



CENTER FOR NATIVE ECOSYSTEMS,
WILDEARTH GUARDIANS, and COLORADO WILD

182 IBLA 37

Decided January 31, 2012



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

CENTER FOR NATIVE ECOSYSTEMS,
WILDEARTH GUARDIANS, and COLORADO WILD

IBLA 2011-164

Decided January 31, 2012

Appeal from a decision by the Colorado State Director, Bureau of Land Management, that authorized the leasing of Federal geothermal resources underlying lands administered by the U.S. Forest Service. COC-73584.

Affirmed.

1. Appeals: Generally--Geothermal Leases: Generally--
Geothermal Leases: Lands Subject To--Geothermal
Resources

The Department may lease geothermal resources within National Forests under the Geothermal Steam Act if consented to by the U.S. Forest Service. Such leases shall include stipulations required by the Forest Service and may include additional stipulations that are necessary and appropriate. Since a decision determining that National Forest lands are suitable for leasing by this Department is not a lease nor an offer to lease those lands, it need not then specify which stipulations will apply when they are leased or offered for lease.

2. Appeals: Generally--Geothermal Leases: Generally--
Geothermal Leases: Lands Subject To--Geothermal
Resources--National Environmental Policy Act of 1969:
Generally--Rules of Practice: Appeals: Board of Land
Appeals

The Department may lease geothermal resources within National Forests under the Geothermal Steam Act if consented to by the U.S. Forest Service. Where a decision on consent is appealed within the Department of Agriculture, BLM is precluded from issuing leases until that appeal is resolved but may properly exercise its

independent authority and determine that those lands are suitable for leasing by this Department during the pendency of that appeal. Regardless of its outcome or the issues decided, this Board will separately review whether BLM's determination complied with its obligation under the National Environmental Policy Act.

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

Pursuant to rules implementing NEPA, the National Environmental Policy Act of 1969, BLM must independently review an environmental document issued by the U.S. Forest Service before it can adopt and rely on that document. Where the record shows BLM actively and meaningfully participated in the NEPA process, had actual knowledge of the major issues it considered, and accepted responsibility for its scope and content by jointly preparing that environmental document with the Forest Service, BLM has achieved the purpose and intent of those rules and is not also required to separately document its review or issue a separate finding of no significant impact in order to adopt and rely on that environmental document in its decisionmaking.

4. Geothermal Leases: Generally--Geothermal Leases: Lands Subject To--Geothermal Resources--National Environmental Policy Act of 1969: Generally--National Environmental Policy Act of 1969: Environmental Statements

Where the environmental assessment for leasing a parcel, within an area that is likely to support only one geothermal project, assumes and analyzes impacts as if that project were to occur wholly on the parcel, it need not analyze the leasing of other parcels in the area as connected actions under the National Environmental Policy Act.

5. Administrative Procedure: Generally--Administrative Procedure: Administrative Procedure Act--Endangered

Species Act of 1973: Generally--National Environmental
 Policy Act of 1969: Generally--Rules of Practice: Appeals:
 Board of Land Appeals

BLM employees must abide by the policies and follow the instructions issued by the BLM Director, but such statements of policy and instructional memoranda do not have the force and effect of law or establish binding legal norms unless issued pursuant to notice-and-comment under the Administrative Procedure Act. Nonbinding policies and instructions may nonetheless be considered by the Board in reviewing whether an environmental document adequately disclosed impacts or the decision on appeal was arbitrary, capricious, or an abuse of discretion.

APPEARANCES: Matthew Sandler, Esq., Denver, Colorado, for appellants;
 Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior,
 Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

The Center for Native Ecosystems (CNE), WildEarth Guardians, and Colorado Wild (hereinafter collectively referred to as “CNE”), appeal from a March 25, 2011, decision by the Colorado State Director, Bureau of Land Management (BLM), determining that certain lands in the Gunnison National Forest were suitable for geothermal leasing. CNE claims BLM failed to comply with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), and failed to consider BLM policies and guidance for protecting the Gunnison sage grouse (GuSG).¹ For the reasons discussed below, we affirm BLM’s decision.

Background

Federal geothermal resources may be leased pursuant to the Geothermal Steam Act of 1970 (Geothermal Act), 30 U.S.C. §§ 1001-1028, as amended by the Energy Policy Act of 2005, 119 Stat. 594, 660-74 (Aug. 8, 2005) (2005 Amendments). *See* 72 Fed. Reg. 24358 (May 2, 2007) (43 C.F.R. Subpart 3200, Geothermal Resource Leasing). The Secretary of the Interior is authorized to issue Federal geothermal leases but may do so for resources in National Forests and other lands administered by the Department of Agriculture “only with the consent of, and

¹ CNE timely filed its statement of reasons (SOR) on May 20, 2011, which BLM responded to on June 17, 2011 (Answer).

subject to such terms and conditions as may be prescribed by, the head of that Department.” 30 U.S.C. §§ 1002, 1014 (2006). Due to a significant backlog in geothermal leasing, section 222 of the 2005 Amendments amended the Geothermal Act to state:

It shall be a priority for the Secretary [of the Interior], and for the Secretary of Agriculture, with respect to National Forest Systems land, to ensure timely completion of administrative actions, including amendments to applicable forest plans and resource management plans, necessary to process applications for geothermal leasing pending on August 8, 2005. All future forest plans and resources management plans for areas with high geothermal resource potential shall consider geothermal leasing and development.

30 U.S.C. § 1003(d) (2006). Section 225 required the Secretaries of the Interior and Agriculture to “enter into and submit to Congress a memorandum of understanding” that establishes “lines of authority, steps in application processing, and time limits for application processing” and “a program for reducing the backlog of geothermal lease applications pending on January 1, 2005, by 90 percent within [5 years of enactment].” 119 Stat. 665, codified at 42 U.S.C. § 15871 (2006). The 2005 Amendments require biennial geothermal lease sales in States with pending nominations for lands “otherwise available for leasing” and also authorize the offering of nominated parcels as a block if they are underlain by a geothermal resource that “could be produced as 1 unit.” 30 U.S.C. § 1003(a), (b), (e) (2006).

The Departments of Agriculture and the Interior entered into a memorandum of understanding (MOU) executed by the Chief Forester and BLM Director on April 14, 2006, which identifies U.S. Forest Service (FS) and BLM roles and responsibilities for geothermal leasing of National Forest System (NFS) lands.

The FS is responsible for consenting (or not consenting) to the leasing of NFS lands, for conducting NEPA analysis for leasing, for developing appropriate terms and conditions under which the lease may be developed, and to ensure that doing so is consistent with the Land and Resources Management Plan developed under the National Forest Management Act [16 U.S.C. §§ 1600-1614 (2006)].

MOU at 4. BLM is to review “the decision and documentation presented by the FS,” make an “independent decision” whether to lease its lands, conduct a lease sale, and then issue leases that include stipulations required by the FS and may include additional stipulations that BLM deems are “necessary and appropriate.” *Id.* at 3. The MOU specifies that FS will take the lead in preparing pre-lease sale NEPA documents, which are to be prepared jointly and in cooperation with BLM. *See id.*

at 5-7 (MOU Section VII, Pre-Lease Environmental Documentation). BLM then independently reviews that environmental document, and if it is consistent with NEPA standards, either signs the FS decision notice/record of decision or prepares and signs its own decision document.² *Id.* at 5-6.

Pursuant to their MOU, the FS and BLM jointly issued their “Programmatic Environmental Impact Statement for Geothermal Leasing in the Western United States” on October 24, 2008 (PEIS). To facilitate geothermal leasing and reduce their backlog of leasing actions, the preferred alternative was to identify lands open to leasing and develop a comprehensive list of stipulations, best management practices, and procedures, which would then be included in amended resource management plans (RMPs) under section 202(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712(a) (2006). PEIS at 1-1 through 1-3, 1-21, 2-1 to 2-30. The PEIS also considered limits on geothermal leasing based on distance from existing power transmission lines and a “no action” alternative. PEIS at 2-31 to 2-34. The project area included 103.5 million acres in National Forests and over 143 million acres of BLM-administered lands that were believed to have geothermal potential. *Id.* at 1-16, 2-8 to 2-11.

The PEIS identified a reasonably foreseeable development scenario (RFDS) for its analysis of potential leasing impacts within that area. *See* PEIS at 2-34 to 2-49. The RFDS anticipated adding 12,200 megawatts (MW) of electric generating capacity over the next 20 years from the development of geothermal resources, with 70 MW to be produced in Colorado (*e.g.*, in the Waunita Hot Springs area of the Gunnison National Forest). *Id.* at 2-40. The PEIS analyzed “broad impacts” associated with geothermal leasing under the RFDS,³ but it did not evaluate post-leasing activities (*e.g.*, exploration, drilling, and constructing new generating facilities) or location-specific issues, which “would be assessed during the permitting process and in separate NEPA documents prepared by local BLM and FS offices” that could be tiered to the PEIS. *Id.* at 1-25; *see id.* at 3-1 to 3-323 (Affected Environment), 4-1 to 4-152 (Environmental Consequences), 5-1 to 5-29 (Cumulative Impacts); *see generally*, 40 C.F.R. § 1502.4.

² Rules implementing NEPA specify: “A cooperating agency may adopt without recirculation the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.” 40 C.F.R. § 1506.3(b). Compliance with the procedures specified in the MOU therefore ensures that environmental documents prepared by the FS are properly adopted by BLM.

³ For example, there are over 2,000 endangered, threatened, and special status species in the project area, but the PEIS does not provide much by way of specifics on those species (*e.g.*, referred to bird species in Colorado). *See* PEIS at 3-151 to 3-155.

The Assistant Secretary of the Interior for Lands and Mineral Management selected the preferred alternative in a record of decision (ROD) dated December 17, 2008. He designated 111 million BLM-administered acres as open to leasing (*i.e.*, 32 million BLM acres were legally or administratively closed to geothermal leasing), identified that 79 million acres in National Forests are legally closed to leasing, adopted “a comprehensive list of stipulations and procedures to serve as consistent guidance for future geothermal leasing,” and amended 114 RMPs in 12 Western States, including the RMP for the Gunnison Resource Area (GRMP). ROD at 1-13, 2-2 (citing PEIS at 2-31); *see* ROD at 2-4 to 2-9 (geothermal lease stipulations), 2-9 to 2-11 (geothermal leasing procedures); ROD Appendix A (RMP Amendments for Geothermal Leasing).⁴

Flint Geothermal LLC (Flint) nominated two parcels near the Waunita Hot Springs in the Tomichi Dome area of the Gunnison Resource Area for geothermal leasing as a block on January 12, 2009, which are roughly 25 miles southeast of Gunnison, Colorado. One parcel includes 3,765 acres in the Gunnison National Forest that was serialized by BLM as COC-73584; the other is for 4,986 acres administered by BLM, including 400 acres of private land with a reserved Federal mineral estate, that was serialized as COC-73585.⁵ BLM formed an Interdisciplinary Team (IDT) with FS to consider both nominations and forwarded COC-73584 to FS, requesting its consent to the leasing of those NFS lands.

The Environmental Assessment for COC-73584

To aid and inform its analysis of potential environmental impacts from geothermal leasing on NFS lands, the FS requested that BLM identify an RFDS for geothermal leasing in the Tomichi Dome area. *See* MOU at 5 (BLM to provide an RFDS “if requested by the FS, to facilitate the disclosure of potential environmental impacts”). BLM responded by issuing a report on January 27, 2010, prepared by experts from its Wyoming State Office and entitled “Geothermal Resource Reasonably

⁴ As to the amended GRMP, the ROD identifies 164,408 acres in the Gunnison Resource Area as legally or administratively closed, leaving 614,233 acres as open to geothermal leasing on lands administered by the BLM Gunnison Field Office (GFO); the ROD also identifies 1,249,964 acres as legally closed to leasing in the Gunnison, Grand Mesa, and Uncompahgre National Forests, which left 2,518,238 acres legally open to leasing that could be administratively closed in the future (*e.g.*, by amended forest plans). *See* ROD at 1-14, A-3; PEIS at 1-14, 2-11.

⁵ These NFS lands include all or part of 8 sections in T. 49 N., R. 4 E., New Mexico Principal Meridian (NMPM); the BLM lands include all or part of 6 sections in T. 49 N., R. 4 E., 4 sections in T. 48 N., R. 4 E., part of sec. 25, T. 49 N., R. 3 E., plus a part of sec. 1, T. 48 N., R. 3 E., NMPM.

Foreseeable Development Scenario for Electrical Generation, Tomichi Dome and Surrounding Area” (RFD Report). Its Study Area included “all lands nominated for geothermal leasing and additional surrounding lands determined to be a part of the local geothermal system.” RFD Report at 2. The report opined that this 38,628-acre Study Area “has the potential for the development of one geothermal resource project, which . . . could culminate in a working commercial binary-cycle geothermal power plant likely sized to 5-10 megawatts, though 20-30 megawatts would not be unreasonable.” *Id.* at 3, 12. Assuming a successful project could result in a 30-MW plant, the report estimated that its long-term disturbances would affect no more than 98 acres for drilling, installing production wells, and constructing roads, pipelines, transmission lines, and a 30-MW power plant. *Id.* at 14, 19; *see id.* at 14-19.

BLM and FS initiated the NEPA scoping process on both COC-73584 and COC-73585 by jointly soliciting public comment on February 24 and hosting a public meeting at Western State College in Gunnison, Colorado, on March 22, 2010. *See also Grand Junction Daily Sentinel*, Mar. 5, 2010 (legal notice). The comment periods closed on April 5 (COC-73584) and June 24 (COC-73585). *See* 75 Fed. Reg. 29361 (May 25, 2010); 36 C.F.R. § 215.6. The IDT reviewed those scoping comments, identified the issues to be addressed, and outlined those issues at a second joint public meeting on September 2, 2010, also at Western State College.

Separate environmental assessments (EAs) were prepared by FS and BLM, with FS taking the lead on COC-73584, BLM taking the lead on COC-73585, and each cooperating in the other’s EA. Their draft EAs were made available for public comment in November 2010, which the IDT reviewed and addressed. The final EA for COC-73584 was issued in January 2011 (FS EA); BLM issued its EA for COC-73585 in March of 2011.

The FS EA was prepared by FS and BLM “jointly in order to support the individual decisions required of each agency” (*i.e.*, a FS decision consenting to the leasing of NFS lands and a BLM decision to offer those lands for geothermal leasing).⁶ FS EA at 1, 3, 6; *see id.* at 9-11 (significant issues jointly identified by FS and BLM). It identified COC-73585 as a “related action” and then explained:

The FS and BLM have been coordinating on indirect and cumulative effects of leasing in this area and on lease stipulations for consistency. The agencies elected not to combine their leasing analysis into one document because of the BLM’s requirements to do an RMP

⁶ Applicable authorities identified by the FS included the Amended Land and Resource Management Plan for the Grand Mesa, Uncompahgre, and Gunnison National Forests (September 1991) and the GRMP that applies to the Federal mineral estate administered by BLM within the Gunnison National Forest. *See* FS EA at 7.

amendment and publication in the Federal Register and the differences required in the Agencies' respective processes. However, public comments were shared as were public meetings.

Id. at 11. The FS EA considered a proposed action and no action alternative. *Id.* at 13. The proposed action, Consent to Lease with Stipulations, included 24 stipulations, 3 of which specified no surface occupancy (NSO), 11 allowed only controlled surface use (CSU), 4 were timing limitations, and 6 provided for specific lease notices (e.g., to protect the GuSG, minimize impacts to lynx habitat, limit impacts to big game during the winter, and further protect threatened, endangered, and special status species). *Id.* at 14-26. The FS EA stated the rationale for each stipulation and specified whether it would be subject to waiver, exception, or modification by BLM.

The FS EA was tiered to the BLM-FS PEIS and relied on BLM's RFD Report (*i.e.*, one successful project in its 38,628-acre Study Area), which then served as its "basis for analyzing environmental effects that could result from leasing and developing geothermal resources." FS EA at 41; *see* RFD Report at 12. Since it could not predict where that project would be located and it was equally likely to be on either NFS lands (COC-73584) or BLM-administered lands (COC-73585), the FS EA assumed the project would be wholly on NFS lands for purposes of its environmental analysis. FS EA at 41. Based on the RFDS, it anticipated short-term disturbances affecting 119 acres and long-term disturbances affecting less than 47 acres. *Id.* at 44; *see id.* at 42-44. The FS EA then identified the affected environment and analyzed the direct, indirect, and cumulative effects of geothermal leasing. *See id.* at 45-202.

Status of the Gunnison Sage Grouse

The GuSG is identified by the U.S. Fish and Wildlife Service (USFWS) as a candidate for listing under the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (2006), and also a designated special status species by both the FS and BLM.⁷ *See* 75 Fed. Reg. 59804 (Sept. 28, 2010); 65 Fed. Reg. 82310 (Dec. 28, 2000); FS EA at 112, 115, 132. There are seven isolated and widely scattered GuSG populations in southwest Colorado and southeast Utah, the largest of which is located in the Gunnison Basin. 75 Fed. Reg. at 59808-11; FS EA at 133. Occupied habitat in the Grand Mesa, Uncompahgre, and Gunnison National Forests (86,732 acres) is roughly 11% of all habitat occupied by GuSG. FS EA at 134. Such habitat also exists on BLM and private lands that are within 4 miles of COC-73584. *Id.* at 112-13, 114,

⁷ USFWS, BLM, FS, the Colorado State Division of Wildlife (CDOW), and other agencies therefore prepared and are committed to implement the Gunnison Sage-Grouse Rangewide Conservation Plan (April 2005) (RCP); *see* FS EA at 18 (RCP identified as one of the rationales for the NSO to protect the GuSG).

118, 138. The lands nominated for leasing in COC-73584 contain no known leks, but there are five within 4 miles of those lands, including the Vito lek in COC-73585. *Id.* at 134. Using the same data and methodology used to estimate the basin-wide GuSG population, the FS EA estimated that these five leks contain 256 of the 3,655 birds in that population (7%). *Id.* at 134-35; *see* 75 Fed. Reg. at 59810.⁸

The analysis of potential effects under the RFDS assumed that all stipulations identified in the FS EA would apply, including the NSO to protect GuSG. *Id.* at 120. This NSO prohibits activities within 4.0 miles of an active, inactive, historic, or newly discovered lek but is subject to waiver, exception, or modification (WEM) for activities more than 0.6 miles from a lek, provided such activities are consistent with the RCP and coordinated with both USFWS and CDOW. FS EA at 18. Added restrictions apply if a WEM is approved by BLM, which would include a 1,000-foot buffer around water features (to protect brood-reading habitat), a noise limit (to prevent display ground abandonment), and a ban on drilling and construction between March 15 and June 30 (to prevent disturbances during breeding, nesting, and early brood-rearing periods). *Id.* at 18-19. The FS EA also stated: “If WEMs are allowed in sage grouse habitat, site specific impacts will be analyzed prior to permitting of the exploration, drilling, utilization, and reclamation/abandonment stages with mitigation developed in consultation with the CDOW and USFWS to minimize impacts.” *Id.* at 138.

Based on its analysis of available data and potential effects, the FS EA found the NSO and other stipulations “should result in limited or no loss of sage grouse habitat and should minimize disturbances during the breeding, nesting, early brood-rearing, and winter periods.” FS EA at 138. While some individual birds could be adversely affected, the FS EA determined that the proposed action “is not likely to result in a loss of viability in the planning area, nor cause a trend towards federal listing.” *Id.*; *see also id.* (“Due to the stipulations developed to avoid, minimize, and mitigate impacts, the negative effects from this project should not deter from meeting the objective and guidelines in the [RCP].”). The FS EA noted these stipulations would protect endangered and threatened species from irreversible and irretrievable impacts due to post-leasing activities and that any surface disturbance would require additional, site-specific analysis and compliance with the ESA. *Id.* at 201-02.

⁸ The RCP target for the Gunnison Basin is a 50-year annual average of 3,000 birds, with between 1,730 and 5,280 birds in any single year. RCP at 3. The Basin’s GuSG population for 2001 through 2010 ranged between 2,443 and 5,205 per year and had a yearly average of more than 3,700 birds over that 10-year period. *See* 75 Fed. Reg. at 59810.

Forest Service and BLM Decisions on COC-73584

The FS consented to BLM's leasing of NFS lands in COC-73584 on February 4, 2011, in a combined Decision Notice and Finding of No Significant Impact (DN/FONSI) issued by the Forest Supervisor for the Grand Mesa, Uncompahgre, and Gunnison National Forests. Based on its EA, the project file, and public comment, he selected the proposed action (Consent to Lease with Stipulations) and found that leasing these lands would not result in a significant impact requiring an environmental impact statement (EIS). DN/FONSI at 3, 6, 8. Noting that FS worked closely with USFWS, CDOW, and others to formulate the NSO for GuSG, but recognizing public concern over WEMs, the Forest Supervisor stated:

To ensure leasing decisions remain appropriate in the light of continually changing circumstances and new information, the agencies (Forest Service and BLM) develop and may apply WEM criteria (Appendix B [DN/FONSI at 19-30] and EA, Section 2.1 [FS EA at 13-27]). I wish to clarify that a lessee or operator may request a WEM; however, granting a WEM is a discretionary act on the part of the agencies requiring specific review which may include additional environmental analysis. A WEM must be specifically approved by the agency if the record shows circumstances/relative resource values have changed or the lessee demonstrates operations can be conducted without causing unacceptable effects. Granting a WEM may result in the application of additional stipulations or conditions of approval to mitigate effects of the WEM.

DN/FONSI at 4. Pursuant to procedures specified by the FS in 36 C.F.R. Part 215, CNE appealed that decision to the Regional Forester, Rocky Mountain Region (FS Appeal). The Forest Supervisor, Nebraska National Forest, was then designated as the Appeal Reviewing Officer for both appeals. *See* 36 C.F.R. §§ 215.8, 215.11, 215.19.

CNE argued on administrative appeal to the Regional Forester that the FS EA was inadequate under NEPA because it failed to: use the best available science (*i.e.*, peer-reviewed research on the greater sage grouse and impacts from oil, gas, and other energy development), FS Appeal at 3-4; adequately consider potential impacts on the GuSG from geothermal leasing and development in COC-73585 and on lands beyond its 89,925-acre cumulative effects area, *id.* at 4-10, 11-15; analyze the effectiveness of stipulations and best management practices for protecting the GuSG, *id.* at 10-11, 15; and consider other project alternatives (*e.g.*, leasing with more stringent protections for GuSG), *id.* at 18-19. The Appeal Reviewing Officer (ARO) analyzed each of CNE's claims in a 25-page memorandum to the Regional Forester on May 2, 2011 (ARO Memorandum). Based on the decision record and BLM's EA for

COC-73585, she recommended that the FS Decision be affirmed on each issue. *See* 36 C.F.R. § 215.19(b). The Regional Forester reviewed the record, concluded it supported that recommendation, and then affirmed the DN/FONSI on May 5, 2011, which constituted final agency action by the Department of Agriculture. *See* 36 C.F.R. §§ 215.18(c), 215.21.

BLM issued a two-part decision on March 24, 2011, which amended the GRMP to add stipulations for lands nominated in COC-73585⁹ and separately determined that those lands were suitable for geothermal leasing.¹⁰ The Colorado State Director then acted on COC-73584 by issuing a Decision Notice on March 25, 2011 (BLM Decision). He adopted the FS DN/FONSI and its EA, determined that these NFS lands were suitable for leasing by BLM, and stated that they would be included in a future lease sale. BLM Decision at 2. CNE has appealed from that decision.

Discussion

CNE contends that BLM did not comply with NEPA and also failed to establish measures necessary for the protection of the GuSG. *See* SOR at 15-22. As to NEPA, it claims BLM did not independently review and properly adopt the EA issued by the FS and that it is also inadequate. CNE separately claims BLM failed to explain how its decision adequately protects the GuSG under established policy and applicable instructional memoranda. BLM responds by asserting it adequately complied with NEPA and that CNE has not shown it acted contrary to law, policy, or guidance for protecting the GuSG. *See* Answer at 9-15. But before we address these claims, there are a trio of issues that warrant our consideration: which stipulations will be in geothermal leases for these NFS lands; whether BLM erred in deciding this matter during the pendency of CNE's administrative appeal within the FS; and the authority of this Board to address NEPA issues that were raised and decided by the FS in that appeal.

⁹ These RMP amendments added stipulations similar to those required by the FS in consenting to the leasing of its lands. For example, they prohibit surface occupancy within 0.6 miles of a lek, restrict activities that are more than 0.6 miles from a lek, impose seasonal limits to protect elk, and include other restrictions to minimize erosion. *Compare* BLM decision dated Mar. 24, 2011, at 6-10 *with* DN/FONSI at 19-24.

¹⁰ CNE protested that amendment, but the BLM Director denied its protest. *See* Director's Protest Resolution Report on PP-CO-GUNNISON GEOTHERMAL-11-0001, Aug. 10, 2011 (Director Decision). Double Heart Ranch has appealed from the BLM determination that lands nominated in COC-73585 are suitable for geothermal leasing, which was docketed as IBLA 2011-163 and will be addressed at a later date.

[1] CNE questions whether the 2011 stipulations in the amended GRMP apply to geothermal leasing on NFS lands that are in the resource area. SOR at 18-20. However, the BLM Director decided that the 2011 amendments did not apply to NFS lands, which is final for the Department and not subject to our review. *See supra* n.8; Director Decision at 13-14, 16; *Southern Utah Wilderness Alliance*, 160 IBLA 225, 229 (2003); *Commission for the Preservation of Wild Horses*, 139 IBLA 24, 27 (1997). BLM must include stipulations required by the FS consent to lease its lands, and while BLM may include others if “necessary and appropriate” pursuant to the above-described MOU, it has yet to make such a determination or offer these NFS lands for geothermal leasing. MOU at 3; *see* 30 U.S.C. § 1014(b) (2006); *Colorado Environmental Coalition (CEC)*, 125 IBLA 210, 215-16 (1993). When BLM does, CNE may file a protest and, if dissatisfied, appeal that decision to this Board.¹¹ Since it is in that context that we will address whether BLM properly exercised its discretion to include/exclude additional stipulations, including those applicable to lands nominated for leasing in COC-73585 under the amended GRMP, we need not answer CNE’s questions or resolve its concerns in this appeal.

[2] BLM may lease geothermal resources on NFS lands under the Geothermal Act if the FS consents to such leasing. 30 U.S.C. §§ 1002, 1014(b) (2006). The Forest Supervisor consented to lease NFS lands nominated in COC-73584; CNE appealed that DN/FONSI to the Regional Forester, claiming its EA was inadequate under NEPA. CNE here claims BLM acted prematurely by deciding this matter during the pendency of that appeal. SOR at 16. FS decisions are not to be implemented until all administrative appeals are resolved by the FS. *See* 36 C.F.R. § 215.9(b) (“when an appeal is filed, implementation may occur on, but not before, the 15th business day following the date of appeal disposition”). FS rules are not binding on this Department, but even if we were to apply that rule as a matter of comity, we would find that BLM has yet to implement that decision. BLM determined only that these NFS lands were suitable for leasing; it did not then offer or include them in a scheduled geothermal lease sale. *See Wyoming Outdoor Council*, 159 IBLA 388, 416 (2003) (a premature BLM decision to include parcels in a lease sale was not set aside because such leases had yet to issue). BLM could have deferred acting until CNE’s appeal to the FS was resolved (*e.g.*, to have the benefit of a final decision on consent and the adequacy of the FS EA), but it was not compelled to do so by law, rule, or as a matter of policy. Since BLM was exercising independent authority when it determined on March 25, 2011, that these NFS lands were suitable for leasing we reject appellants’ suggestion that BLM erred in so acting. *See CEC*, 125 IBLA at 220.

¹¹ BLM recognizes that its decision determining these NFS lands are suitable for leasing under the Geothermal Act is properly before the Board on appeal, but claims CNE has not met its burden to show error in that decision. *See Answer* at 5-7; BLM Decision, Appendix (Appeal Procedures).

The Regional Forester rejected the NEPA claims raised by CNE in its appeal under 36 C.F.R. Part 215, and his affirmance of the DN/FONSI is final for the Department of Agriculture. However, “the Interior Department, acting through BLM, has independent authority not only to condition leasing on any additional stipulations which it deems desirable but also to refuse to lease even where the Forest Service has consented to leasing.” *CEC*, 125 IBLA at 220. Since it is for this Board to decide whether BLM met its NEPA obligations and other applicable requirements in determining that these NFS lands were suitable for geothermal leasing by this Department, we proceed to consider the merits of CNE’s claims under NEPA and for the protection of the GuSG.

NEPA

CNE asserts BLM did not independently review and properly adopt the FS EA that it relied on. SOR at 13-14, 22-23. As discussed, BLM is required to independently review a NEPA document prepared by the FS before it can adopt and rely on that document under 40 C.F.R. § 1506.3(b) and the procedures specified in their MOU. *See* MOU at 5-6; *supra* n.1. We find the record and circumstances in this case show that BLM complied with these requirements, notwithstanding CNE’s unsupported assertion to the contrary.

[3] The FS EA was jointly prepared pursuant to the above-described MOU, with FS taking the lead in drafting and BLM preparing its RFDS. *See* FS EA at 1 (“The FS and Bureau of Land Management (BLM) are preparing this document jointly in order to support the individual decisions of each agency”); MOU at 5 (“FS and the BLM agree to jointly prepare NEPA documents that will meet the requirements of both in reaching their independent leasing decisions”). The FS EA was tiered to their jointly prepared PEIS and the subject of joint public meetings at Western State College. Since the record shows that BLM actively and meaningfully participated in the NEPA process, had actual knowledge of the major issues considered, and accepted responsibility for the scope and content of the FS EA by jointly preparing it with the FS, we find its actions met the purpose and intent of 40 C.F.R. § 1506.3(c) and that it independently and adequately reviewed the FS EA. *Wyoming Outdoor Council*, 159 IBLA at 414 (citing 40 C.F.R. § 1506.3(c)), 416.¹²

¹² This case is readily distinguishable from the circumstances presented in *Board of Commissioners of Pitkin County*, 173 IBLA 173, 182-83 (2007), wherein the Board rejected a claim that BLM adopted environmental impact statements based solely on its status as a cooperating agency on one and a reviewing agency on the other. This record demonstrates substantially more than mere status as a cooperating/reviewing agency in the preparation of this EA by the FS.

CNE claims that adopting the FS EA in the BLM Decision was procedurally deficient because BLM must “document its review and adoption of the FS EA in a FONSI.” SOR at 22-23; *see* BLM Decision at 3. We do not believe BLM was required to separately document its independent review of what it jointly prepared with the FS. We do not elevate form over substance in deciding whether BLM properly adopted an environmental document. *See Wyoming Outdoor Council*, 159 IBLA at 416 (“We look beyond the style and format of the Letter of Review and Acceptance to consider its substantive content in light of [40 C.F.R. § 1506.3(c)].”). As a letter was sufficient to adopt an environmental impact statement issued by the FS in *Wyoming Outdoor Council*, we are unpersuaded that BLM could do so here only in a separate FONSI and, therefore, turn to the adequacy of that EA under NEPA.

In reviewing an appeal from a decision based on an allegedly inadequate EA, the Board applies a “rule of reason” in deciding whether the record shows that BLM considered all relevant matters of environmental concern, took a “hard look” at potential impacts, and made a convincing case that no significant impacts will result (or will be reduced to insignificance by appropriate mitigation measures). *See, e.g., Oregon Chapter Sierra Club*, 176 IBLA 336, 346 (2009); *Western Watersheds Project*, 175 IBLA 237, 246 (2008) (“as long as an EA contains a reasonably thorough discussion of significant aspects of the probable environmental consequences, NEPA requirements have been satisfied”). To successfully challenge the adequacy of an EA, an appellant must make an “affirmative showing that BLM failed to consider a substantial environmental question of material significance.” *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004); *accord Arizona Zoological Society*, 167 IBLA 347, 357-58 (2006). CNE identifies seven alleged deficiencies by single sentences that direct the Board to the statement of reasons it filed with the FS, which was attached as Exhibit 8 to its SOR. SOR at 15 (*e.g.*, “The Forest Service has failed to consider the best available science in its EA. [*see Exhibit 8 at 4*].”). We first consider those seven and then an eighth EA deficiency alleged by CNE.

CNE is not precluded from referring to and relying on an attachment, but we have repeatedly stated that a statement of reasons “must affirmatively point out error in the decision from which he appeals.” *Thelbert Watts*, 148 IBLA 213, 217 (1999); *see Wyoming Outdoor Council*, 172 IBLA 289, 294 (2007); *In re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 362 (1995), and cases cited. CNE here incorporates by reference seven claims from its statement of reason on administrative appeal within the FS, but it fails to mention that each was there rejected or articulate why this Board should reach a different legal result. The Regional Forester’s decision is final for the Department of Agriculture, and while not binding on this Department, principles of comity strongly suggest that we defer to that decision, particularly since it was based on a detailed memorandum that addressed each claim here raised on appeal. *See* ARO Memorandum at 1-10, 16-25. Nonetheless, we have independently reviewed the FS EA, considered each of the seven deficiencies cryptically identified by

CNE, and conclude (as did the Regional Forester) that it has not shown that this EA failed to take a hard look at any environmental impacts from the geothermal leasing of these NFS lands. *See Wyoming Outdoor Council*, 172 IBLA at 294; *Thelbert Watts*, 148 IBLA at 217; *In re Mill Creek Salvage Timber Sale*, 121 IBLA at 362.

CNE's eighth alleged deficiency is that the FS EA "failed to analyze cumulative effects of leasing the FS, BLM, Stand Land Board, and private parcels," which it claims should have been considered in a single environmental impact statement for both COC-73584 and COC-73585. SOR at 17; *see id.* at 16-18. The FS EA considered the environmental impacts of leasing NFS lands and geothermal leasing of adjacent lands by the State Land Board; BLM separately considered impacts from leasing lands it administers, including the Federal mineral estate underlying 400 acres of privately-owned lands. *See* FS EA at 11. The FS EA explained that while public comments were shared and joint public meetings were held, the FS and BLM "elected not to combine their leasing analysis into one document because of the BLM's requirements to do an RMP amendment." *Id.*

[4] Lands nominated in COC-73584 and COC-73585 were apparently identified by Flint because it believed their geothermal resources could be developed as a single unit under 30 U.S.C. § 1003(e) (2006), which is also consistent with the RFDS (*i.e.*, the successful development of a single power plant utilizing geothermal resources underlying BLM-administered and NFS lands). Although geothermal resources were equally likely to underlay either NFS or BLM-administered lands, the FS EA assumed and analyzed impacts as if such development would occur solely on NFS lands.¹³ FS EA at 41; *see id.* at 30-34. CNE claims the separate leasing of these parcels are connected actions under NEPA, but as we explained in *Backcountry Against Dumps*, 179 IBLA 148 (2010):

BLM is required by section 102(2)(C) of NEPA and its implementing regulation, 40 C.F.R. § 1508.25, to consider the environmental impacts of a proposed action and any other action that is "connected" to the proposed action, by virtue of the fact that (1) the proposed action automatically triggers the other action; (2) the proposed action cannot or will not proceed unless the other action is

¹³ The FS EA was based on an RFDS that anticipated "one geothermal development project that could culminate in a working commercial binary-cycle geothermal power plant of between 5 and 10 megawatts." FS EA at 41. Since "predicting precisely where within the RFD scenario study area surface disturbance will occur is almost impossible" and equally likely to occur on FS as on BLM lands, it then stated: "Even though the effects in the FS lease nomination area may be greatly exaggerated, it must be assumed that all future activity may occur on NFS lands in the lease nomination." *Id.*

taken previously or simultaneously; or (3) the proposed action and the other action are interdependent parts of a larger action and depend on the larger action for their justification. However, actions that have “independent utility,” *i.e.*, where there exists sufficient justification for each action such that it may proceed without the other, are generally not connected actions. *See, e.g., Great Basin Mine Watch*, 146 IBLA 248, 251 (1998); *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA 257, 266 (1994).

179 IBLA 171-72. In light of uncertainty as to whether developable geothermal resources exist in the area and, if so, where they are located, it is speculative to assume that the leasing of NFS and BLM-administered lands are interdependent actions that lack independent utility. The FS EA did not improperly segment geothermal leasing in the area by ignoring the leasing of BLM lands or the potential impacts of future development in the area. *See* 179 IBLA at 173, and cases cited. Instead, it identified leasing BLM lands under COC-73585 as a related action and analyzed impacts as if such development were to occur solely on NFS lands.

CNE does not contend or proffer any evidence showing that this area could support more than the one, relatively small, 10-MW power plant anticipated in the RFDS. Since leasing lands nominated in COC-73584 and COC-73585 are merely different locales for where that project will likely be located, they each have independent utility and are not necessarily connected actions under 40 C.F.R. § 1508.25. But even if it is later determined that both leases are necessary to develop geothermal resources in the area, their proposed development would be the subject of a separate BLM decision and NEPA analysis. We are unpersuaded that the FS EA erred in considering the leasing of BLM lands as a related, but not a connected, action to the leasing of these NFS lands. Nor has CNE proffered any evidence demonstrating that potentially significant environmental impacts were not adequately analyzed in the FS EA. We therefore conclude that the FS EA took a hard look at impacts from leasing lands nominated in COC-73584, including the cumulative effects of geothermal leasing in the area.

Protections for the GuSG

CNE claims BLM is “failing to minimize the likelihood of and need for listing of Gunnison sage-grouse” and that it failed to consider, analyze, and explain how it complied with its Specials Status Species Policy, the Gunnison and Greater Sage-Grouse Management Guidelines for Energy Development in Instruction Memorandum (IM) 2009-071,¹⁴ and Colorado Instruction Memorandum (CO IM)

¹⁴ The GuSG (*Centrocercus minimus*) is a related species to the more widespread
(continued...)

2010-028. SOR at 21, 22. This policy and these memoranda provide direction for minimizing the need to list the GuSG as threatened or endangered under the ESA, but we are aware of no law or rule requiring BLM to explain how it complied with that guidance. We therefore reject CNE's claim that BLM was required to separately document its compliance with the Special Status Policy and these memoranda. The burden here is not for BLM to demonstrate that it complied with applicable legal requirements, but on CNE to show that it failed to do so.

[5] BLM employees “are obliged by the conditions of their employment to abide by the policies and to follow the instructions handed down by their Director,” but statements of policy and instructional memoranda do not have the force and effect of law or establish binding legal norms unless they are issued pursuant to notice-and-comment under the Administrative Procedure Act, 5 U.S.C. § 553 (2006). *Wyoming Outdoor Council*, 171 IBLA 153, 166-68 (2007) (quoting *Joe E. Fallini, Jr. v. BLM (Fallini)*, 162 IBLA 10, 38 (2004)); see *Beard Oil Co.*, 111 IBLA 191, 194 (1989); *Kaycee Bentonite Corp.*, 64 IBLA 183, 214, 89 I.D. 262, 279 (1982). However, nonbinding policies and instructions may be considered by this Board in deciding whether an appellant has met its burden to show an EA is inadequate (e.g., “failed to disclose impacts on special status species that would cause it to become threatened or endangered”) or that the decision on appeal is arbitrary, capricious, or an abuse of discretion. *Fallini*, 162 IBLA at 41; *Native Ecosystems Council*, 139 IBLA 209, 219 (1997).

BLM adopted the DN/FONSI, wherein the Forest Supervisor explained that since the GuSG is a candidate for listing under the ESA, the FS conferred and worked closely with USFWS to formulate NSO stipulations “for the conservation of this species and its habitat.” DN/FONSI at 5; see BLM Decision at 2. Thus, activities within 4.0 miles of any active, inactive, historic, or newly discovered lek are prohibited on these NFS lands, which is also consistent with the RCP and “BLM’s national instruction memo.” FS EA at 22. The FS EA adopted by BLM detailed potential impacts to the GuSG from leasing these NFS lands, described a Biological Evaluation prepared to conform with ESA requirements, and determined that leasing

¹⁴ (...continued)

greater sage-grouse (*Centrocercus urophasianus*), which is a separate candidate for listing under the ESA. See 75 Fed. Reg. 13910 (Mar. 23, 2010); SOR at 6. In response to that 12-month determination for the greater sage-grouse by the USFWS, management guidelines in IM 2009-071 for that species were supplemented by Greater Sage-Grouse Interim Management Policies, IM 2012-043, and the BLM National Greater Sage-Grouse Land Use Panning Strategy, IM 2012-044. See also 77 Fed. Reg. 77008 (Dec. 9, 2011) (notice of intent to prepare EIS for incorporating greater sage-grouse conservation measures into RMPs and forests plans).

with stipulations was not likely to result in a loss of viability or a trend toward listing the GuSG as a threatened or endangered species. FS EA at 112, 115, 132.

CNE has proffered no evidence showing the FS EA failed to adequately consider impacts to the GuSG or erred in determining that leasing will not likely result in its listing under the ESA. Nor has it otherwise demonstrated that BLM's decision is arbitrary, capricious, or without record support. To the contrary, our review of the record shows the GuSG was considered in detail, the NSO was designed and intended to protect this special status species, and that the USFWS was appropriately engaged in this process. While CNE believes additional protections should have provided for the GuSG, it has not met its burden to show error in the decision made by BLM or in the FS EA that it adopted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the March 25, 2011, decision by the Colorado State Director, Bureau of Land Management, is affirmed.

_____/s/_____
James K. Jackson
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge