



BIODIVERSITY CONSERVATION ALLIANCE
WYOMING WILDERNESS ASSOCIATION
CENTER FOR NATIVE ECOSYSTEMS

174 IBLA 174

Decided April 4, 2008



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

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IBLA 2007-136

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Appeal from a decision of the Deputy State Director, Minerals and Lands, Wyoming State Office, dismissing protests as to 12 parcels included in the June 6, 2006, competitive oil and gas lease sale. WY-0606-016, WY-0606-065 through WY-0606-067, WY-0606-070, WY-0606-089, WY-0606-092, WY-0606-110, and WY-0606-125 through WY-0606-128.

Affirmed as to parcel WY-0606-110; set aside and remanded as to all other parcels.

1. Administrative Authority: Generally--Regulations: Force and Effect as Law--Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Land-Use Planning--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Competitive Leases----Resource Management Plans

A BLM instruction memorandum (IM) is not a regulation, has no legal force or effect, and is not binding on the Board or the public at large. Proof of a failure “to abide by the policies and to follow the instructions handed down by their Director” in an IM establishing a discretionary policy for deferring leasing decisions is by itself an insufficient basis for overturning a decision not to defer leasing. Such proof is probative, however, of whether the agency’s decision has a rational basis and whether the agency failed to comply with an underlying law or regulation.

2. Administrative Procedure: Administrative Record

Where a decision denying a protest against BLM’s approval of parcels for competitive bidding is rendered on

the basis of the conclusion that BLM consulted with the State under a Memorandum of Understanding (MOU), and the record does not document that consultation took place in the manner required by the MOU, the decision will be set aside and remanded for verification of compliance with the MOU.

APPEARANCES: Suzanne H. Lewis, Esq., for Biodiversity Conservation Alliance, Wyoming Wilderness Association, and Center for Native Ecosystems; Terri L. Debin, Esq., Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Biodiversity Conservation Alliance, the Wyoming Wilderness Association, and the Center for Native Ecosystems (collectively, appellants) jointly appeal from the January 8, 2007, decision of the Deputy State Director (DSD), Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), dismissing protests filed by appellants, together and separately and with other parties, with respect to 12 parcels offered in the June 6, 2006, competitive oil and gas lease sale. The 12 parcels are located in Wyoming in resource areas managed by the Casper Field Office (CFO), Kemmerer Field Office (KFO), Pinedale Field Office (PFO), Rawlins Field Office (RFO), and Worland Field Office (WFO). They are all serialized with initial numbers “WY-0606-,” and separately denominated by a 3-digit suffix. We identify the parcels by the suffix.

BLM issued a Notice of Competitive Oil and Gas Lease Sale for the June 6, 2006, sale (Lease Sale Notice) for, *inter alia*, the 12 parcels after addressing whether it had met its obligations to comply with section 102(2) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2) (2000),¹ by preparing either an Environmental Assessment (EA),² or by preparing a “Documentation of Land Use Plan Conformance and NEPA Adequacy” (DNA) for any

¹ NEPA requires Federal agencies to prepare an environmental impact statement (EIS) when approval of a proposed action would constitute a “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000); *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

² An EA allows an agency, *inter alia*, to determine whether impacts of a proposed action warrant a finding of no significant impact (FONSI) or instead are so significant that an EIS is required. *Biodiversity Conservation Alliance*, 174 IBLA 1, 14 (2008); *Center for Native Ecosystems*, 170 IBLA 331, 345 (2006) (extensive discussion of EAs, EISs, and their differences).

particular parcel. The parcels, field offices, and documents justifying, in BLM's view, the decision to offer the parcels for bidding are as follows:

Field Office	Parcels	Documentation Regarding NEPA
RFO	065, 066	DNA
CFO	016, 067, 070	DNA
WFO	089, 092	DNA
PFO	110	EA
KFO	125, 126, 127, 128	DNA

See Lease Sale Notice. This information from the Lease Sale Notice diverges to some extent from that presented in the protest decision. Administrative Record (AR) 4; *see* AR 13. The decision implies, at 7, that parcels 065, 066, 067, 070, 110, 125, 126, 127, and 128 are managed by the RFO. The Lease Sale Notice does not tie any parcel to any particular EA or DNA, but indicates the managing field office and special lease stipulations or notices for each parcel.

Appellants present two issues.³ First, they allege that BLM violated the land use planning requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (2000), and Instruction Memorandum No. (IM) 2004-110 Change 1 (Aug. 13, 2004) (Change IM), by granting leases for lands in resource areas managed by the RFO, KFO, PFO, and CFO, when relevant resource management plans (RMPs) for those resource areas were in the process of being revised.⁴ Second, they claim that BLM violated FLPMA and also policies of the State of Wyoming (Wyoming policies), as implemented in a Memorandum of Understanding (MOU) between BLM and the Wyoming Game and Fish Department (WGFD), when it granted leases in big game crucial winter range and parturition areas. SOR at 2.

I. The Change IM as it Relates to Leasing During Land Use Plan Revision.

BLM uses its FLPMA land use planning process to determine whether or not particular areas of land will be subject to mineral leasing. FLPMA section 202(a) requires BLM to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a) (2000). Consistent with this statutory authority, the Department adopted regulations

³ In their Statement of Reasons (SOR), at 2, appellants also repeat an issue from their protest regarding 16 parcels administered by the U.S. Forest Service, but do not address this issue further. We therefore do not consider this argument here.

⁴ As the parties agree that the RMP governing parcels administered by the WFO is not undergoing revision, this argument does not pertain to parcels 089 and 092.

for the development of RMPs. 43 C.F.R. Part 1600; *see* 43 C.F.R. § 1601.0-5(n). These rules provide that approval of an RMP “is a major Federal action significantly affecting the quality of the human environment,” thus calling for an EIS. 43 C.F.R. § 1601.0-6. An RMP must be amended or revised when new data, a new or revised policy, or changes in circumstances require modification of the plan. 43 C.F.R. §§ 1610.5-5, 1610.5-6. A plan amendment is more limited in scope and may be based upon an EA, while a plan revision requires preparation of a new EIS. 43 C.F.R. §§ 1610.5-5, 1610.5-6.

The BLM Director has issued several IMs to address oil and gas leasing during the period of time during which an existing RMP and its associated EIS are being amended or revised. The BLM Director issued IM 2004-110 on February 23, 2004, to address BLM’s oil, gas, and geothermal leasing decisions “authorized under existing land use plans” which were undergoing some form of reconsideration. IM 2004-110 explained BLM’s policy to “follow current land use allocations and existing land use plan decisions . . . when preparing land use plan amendments or revisions.” *Id.* at 2. This IM is consistent with the Board’s holding in *In re Bryant Eagle Timber Sale*, 133 IBLA 25 (1995). Appellants there argued that preparation of an EIS for the purpose of adopting an RMP was an acknowledgment that prior NEPA studies were inadequate and, therefore, undertaking action prior to completing the EIS would violate Council on Environmental Quality (CEQ) regulation 40 C.F.R. § 1506.1(a). *In re Bryant Eagle Timber Sale*, 133 IBLA at 27. The Board agreed with BLM’s position that this rule applies only when “the action is not covered by an existing program statement” subject to an EIS, 40 C.F.R. § 1506.1(c), and that BLM could therefore continue implementing management decisions for lands under its existing program while preparing a new environmental analysis. *Id.* “Indeed, were it otherwise, this provision would penalize those agencies which seek to update their EIS’[s] to keep them current and might provide Government officials with an incentive to discount all new environmental evidence rather than attempt to timely evaluate such information with an eye toward its impact upon ongoing operations.” *Id.* at 28.

The BLM Director issued the Change IM on August 13, 2004, to clarify IM 2004-110, given a “need for policy direction in regard to implementing existing land use plan decisions, especially while preparing land use plan amendments or revisions.” Answer Ex. C, Change IM, at 1. The Change IM noted that BLM State Directors have discretion to temporarily defer leasing during land use planning revision, and expressly announced a policy of “consideration” of leasing deferral on lands subject to an RMP under revision or amendment in the following circumstances:

A decision temporarily to defer could include lands that are designated in the preferred alternative or draft or final RMP revisions or amendments as: (1) lands closed to leasing; (2) lands open to leasing under no surface occupancy; (3) lands open to leasing under seasonal

or other constraints with an emphasis on wildlife concerns; or (4) other potentially restricted lands. Deferral, therefore, would not apply to areas designated in the alternative as open to leasing under the terms and conditions of the standard lease form.

Id. at 2.⁵

Appellants' first argument is that the Rawlins, Casper, Pinedale, and Kemmerer Field Offices are all in the process of revising their governing RMPs and that BLM did not adequately "consider" deferral of leasing. Appellants assert: "There is no indication that the Wyoming State Office has given any consideration to deferring leasing on parcels in any of these Field Offices, even though many of the lease parcels fall into one of the four categories" identified in the Change IM. SOR at 7.

As a practical matter, appellants misread the Change IM as recommending deferral, or consideration of it, in situations in which land use planning documents are merely "in the process of being revised." The language quoted above makes clear that the Change IM anticipated that BLM State Directors would consider deferring leasing of lands designated as subject to restraints on leasing in a preferred alternative of a draft or final RMP revision or amendment, but which had not been so designated in the existing RMP. BLM and appellants appear to agree in their pleadings that, of the four field offices addressed in this argument, only the RFO had actually gone so far as to issue a draft RMP revision and associated environmental documents at the time of the decision. SOR at 5-6; Answer at 4-6. The CFO, PFO, and KFO had not issued any such draft documents at the time of the decision and, therefore, the policy of "considering deferral" in the Change IM does not pertain to the situations faced by those offices.

BLM thus addresses the Change IM only with respect to parcels 065 and 066 managed by the RFO. BLM contends that the decision to lease those parcels was consistent with the Change IM because, as BLM correctly notes, the IM only addresses deferring leasing of land designated under the four categories quoted above. Answer at 7-8. BLM acknowledges that, in the preferred alternative in the Draft Rawlins RMP/EIS revision, the land covered by the two parcels is open to leasing "with standard stipulations, with minor constraints, or with major constraints." *Id.* at 8. BLM nonetheless concludes that neither of the parcels falls within any of the four categories described in the Change IM, without explaining whether and to what extent the "major" and "minor" constraints on leasing constitute "seasonal or other

⁵ As appellants note, this IM is consistent with the premise of CEQ rule 40 C.F.R. § 1502.9(c). That rule compels that if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise, a new NEPA statement is required before an action is approved. *Center for Native Ecosystems*, 170 IBLA at 346.

constraints with an emphasis on wildlife concerns” or why additional restrictions not found in the existing RMP would not cause lands subject to them to be “other potentially restricted lands” as described in the Change IM. *Id.*; see AR 4 at 7. BLM submits as Exhibit E a copy of a set of maps from the 2004 Draft EIS for the Rawlins RMP, depicting the entire Rawlins Resource Area. Differently shaded areas display lands open to leasing with “minor constraints” and others with “major constraints.” The maps do not reveal the nature of either category of constraint, or whether or how they might relate to “seasonal or other constraints with an emphasis on wildlife concerns” or “other potentially restricted lands.” The maps contain no information regarding the two parcels, and the scale of each township is approximately a one-half inch square. The two parcels, totaling over 2,800 acres, are identified in the Lease Sale Notice as follows: “065 (T. 22 N., R. 78. W., 6th P.M., Sec. 20 Sw; Sec. 24 NENE, S2NW, S2; W2NE, SENE, N2NW (Excluding 24.79 acres in RR ROW); Sec. 26 E2, N2NW; Sec. 30 Lots 1-4 E2, E2W2); 066 (T. 22 N., R. 78 W., 6th P.M., Sec. 32 E2; Sec 34 NE, S2) [sic].” The scale of the maps, including the most relevant Map 2-38, prevents us from identifying the precise location of the parcels or the extent to which they overlap areas open with either type of constraint, or determining the nature of the constraints and whether they would mean that the land falls within any of the four categories of land for which a deferral might have been considered under the Change IM.

Nor is it clear to us that, when he issued the protest decision, the DSD was aware, one way or the other, of the status of the lands in the parcels he approved offering for bidding. The decision indicates only that the DSD was generally aware that RMP revisions were underway in the four field offices, and that he concluded that none of them fit within the four categories of lands described in the Change IM. Nothing in the protest decision shows that he considered the status of any particular relevant RMP revision or its relevance to a parcel being offered for bidding. The protest decision asserted, in response to appellants’ argument:

RMP Revisions are ongoing in the RFO, CFO, KFO, and the PFO.

BLM reviewed all of the parcels prior to the lease sale. None of the subject parcels [is] designated in the preferred alternative of the draft RMP revision as lands closed to leasing, lands open to leasing under no surface occupancy, lands open to leasing under seasonal or other constraints with an emphasis on wildlife concerns, or other potentially restricted lands.

AR 4, Protest Decision at 7. Thus, we must agree with appellants that the DSD’s conclusory comments suggest that he was not actually informed of facts with respect to any of the field offices sufficient to address either (a) whether any of them had published a Draft EIS/RMP revision; or (b) whether the parcels managed by the RFO, the only field office to have issued draft planning and environmental documents,

actually fell within areas designated in the preferred alternative as open for leasing with “minor” and “major” constraints or what those constraints might be. The RFO DNA upon which the protest decision is premised does not mention the Draft Rawlins RMP documents at all. Thus, there is no evidence that either the RFO or the DSD considered these facts regarding the parcels.

[1] We do not reverse, however, on the basis of this apparent lack of consistency with the Change IM. The Change IM is a policy directive that “re-emphasizes the discretionary authority of the State Director” to defer leasing, and does not compel any particular outcome, mandate an exercise of discretion to defer leasing, or impose a moratorium on leasing. Given its discretionary nature, we have refused efforts by appellants to enforce the Change IM in other cases, and declined to find that a failure to follow its policy guidance independently constitutes a violation of law or rule. We have explained that the Change IM was not adopted pursuant to the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (2000), and, therefore, does not have the force and effect of law. *Wyoming Outdoor Council (WOC)*, 171 IBLA 153, 166-68 (2007), citing *Fallini v. BLM*, 162 IBLA 10, 37-44 (2004). In *WOC*, we addressed the Change IM’s discussion of best management practices and agreed that it obligated BLM officials “to abide by the policies and to follow the instructions handed down by their Director,” but nonetheless held that it did not have the status of a regulation and that its instructions could not be interpreted as imposing a binding responsibility which precluded the exercise of BLM’s discretionary authority. 171 IBLA at 166-68. In *Biodiversity Conservation Alliance*, 171 IBLA 313, 317-18 (2007), we followed that holding, in refusing to read the Change IM to compel a BLM State Director to defer leasing and effectively negate his discretion to choose otherwise. Thus, notwithstanding the fact that it would appear that the DSD did not actually investigate the parcels at issue under the BLM Director’s policy set forth in the Change IM with respect to any of the parcels in the four field offices, this precedent prevents us from finding the DSD’s decision to be an abuse of his discretion to “consider” deferring leasing under the Change IM.

While appellants’ concern regarding compliance with the Change IM does not independently constitute proof of a violation of law or prove a violation of a discretionary policy, appellants’ arguments may be sufficient to call into question the agency’s compliance with law or indicate a lack of a rational basis in the agency’s decision. We thus look to determine whether the Protest Decision is rational.

We find with respect to the RFO decision that it was not. BLM has submitted information into the record indicating that at the time of the decision, the RFO was revising the governing Great Divide RMP (to be named the Rawlins RMP) and had proposed a preferred alternative in the Draft RMP that would place “major” and “minor” constraints on leasing lands that overlap, to an extent impossible for us to decipher, the parcels it chose to offer for lease sale. Unable on this record to

determine the nature of the constraints, the locations of major versus minor constraints, and whether any constraints are even addressed at all by stipulations on the lease, we cannot verify the basis for the DSD's conclusion that "none of the subject parcels [is] designated in the preferred alternative of the draft RMP revision as lands closed to leasing, lands open to leasing under no surface occupancy, lands open to leasing under seasonal or other constraints with an emphasis on wildlife concerns, or other potentially restricted lands." This may be easy to verify, but it is not verifiable in the record before us. We are unable to decide at this time whether the DSD's conclusion is a violation of FLPMA's land use planning requirements or NEPA's requirements to the extent appellants urge that we find a violation of 40 C.F.R. § 1502.9. We are unable to ascertain a factual basis for the DSD decision and it is unclear whether, if the DSD knew the facts and details about the preferred alternative, he might have imposed additional stipulations consistent with the "major and minor constraints" admitted by BLM to have been added in the Draft Rawlins RMP revision. We therefore set aside the decision with respect to parcels 065 and 066.

II. Big Game Crucial Winter Range and Parturition Areas

Appellants claim that all 12 parcels are for lands which are big game crucial winter range and parturition areas. SOR at 7. Recognizing that BLM has imposed a standard timing limitation stipulation (TLS) with respect to all 12 leases, they nonetheless contend that BLM's responsibility to manage the public lands for multiple use includes the protection and preservation of wildlife, *id.* at 8, and that studies have shown that oil and gas development and production have already caused unacceptable impacts on big game, despite the use of such stipulations limiting drilling during the winter months. They argue that the lands should be offered with no surface occupancy stipulations. *Id.*

Appellants maintain that the TLS stipulation, which prohibits surface use between November 15 and April 30 to protect big game on crucial winter range, is inadequate because it applies only to drilling and does not protect big game once production operations begin.⁶ In addition, appellants complain that BLM, the PFO in

⁶ The TLS stipulation prohibits surface use for drilling during winter months, but allows production operations and maintenance of production facilities once a successful well has been drilled. *See* AR 9 at 69. The Lease Notice record includes an outline of the stipulation with three blanks for timing, surface location, and reason for a TLS. *Id.* The Lease Sale Notice then includes particular stipulations for each lease. By way of example, for PFO parcel 110, the TLS is written: "(1) Nov 15 to Apr 30; (2) as mapped on the [PFO] GIS database; (3) protecting big game on crucial winter range." AR 9 at 52; *see also* AR 9 at 32-33 (RFO), 34 (CFO), 44 (PFO).

Because the description refers to a map, it suggests that the limitation does not apply
(continued...)

particular, “regularly—almost automatically” grants requests for exceptions which allow “winter-long” development/drilling. SOR at 8-9. Appellants contend that sufficient authority to protect big game and winter ranges must be expressly reserved at the leasing stage because the limited authority to require “reasonable measures” is not “nearly broad enough to ensure crucial winter ranges are protected at the operation and production stage.” SOR at 9.

Appellants also rely on FLPMA’s requirement that, in developing and revising land use plans, BLM shall:

to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of . . . the States and local governments within which the lands are located, including, but not limited to, statewide outdoor recreation plans . . . by, among other things, considering the policies of approved State and tribal land resource management programs.

43 U.S.C. § 1712(c)(9) (2000); *see* 43 C.F.R. § 1610.3. Appellants explain that the State of Wyoming and WGFD have recently adopted policies based on studies which indicate that far more mitigation is required to protect what Wyoming state agencies have defined as “crucial” winter ranges than is found in the TLS stipulation. Appellants note that Wyoming has adopted policies to ensure protective measures even after drilling/development is complete and production and operations have begun. They contend that BLM’s TLS stipulation does not comply with these policies or the mitigation standards the Wyoming Game and Fish Commission set forth in an April 1998 mitigation policy statement ⁷ and is insufficient to protect the habitat function of the winter range. SOR at 10-12. Appellants assert that not only is there “no indication that BLM’s winter timing stipulation is based on consideration of

⁶ (...continued)

to the entire parcel.

⁷ BLM has provided a copy of a 10-page mitigation policy statement dated Apr. 28, 1998, issued by the Wyoming Game and Fish Commission. Answer Ex. G. This policy contains “recommendations” for mitigation measures. *Id.* at 3. Although the pages correspond to some of appellants’ citations, other page references indicate that they used a larger document that included “a suite of additional standard management practices.” SOR at 10. BLM has also provided pages 1-28 of a WGFD document titled “Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats” (Dec. 6, 2004), which may or may not be the document the appellants cite as the addition to the mitigation policy. Answer Ex. H.

Wyoming's 1998 mitigation policy, or its new programmatic standards policy . . . , there [also] has been no attempt to resolve inconsistencies between what BLM's stipulation provides and what Wyoming's mitigation policy requires." SOR at 12. They maintain that allowing the sale of the parcels to go forward prior to resolving the inconsistencies would violate NEPA. SOR at 13. Finally, appellants claim that BLM's failure to apply WGFD's standards for oil and gas development means that BLM has failed to satisfy its obligation to take any action necessary to prevent unnecessary or undue degradation under 43 U.S.C. § 1732(b) (2000). SOR at 13.

The parties agree that BLM and the WGFD signed an MOU which sets forth procedures by which BLM will consult with the State regarding leasing decisions on Federal lands. AR 5.⁸ Appellants contend that BLM violated this MOU by failing to incorporate the mitigation measures identified in the Commission's standards.

In some respects, we agree with BLM's responses on these points; in others we cannot verify that appellants are correct. Appellants have previously raised arguments regarding the alleged lack of overlap between the standard TLS stipulation and the Wyoming policy statements before this Board; these arguments were rejected in *Wyoming Outdoor Council*, 171 IBLA 108 (2007).⁹ We also agree with BLM's opposition to appellants' argument that, to the extent the MOU satisfies BLM's coordination obligations under FLPMA, a failure to follow Wyoming policy statements in leasing decisions is a violation of FLPMA section 202, 43 U.S.C. § 1712 (2000). That provision applies to "the development and revision of land use plans" rather than actions taken under a previously adopted plan. 43 U.S.C. § 1712(a), (c) (2000). While it is true that under FLPMA BLM must coordinate with and confer with States, Indian tribes, and local governments in order to ensure consistency with State and local plans at the land use planning phase, to the maximum extent consistent with Federal law, *id.* at § 1712(c)(9),¹⁰ this provision does not require

⁸ The MOU included in the record at AR 5 is a 14-page document "Oil and Gas Coordination Procedures Appendix 5G (Revised April 1995)" with an attached 3-page table. The title suggests that it is only a portion of a larger document.

⁹ Appellants' additional argument that BLM's failure to consider and incorporate into the leases the kinds of standards set forth by the WGFD in its mitigation policy establishes a violation of the Department's obligation under 43 U.S.C. § 1732(b) (2000) to take any action necessary to prevent unnecessary or undue degradation was rejected in *Wyoming Outdoor Council*, 171 IBLA at 121-22. We note that this argument is separate from a claim of lack of compliance with an RMP under FLPMA, or a lack of consideration of effects under NEPA. Nonetheless, we consider it no further given the disposition of the appeal.

¹⁰ This provision also authorizes State officials "to furnish advice to the Secretary . . . with respect to such other land use matters as may be referred to them by him."

(continued...)

such policy coordination with respect to individual decisions implementing actions authorized under an existing management plan.

To the extent appellants advance an argument under NEPA on this point, it derives from an agency's obligation to supplement prior NEPA documentation when new information arises that might change a prior NEPA analysis of effects. Appellants effectively represent the Wyoming policies as new information regarding crucial winter range, and suggest that protections adopted in the existing RMPs for leasing are insufficient.¹¹ We admit to being troubled by appellants' argument. In fact, the Wyoming Game and Fish Commission mitigation policy statement, Answer Ex. G, and the WGFD "Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats" (Dec. 6, 2004), Answer Ex. H, establish mitigation requirements for oil and gas operations and production that Wyoming believes are necessary to afford the protections that BLM claims the TLS stipulation provides. In *Center for Native Ecosystems*, 170 IBLA at 346, we held that "whether more NEPA analysis based on new information is required depends on the nature of the NEPA analysis already completed, and the nature of the information available at the time of the agency action." We explained that DNAs prepared for the lease sale "cannot properly be used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them." *Id.*, citing *Southern Utah Wilderness Alliance*, 166 IBLA at 283. We held that preparers of the DNAs were required to examine existing NEPA statements to identify the portions of those statements that analyzed the effects of oil and gas development on a topic, here winter ranges, and then to determine whether there were "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Center for Native Ecosystems*, 170 IBLA at 346, quoting 40 C.F.R. § 1502.9(c).

We do not find that the DNAs engaged in the analysis described in *Center for Native Ecosystems*, and above, with respect to crucial winter ranges or parturition areas. Nonetheless, we cannot find that appellants have sufficiently presented a case proving that the "new" information represented by the Wyoming policies constitutes "significant new circumstances or information relevant to environmental concerns," *id.*, such that more NEPA analysis is required before BLM could undertake leasing decisions consistent with the EISs prepared for the pre-existing RMPs. Such a

¹⁰ (...continued)

43 U.S.C. § 1712(c)(9) (2000).

¹¹ Appellants also cite the Jack Morrow Hills EIS and the Green River EIS/RMP as evidence that, in documents post-dating the RMPs for the relevant field offices, BLM has confirmed "the findings in the scientific and popular literature" to the effect that drilling in big game winter ranges has negative effects "even when winter timing stipulations are in effect." SOR at 11.

showing would require a specific comparison of pre-existing NEPA documentation and current available information, a showing appellants have not undertaken in this appeal. The Wyoming policies contain, rather than express requirements, recommendations for treatment of winter ranges for particular species. *See, e.g.*, WGFD “Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats” (Dec. 6, 2004), Answer Ex. H at 11-12; *see also* Wyoming Game and Fish Commission Mitigation Policy, Answer Ex. G at 3. Whether failure to implement State policies constitutes a violation of NEPA in a given case depends on whether appellants show the policies contain or constitute new information that is significant as compared to that found in existing NEPA documents. As noted above, appellants did not do so here.

The FLPMA bridge between the Wyoming policies and the leasing decisions is the MOU. BLM and WGFD expressly entered into the MOU to provide an avenue for the State agency to provide such recommendations to BLM, and for BLM to consider WGFD’s recommendations. The difficulty presented by this appeal, however, is that this record presents no evidence that BLM complied with the MOU, the existence of which is BLM’s stated defense against appellants’ FLPMA challenge. The MOU expressly requires that BLM provide a preliminary list of proposed lease parcels to the Cheyenne and local offices of the WGFD for concurrent review. “The WGFD Field Office will coordinate with the respective BLM Resource Area Office with data review and lease stipulation development as needed. In all cases, the concerns and *coordination will address reasonable and necessary protective measures and will be documented in writing and on the data base displays.*” MOU at unnumbered page 9 (emphasis added). The data base displays are apparently the “common coordinated base of information regarding wildlife” referred to in the MOU at Part II, for which BLM and WGFD hold joint responsibility.¹²

Though the DSD stated in the protest decision (AR 4 at 5) and BLM stated in its Answer (at 12, 15) that BLM complied with the MOU, the record submitted to this Board fails to document that this was the case for the field offices which prepared DNAs. Nothing in the record prepared by the CFO, RFO, KFO, or WFO showed that the State was notified. The RFO, KFO and WFO DNAs fail to mention whether the State was given notice about the specific parcels addressed in each document. *See*, AR 22, RFO DNA at unnumbered 5, KFO DNA at unnumbered 5, WFO DNA at 3. The CFO DNA alludes to consultation but does not reference the documentation required by the MOU. By contrast, the PFO’s EA names the individual consulted at WGFD, provides a date of a meeting, and describes WGFD concurrence in stipulations adopted for parcel 110. AR 22, PFO EA at unnumbered 10. Because the MOU required that coordination “be documented in writing and on the data base displays,” the Board’s Docket Attorney requested record evidence of coordination for parcels

¹² This data base is the subject of “Appendices 4b and 4c of the umbrella MOU,” *id.* Neither the data base nor the appendices are in the record before us.

administered by the CFO, RFO, KFO and WFO. Under the MOU, this evidence should have existed at the time the decision was made.

Apparently it did not. Though BLM responded with a brief telefaxed cover letter, dated January 23, 2006, which forwarded to WGFD a lease sale list for the June 6, 2006, competitive lease sale, BLM explained that WGFD had no objections as evidenced by the fact that “no written response [was] received.” Jan. 17, 2008, Memorandum from Office of the Solicitor to IBLA. On January 25, 2008, however, the Board received another telefax from BLM indicating that BLM had discovered “a letter from WGFD to BLM which the Rawlins Field Office forwarded.” Jan. 25, 2008, Memorandum from Office of the Solicitor to IBLA. This Memorandum documents that in 2008 the BLM Wyoming State Office was now attempting, in response to the Board’s request, to actually determine whether the State/Federal coordination required by the MOU had generated any response from WGFD and that, therefore, at the time the DSD made his decision, compliance with the MOU had been sufficiently documented before the DSD.

More importantly, the WGFD letter, dated January 27, 2006, was apparently sent to the BLM State Office in Cheyenne, and had made its way to the RFO. In this letter, WGFD stated that it had reviewed the preliminary list of parcels and made specific requests for stipulations to be applied with regard to sage grouse leks and crucial winter ranges. It is not possible to determine, on the record before us, (a) that an appropriate office of BLM responded by incorporating the requested stipulations; or (b) that the BLM Wyoming State Office was even aware of this set of recommendations. The record contains no maps of the TLS stipulations as applied that we could compare to the specific locations identified by WGFD for recommended stipulations. With respect to the DNAs, the record does not provide any reason to support the DSD’s conclusion that BLM had complied with the MOU by considering WGFD comments, or even looked to see whether any had been received.

In light of the MOU’s requirement for coordination, our inability to verify the nature of the coordination that took place, and the evident lack of such information available to the decisionmaker at the time the protest decision was made, it is not clear that any of the field offices except the PFO complied with the MOU. This was the chosen avenue for BLM to ensure that it met its FLPMA obligations under 43 U.S.C. § 1712 (2000). The decisionmaker presumed such compliance without evidence of it in the record supplied to us. Therefore, we set aside and remand the decision, to the extent it dismissed the protests for the lease parcels supported by DNAs, to ensure that the record verifies compliance with the MOU.¹³

¹³ BLM asserts that appellants’ claims that the TLS stipulation is inadequate are speculative because appellants do not provide “evidence that each of the subject leases will cause exploration or development activities to occur which will, in turn,

(continued...)

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 January 8, 2007, decision of the Deputy State Director of the Wyoming State Office is set aside and remanded as to all parcels, except parcel 110, for compliance with the terms of the MOU as identified above; the decision with respect to Parcels 065 and 066 is set aside for verification of facts relating to the Draft Rawlins RMP, as explained herein.

_____/s/
 Lisa K. Hemmer
 Administrative Judge

I concur:

_____/s/
 Sara B. Greenberg
 Administrative Judge

¹³ (...continued)

cause significant injury to big game crucial winter range and big game species.” Answer at 10. BLM’s argument depends on its further contention that BLM retains “the ability to condition operational activities” and that “[a]t both the exploratory and operational/development stages, additional site-specific environmental analyses are conducted and needed restrictions or mitigation identified in those analyses are incorporated into the operation or development plan.” *Id.* To the extent BLM suggests here that it will necessarily perform additional NEPA analysis at the APD phase, this assertion is undercut by the fact that BLM may rely on statutory categorical exclusions created by section 390 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, permitting it to forego further NEPA analysis before approving certain APDs submitted within 5 years of issuance of a NEPA document with respect to the subject lands. 42 U.S.C. § 15942 (West Supp. 2007). This statutory provision necessarily reinforces appellants’ concern that full stipulations to mitigate all environmental impacts must be adopted at the leasing stage. At a minimum, it may in some cases undercut BLM’s reliance on deferral of NEPA consideration of site-specific impacts to the APD phase.