts) at 37-39.

BLM did not quantify the number of acres of year-long habitat lost or impaired by CBNG activity along the periphery of the year-long range. See Declaration of Thomas E. Bills, Wildlife Biologist and Environmental Coordinator, BFO, dated June 8, 2007 (Ex. I attached to BLM Answer), at unpaginated 3, ¶6 (“BLM acknowledges effective habitat will be reduced but does not know the exact level”).²² Nor did Alldredge purport to quantify the actual acreage which is likely to be lost or impaired by CBNG activity occurring *outside* the herd’s range under the alternative approved, and recognized that “impacts from additional development *will depend on location of wells and facilities*, the amount of human activity and season of development.” Ex. 6 to SOR (IBLA 2007-246), July 19 Letter at 2 (emphasis added); see Ex. 5, May 3 Letter at 2. He went no further than to hypothesize a loss of up to 1,000 acres of year-long habitat per mile of development, assuming development occurs “right on the boundary of elk [year-long] range[.]” Ex. 5, May 3 Letter at 2.

Alldredge also stated that, given existing and proposed well sites, “it appears that *almost the entire periphery* of the yearlong range will experience energy development,” and thus concluded that the range would be ringed with CBNG wells, thereby “restrict[ing] dispersal capabilities for elk” and further isolating them. Ex. 5, May 3 Letter at 2 (emphasis added). The record does not support the conclusion that the year-long range will be ringed with CBNG wells, or that dispersal will be otherwise impaired. See Map (POD Proposals) (Ex. 5 attached to SOR (IBLA 2007-142)); Bills Declaration at unpaginated 2, ¶5 (“BLM acknowledges that CBNG development along the yearlong [range] boundary would restrict elk use[] . . . [but] not to the extent that dispersal would be prevented”).

BLM concluded, in its expert opinion, that any impacts to the elk herd were likely to be minimal (if not non-existent). 2006 SDR Decision at 8; 2007 SDR Decision at 21. In making this determination, the record clearly shows that BLM took into account the possibility that some year-long habitat would be lost or impaired by virtue of drilling/development along the periphery of the year-long range, and the inability of elk to habituate to such activity and the likelihood that they will relocate 0.5 to 1.25 miles from such activity. EA (Michelena) at 31-32; EA (Hollcroft-Stotts) at 37-38; FEIS at 4-207 (“Existing literature . . . shows that elk reduce their use of habitats within one-half mile of disturbance”); Bills Declaration at unpaginated 3, ¶6 (“BLM acknowledges effective habitat will be reduced”), ¶7 (“[A]dditional CBNG development on the periphery of yearlong habitat will further reduce effective habitat”). In the CBNG ER, BLM revised the estimated avoidance distance to

²² BLM provided the Bills Declaration on appeal, since he “is the biologist that has been evaluating elk impacts in the Fortification Creek area.” Answer (IBLA 2007-246) at 18.

1.7 miles.²³ CBNG ER at 7. It was expected that elk would be primarily displaced during drilling/construction of the wells and associated infrastructure, and return following drilling/construction, with some elk still being displaced during operation/maintenance of completed wells. EA (Michelena) at 32; EA (Hollcroft-Stotts) at 38.

Importantly, BLM further concluded that there was alternative year-long habitat available for displaced elk in the remainder of the 122,930-acre overlapping elk range and that the carrying capacity of the unaffected part of the range was more than adequate to support most, if not all, of the current herd. See Bills Declaration at unpaginated 3, ¶5. It did not rule out dispersal outside the year-long range. See EA (Hollcroft-Stotts) at 39 (“There is genetic interchange between the Fortification Creek herd and other regional elk herds”); Bills Declaration at unpaginated 3, ¶8 (“[A]lthough the Fortification Creek herd is geographically isolated, there is interchange with elk further down the Powder River in Montana”).

Appellants provide no evidence, whether through Alldredge or otherwise, regarding the carrying capacity of the year-long range sufficient to demonstrate that it is likely to be exceeded by the displacement of elk from the periphery of the year-long range, even on the order of 1.7 miles away from the range boundary. In fact, referring to the “existing carrying capacity for elk in the FCSMA,” Alldredge states: “[C]ertainly I do not know what it is.”²⁴ Ex. 6, July 19 Letter at 3. Nor do they present any evidence that the herd lacks other habitat, inside the year-long range, to which they might successfully relocate in the event of such displacement. The EAs, as tiered to the FEIS, presented a reasonably thorough discussion of impacts to the elk. See FEIS at 3-135 (Figure 3-14 (Elk Ranges)); EA (Michelena) at 19-21, 31-32; EA (Hollcroft-Stotts) at 22-23, 37-39.

²³ In its CBNG ER, BLM assessed the extent to which elk will avoid a well in year-long range, finding that fewer elk will occupy habitat that is 0.75 to 1.25 miles from a well site, that more elk will occupy habitat that is 1.25 miles or more distant from a well site, and that even more will occupy the area if the distance is more than 1.7 miles. We note that, in adopting a 1.7-mile avoidance distance, Alldredge agreed that the estimate was “in the ballpark with scientifically credible studies done elsewhere[.]” Ex. 5, May 3 Letter at 3; see *id.* at 2; Ex. 6, July 19 Letter at 2.

²⁴ He further indicates that the carrying capacity is likely not being exceeded even though the elk population currently exceeds the WGFD’s population objective: “The fact that the current population is estimated at 230 animals[,] which exceeds the WGFD’s herd unit objective of 150, suggests to me that habitats have, at least to this point in time, been *able to meet the needs of the population.*” *Id.* (emphasis added).

Appellants have failed to identify any impact that BLM did not consider in the EAs, as tiered to the FEIS. They seek to make much of the fact that BLM has acknowledged that the cumulative effects of CBNG drilling/development in the FCA are “currently unknown and under investigation,” since they were not addressed in either the FEIS or any of the EAs at issue. SOR (IBLA 2007-142) at 2, 7 (*quoting* EA (Meadow) at 3). We are not persuaded that BLM’s admission that it did not know the likely cumulative effects if CBNG drilling/development were undertaken *inside* the year-long range boundary somehow establishes that it was unable to render an accurate assessment of the likelihood that drilling/development *outside* the range would impact the elk herd inside the range boundary. While appellants intimate that BLM was not able to render a reliable opinion regarding the impacts of drilling/development outside the range, they fail to explain why BLM’s opinion is not reliable. *See, e.g.*, SOR (IBLA 2007-142) at 10.

BLM’s analysis in the EAs, as tiered to the FEIS, constitutes a reasonably thorough discussion of significant aspects of the probable environmental consequences for the Fortification Creek elk herd from CBNG drilling/development, in the case of the five PODs, both individually and cumulatively, and thus satisfies the requirements of section 102(2)(C) of NEPA. *Biodiversity Conservation Alliance*, 169 IBLA 321, 337-38, 342-43 (2006). Since “no contrary scientific evidence, data and findings are offered [by appellants] which would vitiate BLM’s reasoned conclusions,” appellants have not shown that BLM erred in relying on the opinion of its experts or otherwise erred in its NEPA review of the likely impacts to elk. *National Wildlife Federation*, 150 IBLA at 394; *see Fred E. Payne*, 159 IBLA at 78.

2. Water Wells

Appellants also argue, with respect to the Hollcroft-Stotts Draw POD, that BLM failed to adequately consider the potential adverse impacts of decreases in water quality and quantity in nearby private water wells from coalbed dewatering associated with CBNG drilling/development. They explain that BLM incorrectly concluded, in the FEIS, that the zone (or circle) of influence, which is likely to be affected by dewatering, extends in a one-half mile radius around each CBNG well.

Appellants state that BLM’s conclusion is refuted by the expert opinion of Walter R. Merschat, a geologist with expertise in geochemistry who is said to have “worldwide experience in tracing gas[es] from oil and gas deposits.” SOR (IBLA 2007-246) at 20. They point to Merschat’s statement, in a July 16, 2007, declaration (Ex. 7 attached to SOR (IBLA 2007-246)), that “the areal extent [of the effects] of CBM [coalbed methane] dewatering is more widespread and complex than a simple circle on a map,” and that “there is increasing evidence that dewatering

effects extend *greater than one-half mile*[.]”²⁵ SOR (IBLA 2007-246) at 20 (*quoting* Merschat Declaration at unpaginated 2, ¶13), 21 (citing Merschat Declaration at unpaginated 2, ¶14) (emphasis added). Appellants also note that Merschat stated that the “most likely explanation” for the elevated methane gas levels in existing water wells in the FCA “is the dewatering of coal [deposits] that is a necessary step in CBM production, a process which liberates methane for travel to the CBM wells *and any other available openings, including water wells.*” SOR (IBLA 2007-246) at 20 (citing Merschat Declaration at unpaginated 1-2, ¶¶8-10), emphasis added.

To corroborate Merschat’s statements, appellants point to the experience of Ken Burton, a local rancher who has a water well located more than one-half mile from the nearest CBNG well in the Hollcroft-Stotts Draw POD. They provide a February 22, 2007, declaration (Ex. 2 attached to February 2007 SDR Request), in which Burton attested to the fact that he had recently noted “a reduction in the flow of his [water] wells and the presence of methane gas.” SOR (IBLA 2007-246) at 20. Burton stated that he was fearful that his water wells would be “destroyed by CBM dewatering as is predicted[.]” Burton Declaration at 3. Merschat opined that coalbed dewatering, associated with CBNG activity, is, in fact, to blame for both negative impacts. SOR (IBLA 2007-246) at 20 (citing Merschat Declaration at unpaginated 1-2, ¶¶6, 7, 9, 10), 21 (citing Merschat Declaration at unpaginated 2, ¶15).

BLM evaluated, in its EA and FEIS, the likely impacts of coalbed dewatering associated with CBNG drilling/development on the quality and quantity of groundwater, including that being used by landowners near the proposed activity. *See* EA (Hollcroft-Stotts) at 30, 48-50; FEIS at 4-1 (“The effects of development of CBM on groundwater resources would be seen as a drop in the water level (drawdown) in nearby water wells completed in the developed coal aquifers and underlying or overlying sand aquifers”), 4-2 (“Other potential effects on existing water wells would include changes in water yield and quality or methane emissions”), 4-50 to 4-52. Generally in Wyoming’s Powder River Basin, BLM expected decreases in water quality and quantity to be significant in the case of water wells drilled into coal aquifers, but “not . . . as significant,” in terms of water quantity, or not evident at all, in terms of water quality, in the case of overlying or underlying sand aquifers, which were generally separated from the coal aquifers “by low-permeability claystone layers over most of the PRB [Powder River Basin].” FEIS

²⁵ BLM argues that the Board need not consider “th[e] issue” raised by Merschat’s declaration, since “[n]one of the information or opinion of Mr. Merschat was provided in Appellants’ request for SDR.” Answer (IBLA 2007-246) at 27. We think that the issue of the adequacy of BLM’s NEPA review of CBNG drilling/development on water quality/quantity in nearby private wells was raised in that request, and thus is now cognizable by the Board. *See* 2007 SDR Decision at 17-18.

at 4-50; *see id.* at 4-52 (“Withdrawal of water during CBM development can depressurize the coal aquifer and induce methane release into nearby water wells *completed in the coal aquifer*” (emphasis added)).

BLM clearly is of the opinion that the zone of influence for the significant effects of coalbed dewatering extends in a one-half mile radius around a CBNG well, basing that conclusion on groundwater flow modeling, given geologic, hydrologic, and other factors, and monitoring of existing wells in the Powder River Basin and, accordingly, imposed mitigation measures to reduce those effects to insignificance.²⁶ Since Burton’s wells are located outside the zone of influence for the Hollcroft-Stotts Draw wells, BLM concludes that such wells are not likely to be negatively impacted to a significant degree by CBNG drilling/development. *See* 2007 SDR Decision at 17-18. In light of the fact the BLM’s use of a one-half mile zone of influence is based on groundwater flow modeling, geologic, hydrologic, and other factors, and on monitoring of existing Powder River Basin wells, we reject appellants’ unsupported accusation that BLM’s one-half mile zone of influence is “arbitrary” and find that it is, in fact, supported by a rational basis. SOR (IBLA 2007-246) at 21.

Since Merschat does not provide countervailing modeling or data showing that a different zone of influence is indicated, we are left with differing opinions. However, BLM was entitled to rely on the opinion of its experts. Appellants have not established that BLM erred in its NEPA review. *Fred E. Payne*, 159 IBLA at 78; *Donna Charpied*, 150 IBLA 314, 335 (1999);²⁷ *Powder River Basin Resource Council*, 144 IBLA 319, 322-28 (1998).

3. *Invasive/Noxious Plant Species*

Appellants also argue, with respect to the Hollcroft-Stotts Draw POD, that BLM failed to adequately consider the potential adverse impacts of invasive/noxious plant

²⁶ *See* EA (Hollcroft-Stotts) at 1, 49 (“As mitigation, the operator has committed to offer water well agreements to holders of properly permitted domestic and stock wells within the circle of influence of the proposed [CBNG] wells”); 2007 SDR Decision at 17 (“The intent of the[] [water well] agreements is to ensure that development of Federal natural gas *would not result in significant impacts* to water well users located within the area of influence” (emphasis added)); RMP Amendments ROD, Appendix B (Water Well Agreement); FEIS at 4-2 to 4-49, 4-50 (“The water well agreement *would protect* landowners if impacts were to occur on [F]ederal mineral ownership” (emphasis added)).

²⁷ *Appeal filed, Charpied v. Department of the Interior*, No. EDCV 99-0454-RTCMC (C.D. Cal. Dec. 22, 1999) and *National Parks and Conservation Association v. BLM*, No. EDCV 00-0041 VAP (C.D. Cal. Jan. 27, 2000).

species, owing to surface disturbance associated with CBNG drilling/development and unsuccessful revegetation of the affected land. SOR (IBLA 2007-246) at 22. In addition, they offer a July 19, 2007, letter (Ex. 8 attached to SOR (IBLA 2007-246)) of Dr. Bob Giurgevich, a botanist and 25-year employee of the Land Quality Division, Wyoming Department of Environmental Quality, in support of their assertion that due to “several significant shortcomings in BLM’s reclamation plan . . . there is no doubt that the reclamation . . . *will not be successful.*” SOR (IBLA 2007-246) at 22 (emphasis added). Giurgevich challenges, *inter alia*, the composition and lack of diversity of seed mixtures and the failure to control wind and water erosion, averring that BLM has not adequately provided for controlling invasive/noxious plant species.²⁸ See *id.* at 23-24.

We disagree with appellants’ claims. The record reveals that BLM thoroughly evaluated the likelihood that CBNG drilling/development will cause the spread of invasive/noxious plant species in its EA (as tiered to the FEIS), concluding that the resulting impacts would be minimal, with implementation of required mitigation measures. See EA (Hollcroft-Stotts) at 22, 36-37; FEIS at 3-92 to 3-108, 4-153 to 4-172. It further shows that BLM adopted a complete plan for reclaiming the effects of such activity, including revegetating disturbed lands and controlling the spread of invasive/noxious plant species, and evaluated the likelihood that reclamation will succeed.²⁹ See EA (Hollcroft-Stotts) at 14-15, 21-22, 33-37; 2007 SDR Decision at 11-12.

NEPA requires BLM to consider appropriate measures for reducing significant impacts to insignificance, and reasonably assess the likelihood that such measures will succeed, in order to justify a FONSI. *Klamath Siskiyou Wildlands Center*,

²⁸ BLM responds to Giurgevich’s specific concerns with the Aug. 22, 2007, declaration (Ex. F attached to BLM Answer (IBLA 2007-246)) of James P. Verplancke, Natural Resource Specialist, BFO, who states that the seed mixture chosen was based on inspection/analysis of the specific area which would actually be disturbed by the Hollcroft-Stotts Draw POD, and conforms to agency and other recommendations, availability, and, ultimately, the preference of the private surface owner. Answer (IBLA 2007-246) at 33 (citing Verplancke Declaration at unpaginated 2, ¶¶3, 4 (Response to Giurgevich)). In addition, appropriate measures would be undertaken for the control of erosion. Answer (IBLA 2007-246) at 34 (citing, *e.g.*, Verplancke Declaration at unpaginated 2, ¶7 (Response to Giurgevich)).

²⁹ Included in the reclamation plan, as required by the RMP Amendments ROD, is an “Integrated Pest Management Plan for: Coal Bed Methane Development within the Hollcroft/Stotts Draw POD,” prepared by Pennaco Energy, Inc., and submitted with its POD. See ROD at 9, Appendix F (Integrated Pest Management Plan); EA (Hollcroft-Stotts) at 22, 36.

157 IBLA 332, 338 (2002); *Nez Perce Tribal Executive Committee*, 120 IBLA at 43-44. BLM recognizes that reclamation may be difficult, due to recent years of prolonged severe drought, but has taken reasonable steps to ensure that any significant impacts will be reduced to insignificance.³⁰ See 2007 SDR Decision at 12. It is not, however, required to ensure that the affected area is completely revegetated or devoid of all invasive/noxious plant species following reclamation, to meet its NEPA obligations. Indeed, when measures have been taken to mitigate a project's effects, a FONSI will be upheld provided they are reasonably calculated to eliminate significant impacts or reduce them to insignificance. *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993); *Biodiversity Conservation Alliance*, 169 IBLA at 347.

Appellants have failed to establish that BLM erred in relying on the opinion of its own experts or to show error in BLM's consideration of impacts to invasive/noxious plant species in the Project area and the effectiveness of mitigation measures. *Fred E. Payne*, 159 IBLA at 78; *Klamath Siskiyou Wildlands Center*, 157 IBLA at 338. Based on the record in this case, we conclude that BLM has complied with section 102(2)(C) of NEPA.

B. BLM Was Not Required to Prepare An EIS to Address Elk Herd Impacts

Appellants challenge each of BLM's FONSI's by arguing that BLM has failed to make a convincing case that the POD "will not" significantly impact the Fortification Creek elk herd, thus justifying a FONSI. SOR (IBLA 2007-142) at 6 (*quoting* 40 C.F.R. § 1508.13). They assert that evidence undermining the FONSI's is to be found in Alldredge's expert opinion, provided for the first time on appeal, and in "considerable evidence" in the EAs themselves. SOR (IBLA 2007-142) at 10.

Appellants state that Alldredge's analysis and opinion support their conclusion that BLM erred in issuing its FONSI's: "Alldredge's expert report makes it abundantly clear that significant impacts within occupied elk ranges are very likely to occur even though BLM has limited physical development to areas just outside of the elk range." SOR (IBLA 2007-142) at 15-16. Alldredge, however, was clearly referring to the effect of drilling/development *both* inside *and* outside the year-long range ("in and

³⁰ BLM has explained that, by providing for increased inspections as well as issuance of written follow-up orders, it already has adopted one of the key recommendations of the Surface Compliance of Coal Bed Natural Gas (CBNG) Development in North Central Wyoming, dated Nov. 4, 2005 (Compliance Report) (Ex. 9 attached to October 26 SDR Request), which addresses the level of reclamation noncompliance by oil and gas operators in the Powder River Basin. 2006 SDR Decision at 17-18; 2007 SDR Decision at 12; *see* Compliance Report at 10; BLM Answer (IBLA 2007-142) at 42; Verplancke Declaration at unpaginated 3, ¶8.

around”).³¹ It is important to note that appellants’ expert does not here or elsewhere in the record conclude that activities strictly outside the range are likely to cause significant impacts to the elk inside that range. Nor have we found any, much less “considerable,” evidence in the EAs supporting appellants’ contention.

BLM plainly was aware that the five PODs at issue encompass portions of the Fortification Creek elk herd’s year-long range and that any CBNG drilling/development in that range was likely to negatively impact the herd. While the FEIS had addressed the likely cumulative impacts on the elk herd of CBNG drilling/development generally in the FCA, and each of the EAs had specifically addressed the likely direct and indirect impacts on the elk herd of such activity outside the year-long range associated with each of the PODs, BLM had yet to consider, by the time of its September 2006 and January 2007 FONSI/DRs, the likely cumulative impacts on the elk herd of *undertaking CBNG drilling/development inside the year-long range*. BLM, thus properly deferred the approval of any such activity inside the year-long range, since it was not yet adequately informed regarding the environmental consequences of doing so, in fulfillment of its NEPA responsibility.

Since issuing the FONSI/DRs, BLM has completed the “cumulative effects analysis” for CBNG drilling/development in the FCA, and appellants have provided the Board a copy of the CBNG ER, along with a September 12, 2007, Notice of Supplemental Information, stating that the report “*may be relevant* to a decision in this matter.” (Emphasis added.) However, appellants do not explain how the report demonstrates that activities outside the range will have impacts on elk inside the range that are significant. Although the report appears to be relevant to any future BLM decision concerning whether and to what extent to approve CBNG drilling/development *inside the year-long range*, that decision had been deferred at the time of issuance of the FONSI/DRs, and appellants have not shown how the report supports their claim here. We are not convinced that this environmental analysis changes BLM’s assessment (in the FEIS and EAs) of the significance of likely impacts to elk within the 122,930-acre year-long range from approving such activity *outside* that range.

Appellants find it “difficult to see how BLM can conclude there *will not* be significant impacts to the elk herd when it itself states the relevance and importance

³¹ See Ex. 5, May 3 Letter at 5 (“[D]evelopment on the periphery with concomitant CBNG development in the yearlong range would pose serious impacts to the elk population”); Ex. 6, July 19 Letter at 1 (“[O]bservations made and information gathered since May 2007[] support my initial contention that development of coal bed methane around the periphery and within elk yearlong range in the FCSMA will result in impacts to that elk population”), 3 (“[C]oal bed methane development in and around the FCSMA will negatively impact elk to a substantial degree”).

criteria related to the elk herd that formed the basis for nomination and recognition of this ACEC will be impacted,” and when the resource values associated with the herd are protected by designation of the SMA. SOR (IBLA 2007-142) at 12; *see id.* at 13-14. They conclude that the fact that the FCA is considered, in whole or in part, suitable for ACEC designation and was designated as an SMA imposes upon BLM “a *heightened obligation to carefully evaluate the environmental impacts* resulting from development of the PODs at issue here due to the recognized special values of the area, specifically including the value of the unique isolated elk herd that occupies the area.” *Id.* at 14 (emphasis added). Accordingly, appellants aver, BLM must “make an *especially convincing case* to support its FONSI, which it has failed to do.” *Id.* (emphasis added).

However, it remains to be determined whether the ACEC will ever be designated and, in this light, we are not convinced that a finding of significant impact must be made simply because a proposed action is likely to impact a natural resource value supporting possible ACEC designation. Nor do we find any support in section 102(2)(C) of NEPA or its implementing regulations for imposing upon BLM a “heightened obligation” regarding the assessment of environmental impacts or a duty to make an “especially convincing case” regarding the absence of any significant impact simply because the area that would be affected by the proposed action may have special significance for land management purposes. We think that BLM’s conclusion that the approved CBNG drilling/development will not result in any significant impacts to the elk herd, principally given the preclusion of any such activity inside the year-long range, was reasonable and supported by the record.

Appellants have made little or no effort to ground their objection to the FONSI on the context and intensity criteria for determining the significance of environmental impacts under 40 C.F.R. § 1508.27.³² Even assuming that the FCA is properly considered an “ecologically critical area,” as we recently noted in *Missouri Coalition for the Environment*, 172 IBLA 226 (2007), the presence of one or more of the intensity criteria does not compel BLM to find the existence of a significant impact. Referring to 40 C.F.R. § 1508.27, we agreed with BLM that

the regulatory provisions identify only . . . many matters that an agency “should” consider in determining the intensity or severity of the impact

³² The regulation at 40 C.F.R. § 1508.27 provides that, in addition to the context (such as society as a whole, region, or locality) in which a proposed action will occur, the significance of its impacts should be determined by considering the intensity of the action (or the severity of its impacts) considering 10 identified factors. These factors include the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or *ecologically critical areas*[.]” (Emphasis added.)

of the proposed action and this analysis is only one element of the determination of whether an action “significantly” affects the environment, “which is itself a component of the analysis of whether to prepare an EIS.” . . . Indeed, the regulations . . . do not *require* an agency to prepare an EIS simply because the impacts of the proposed action are “highly controversial” or “largely unknown,” [or meet any of the other intensity criteria]

172 IBLA at 249 (*quoting* 40 C.F.R. § 1508.27, and BLM Answer at 36).

Finally, appellants briefly seek to disparage BLM’s consideration of the other context and intensity criteria of 40 C.F.R. § 1508.27. As an example, they state that the extent to which the effects of CBNG drilling/development will extend inside the year-long range gives rise to “uncertain impacts” which have not been adequately dispelled by BLM. SOR (IBLA 2007-142) at 14. Appellants misstate the regulation, which notes that one of the factors to be considered is “[t]he degree to which the possible effects on the human environment are highly uncertain[.]” 40 C.F.R. § 1508.27. We do not agree that a high degree of uncertainty within the meaning of the regulation is associated with the impacts of CBNG activity. *See* EA (Michelena) at 3; EA (Hollcroft-Stotts) at 3. Nor do we think that Alldredge’s analysis and opinion renders the matter of environmental impacts “[highly] controvers[ial].”³³ SOR (IBLA 2007-142) at 15, n.7; *see* 40 C.F.R. § 1508.27; *e.g.*, *Southern Utah Wilderness*

³³ Appellants also advert to “[t]he degree to which the action may adversely affect an endangered or threatened species,” one of the factors listed in 40 C.F.R. § 1508.27, noting that BLM concluded, under section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (2000), that its undefined “actions” are likely to adversely affect the threatened bald eagle (*Haliaeetus leucocephalus*). SOR (IBLA 2007-142) at 15. We note that BLM has, formally or informally, consulted with the Fish and Wildlife Service (FWS), U.S. Department of the Interior, concerning both the RMP Amendments and the five PODs, and FWS has either concurred in BLM’s not likely to adversely affect determination (Michelena POD) or issued a no jeopardy biological opinion (remaining PODs). *See* Programmatic Biological and Conference Opinion (ES-6-WY-02-F006), dated Dec. 21, 2002, at 35; Memorandum to BLM from FWS (ES-61411/W.02/WY06F0301), dated Sept. 26, 2006 (Michelena), at 3; Memorandum to BLM from FWS (ES-61411/W.02/WY06F0314), dated Sept. 26, 2006 (Mooney), at 4; Memorandum to BLM from FWS (ES-61411/W.02/WY06F0292), dated Sept. 12, 2006 (Carr), at 4; Memorandum to BLM from FWS (ES-61411/W.02/WY06F0094), dated July 10, 2006 (Meadow), at 4; Memorandum to BLM from FWS (ES-61411/W.02/WY07F0067), dated Dec. 20, 2006 (Hollcroft-Stotts), at 4; 2006 SDR Decision at 8, 15-16; 2007 SDR Decision at 15.

Alliance, 141 IBLA 85, 92-93 (1997); EA (Michelena) at 3-4; EA (Hollcroft-Stotts) at 3.

III. Conclusion

Appellants have not carried their burden to demonstrate, with objective proof, that BLM failed to adequately consider a substantial environmental problem of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Southern Utah Wilderness Alliance*, 127 IBLA at 350, 100 I.D. at 380; *Red Thunder*, 117 IBLA at 175, 97 I.D. at 267; *Sierra Club*, 92 IBLA at 303. The record demonstrates that BLM has considered all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result which was not already addressed in the FEIS or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d at 681-82; *Nez Perce Tribal Executive Committee*, 120 IBLA at 36. Moreover, having adequately identified and evaluated the adverse environmental effects of the proposed action, BLM “is not constrained by NEPA from deciding that other values outweigh the environmental costs,” and going forward with the action. *Wyoming Audubon*, 151 IBLA 42, 50 (1999) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

To the extent not expressly addressed herein, all other errors of fact or law raised by appellants have been considered and rejected, as contrary to the facts or law, or immaterial to a final resolution of the appeal.

We, therefore, conclude that the Acting Deputy State Director, in his December 2006 and May 2007 decisions, properly affirmed, on SDR, the five FONSI/DRs of the Buffalo Field Manager, approving the five PODs for Federal oil and gas leases in and near the Fortification Creek Area of the Powder River Basin.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

/s/

Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James Jackson
Administrative Judge