



WILLIAM P. MAYCOCK, POWDER RIVER BASIN RESOURCE COUNCIL,
BIODIVERSITY CONSERVATION ALLIANCE

177 IBLA 1

Decided March 16, 2009



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

WILLIAM P. MAYCOCK
POWDER RIVER BASIN RESOURCE COUNCIL
BIODIVERSITY CONSERVATION ALLIANCE

IBLA 2008-197, 2008-200

Decided March 16, 2009

Appeals from decisions of the Acting Deputy State Director, Wyoming State Office, Bureau of Land Management, affirming a Finding of No Significant Impact/Decision Record of the Field Manager, Buffalo Field Office, approving a plan of development for Federal oil and gas leases and applications for permits to drill coalbed natural gas wells in the Powder River Basin. WY-2008-16; WY 2008-17.

Affirmed in part; set aside and remanded in part.

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

The Board will remand to BLM for further analysis where the Board is unable, on the basis of the record before it, to determine how the present case is distinguishable from a recent case in which BLM, acting under the same planning document and in substantial reliance on the results of more recent scientific research, imposed additional mitigation measures in two site-specific environmental assessments that it did not impose in the present case.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

BLM is not required to analyze an alternative that is not feasible because it is inconsistent with the basic presumption of the applicable oil and gas unit agreement and because BLM cannot

legally compel the operator to adopt that alternative under the terms of the unit agreement.

3. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

In an EA accompanying approval of an oil and gas plan of development, BLM properly declined to address impacts of future surface water discharge where such discharge is not legally permitted and where produced water will be disposed of using existing facilities located outside the plan area.

APPEARANCES: Tom C. Toner, Esq., Sheridan, Wyoming, for William P. Maycock; Shannon R. Anderson for Powder River Basin Resource Council; Erik Molvar for Biodiversity Conservation Alliance; Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; Jack D. Palma II, Esq., Cheyenne, Wyoming, and Karol Kahalley, Esq., Greenwood Village, Colorado, for Williams Production RMT Company.

OPINION BY ADMINISTRATIVE JUDGE HEATH

William P. Maycock II, the Powder River Basin Resource Council (PRBRC), and the Biodiversity Conservation Alliance (BCA) have each appealed from separate June 13, 2008, decisions of the Acting Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM). Both decisions affirmed, on State Director Review (SDR), a March 4, 2008, Finding of No Significant Impact/Decision Record (FONSI/DR) of the Field Manager, Buffalo (Wyoming) Field Office (BFO), BLM.¹

The FONSI/DR approved the Carr Draw III East Coal Bed Natural Gas (CBNG) Plan of Development (POD) for Federal oil and gas leases, authorizing the drilling, production, abandonment, and reclamation of 82 CBNG wells on 41 well sites by the Williams Production RMT Company (Williams) in the Barber Creek and South Prong Barber Creek (South Prong) drainages, in the Powder River Basin (PRB) in

¹ Maycock's appeal is docketed as IBLA 2008-197. The appeal filed by PRBRC and BCA is docketed as IBLA 2008-200. Because they arise from similar decisions and raise related questions of fact and law, we consolidated the two appeals by Order dated Sept. 18, 2008.

northeastern Wyoming.² By Orders dated July 24, 2008, we granted Williams' motions to intervene in both IBLA 2008-197 and IBLA 2008-200. BLM based its decision to approve the POD on a March 4, 2008, Environmental Assessment (EA) (WY-070-08-029), prepared under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000).³

Background

A. *The Carr Draw III East Plan of Development, the EA, and the BLM Field Manager's Decision*

Maycock owns and operates a ranch approximately 11,000 acres in size located in T. 50 N., Rs. 75 and 76 W., Sixth Principal Meridian, Campbell County, Wyoming, in the Powder River Breaks area west of Gillette, Wyoming. The private lands within the ranch were patented to Maycock's predecessors-in-interest primarily under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. §§ 291-301 (1970). Under the SRHA conveyances, the United States reserved the interest in all minerals, including oil and gas. 43 U.S.C. § 299(a) (2000).⁴ One parcel was

² The POD area is in the vicinity of the Fortification Creek Area. The Barber Creek drainage lies immediately to the south of the Fortification Creek drainage. BLM decisions approving five different PODs for Federal oil and gas leases in and near the Fortification Creek Area were affirmed by this Board in *Wyoming Outdoor Council*, 173 IBLA 226 (2007).

³ The FONSI/DR and EA are a single document, which is continuously paginated, with the FONSI/DR appearing at pages 1-4. We will cite to the FONSI/DR and EA simply as "EA." The EA is Document 1 in the Administrative Record (AR) Vol. C in both IBLA 2008-197 and IBLA 2008-200.

⁴ The SRHA was repealed in part by section 702 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Title VII, § 702, Oct. 21, 1976, 90 Stat. 2787. The repeal did not affect section 9 of the SRHA governing the exercise of mineral rights on lands covered by existing SRHA patents. 43 U.S.C. § 299 (1988), subsequently redesignated as 43 U.S.C. § 299(a) (2000).

We recently decided a related case involving the adequacy of the bond Williams posted under 43 U.S.C. § 299(a) (2000) to secure payment to Maycock for damages to crops, tangible improvements, and the value of land for grazing resulting from development of leased Federal CBNG resources underlying the patented surface. *William P. Maycock*, 176 IBLA 206 (2008). To avoid duplicate filings of extensive record documents, Volumes A and B of the Administrative Record in that case (the documents pertaining to the Carr Draw III East POD and the associated Applications for Permit to Drill) are incorporated by reference as part of the record in this case.

(continued...)

patented to Maycock's predecessors under the Agricultural Entry Act of 1914 (AEA), 30 U.S.C. §§ 121-123 (2000). Conveyances under that statute also reserved mineral deposits (including oil and gas) to the United States. 30 U.S.C. § 122 (2000).

Williams is the unit operator for the "Carr Draw (CBM) Unit," encompassing some 21,459.51 acres, and is one of the lessees of unitized Federal oil and gas leases. The unit agreement was entered into in January 2001.⁵ Several of the unit leases underlie Maycock's ranch. Williams originally submitted a proposal to develop part of the unit as the Carr Draw III POD on March 2, 2006. Williams sought to drill a total of 197 CBNG wells, and construct roads, pipelines, and other related infrastructure. Most of the lands in the unit are split-estate lands, with the surface estate privately owned and the mineral estate owned by the United States.

BLM declined to approve the Carr Draw III POD because it included a large segment of lands within year-long elk range, posing a risk of significant impacts to the Fortification Creek elk herd.⁶ Williams thereafter proposed separate developments, one inside the year-long range (Carr Draw III West) and the other generally outside the year-long range (Carr Draw III East). The latter is at issue in this appeal.

Williams submitted the Carr Draw III East POD on October 31, 2007. Under the Carr Draw III East POD, Williams proposed to drill 82 CBNG wells at 41 locations in the approximately 5,500-acre POD area, for which it submitted APDs.⁷ It also proposed to use existing primitive roads and corridors and to construct new primitive

⁴ (...continued)

Documents from that record will be cited as "2008-187 AR." Administrative record documents submitted in the two consolidated appeals here similarly will be cited as "2008-197 AR" and "2008-200 AR," respectively.

⁵ See Unit Agreement, Ex. 2 to Williams' Answer in IBLA 2008-187, at 1.

⁶ The Fortification Creek elk herd is a geographically isolated herd, currently composed of approximately 230 animals, which PRBRC describes as "one of the last remaining herds of prairie elk in the Western United States." Notice of Appeal, Request for Stay and Statement of Reasons in IBLA 2008-200, dated July 9, 2008 (PRBRC SOR), at 2. The Fortification Creek Area of the PRB consists of approximately 122,930 acres of year-long elk range, within which are smaller overlapping crucial winter, parturition (calving), and winter year-long ranges, all of which have been designated by the Wyoming Game and Fish Department.

⁷ Williams originally proposed to drill 84 CBNG wells as part of the Carr Draw III East POD, but later dropped two wells at one site because of the difficulty of reclaiming the access route.

roads and corridors to well pads and well sites, along with other facilities. See Carr Draw III East POD, 2008-187 AR Vol. B unnumbered. One of the proposed well sites, 21-26-5076BG/W in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 26, T. 50 N., R. 76 W. (referred to hereinafter as “Well 21-26”), lies a short distance (approximately 100 feet) within the year-long range of the Fortification Creek elk herd at the end of an existing primitive road. All of the remaining well sites were situated outside the year-long range. See EA at 8, 22; Williams Response in Opposition to Request for Stay in IBLA 2008-197, dated July 16, 2008 (Williams Maycock Opp.), at 11; Project Facility Map (Ex. A to Williams Maycock Opp. and 2008-187 AR Vol. A Doc. 2(v) and Vol. B unnumbered).⁸

Oil and gas leasing and associated activity in the POD area is governed by the October 1985 Buffalo Resource Management Plan (RMP), as revised in 2001, and as amended with issuance of a July 30, 2003, Record of Decision (ROD), adopting the April 2003 RMP Amendment for the PRB Oil and Gas Project. In the EA, BLM analyzed the potential environmental impacts of the proposed Carr Draw III East POD (Alternative B) and alternatives thereto, including no action (Alternative A) and an environmentally-preferred alternative (Alternative C).⁹ Under 40 C.F.R. §§ 1508.28 and 1502.21, BLM tiered the EA to the Final Environmental Impact Statement and Proposed Plan Amendment for the PRB Oil and Gas Project (FEIS) (WY-070-02-065), dated January 2003, which was prepared in conjunction with the April 2003 RMP Amendment.¹⁰ The FEIS addressed the proposed drilling of 39,367 CBNG wells and

⁸ The EA describes the Carr Draw III East POD area as “approximately 90% private surface and 10% federal surface overlaying approximately 85% federal minerals and 15% private minerals.” EA at 19. This description of surface ownership is not completely accurate. The only Federally-owned surface in the Carr Draw III East POD area is the S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 13, T. 50 N., R. 76 W. (80 acres, with well site 32-13-5076BG/W) and SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 26, T. 50 N., R. 76 W. (40 acres, with no well or facility or road). This is approximately 2.2 percent of the surface within the POD area, not 10 percent. The State of Wyoming owns sec. 36, T. 50 N., R. 76 W. (640 acres), another 11.6 percent of the POD area. See Project Facility Map and <http://www.geocommunicator.gov/blmMap/Map.jsp?MAP=LAND> for T. 50 N., R. 76 W.

⁹ Alternative C, developed by Williams and BLM following on-site inspections of the POD area, is a modification of Alternative B. Alternative C also calls for 82 wells in 41 locations, but seeks to alleviate environmental impacts by rerouting access roads and moving, modifying, mitigating, or dropping from further consideration various well locations, pipelines, discharge points and other water management control structures. EA at 9-11.

¹⁰ The EA is a “project EA” that “addresses site-specific resources and impacts that were not covered within the PRB FEIS.” EA at 5.

3,200 conventional oil and gas wells in the PRB over a 10-year period.¹¹ See EA at 5; FEIS (excerpts at 2008-197 AR Vol. C. Doc 3 and 2008-200 AR Vol. C Doc. 3) at 2-9. BLM also noted in the EA at page 8 that in conducting its analysis it utilized a report prepared in September 2007 entitled “Environmental Report: Coalbed Natural Gas Effects on the Fortification Creek Area Elk Herd” (Elk Study), 2008-197 AR Vol. C Doc. 10 and 2008-200 AR Vol. C. Doc. 10. BLM described the Elk Study as a “cumulative effects analysis,” which it compiled “to determine the effects of CBNG development on this geographically isolated herd.” Elk Study at iii.

In his March 2008 FONSI/DR, the Field Manager approved Alternative C and the associated 82 APDs. He concluded that the drilling and associated activity was not likely to significantly impact the human environment in a manner that was not already fully addressed in the FEIS, and, therefore, BLM was not required to prepare an EIS before approving the POD. See EA at 1-3.

B. *The Acting Deputy State Director’s Decisions*

Maycock, PRBRC, and BCA each sought SDR of the FONSI/DR under 43 C.F.R. § 3165.3(b). In his June 13, 2008, decisions (referred to hereinafter as the “2008-197 Decision” and the “2008-200 Decision,” respectively), the Acting Deputy State Director (hereinafter referred to as “State Director” for ease of reference) affirmed the FONSI/DR, allowing the activities under the POD to proceed. Both decisions noted at 2:

The BLM recognized significant impacts are likely to occur from the implementation of oil and gas projects in the area analyzed in the PRB Final EIS (FEIS)/ROD. The subject ROD includes mitigation measures to reduce or eliminate potential adverse environmental effects, which are included as conditions of approval (COA) as applicable, in the site-specific EA.

Citing 40 C.F.R. § 1508.9, the State Director noted that the intent of preparing an EA “is to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI.” *Id.* He then quoted BLM NEPA Handbook, H-1790-1, section 5.2.2, which allows preparing an EA for an action with significant effects “if the EA is tiered to a broader EIS which fully analyzed those effects. Tiering to the programmatic EIS would allow the preparation of an EA and FONSI for the individual action, so long as the remaining effects of the individual action are not significant.” 2008-197 Decision at 2; 2008-200 Decision at 3.

¹¹ The 2003 PRB FEIS recently was upheld on judicial review in *Western Organization of Resource Councils v. Bureau of Land Management*, 591 F. Supp. 2d 1206 (D. Wyo. 2008).

The principal issues on SDR in both appeals were the effects on the sage grouse and sage grouse habitat and the Fortification Creek elk herd. The State Director also addressed arguments related to certain ditches that Williams had dug along a portion of Barber Creek and a portion of South Prong on easements it obtained through a condemnation action in the Wyoming State court,¹² as well as the removal of buried pipelines, power lines, and pit liners when operations cease. Both decisions also addressed other arguments that have not been carried forward as subjects of this appeal and therefore require no discussion.

1. *Sage Grouse*

The State Director rejected Maycock's and PRBRC's/BCA's arguments¹³ that the POD would result in significant adverse effects on the sage grouse. He maintained that the FEIS fully analyzed and disclosed the adverse impacts on the sage grouse that could be expected from full field operations in the PRB, including operations under the Carr Draw III East POD, identifying and summarizing several of those impacts. 2008-197 Decision at 3-4. He rejected Maycock's argument that the buffer zones and timing restrictions around sage grouse leks (strutting grounds for breeding) were inadequate. Those buffer zones and timing restrictions are (1) a prohibition of all surface disturbance and occupancy within a radius of .25 miles of a lek; (2) prohibition of surface disturbance within a radius of 2 miles of a lek from March 1 to June 15; and (3) a requirement to locate power lines (which are potential raptor hunting perches) at least .5 miles from a lek. The State Director noted that the sage grouse protection measures applied to the approval of the Carr Draw III East POD were "consistent with those required by the 1985 Buffalo Resource Management Plan (RMP)." 2008-197 Decision at 4; 2008-200 Decision at 4.

Both Maycock and PRBRC asserted that the EA ignored more recent studies regarding sage grouse population decline that showed that the buffer zones were inadequate. In both decisions, the State Director said:

The subject EA acknowledges recent studies show that even with a timing limitation on construction activities, sage-grouse may avoid nesting within the CBNG fields because of the activities associated with operation and production (EA at 48).

¹² The history of these ditches is explained in detail our recent decision in the bonding case. See *William P. Maycock*, 176 IBLA at 209-10.

¹³ Hereinafter, references to PRBRC and citations to documents filed by PRBRC include BCA.

As the subject EA discloses, the two-mile distance measure currently used by BLM to protect sage grouse nesting habitat was based on recommendations from early research indicating between 59 and 87 percent of sage-grouse nests were located within two-miles of a lek (EA at 49). Recently, as the subject EA also discloses, additional studies, across more of the sage-grouse's range, show many populations nest much farther than two miles from the lek of breeding (EA at 49). However, it should be noted the percentage of sage-grouse nesting within a certain distance from their breeding lek is unavailable for the PRB at this time (EA at 49). The Buffalo and Miles City, Montana Field Offices, through the University of Montana, with assistance from other partners, including the U.S. Department of Energy and industry are currently researching nest location and many other sage-grouse issues with respect to sage grouse and coalbed natural gas development (EA at 49).

Until research can provide a more accurate answer regarding an appropriate distance between disruptive activities and sage grouse lek and nesting/brooding areas, the BLM will continue to apply mitigation as required in the Buffalo RMP and PRB ROD.

2008-197 Decision at 5; 2008-200 Decision at 5. The State Director also stated:

Currently there are [in]numerable (and sometimes conflicting) sage grouse studies being conducted throughout the western United States, including the PRB. The BLM is currently evaluating the results of these studies.

Also, on August 10, 2007, the BLM Wyoming State Director sent a letter to PRB oil and gas operators and other parties with operations in high-quality sage grouse habitat that BLM intends to consider recent peer-reviewed findings regarding sage grouse. This letter acknowledges the results of published research that indicates CBNG development "is having a negative impact to long-term Sage grouse population levels." This letter advises operators that additional mitigation will be required when conducting operations that are wholly or partially located within high quality sage grouse habitat in the PRB.

...

2008-197 Decision at 5-6; 2008-200 Decision at 3. The State Director concluded that "the BFO is considering new information as it approves activities in known high quality sage grouse habitat areas. Further, the BFO applies mitigation to protect sage grouse that is consistent with current management direction provided in the PRB

ROD and the 1985 Buffalo RMP, as amended.” 2008-197 Decision at 6; 2008-200 Decision at 4.

2. *Fortification Creek Elk Herd*

With respect to the Fortification Creek elk herd, both Decisions stated:

The CD3-E decision includes approval of well 21-26 [*i.e.*, well 21-26-5076BG/W] and use of 0.6 miles of existing primitive road located within a proposed utility corridor that is within the elk year-long range. The subject EA discloses that no elk have been recorded within the CD3-E project area by the landowner, or by the consultants’ surveys, or by BLM radio-collared elk in recent years and the topography and vegetation throughout the CD3-E project area does not provide suitable hiding cover for elk (EA at 22).

2008-197 Decision at 9; 2008-200 Decision at 6.¹⁴

Both Decisions noted that the EA stated that long-term disturbance, including facilities construction and road improvement, would result in elk habitat loss, and that big game likely would be displaced from the project area during drilling and construction operations. The EA also included consideration of impacts from several recent studies. The BFO also concluded that because elk had already been displaced from the Carr Draw III East project area, project development should not further impact elk habitat use. 2008-197 Decision at 9; 2008-200 Decision at 7. Both Decisions concluded that the BFO “correctly determined that development of the 21-26 well and ancillary facilities will have no significant impact to elk.” 2008-197 Decision at 10; 2008-200 Decision at 7.

3. *Ditches Dug Along Barber Creek and South Prong*

Maycock argued that the BFO wrongly failed to consider and assess the environmental impacts of discharging produced water into the ditches that Williams had dug on easements it obtained through the Wyoming State court condemnation action. The State Director’s Decisions noted that Williams had proposed 53 impoundments and 57 outfalls to contain produced water in the original Carr Draw III East POD, which was rejected. The EA then noted that the Wyoming Pollution Discharge Elimination System (WYPDES) permit approving the discharge of produced

¹⁴ The Decisions further noted that the PRB FEIS had not discussed potential cumulative effects on the elk herd from CBNG development, and to remedy this problem, BLM prepared the September 2007 Elk Study. *See* 2008-197 Decision at 9; 2008-200 Decision at 7.

water into reservoirs and channels within the Barber Creek drainage was revoked. The Decisions stated:

Produced water will be handled as proposed in the approved CD3-E WMP [Water Management Plan] using previously approved facilities (EA No. WY-070-08-013, approved October 19, 2007) to transport the produced water south, out of the CD3-E POD area (EA at 8). No water, produced in association with a Federal action, is approved to be discharged through the channel cuts within the CD3-D POD (EA at 8).

2008-197 Decision at 7; 2008-200 Decision at 9. The Decisions further explained that

whether Williams[] considered discharging water produced from Federal wells through the channel cuts is immaterial with regard to the approved POD. The Federal action for BLM analysis purposes states produced water will be disposed of using existing facilities located outside the project area. The WDEQ [Wyoming Department of Environmental Quality] revoked the approved WYPDES permit which would have allowed produced water from either fee or Federal CBNG wells to be discharged into Barber Creek. . . . As no WYPDES permit is in place, legally no water can be disposed of on the surface.

2008-197 Decision at 7; 2008-200 Decision at 9-10. The State Director therefore rejected Maycock's argument and held that the BFO properly identified the scope of the Federal action with respect to water management in the EA.

4. *Buried Pipelines and Other Infrastructure*

Finally, in rejecting Maycock's and PRBRC's arguments that BLM should require Williams to remove all buried pipelines, power lines, and pit liners when operations under the POD cease, the State Director said that the BFO had recognized concerns regarding buried infrastructure and that as a matter of site-specific mitigation required removal of all lines buried close to the surface that become or may become exposed due to erosion or soil movement, but that deeply buried lines could remain in place unless the BLM authorized officer directed otherwise. The BFO further required, according to the State Director, that pit liners be buried deep enough to ensure that they did not become exposed. *See* 2008-197 Decision at 11; 2008-200 Decision at 12-13.

Concluding that the DR/FONSI complies with NEPA and other applicable laws and regulations, and is consistent with the analysis in the PRB FEIS, the State

Director affirmed the approval of the Carr Draw III East POD. 2008-197 Decision at 11; 2008-200 Decision at 14.

C. *The Instant Appeals*

In both IBLA 2008-197 and 2008-200, Maycock and PRBRC challenge the State Director's conclusions with regard to NEPA compliance with respect to sage grouse and the Fortification Creek elk herd. They argue that the State Director was wrong in concluding that the POD would not result in significant impacts in addition to those analyzed in the PRB FEIS and that an EA was sufficient. In IBLA 2008-197, Maycock additionally challenges the State Director's conclusions regarding the ditches dug along Barber Creek and South Prong on his ranch and the removal of buried pipelines and other infrastructure at the conclusion of operations.

Analysis

I. *Sage Grouse*

A. *Adequacy of the FONSI in Light of Other BFO Actions and Board Decisions*

In his initial Notice of Appeal and Request for Stay dated July 2, 2008 (Maycock NOA/Request), Maycock argues that the limitations imposed to protect sage grouse are inadequate to render the environmental impacts on sage grouse insignificant. It is undisputed that there are sage grouse nesting and brood-rearing areas within the Carr Draw III East POD area. The EA states at 28: "Nesting and brood-rearing habitat occurs in sagebrush communities throughout the project area." Maycock quotes the EA as acknowledging that recent scientific studies show that many sage grouse populations nest farther than 2 miles from the breeding lek and that the 2-mile timing limitation is likely insufficient to reverse sage grouse population decline and that studies have recommended increasing the protective distance around leks (EA at 49-50). Therefore, Maycock argues, the 2-mile radius for the March 1 to June 15 timing limitation is inadequate. He further quotes the EA (at 49) as pointing out that the organization with which the 2-mile timing limitation originated (the Western Association of Fish and Wildlife Agencies (WAFWA)) revised its guidelines to recommend protection of sage grouse habitats within 3.1 miles (5 km) of leks in habitats where sagebrush coverage is fragmented and not distributed uniformly, such as the PRB. Maycock NOA/Request at 3-4.

Maycock also cites extensively a January 2008 internal Wyoming Game and Fish Department (WGFD) memorandum (Maycock NOA/Request Ex. C). That memorandum relies in major part on a 2007 published article in the *Journal of Wildlife Management* by three wildlife biologists at the University of Montana (Walker, Naugle, and Doherty), and a 2006 unpublished report by the same authors

(Maycock NOA/Request Ex. B), to find that a .25-mile no-surface-occupancy buffer is inadequate to protect both leks and sage grouse winter habitat. Maycock NOA/Request at 5-6. Maycock additionally asserts that within 3 months after it approved the Carr Draw III East POD, the BFO issued documents that effectively acknowledge that current management practices may be insufficient to sustain sage grouse populations and that the data on which the limitations to protect the sage grouse in the approved POD are based is outdated. *Id.* at 13.¹⁵

PRBRC similarly argues that recent peer-reviewed studies establish that mitigation measures established in the 1985 Buffalo RMP (and the PRB FEIS) are failing badly. According to PRBRC, the State Director dismissed the studies out of hand in the Decision (at 3) on the ground that there are “[in]numerable (and sometimes conflicting) sage grouse studies being conducted . . .” and continued to rely on the 1985 Buffalo RMP even though the studies uniformly showed the need for far larger buffers around leks and protection of nesting habitat. PRBRC SOR at 5-6. PRBRC argues that BLM has acknowledged the significance of these studies in the August 10, 2007, letter to oil and gas operators in the PRB (PRBRC SOR Doc. L). PRBRC says that the EA does not attempt to defend the efficacy of the existing lek buffers on the basis of current studies. *Id.* at 7.

In PRBRC’s view, because BLM did not consider the consequence to sage grouse viability of authorizing the POD in light of current peer-reviewed science and did not alter sage grouse protections or consider new mitigation measures, it has failed to take the required “hard look” and cannot demonstrate that the POD would not cause significant direct, indirect, or cumulative impacts and therefore cannot justify the FONSI on the rationale given. *See* PRBRC SOR at 7, 9. PRBRC asserts that 40 C.F.R. § 1508.13 requires that a FONSI must present reasons why an action will not have a significant effect, and that BLM cannot rely on the mitigation measures in the 1985 Buffalo RMP, carried forward into the 2003 PRB FEIS and ROD, for that purpose. According to PRBRC, BLM may rely on an EA only if mitigation measures are mandatory and constitute an adequate buffer so as to render impacts so minor as not to warrant an EIS, citing *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1250 (D. Wyo. 2005), quoting *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1276 (10th Cir. 2004). PRBRC SOR at 10-11.

BLM and Williams both responded to Maycock’s and PRBRC’s respective appeals and requests for stay. In its responses to both Maycock and PRBRC, after

¹⁵ Maycock further notes that the EA (at 48) acknowledged the WGFD’s view that a well density of 8 wells per section (*i.e.*, a maximum density of one well or well pad every 80 acres, as provided in the Carr Draw III East POD) creates a high level of impact for sage grouse and that sage grouse avoidance zones around mineral facilities overlap, creating contiguous avoidance areas. Maycock NOA/Request at 5.

noting that 10 wells were relocated due to proximity to sage grouse nesting habitat, BLM maintained that the EA and FONSI were proper because the effects predicted in the EA do not exceed those previously disclosed and analyzed in the PRB FEIS to which it is tiered. The PRB FEIS had disclosed that CBNG development on 80-acre spacing will have significant impact to sage grouse.¹⁶

Both BLM and Williams argue that Maycock's and PRBRC's reliance on more recent sage grouse studies amounts simply to a difference of opinion with the BLM Field Manager and experts, which is not an adequate ground for reversal.¹⁷ BLM and Williams also argue that Maycock and PRBRC provide no site-specific studies of the Carr Draw III East POD to show that the existing buffers are inadequate or that impacts from development will be significant, and that references to scientific literature are insufficient to demonstrate deficiency of sage grouse buffers in a particular area.¹⁸

Williams argues that the EA considered the new studies indicating that, as a general matter, 2-mile buffers may not be sufficient to protect sage-grouse and, therefore, adequately analyzed the impacts of the POD. Williams asserts that the Carr Draw III East POD area is not in the high-quality or "core" sage grouse habitat that it says was evaluated in the recent studies on which Maycock and PRBRC rely and was the focus of the WGFD memorandum that Maycock cites. It further argues that there is not a single lek within the POD boundary. Williams asserts that the 5 leks within 2 miles of the POD area are separated from development by well-traveled roads, topographic features, and rough terrain. See Williams Maycock Opp. at 6-8; Williams PRBRC Opp. at 9-10, 14-16. Williams also argues that the POD area is not in pristine undisturbed habitat, but on an operating cattle ranch, and that the negative effect that ranching operations have on sage grouse is well known. See Williams Maycock Opp. at 7-8; Williams PRBRC Opp. at 10-11.

Maycock filed a Statement of Reasons (Maycock SOR) dated July 29, 2008. Maycock points out that the State Director conceded that the Carr Draw III East POD area provides important sage grouse habitat (citing 2008-197 Decision at 5), and that

¹⁶ See BLM July 11, 2008, Objection to Maycock's Request for Stay (BLM Maycock Obj.) at 2, 4-5, 12-13; BLM July 24, 2008, Objection to PRBRC's Request for Stay (BLM PRBRC Obj.) at 2, 5, 13-15.

¹⁷ See BLM Maycock Obj. at 13-15, citing *Wyoming Outdoor Council*, 173 IBLA at 235; Williams Maycock Opp. at 9-10; Williams Response in Opposition to PRBRC's Motion for Stay (Williams PRBRC Opp.) at 7.

¹⁸ See BLM PRBRC Obj. at 14-15; Williams Maycock Opp. at 6, 9-10; Williams PRBRC Opp. at 8, all citing *Biodiversity Conservation Alliance*, 171 IBLA 218, 228-29 (2007).

BLM has admitted that 1,295 acres of sage grouse habitat will be affected by CBNG activity in the POD area (citing EA at 48). Maycock points out that 8 leks are located within 3 miles of the POD area, one active lek is only .33 miles away, and 4 active leks are within 2 miles. Maycock SOR at 12; *see also* PRBRC Reply at 2. Maycock also attacks the State Director's position (2008-197 Decision at 5) that BLM will continue to apply mitigation as required by the 1985 Buffalo RMP and 2003 Powder River Basin ROD until research can provide a more accurate answer regarding the appropriate distance between disruptive activities and sage grouse lek and nesting and brood-rearing areas, on the basis that this position is contrary to this Board's recent decision in *Biodiversity Conservation Alliance*, 174 IBLA 1, 22-23 (2008). Maycock SOR at 14-15.

PRBRC also submitted additional analysis and arguments in a Reply dated August 8, 2008. PRBRC asserts that in the EA, BLM ignored the WAFWA study and recommendations for expanded buffer zones (PRBRC SOR Ex. I). PRBRC Reply at 5, 7-8. Further, PRBRC says, BLM has not shown any "conflicting" scientific research, and the recent scientific studies are unequivocal in showing that current buffers are ineffective. *Id.* at 5. PRBRC explains that the studies performed by the University of Montana wildlife biologists took place in areas geographically very close to the PRB and very similar in habitat conditions to Maycock's ranch, and therefore appropriately apply to the Carr Draw III East POD area. *Id.* at 5-6. By not considering these studies, PRBRC argues, BLM failed to use accurate scientific analysis in the EA and approval of the POD. *Id.* at 6.

Williams' August 28, 2008, Response to Maycock's SOR (Williams Response) reiterated Williams' position that the studies on which Maycock relies do not address site-specific conditions on the Carr Draw III East POD area. Williams further argues: "There is no indication that Williams' development will be peculiarly harmful to sage-grouse as compared to other gas development, especially in light of the sensitive mitigation measures imposed by BLM, including relocation of 10 wells to avoid sage-grouse habitat and geographic and timing stipulations." *Id.* at 7-8.¹⁹

The 2003 PRB FEIS acknowledges that CBNG development, on the scale of more than 39,000 CBNG wells in the entire PRB, will have significant effects on sage grouse. The FEIS discussion included the anticipated effects of vehicle collisions, power line collisions, raptor predation, loss or degradation of habitats, habitat fragmentation, and disturbance from construction, road use, and noise. FEIS at 4-257, 4-266 through 4-273. With regard to the effects on sage grouse population, the FEIS stated:

¹⁹ BLM filed an Answer to Maycock's SOR on Aug. 27, 2008. It incorporates BLM's responses to the requests for stay and argues that Maycock has shown only a clear difference of opinion with BLM officials.

Vehicle and power line collisions, increased raptor predation, habitat loss, displacement, noise, and habitat fragmentation all have the potential for substantial negative effects on sage grouse populations Implementation of several mitigation measures would reduce the extent of each impact addressed by those measures. Despite these measures, the synergistic effects of several impacts would likely result in a downward trend for the sage grouse population, and may contribute to the array of cumulative effects that may lead to its Federal listing [as an endangered species]. Local populations may be extirpated in areas of concentrated development, but viability across the Project Area or the entire range of the species is not likely to be compromised.

FEIS at 4-270. While the mitigation measures required under the FEIS (including the 2-mile seasonal restriction, the .25-mile no-surface-occupancy buffer, and power line location restrictions) are designed to reduce the adverse impacts to sage grouse, the FEIS makes clear that they are not designed, and are not anticipated, to reduce those effects to insignificance over the entire PRB area.

The 82 wells approved under the Carr Draw III East POD are only a small portion (slightly more than two-tenths of one percent) of the CBNG wells that the FEIS anticipates would be drilled in the entire PRB over the multiple-decades-long life of the PRB project. Nevertheless, because sage grouse and sage grouse habitat are present throughout the POD area, some portion of the significant effects anticipated under the FEIS will occur within the Carr Draw III East POD area.

Although the BFO relied on the existing mitigation measures in the FEIS when it issued the FONSI, it noted in the EA the subsequent studies and information that demonstrate that the mitigation measures required under the FEIS are not as effective as BLM contemplated they would be. The EA explained:

The Buffalo Field Office (BFO) Resources Management Plan (BLM 2001) and the Powder River Basin Oil and Gas Project Record of Decision (BLM 2003) include a two-mile timing limitation within sage-grouse nesting habitat. The two-mile measure originated with the Western Association of Fish and Wildlife Agencies (WAFWA), which includes the WGFD, 1977 sage-grouse guidelines (Bennett 2004). Under pressure for standardization BLM Wyoming adopted the two-mile recommendation in 1990, and instructed the field offices to incorporate the measure into their land use plans (Bennett 2004, Murkin 1990).

The two-mile recommendation was based on research which indicated between 59 and 87 percent of sage-grouse nests were located

within two-miles of a lek (Bennett 2004). These studies were conducted within prime, contiguous sage grouse habitat such as Idaho's Snake River Plain.

Additional studies, across more of the sage grouse's range, indicate that many populations nest much further than two miles from the lek of breeding (Bennett 2004). Holloran and Anderson (2005), in their Upper Green River Basin study area, reported only 45% of their sage grouse hens nested within 3 km (1.86 mi) of the capture lek. Moynahan and Lindberg (2004) found 36% of their sage grouse nesting within 3 km of the capture leks. Moynahan's study area was north-central Montana in an area of mixed-grass prairie and sagebrush steppe

Percentage of sage grouse nesting within a certain distance from their breeding lek is unavailable for the Powder River Basin. . . . Habitat conditions and sage grouse biology within the Buffalo Field Office is probably most similar to Moynahan's north-central Montana study area.

Vegetation communities within the Powder River Basin are naturally fragmented as they represent a transition between the intermountain sagebrush communities to the west and the prairie communities to the east. . . . Without contiguous habitat available to nesting grouse it is likely a smaller percentage of grouse nest within two miles of a lek within the PRB than grouse within those areas studied in the development of the 1977 WAFWA recommendations and even the Holloran and Moynahan study areas. Holloran and Moynahan both studied grouse in areas of contiguous sagebrush habitats without large scale habitat fragmentation and conversion (Moynahan et al In press, Holloran and Anderson 2005). . . . Recognizing that many populations live within fragmented habitats and nest much farther than two miles from the lek of breeding WAFWA revised their sage grouse management guidelines (Connelly et. al. 2000) and now recommends the protection of suitable habitats within 5 km (3.1 mi) of leks where habitats are not distributed uniformly such as the Powder River Basin.

EA at 48-49.

In affirming the BFO, the State Director likewise relied on the 2003 PRB FEIS and the mitigation measures it prescribed. 2008-197 Decision at 2, 4-6; 2008-200 Decision at 2, 4-5. In addition, the State Director cited the fact that the Carr Draw III East POD area is not in so-called "core" or "high quality" sage grouse habitat, relying

on the August 10, 2007, letter to oil and gas operators in the PRB. 2008-197 Decision at 6; 2008-200 Decision at 3-4. That letter acknowledges the results and implications of the more recent scientific research on which Maycock and PRBRC rely. The further research and studies subsequent to the FEIS have demonstrated—as BLM has acknowledged—that the mitigation measures prescribed in the EIS are not as effective as BLM contemplated at the time.

[1] What BLM has done before in another case provides an important contrast to the present situation. Almost 2½ years before the EA and FONSI/DR in the instant case approving a 2-mile seasonal restriction around sage grouse leks, the BFO imposed a 3-mile seasonal restriction in two CBNG PODs in the PRB, in Johnson County, Wyoming (the “Nemesis POD” and the “Skyward POD”) that it approved with accompanying EAs and FONSI on September 13, 2005, and September 23, 2005, respectively. The BLM Wyoming Deputy State Director affirmed the 3-mile timing buffer zone in both cases on May 26, 2006, and May 5, 2006, respectively. This Board affirmed on September 30, 2008. *Yates Petroleum Corp.*, 176 IBLA 144, 151, 153, 155-57 (2008).

In *Yates*, BLM biologists “evaluated possible impacts to wildlife resources and provided recommendations for project adjustments on the basis of those findings” in light of collected information and studies. 176 IBLA at 148; *see also id.* at 153. BLM’s interdisciplinary team “requested many design feature changes [in the POD] to reduce the environmental consequences of development.” *Id.* at 148. BLM then developed alternatives for both PODs that Yates had submitted, including both the proposed action and environmentally preferred alternatives. *Id.* at 148, 153. BLM’s Wyoming policy “allows for modification of mitigation requirements, such as expanding the radius of a seasonal limitation, based on site-specific concerns and support.” *Id.* at 149. The BLM BFO “evaluated potential site-specific impacts to sage grouse” and found that the 2-mile seasonal restriction left the majority of the project area unprotected. *Id.* at 150. The environmentally preferred alternative extended the 2-mile seasonal restriction around active leks to 3 miles. The BFO adopted that alternative for both the Nemesis and Skyward PODs, relying in substantial part on the revised WAFWA recommendations for a 3-mile seasonal restriction zone. *Id.* at 149, 151-53.

On appeal, this Board rejected Yates’ argument that the 3-mile seasonal restriction was inconsistent with the 2-mile restriction required under the 1985 RMP and the 2003 PRB FEIS and violated the requirement of section 302(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1732(a), that the Secretary manage the public lands in accordance with land use plans. We noted that the Buffalo RMP specifically provided for the possibility of an exception, waiver, or modification if approved by the BFO manager and that the mitigation guidelines in the RMP gave BLM discretion to modify surface operations to add specific mitigation

measures. 176 IBLA at 156-57. We explained: “The specific mitigation adopted by the BFO and upheld in the SDR Decisions was recommended by BLM’s technical experts following submission of detailed PODs, on the basis of environmental analyses unrefuted with any specificity by Yates.” *Id.* at 157 (footnote omitted).

In the instant case, it appears that the BFO did not undertake an analysis under the BLM Wyoming policy to adjust sage grouse protective areas when appropriate. It appears that the kind of site-specific analysis that the BFO did in *Yates* was not done here.²⁰ Nor has BLM offered any explanation or analysis of why *Yates* is different from the instant case, or why the more recent WAFWA guidelines were highly relevant in *Yates* but are not relevant here.

In addition, in contrast with the State Director’s position in the instant case, there was no discussion by BLM in *Yates* on whether the habitat within the two POD areas was supposedly “core” or “high quality” habitat — the distinction made in the August 10, 2007, letter from the BLM Wyoming State Director to oil and gas operators in the PRB.²¹ While in *Yates*, as in the instant case, suitable sage grouse habitat was present throughout both POD areas, 176 IBLA at 149, 153, comparing *Yates* to this case indicates that the POD areas in that case are not in “high quality” habitat. There are the same number of leks within 3 miles, and the same number of

²⁰ Moreover, approximately 7 months before the decision in *Yates*, in *Biodiversity Conservation Alliance*, 174 IBLA 1 (2008), we observed that “the scientific community is moving in a different direction on the issue of sage grouse protections.” 174 IBLA at 22. We further noted that a BLM instruction memorandum (IM 2004-057) required a site-specific policy for sage grouse management and “imposes a policy of case-by-case mapping of sage grouse habitat, including nesting habitat, to better protect nests that are beyond a 2 mile radius ‘regardless of distance from leks’ while allowing disturbance in areas within such a radius that do not provide suitable habitat.” *Id.* at 23, quoting IM 2004-057 at 5.

²¹ PRBRC asserts that the Carr Draw III East POD area was identified in the 2003 EIS as core sage grouse habitat, citing Fig. 3-16 of the EIS. PRBRC SOR at 3. PRBRC also maintains that WGF D maps of “core” sage grouse breeding areas (PRBRC Reply Ex. 5) initially included the Carr Draw III East POD area. *Id.* at 3. Williams states that the map of the “high-quality sage grouse habitat” referred to in the Aug. 10, 2007, letter (Williams PRBRC Opp. Ex. E) shows that they do not include the Carr Draw III East POD area. Williams PRBRC Opp. at 9-10. On Aug. 28, 2008, PRBRC submitted a series of e-mail communications between BFO staff and BLM Wyoming State Office staff, obtained through the Freedom of Information Act, 5 U.S.C. § 552 (2000), indicating that the Carr Draw III East POD area, while included in a sage grouse Interim Management Area, is not included within the “polygons” of “high-quality” habitat subject to the State Director’s Aug. 10, 2007, letter.

leks within 2 miles, of the two POD areas (taken together) in *Yates* that there are within 3 miles and 2 miles, respectively, of the Carr Draw III East POD area in the instant case. See 176 IBLA at 149, 153. Moreover, the BFO's action in *Yates* imposing the 3-mile seasonal restriction in light of the WAFWA recommendations precedes the August 10, 2007, letter by almost 2 years. Therefore, whether the habitat would be regarded as "high quality" or "core" habitat was not a factor in BLM's decision.

In the present case, the BFO and the State Director appear to have simply defaulted to the mitigation measures prescribed in the 1985 Buffalo RMP and the 2003 PRB FEIS and ROD. It is contradictory for BLM to rely solely on those mitigation measures in issuing an EA and FONSI at the same time that it acknowledges the validity of the more recent research that demonstrates that those mitigation measures are not as effective as originally anticipated, and, indeed, has acted on the basis of the more recent research in another comparable situation to impose more stringent mitigation measures in two EAs.

Nor can BLM avoid the problem by purporting to rely on the 1985 Buffalo RMP and 2003 PRB FEIS and ROD until further research can provide a more accurate answer regarding the appropriate distance between disruptive activities and sage grouse lek and nesting and brood-rearing areas. PRBRC is correct in asserting, as noted above, that BLM has not shown any "conflicting" scientific research. The more recent scientific studies uniformly indicate that the current measures are less effective than BLM believed they would be. For the same reason, Williams cannot validly argue in these circumstances that the appellants' reliance on more recent studies amounts only to a difference of opinion between experts.

Further, Williams' argument that Maycock and PRBRC provide no site-specific studies of the Carr Draw III East POD is not persuasive. Williams (and BLM) do not dispute that the studies performed by the University of Montana wildlife biologists examined areas very close in geographic proximity to the PRB with habitat conditions very similar to the Carr Draw III East POD area. Neither Williams nor BLM has offered or shown any reason why sage grouse in the Carr Draw III East POD area would be expected to behave in a manner dramatically different from sage grouse in the areas studied.²²

²² Williams' argument that there are no leks within the POD boundary itself is not persuasive in view of the proximity to the area of a number of leks and the undisputed fact that there is sage grouse nesting and brood-rearing habitat throughout the POD area. Further, the fact that the 5 leks located within 2 miles of the POD area are separated from the area by well-traveled roads, topographic features, and rough terrain is of no apparent relevance. Sage grouse obviously travel
(continued...)

Therefore, we will set aside and remand the portion of the State Director's decisions regarding the sage grouse for further analysis of the relationship of this case to *Yates* and appropriate further action or explanation of how the instant case is distinguishable from *Yates*.²³

B. *Alternatives and Cumulative Effects Analysis*

[2] Maycock asserts that the Carr Draw Unit Agreement states that efficient development of the unit may be accomplished with one well every 160 acres rather than 2 wells every 80 acres as BLM approved here. Therefore, Maycock argues, BLM failed to consider alternatives that are technically and economically feasible and have lesser impact, citing *Biodiversity Conservation Alliance*, 174 IBLA at 25. Maycock NOA/Request at 14. This argument is an incomplete characterization of the unit agreement. The unit agreement at 6 (excerpts at Maycock NOA/Request Ex. D) provides:

It is the intent herein that the initial wells drilled hereunder will be drilled on a pattern of not less than one well per eighty (80) acres, or the aliquot equivalent. The parties hereto and the AO [BLM Authorized Officer] recognize, however, that efficient development of this unit may be accomplished by drilling wells located on a pattern of one well per one hundred sixty (160) acres. In the event Operator determines that it can efficiently develop the unit area on a pattern of one well per one hundred sixty (160) acres, it shall notify the AO of such event.

In other words, the unit agreement, which BLM approved, leaves to the unit operator the option of lease development on the basis of one well per 80 acres or one well per 160 acres, and does not grant power to BLM to require the latter. Williams, the unit Operator, has not notified BLM of any determination that it can efficiently develop on the basis of one well per 160 acres. BLM is not required to analyze an alternative that is not feasible because it is inconsistent with the basic presumption of the Unit Agreement and BLM cannot legally compel the operator to adopt that alternative

²² (...continued)

across these features to nesting and brood-rearing habitat within the POD area.

²³ We note that if a 3- or 3.1-mile timing buffer around sage grouse leks were applied to the Carr Draw III East POD, all the wells within the POD area would come under the timing mitigation restrictions now applicable to those within the 2-mile timing buffer. According to the Project Facility Map, that would subject an additional 15 well sites (30 wells) to the timing restrictions. The remaining 26 well sites (52 wells) of the 41 proposed well sites/82 proposed wells are within the 2-mile timing buffer and are subject to those restrictions already.

under the terms of the Unit Agreement. *See, e.g., Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1180 (9th Cir. 1990).

PRBRC argues that the EA's reliance on the 5-year-old analysis of cumulative effects on sage grouse associated with the 2003 PRB FEIS is inadequate not only in light of the new research, but also because of the surge in the pace of energy development activity, applications for rights-of-way on BLM lands for up to 20 wind-power projects of 3,000-5,000 turbines each, and an increase in uranium mining in the PRB. PRBRC Reply at 8-10. Because we set aside that portion of the State Director's Decisions affirming the FONSI/DR with respect to the sage grouse, BLM may address as necessary any cumulative effects from development under the Carr Draw III East POD in the course of further analysis.

C. *NEPA Versus FLPMA*

Both Maycock and PRBRC argue that in adhering to the mitigation measures prescribed in the 1985 Buffalo RMP and the 2003 PRB FEIS, BLM failed to prevent unnecessary and undue degradation on the public lands in violation of the Secretary's duty under section 302(b) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1732(b). Maycock SOR at 13, 15; PRBRC SOR at 12-13. In its opposition to PRBRC's SOR and stay request, Williams points out that the surface within the Carr Draw III East POD area is almost entirely privately owned, and that BLM has "limited authority" to manage the surface. Williams PRBRC Opp. at 18-19. Williams is correct that FLPMA applies to public lands, not to sage grouse habitat on privately-owned or State-owned lands. However, the obligation to prevent unnecessary and undue degradation applies to the 120 Federally-owned surface acres. Nevertheless, the NEPA argument provides the factual predicate for Maycock's and PRBRC's FLPMA claim here, particularly in view of the fact that, according to the Project Facility Map, none of the wells and none of the roads will be located on the 120 Federally-owned surface acres. In view of our decision to set aside and remand the portion of the State Director's decisions pertaining to the sage grouse, the FLPMA claim effectively is moot.

II. *Fortification Creek Elk Herd*

With regard to the Fortification Creek elk herd, Maycock argues that the Carr Draw III East POD includes one approved well (Well 21-26) *inside* the year-long elk range, contrary to what Williams represented when the Carr Draw III POD was split into separate East and West PODs. Maycock NOA/Request at 9. Further, he argues, accepting the EA's statement (at 38) that elk are avoiding existing wells by at least 1.7 miles, 26 of the approved well sites outside the year-long range will create avoidance zones within the year-long range. (Maycock's breakdown of the well site numbers by land section actually totals 30 well sites.) He notes, however, that elk in

the year-long range frequently use a reservoir in that range that is less than one mile from Well 21-26. *Id.* at 10; *see* Maycock SOR at 5-6. Maycock additionally asserts that BLM approved at least 12 wells within 1.7 miles of the “crucial elk range” (which includes sec. 14, T. 50 N., R. 76 W., adjoining the northern portion of the Carr Draw III East POD area to the west). Thus, according to Maycock, this development will cause elk to avoid their crucial range, and, therefore, result in a significant impact. Maycock SOR at 6.

Maycock attacks the statement in the EA (at 22) that no elk have been recorded in the POD area, citing several specific locations at which numerous elk have been sighted. He asserts that some elk are moving east onto his ranch because of CBNG activity to the west and north. Maycock NOA/Request at 9. Specifically, Maycock states that in 2007, 15 elk stayed for several months in the SW¹/₄SW¹/₄ sec. 24, T. 50 N., R. 76 W. On May 13, 2007, he photographed elk in the NW¹/₄NE¹/₄ sec. 26, T. 50 N., R. 76 W. In April 2008, he photographed elk in the NE¹/₄SW¹/₄ sec. 24, T. 50 N., R. 76 W. These locations are all in the western portion of the Carr Draw III East POD area and are outside the year-long range. He also refers to several other elk sightings within the Carr Draw III East POD area with less specific time references. *Id.* at 9, 15; attached Affidavit of William P. Maycock dated June 30, 2008, at 2, ¶¶ 6-8; Maycock SOR at 7-8. PRBRC similarly argues that BLM cannot justify the FONSI by the argument that elk already have been displaced from the Carr Draw III East POD project area (EA at 39) because Maycock’s and Williams’ own wildlife surveys show that elk are present in the area. PRBRC SOR at 8 n.7.

Maycock and PRBRC also argue that the EA (at 38) states that elk have adjusted to the current level of development by favoring a wilderness study area and the crucial ranges, but how much more development they can tolerate is unknown. He also cites the State Director’s concession that the 2003 PRB FEIS on which the EA was based did not discuss potential cumulative effects to the elk herd from CBNG development. Maycock argues that it follows that BLM cannot conclude that development under the POD would not have a significant impact and must prepare an EIS. *See* Maycock NOA/Request at 9-10, 15; PRBRC SOR at 8; Maycock SOR at 4-5.

Maycock also asserts that BLM admits that CBNG development will reduce the Fortification Creek elk herd from 230 to between 46 and 64 head — below the WGFD objective of 150 head. Maycock maintains that a population decline of that magnitude is a significant impact. Maycock SOR at 7.

BLM countered by arguing that Maycock cannot show that a single well and portion of a primitive road at the edge of the year-long range or other wells located outside of it present a significant adverse impact. BLM Maycock Obj. at 5-6; *see also* BLM PRBRC Obj. at 15-16. BLM quoted from the Elk Study to the effect that the

WGFD set a population management objective at 150 head, and that currently there are an estimated 230 elk in the herd. BLM Maycock Obj. at 7-8, *quoting* Elk Study at 3. BLM further noted that the Elk Study, using data from elk captured and fitted with radio collars, found that Elk avoided using habitat within 1.7 miles of well sites and .5 miles of roads. The Elk study further found, as of 2005 and with 71 producing wells inside the year-long range: “Although the existing level of mineral development has affected the elk herd, it remains healthy and productive.” BLM Maycock Obj. at 8, *quoting* Elk Study at 4. BLM further argued that while PRBRC and Maycock take issue with BLM’s conclusion that no elk had been recorded in the Carr Draw III East POD area, they have not addressed BLM’s observation that the topography and vegetation in the POD area do not provide suitable hiding cover for elk. BLM PRBRC Obj. at 17.

Williams notes that the well within the year-long range boundary is only about 100 feet inside it.²⁴ Except for that single well site, Williams argues, this case is not different from the PODs approved in *Wyoming Outdoor Council*, 173 IBLA 226 (2007), where the EAs determined that development outside the year-long range, where elk were rarely found, would not be significant. Williams asserts that BLM took into account the fact that some year-long habitat would be impacted and that displaced elk would be supported by the remaining 122,930 acres of habitat. Williams Maycock Opp. at 11; Williams PRBRC Opp. at 11-12. Williams cites the EA (at 22, 39) for the proposition that elk have already been displaced from the portion of the year-long range that is within 1.7 miles of oil and gas activity under the Carr Draw III East POD, and that the elk concentrate in the crucial range and wilderness study area miles away to the north. *Id.* at 12.

Williams further argues that the uncertainty of impacts is only one of 10 factors considered in determining the intensity of effects and whether effects will be significant under 40 C.F.R. § 1508.27. The presence of one or more does not compel BLM to find that there is a significant impact, citing *Wyoming Outdoor Council*, 173 IBLA at 246. Williams Response at 1-2. Williams maintains that in any event, the impacts of the Carr Draw III East POD in fact are well known. Given an elk avoidance range of 1.7 miles, Williams says that approximately 1,000 acres of elk habitat will be affected by POD operations, compared to the 122,000 acres in the year-long range, citing EA at 38-39. The record supports the FONSI, according to Williams, because elk have not been documented in the POD area and they concentrate away from the POD area to the north, citing EA at 39. Williams Response at 2. Williams says the Board rejected a similar argument regarding

²⁴ Regarding that well site, Williams also stated that denying access along the small section of existing road within the year-long range would have required the construction of a new road, which would have been more disturbing to elk than permitting the access along the existing road. Williams Response at 6.

allegedly unknown or uncertain impacts in *Wyoming Outdoor Council*, 173 IBLA at 247. Williams Response at 2.

Williams additionally argues that BLM's prediction that the Fortification Creek elk herd would be reduced to between 46 and 64 elk was made in the September 2007 Elk Study, which considered the effects of full field development throughout the entire Fortification Creek elk range, not the site-specific impact of a single well 100 feet within the year-long range associated with the Carr Draw III East POD. Though development under the Carr Draw III East POD may affect 1,000 acres within the year-long range, Williams argues that will not significantly affect the herd. *Id.* at 3.

We begin our analysis with Maycock's and PRBRC's argument that the EA admits that it is unknown how much more development elk can tolerate, and that BLM therefore cannot conclude that development under the Carr Draw III East POD would not have a significant impact. The EA, on which Maycock and PRBRC rely, states:

Human activities associated with mineral activities are having the greatest influence on elk habitat selection *within the Fortification Creek Elk Herd area*. The elk have adjusted to the current level of development, by favoring the Wilderness Study Area and crucial ranges, but how much more development they can tolerate is unknown. Elk are exhibiting an avoidance of existing wells by at least 1.7 miles.

EA at 38 (emphasis added). The context of this statement is clearly a reference to overall development in the entire elk range, not one relatively small POD area almost entirely outside the year-long range. The fact that the EA says that how much more CBNG development in the Fortification Creek area the elk can tolerate is unknown does not necessarily imply that BLM cannot conclude that this particular action will not have a significant impact. In short, Maycock's and PRBRC's argument takes the EA's statement out of context and is not logically sound. Further, Williams is correct that the Board rejected an argument that uncertainty of impacts implies significant impacts in *Wyoming Outdoor Council*, 173 IBLA at 247. There, we noted that uncertainty of impacts is but one factor to be considered in determining whether impacts are significant under 40 C.F.R. § 1508.27.

Similarly, the September 2007 Elk Study²⁵ considered the effects of full field development throughout the entire elk range, not just the 1,000 acres of the year-

²⁵ As explained above, the Elk Study was prepared for the purpose of analyzing the cumulative effects of CBNG development on the elk herd, and it effectively supplemented the 2003 PRB FEIS.

long range potentially affected because of the 1.7-mile avoidance radius around a number of wells in the Carr Draw III East POD outside that year-long range.²⁶ Contrary to the implication of Maycock's argument, the Elk Study's projection of herd reduction from 230 to between 46 and 64 head was the anticipated effect of full field development throughout the entire Fortification Creek elk range, as Williams correctly points out, not a projection of the effect of the Carr Draw III East POD. The Elk Study therefore does not preclude a finding that development under the Carr Draw III East POD would have no significant impact on the elk herd.

Maycock's emphasis on the fact that Well 21-26 will be located just inside the year-long range is also misplaced. BLM is correct that Maycock has not shown that a single well and portion of a primitive road at the edge of the year-long range or other wells located outside of it will result in a significant adverse impact. Williams is correct in observing that except for that single well site, the situation in this case is very similar to the PODs at issue in *Wyoming Outdoor Council* with respect to the effects on the Fortification Creek elk herd. See 173 IBLA at 232-33, 236-40, 244-47. In addition, were Well 21-26 to be moved just outside the year-long range boundary, it would make only a negligible difference in the potentially affected acreage inside the year-long range in view of the 1.7-mile avoidance radius.

Contrary to the EA's statement (at 39) and Williams' argument that elk have already been displaced from within 1.7 miles of the Carr Draw III East POD area, Maycock has shown that elk come into and have stayed in the POD area. But that fact actually undercuts Maycock's and PRBRC's arguments that development would result in significant impacts under the circumstances of this case. All the parties apparently have overlooked the fact that the Project Facility Map shows 5 existing producing gas wells in secs. 1 and 12, T. 50 N., R. 76 W., north of the Carr Draw III East POD area, and 5 existing producing oil wells in secs. 15, 22, and 27, T. 50 N., R. 76 W., west of the Carr Draw III East POD area. The areas within a 1.7-mile radius of each of these respective wells both overlap and include all portions of the year-long range that would be within 1.7 miles of any of the wells approved in the Carr Draw III East POD. Thus, the approximately 1,000 acres inside the year-long range that the EA anticipates would be affected because of the 1.7-mile avoidance zone are already affected in that manner by the existing producing wells. The wells

²⁶ Williams' argument that the Elk Study did not consider the site-specific impact of a single well 100 feet within the year-long range overstates the argument somewhat, because the point is that the Elk Study was not addressing just the 1,000 acres affected here. Williams' point that the Elk Study was considering the entire elk range is correct.

approved under the Carr Draw III East POD would not add any avoidance zones in the year-long range that do not already exist.²⁷

Maycock and PRBRC have not carried their burden of showing that there would be significant effects to the elk herd from development under the Carr Draw III East POD that have not already been addressed in the 2003 PRB FEIS and the 2007 Elk Study. They have not shown 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. *Wyoming Outdoor Council*, 173 IBLA at 235, citing *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). We therefore affirm those portions of the State Director's Decisions addressing the Fortification Creek elk herd.

III. *Ditches Dug Along Barber Creek and South Prong*

[3] In his appeal, Maycock disputes the State Director's affirming the EA's not addressing the effects of discharging produced water into the two serpentine ditches dug along parts of Barber Creek and South Prong. Maycock SOR at 16-19. In our recent decision in Maycock's appeal regarding Williams' bond, we explained:

The operations that Williams conducted that resulted in the effluent flow into and through the ditches dug in 2006 were not in connection with the proposed Carr Draw III POD (which was disapproved) or the bond submitted in 2005. The ditches were dug on easements granted in the State court action described above, and were not dug as part of the exploration or development of the mineral estate

²⁷ The fact that elk evidently come through the currently producing wells' avoidance zones onto the Carr Draw III East POD area may indicate that the impact on elk of operating wells might be less than the EA and the Elk Study assume. The Project Facility Map shows that the locations within the Carr Draw III East POD area where 15 elk stayed for several months in 2007, and where Maycock photographed elk in May 2007 and April 2008, as noted above, are all within 1.7 miles of two of the existing producing oil wells. We further note that both State Director Decisions in this case state (at 2) that "[n]o central gathering/metering and compression facilities will be built for this project." This indicates that there will be no reciprocating compressor stations and no dehydrators in the POD area, and that the gas gathering lines necessarily will be connected with such facilities off-project. This greatly lowers potential noise levels from production after drilling, and means that the CBNG wells approved in the POD area should be comparatively quiet once they are completed and in production.

reserved to the United States, on which no operations had been authorized. . . .

Further, it is clear that under the Carr Draw III East POD, produced water will not be discharged into the two ditches dug in 2006, even though they are located within the Carr Draw III East POD area. . . .

William P. Maycock, 176 IBLA 206, 216 (2008). We then explained why this was the case under the Water Management Plan submitted with the Carr Draw III East POD, and also explained that the WDEQ had rescinded Williams' WYPDES permit for discharge into these ditches. *Id.* at 216-17.

The State Director was correct in concluding that no water produced in connection with the Carr Draw III East POD is approved to be discharged through these channel cuts, and that produced water will be disposed of using existing facilities located outside the POD area. Without a WYPDES permit, no water legally can be disposed of on the surface.²⁸ BLM was correct in the EA in not addressing impacts of future surface water discharge that is not legally permitted. We therefore affirm the portion of the State Director's Decisions regarding the ditches previously dug along parts of Barber Creek and South Prong.

IV. *Buried Pipelines and Other Infrastructure*

Maycock asserts it was unreasonable for BLM not to have required removal of buried power lines, pipelines, and pit liners, as Williams agreed to do on adjoining properties on both the north and the south. Maycock SOR at 19-22. Citing BLM's "Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development" (4th Ed., revised 2007) (commonly referred to as the "Gold Book"), at 44-45 and 49, Williams argues that it is perfectly acceptable to leave deeply buried pipelines, power lines and pit liners in the ground on final abandonment. If the BLM authorized officer determines that a pipeline may reemerge at the surface, he may require its removal. Williams asserts that BLM's discretion to do so here is reflected in site-specific condition no. 15, citing EA at 14. Williams argues that the fact that it may have agreed to remove buried infrastructure on other properties is irrelevant because agreements with other ranchers were negotiated, and Williams and Maycock could not reach agreement in this case. Finally, Williams argues that leaving this infrastructure in place probably is more environmentally friendly anyway. *See Williams Response* at 11-12.

²⁸ This also means that Williams is correct regarding the alleged impacts of West Nile Virus on sage grouse, because there will be no surface ponds or additional surface water in the POD area resulting from POD operations. *See Williams Surreply* at 3-5.

The regulations require an operator to “reclaim the disturbed surface in a manner approved or reasonably prescribed by the authorized officer.” 43 C.F.R. § 3162.5-1(b). With respect to pit liners, the BLM Oil and Gas Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development (Gold Book 2005) states, at 44, that “[t]he pit liner must be removed to the solids level or treated to prevent its reemergence to the surface or its interference with long-term successful revegetation.” With respect to pipelines and flowlines, the Gold Book states, at 45, that “[a]ll surface lines and any lines that are buried close to the surface that may become exposed due to water or wind erosion, soil movement, or anticipated subsequent use, must be removed.”

Maycock has not shown error in the State Director’s Decisions or that the required site-specific mitigation (*i.e.*, removal of all lines that become or may become exposed due to erosion or soil movement but leaving deeply buried lines in place absent other BLM direction, and burial of pit liners at a depth sufficient to ensure that they do not become exposed) is insufficient or unreasonable. BLM is not required to impose conditions that Williams may have agreed to with others as a matter of negotiation. We therefore affirm those portions of the State Director’s Decisions addressing buried pipelines, power lines, and pit liners.

Conclusion

For the reasons explained above, we set aside the portions of the State Director’s Decisions affirming the FONSI/DR with respect to sage grouse. In view of this holding, we necessarily must set aside the approval of the 82 APDs, and remand to BLM for appropriate further analysis and action consistent with this opinion. We affirm the portions of the State Director’s Decisions affirming the FONSI/DR with respect to the Fortification Creek elk herd. We further affirm the State Director’s Decisions with respect to the ditches dug along Barber Creek and South Prong, and with respect to buried pipelines and other infrastructure.

_____/s/
Geoffrey Heath
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge