

DEFENDERS OF WILDLIFE
WYOMING OUTDOOR COUNCIL

IBLA 2004-186

Decided May 31, 2006

Appeal from decision of the Deputy State Director, Minerals and Lands, Wyoming, Bureau of Land Management, on State Director Review affirming a decision of the Field Manager, Pinedale (Wyoming) Field Office, BLM, which approved two "Sundry Notices and Reports on Wells," thus authorizing relocation of two approved natural gas wells. SDR WY-2004-11.

Affirmed.

1. Appeals: Generally--Rules of Practice: Appeals: Generally

Under 43 CFR 4.411, a party to a case who is adversely affected by a decision of an officer of BLM may appeal to the Board of Land Appeals by filing a notice of appeal in the office of the officer who made the decision within 30 days after the date of service. The Board has no jurisdiction to consider challenges to BLM actions raised after the time for appealing those actions. To the extent those actions are raised as further evidence of the alleged error in a BLM decision properly appealed to the Board, consideration of such evidence must attend a finding that BLM erred in undertaking the challenged action.

2. Administrative Procedure: Generally--Appeals:
Jurisdiction--Board of Land Appeals--Rules of Practice:
Appeals: Generally

As an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over BLM except in the context of deciding an appeal over which the Board has jurisdiction. The Board will decline to render advisory opinions on questions not involved in a properly filed appeal.

3. Endangered Species Act: Generally--Environmental Policy Act--Environmental Quality: Environmental Statements

Where BLM determines to proceed with a specific well relocation project after it has formally consulted with the FWS regarding a listed species, and FWS has issued a biological opinion concurring in the conclusion that the proposed action will not jeopardize the continued existence of the species or destroy or adversely modify its critical habitat without disapproving the proposed action as one of a number of similar projects in a geographical area or a segment of a comprehensive plan, no violation of the Endangered Species Act has been shown. A challenge to FWS' failure to disapprove the well relocation project as the impermissible segmenting of a comprehensive project plan is not within the jurisdiction of this Board.

4. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Where in a biological opinion FWS concurs in the determination that a listed species has merely passed through a proposed well site area that contains no critical habitat on a transient basis and that the proposed well project is not likely to affect the species or its habitat, and where appellants have provided no persuasive evidence to the contrary, BLM is not prohibited from authorizing site-specific action while it updates or revises an EIS to which that action is tiered. In such circumstances, the question is whether in the EA the agency sufficiently considered those environmental effects not analyzed in the EIS. If BLM took a hard look at the potential environmental impacts of its proposed action and properly concluded that no significant impact would likely result, it has complied with section 102(2) of the NEPA, 42 U.S.C. § 4332(2) (2000).

APPEARANCES: Michael T. Leahy, Esq., Defenders of Wildlife, Washington, D.C., for appellants; Christopher W. Armstrong, Esq., Houston, Texas, for intervenor Exxon Mobil Corporation; Terri L. Debin, Esq., Office of the Regional Solicitor, U.S.

Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Defenders of Wildlife (Defenders) and Wyoming Outdoor Council (WOC) appeal from a February 26, 2004, decision of the Deputy State Director, Minerals and Lands, Wyoming, Bureau of Land Management (BLM), on State Director Review (SDR), affirming a January 9, 2004, decision of the Field Manager, Pinedale (Wyoming) Field Office, BLM, which approved two October 28, 2002, "Sundry Notices and Reports on Wells," thus authorizing relocation of two approved natural gas wells. The drilling of the two wells, by the Exxon Mobil Corporation (Exxon), would occur on public lands situated in sec. 33, T. 28 N., R. 114 W., Sixth Principal Meridian, Sublette County, Wyoming, near the Bridger-Teton National Forest.

BLM originally approved, on September 27, 2001, Exxon's Applications for Permit to Drill (APDs) three natural gas wells, including Nos. 3129, 3228, and 4032, from a single well pad situated on Federal oil and gas lease WYW-0317227A in SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 33. BLM prepared environmental assessment (EA) WY100-EA01-399 and on September 27, 2001, issued a decision record/finding of no significant impact (DR/FONSI), signed by the Field Manager. Based on its October 17, 2000, biological assessment (BA) concluding that the action "may affect but was not likely to affect" the Canada lynx (Lynx canadensis), which is a designated threatened species under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531-1543 (2000), BLM initiated informal consultation with the U.S. Fish and Wildlife Service (FWS). On September 21, 2001, FWS concurred in the BA. As a condition of its approval of the APD in an area where trees were to be removed, BLM imposed certain mitigating conditions requiring tree replanting and slash piles. Defenders and WOC did not challenge these conclusions either by seeking State Director review or by any other means in 2001.

Exxon filed two October 28, 2002, Sundry Notices to relocate the drilling 40 feet north and 140 feet east of the approved well pad location, still within SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 33. Exxon proposed to reduce to two the number of wells to be drilled, renumbered 3133 and 3233, and explained its purpose:

Exxon Mobil Corporation wishes to move the surface location of the wellbore in order to avoid the removal of trees on the western edge of the currently approved APD. * * * Since there will be no destruction of the existing habitat we will no longer construct slash piles (Surface Use Plan - 11D) to provide habitat for snowshoe hares and other lynx prey species; transplant 10-15 trees (Surface Use Plan - 11E) to enhance the habitat; and furnish & plant 900 containerized nursery-grown aspen/

lodgepole [pine] seedlings as per Conditions of Approval (10 - Tree Planting).

The surface location of the two wells would be within the boundaries of Lease WYW-0317227A, and well 3133 would be drilled vertically. Well 3233 would be drilled directionally, bottoming in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 33 within Federal oil and gas lease WYW-05689.

The single well pad would disturb a total of approximately two acres, and immediate access to the site would be provided by a 300-foot long extension from an existing access road. In addition, a 300-foot long pipeline would be placed within the well pad and along the new and existing access road. The total area disturbed by initial drilling and related activity would be approximately 3.3 acres. Drilling the two wells would take approximately 60 days, and would be followed by partial reclamation, leaving a disturbance of 1.4 acres. Pictures and topographic map displays in the record show that the proposed well pad site, as amended by the Sundry Notices, has been moved out of a forested area into a largely treeless area at the end of an existing road, along which runs a pre-existing power line. Exxon proposes a 216-foot tie-in to the power line. See topographic maps dated Sept. 19, 2002; photographs dated Sept. 20, 2002.

The Field Manager's January 2004 decision to approve the Sundry Notices ^{1/} was based on a January 7, 2004, EA WY100-EA04-074, which analyzed the potential environmental impacts of approving the drilling of the two relocated natural gas wells and alternatives thereto, ^{2/} and a January 8, 2004, DR/FONSI. The original EA approved in 2001 was appended to and incorporated into the January 2004 EA and DR/FONSI. The January 2004 EA conformed to the Pinedale Resource Management Plan (RMP), and the RMP's supporting Environmental Impact Statement (EIS) and Record of Decision, approved December 12, 1988. BLM referenced as a "supporting NEPA document" the January 25, 1984, Riley Ridge Natural Gas Project EIS. This project EIS addressed the proposed development of sour gas (gas high in hydrogen

^{1/} The Field Manager's January 2004 decision also approved two Sept. 22, 2003, Sundry Notices requesting 1-year extensions of the existing APDs to afford sufficient time for the wells to be drilled in the amended location. All four Sundry Notices were approved by the Assistant Field Manager, Minerals and Lands, Pinedale Field Office, BLM, on Jan. 8, 2004.

^{2/} BLM considered the proposed action and three alternatives: Alternative 1 (drilling wells 3133 and 3233 from separate pads); Alternative 2 (the no action alternative, which would result in drilling the wells from the previously approved location); and Alternative 3 (denying the Sundry Notices to extend the APD expiration date, which would deny Exxon the opportunity to drill wells 3133 and 3233).

sulfide) from wells approximately 14,000 feet in depth, from drilling, over the 40-year life of the Project, up to a total of 238 natural gas wells, as well as construction and operation of gas treatment plants, pipelines, and associated facilities, within a 159,928-acre Project area under the jurisdiction of BLM's Pinedale Field Office, including the lands at issue here, and other Federal lands under the jurisdiction of the Forest Service (FS), U.S. Department of Agriculture. At the time of the decision at issue here, only 39 wells had been drilled as a part of that project. The Exxon wells at issue are sweet gas wells. BLM reports that, at the time of preparation of the January 2004 EA, sec. 33 had one producing and one plugged and abandoned well, both of which predated the proposed Riley Ridge project and thus were not a part of it.

The Field Manager determined that the drilling and related activity were not likely to result in any significant impact to the human environment and, accordingly, that BLM was not required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), to prepare an EIS.^{3/} She further concluded that such activity conformed with the applicable land-use plan (1988 Pinedale RMP), which generally opened the entire planning area to oil and gas exploration and development, thus satisfying section 302(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (2000).

After the approval of the APDs in 2001 but before the approval of the well relocations in 2004, circumstances regarding the Department's obligations with respect to the Canada lynx under the ESA changed as a result of a Federal court order. In a December 26, 2002, order and accompanying memorandum opinion in Defenders of Wildlife v. Norton, No. 00-2996 (GK) (D.D.C.), the U.S. District Court for the District of Columbia held that, because it had failed to designate critical habitat for the Canada lynx in violation of the ESA, FWS was enjoined, pending such designation or further order of the court, from concurring with any determination by a Federal agency that a proposed action might affect, but was not likely to adversely affect, the Canada lynx. FWS thus was required to formally consult in the case of every such action pursuant to section 7 of the ESA, as amended, 16 U.S.C. § 1536

^{3/} Section 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000), requires Federal agencies to prepare an EIS for a major Federal action significantly affecting the quality of the human environment. The Council on Environmental Quality (CEQ) has promulgated regulations governing an agency's compliance with NEPA. 40 CFR Part 1500. In determining whether to prepare an EIS, an agency may prepare an EA in order to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS]" or, instead, a "finding of no significant impact," in which case the EA is sufficient. 40 CFR 1508.9(a)(1); see 40 CFR 1501.4(b).

(2000).^{4/} See 239 F. Supp. 2d 9, 25 (D.D.C. 2002). This order was in effect through the time of the Deputy State Director's February 2004 decision, but the injunction was vacated by the U.S. Court of Appeals for the District of Columbia Circuit on March 3, 2004, and the case was remanded to the District Court.

Because it was issued during the period of the effectiveness of the District Court decision, the Field Manager's January 2004 decision to approve the Sundry Notices was thus also based on a March 26, 2003, BLM BA, which was far more detailed than the one prepared in 2001. The BA analyzed the potential impacts of approving the drilling of the two relocated natural gas wells on the Canada lynx under the ESA. BLM determined that the drilling and related activity was not likely to adversely affect the lynx. BLM forwarded the BA to FWS for formal consultation. In response FWS sent a letter to BLM, dated April 1, 2003, asking for more information, and, in particular, information regarding lynx habitat. On August 7, 2003, BLM responded, stating, inter alia:

Data related to a lynx analysis unit (LAU) were not provided in the BA because delineation of the LAU was not available. At this time some preliminary analysis has been completed by the [FS] and BLM. The FS-LAU preliminary designation is 29 which is likely to be combined with FS-LAU 41. The BLM will assign the same FS numerical designation when this analysis is complete. Presently, the BLM identifies this LAU as Deadline Ridge which tentatively has approximately 6419 acres of suitable Canada lynx habitat (Attachment 1). Attachment 2 provides specific data (location of proposed wells and timber-types) for Section 33.

Based on the data provided in the BA which showed an aerial photo of the project area and a description of the timber-types adjacent to the project, and from the tentative BLM-LAU delineation in this area, the

^{4/} Section 7(a)(2) of the ESA requires BLM to consult with the FWS to ensure that "any action authorized, funded, or carried out" by BLM is not likely to jeopardize the continued existence of any listed endangered or threatened species or result in the destruction or adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2) (2000). Regulations implementing the ESA set out the procedure to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action." 50 CFR 402.12(a); see 50 CFR Part 402. Normally, if after preparing a biological assessment, BLM, with the concurrence of FWS, makes a determination that the action is not likely to adversely affect listed species or critical habitat, then formal consultation is not required. 50 CFR 402.12(k), 402.13(a).

proposed ExxonMobil project lies outside but adjacent to “primary” suitable Canada lynx habitat as defined in the [Lynx Conservation Assessment and Strategy] LCAS (Northern Rocky Mountain Geographic Area/Lynx Habitat/Wyoming).

(Aug. 7, 2003, letter from BLM to FS at 2.) BLM attached maps depicting the “Deadline LAU,” which relates to the project area, and forested areas in relation to the project site, showing that the site (consistent with the photographs in the record and the purpose of relocating the well pad) was outside of forested areas. See id., attachments 1 and 2.

On May 21, 2003, Defenders filed a 60-day Notice of Intent to Sue BLM, as well as FS and FWS, pursuant to section 11(g) of the ESA, as amended, 16 U.S.C. § 1540(g) (2000). The Notice challenged BLM’s approval of the two natural gas wells at issue here and other actions potentially affecting Canada lynx in the Riley Ridge Natural Gas Project area. This notice attached 28 exhibits to support Defenders’ view that BLM could not approve the subject wells until it undertook to obtain from FWS a biological opinion (or opinions) considering not just the drilling of the two wells but also considering any activity related to the Pinedale RMP and the Riley Ridge gas project, as well as a nearby “LaBarge Oil and Gas Project” EIS. Specifically related to the project site, Defenders submitted evidence that it claims shows that the well pad would be located in an area of habitat critical to the lynx. See Exs. 21-25. Neither party has advised us whether appellants have filed suit against BLM as the Notice of Intent to Sue presages.

FWS issued a Biological Opinion on October 14, 2003. After considering the potential impacts on the proposed “action area” likely to be directly or indirectly affected by drilling and related activity, defined as the well pad, access road, and 400 meters north, west, and southwest of the well pad (which encompasses suitable habitat for lynx), FWS concluded that the proposed activity was not likely to jeopardize the continued existence of the species, or destroy or adversely modify its critical habitat. (Biological Opinion at 17.) It reached this conclusion because:

1. The proposed action area encompasses a relatively small amount of the Canada lynx’s range in the northern Rocky Mountains.
2. Currently, 44 percent of LAU 41 is described as unsuitable and does not meet the standard for lynx habitat in the LCAS (Ruediger et al. 2000) of less than 30 percent unsuitable habitat. However, the proposed action will not convert any suitable habitat [for lynx] within LAU 41 to the unsuitable stage.

3. Lynx have not been observed in the proposed action area. In addition, components for denning and foraging habitat do not occur within the proposed action area, nor does the proposed action area support snowshoe hare [the lynx's primary food source]. Although alternative prey species may be impacted, the impacts are discountable due to the availability of better habitat, adjacent.
4. The proposed action area is located in the southeastern portion of LAU 41 and at the eastern edge of potential habitat. Continuous sagebrush steppe occurs due east of the Project area.

Id.; see id. at 16. FWS noted that the record contains evidence that a male lynx which was radio-collared in 1996 and tracked until 2002 appeared in the southeastern portion of LAU 41 near the action area, but discounted these visits as demonstrating that the area was significant to lynx, due to the individual animal's brief time traveling through the area. "Several of the 477 locations obtained from this lynx occurred in the southeastern portion of LAU-41. However, the brief duration of the locations within LAU-41 and the distance traveled between those locations indicate only a transitory use of the LAU." (Biological Opinion at 15.) Otherwise, the Opinion documented recorded evidence of lynx within various distances of the site on single occasions in 1960, 1970, and 1975. Id.

In a letter dated December 4, 2003, FWS responded to the comments and concerns Defenders expressed in the Notice of Intent to Sue. FWS stated that it concluded that the project area did not provide suitable habitat for lynx, but that such habitat did exist to the north, west, and southwest of the project area. "Therefore, we defined the action area (defined at 50 CFR 402 to mean 'all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action') to include the well pad, access road and 400 meters north, west and southwest of the well pad." (Letter at 2; see Biological Opinion at 13.) The Field Manager subsequently issued her January 2004 decision to approve the Sundry Notices.

Appellants sought State Director review of the Field Manager's January 2004 decision, pursuant to 43 CFR 3165.3(b), on February 6, 2004. Appellants' principal assertion was that BLM and FWS were obligated to prepare a biological assessment and opinion, reinstate consultation with FWS regarding the lynx, and supplement the EIS or prepare a new EIS for the Riley Ridge Project "as a whole," and that the agencies' combined failure to do so rendered the FWS biological opinion and FONSI for the site-specific action illegal. With respect to the biological opinion rendered for the well project at issue, appellants argued that it was legally deficient because BLM's analysis of the evidence of record and, particularly, the visitation by the radio-

collared lynx, was inadequate. They argued that this alleged failure of BLM was not based on “best available science” and thus effectively tainted FWS’ biological opinion. They attached to their request for SDR, inter alia, the 60-day notice and exhibits.

In his February 2004 decision, the Deputy State Director affirmed the Field Manager’s decision to authorize relocation of the two approved natural gas wells, concluding that appellants had failed to demonstrate that BLM had, in approving drilling and related activity, violated the environmental review requirements of section 102(2)(C) of NEPA or the threatened and endangered species protection requirements of section 7 of the ESA. The Deputy State Director pointed out that the relocated well pad site was environmentally superior to the well pad site chosen and approved in 2001. He disagreed with appellants’ claims that the biological opinion was not based on “best available science” and noted that BLM does not have authority to review FWS’ decision. He concluded that it was not necessary to perform a “Riley Ridge-wide BA/BO in order to approve the two subject Exxon-Mobil wells,” and stated that the ESA section 7 consultation performed for the wells was sufficient.

Appellants appealed, petitioning the Board to stay the effect of the Deputy State Director’s February 2004 decision pending a final resolution of their appeal, and including a statement of reasons (SOR) for their appeal along with their petition. Appellants requested the Board to stay “further implementation of the Riley Ridge Project, through implementation of the Decision of the Deputy State Director, or approval of other APDs and Sundry Notices.” (Petition for Stay at 22.) By order dated May 21, 2004, the Board denied the stay. We specifically noted that the relief sought by appellants’ in the form of a stay of implementation of the Riley Ridge Gas Project was “beyond the scope of this proceeding, which is limited to an appeal of the Deputy State Director’s February 2004 decision affirming the approval of various Sundry Notices.” (Order dated May 21, 2004.) We also granted a motion to intervene submitted by Exxon.

In their SOR, appellants make two sets of arguments under both section 7 of the ESA and section 102(2)(C) of NEPA. One set of arguments under each statute relates to the Riley Ridge Project and one set relates to the site-specific Exxon wells. First, they argue that BLM is in violation of the ESA because the agency “continues to implement the Riley Ridge Project, through the Fogarty Creek wells” while at the same time BLM “has also failed to consult with [FWS] on the Riley Ridge Project’s impacts on lynx as required by Section 7 of the ESA.” (SOR at 10.) Appellants assert that formal consultation was conducted on “two segments of the 238 well Riley Ridge Project, * * * but not on the Project itself.” Citing 50 CFR 402.14(c), appellants claim that “segmented review is impermissible.” (SOR at 13.) Appellants assert that BLM failed to evaluate direct and indirect potential effects of the wells on the lynx. They argue that the Fogarty Creek wells constitute an interrelated and interdependent activity of the Riley Ridge Project and that BLM must consider the effects of

interrelated activities and interdependent activities. *Id.* at 12-13, *citing* 50 CFR 402.12(a) and 404.02. Appellants maintain that “further implementation of the Riley Ridge Project, including through the drilling of the Fogarty Creek Units or other parcels, cannot be authorized until such formal consultation is completed,” *id.* at 12, and that the BA must consider “the effects of all of the 238 wells that comprise the Riley Ridge Project before drilling can be authorized on the Fogarty Creek” site. *Id.* at 13.

Second, they assert that BLM’s action in issuing the BA for the two wells violates section 7 of the ESA because the BA was inadequate to provide FWS with the best available science as required by 50 CFR 402.14, and because BLM failed to list interrelated and interdependent activities as required by 50 CFR 402.02. (SOR at 12-13.) Appellants argue that the BA did not contain readily available information regarding lynx travel patterns and that BLM thus did not mention in the BA that the male radio-collared lynx “moved its home range to the general vicinity of the Fogarty Creek wells (about 5-10 miles northwest of the wells), and on a number of occasions in 2000 and 2001 this lynx was located in the vicinity of the wells.” *Id.* at 14. They conclude that the data purportedly omitted in the BA “refutes conclusions upon which the BLM bases its BA, including that the nearest evidence of lynx presence is one probable record from 1970 one mile northwest of the site.” *Id.* at 14-15.

Under NEPA, appellants first argue that they have shown “substantial recent lynx use of the Riley Ridge Project Area,” which constitutes significant new circumstances within the meaning of 40 CFR 1508.27, which mandates a conclusion that BLM may not continue to implement the Riley Ridge Project without preparing a supplemental EIS on the Project “as a whole” to determine its impacts on the lynx. Noting that the 1984 Riley Ridge Project EIS was prepared before the lynx was listed as threatened in 2000, appellants argue that the listing itself is significant new information which requires preparation of a supplemental EIS and that various oil and gas development projects in the area have created significantly changed circumstances requiring preparation of a supplemental EIS. (SOR at 17.) Finally, appellants argue that the 2004 EA for the well pad is legally inadequate and in violation of NEPA because it failed to consider available high-quality information or cumulative impacts. They claim that the information allegedly omitted from the EA was the same “lynx location data” mentioned with respect to their ESA claim. They argue that by limiting its analysis to the perimeter around the wells BLM failed to consider the cumulative effects, as defined in 40 CFR 1508.7, of drilling on lynx.^{5/}

^{5/} A “cumulative impact” is defined as the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 CFR 1508.7.

On March 20, 2005, WOC submitted seven additional documents in support of the above-stated arguments. Two documents are requests for State Director review of decisions rendered by the Pinedale Field Office (Exs. 1 and 3), and two (Exs. 2 and 4) are the State Office decisions rendered on the basis of those requests. Two documents relate to a letter submitted by WOC (Ex. 5) and a response to that letter (Ex. 6) sent to WOC by BLM. The seventh document is a set of news articles indicating that scientists found evidence that a lynx from Yellowstone National Park traveled to the Wyoming Range, apparently north of the project area.

[1] It is important to start our analysis by identifying those issues not before us, before turning to those that are. Appellants have not appealed from the decisions on State Director review rendered by the BLM Wyoming State Office which were attached to their March 20, 2005, supplementation of the record. The Board's docket does not indicate that appeals from those decisions were filed. The decisions were dated in October and December 2004; a timely appeal from those decisions would have been filed within 30 days of service. 43 CFR 4.411. Accordingly, we do not have before us appeals from those decisions and have no jurisdiction to consider whether BLM rendered them in error. To the extent appellants believe that the actions addressed in those decisions may have constituted violations of law of the sort they claim in their challenge to BLM's decision to approve the Sundry Notices for the Fogarty Creek wells, including improper segmentation or unaddressed cumulative or indirect impacts, it would have been necessary for the appellants to submit appeals from those decisions. To the extent appellants submitted such information in 2005 as exemplary of appellants' point that BLM is taking further action under the Riley Ridge Project, to obtain any such consideration, appellants must first show error on BLM's part in approving the Fogarty Creek well relocations.

[2] Turning to the general challenges to the Riley Ridge Project EIS described above, we start with the preliminary point that we do not have general management authority over BLM. Departmental regulations limit our jurisdiction to considering decisions, in the case of BLM, which make determinations regarding individual rights of a party and take or prevent specific action. 43 CFR 4.410 (2003); see Rock Crawlers Association of America, 167 IBLA 232, 236 (2005). A decision is an action by BLM affecting persons having or seeking some right, title, or interest in public lands or resources. See Joe Trow, 119 IBLA 388, 392 (1991). We thus will not consider a generalized request by an appellant that the Board tell BLM to update its EISs or records of decision. In a similar matter, the Board commented on an appellant's "pointed" request of "the Board to 'instruct the BLM on the need for an [EIS] on any significant federal action involving the leased lands * * *.' * * * The Board does not exercise supervisory authority over BLM except in the context of deciding an actual appeal case over which the Board has jurisdiction." Nevada Outdoor Recreation Association, 158 IBLA 207, 210 (2003). An appellant may properly appeal from a decision implementing, or that is tiered to, an EIS or record of

decision and we will review the decision and order relief that is commensurate with any violation established within BLM's record of compliance with applicable authority.^{6/}

Moreover, we need not give advisory opinions regarding relief requested by an appellant which is in progress. Carbon Tech Fuels, Inc., 161 IBLA 147, 165 (2004). BLM is undertaking the review requested by appellants. Appellants point out correctly that, when the 1988 Pinedale RMP and 1984 Riley Ridge Gas Project EIS were originally prepared, lynx had not yet been designated a threatened species, which means that project impacts on the lynx as a threatened species were not considered and no consultation with FWS regarding such impacts occurred pursuant to section 7 of the ESA. As we have addressed in other cases, BLM is in, or by now has completed, the process of amending or updating the 1988 Pinedale RMP in order to update its NEPA analysis, at which time it will necessarily consider impacts on the Canada lynx for lands within the Pinedale Resource Area. Wyoming Outdoor Council, 164 IBLA 84 (2004). BLM states as well that it is presently working on a programmatic BA for the lynx. (Answer at 6.) To the extent updated analysis of impacts on the lynx from oil and gas development in the Pinedale area is the relief sought in this case, appellants are fully aware that this analysis is underway.

Thus, the only question before us relates to appellants' arguments that project-wide NEPA supplementation and ESA consultation must occur before BLM can approve Exxon's drilling the Fogarty Creek wells, since designation of the lynx constitutes a "significant new circumstance[]" which compels preparation of a supplemental EIS under 40 CFR 1502.9(c)(1), and the reinitiation of formal ESA consultation under 50 CFR Part 402 for the project as a whole. Thus, appellants effectively seek a general moratorium on oil and gas activities in the Riley Ridge Project Area until BLM completes updating and supplementation under NEPA and the ESA of the Riley Ridge Project EIS.

[3] We turn to appellants' arguments that BLM violated the ESA by segmenting the project and failing to consider interdependent and indirect effects of drilling the Fogarty wells in light of the Riley Ridge Project "as a whole." To support their argument, appellants cite 50 CFR 402.14(c). That regulation establishes the components of a written request to initiate formal consultation, which include:

- (6) Any other relevant available information on the action, the affected listed species or critical habitat. Formal consultation shall not be

^{6/} Accordingly, it is not enough for appellants to document, as they did in the Mar. 20, 2005, supplemental filing, that BLM is taking other potentially related actions, to obtain management oversight from the Board over BLM. It is the appellants' burden to demonstrate that BLM's actions constitute a violation of law.

initiated by the Federal agency until any required [BA] has been completed and submitted to the Director [of the FWS] in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

BLM completed a BA, initiated formal consultation, and obtained a biological opinion concurring in the BA's conclusions, consistent with this requirement. It is proceeding to undertake a programmatic BA. FWS exercised its authority, articulated in this rule, to approve proceeding with the Fogarty Creek wells. To the extent that appellants disagree with FWS on this point, that argument lies in another forum, as we do not have jurisdiction to review decisions of the FWS. Accordingly, we find no violation of the ESA in BLM's proceeding with consultation on this segment of the Riley Ridge Project.

Moreover, appellants' challenge to BLM's proceeding with the individual well project, in the absence of a moratorium on wells pending ESA consideration of the lynx in the Riley Ridge Project as a whole, presumes that the Project EIS contained no mechanism to address subsequently listed species such as the lynx. This is not the case. The record of decision for the Riley Ridge Project, at 5, specifically provided that applicants seeking authorization to drill a well would be required to conduct surveys no more than a year prior to a proposed disturbance to determine whether listed species or their habitats could be present on the areas to be disturbed, irrespective of whether the species in question was known to be listed in 1984 at the time the EIS was completed. Measure 27 of the General Measures states:

Under the terms of the [ESA], the Company will conduct surveys, no more than one year prior to disturbance, to determine if listed species or their habitats might be present on areas to be disturbed by any of the proposed action, or alternatives, regardless of land ownership. If it is determined that listed species or their habitats might be present and could be affected by the proposals, appropriate consultations with the [FWS] will be conducted by the federal authorizing agency. No activities will be authorized until consultation is complete as specified by Section 7(c) of the consultation process[,] which would specify the mitigation measures to be carried out. The Biological Opinion issued by the [FWS] as a result of consultation process will specify the mitigation measures to be carried out by the Company.

The Holder shall develop a conservation plan consistent with the FWS Biological Opinion that will ensure the continued existence of

threatened or endangered species is not jeopardized or that their critical habitat is not destroyed or adversely modified.

(Riley Ridge Project Record of Decision, Attachment B.5, General Measure 27, B-32.) Despite the fact that the lynx had not been listed in 1984, General Measure 27 ensured that if a company sought to proceed with a well project, it was required to conduct surveys for any species listed at the time and proceed with consultation if necessary. Formal consultation occurred here. Thus, all that is left of appellants' ESA challenge to BLM's actions is their general complaint regarding BLM's consultation process with respect to the Fogarty Creek wells, which we consider below.^{2/}

[4] Turning to appellants' arguments that BLM cannot proceed with a site-specific well project within the Riley Ridge Project area without first supplementing the Riley Ridge Project EIS, we have rejected the general notion that BLM is prohibited, as a matter of law, from authorizing site specific action during the time it is updating or revising a NEPA decision to which a site-specific action is tiered. The question of whether BLM properly authorized site-specific action is answered by the nature of the assessment of impacts for that action and whether it is sufficient to comply with the requirements of NEPA. Wyoming Outdoor Council, 164 IBLA at 95-96. This basic NEPA requirement does not change during the period BLM may also be supplementing another NEPA document.

Appellants' argument that BLM may not authorize the Fogarty Creek wells until it completes a supplemental EIS for the Riley Ridge Project necessarily reasons that, if a broader NEPA document (in this case an EIS) to which a narrower NEPA document (in this case an EA) is tiered does not analyze a particular impact, no action can be approved under NEPA until the EIS is supplemented. Appellants thus unjustifiably presume that BLM cannot analyze the environmental effects of the proposed action on lynx until BLM can first do so in the context of the Riley Ridge EIS. We disagree. There is simply no such stricture in NEPA or CEQ's implementing rules.

CEQ rules define "tiering" as the "coverage of general matters in broader [EISs] * * * with subsequent narrower statements or environmental analyses * * * incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 CFR 1508.28. The point of tiering is to allow an agency to avoid duplicating paper and effort. So long as a broader NEPA document considers impacts, the narrower NEPA document can

^{2/} To the extent appellants complain regarding BLM's alleged failure to consider effects of interdependent and interrelated activities, 50 CFR 402.12(a) and 404.02, our lack of endorsement of those arguments derives largely from the nature of the evidence in the record and considered more fully below.

incorporate by reference such consideration. Impacts must be considered somewhere, however, and undertaking the analysis in the narrower NEPA document ensures NEPA consideration of issues specific to that statement. Tiering is not focused, as appellants would have it, on compelling the agency to undertake the necessary environmental analysis in the NEPA document of an appellant's choice. Rather, if the agency did so tier, the question is whether the analysis in the EIS was sufficient to support tiering. In In re Stratton Hog Timber Sale, 160 IBLA 329, 331 (2004), we noted that, in Kern v. BLM, 284 F.3d 1062 (9th Cir. 2002), "the Ninth Circuit Court of Appeals * * * held that an environmental impact, consideration of which is eschewed in an EA, must necessarily have been addressed adequately in a document to which the EA is tiered." So long as the necessary analysis of a particular action is undertaken, an agency is not required to halt all actions and the NEPA analysis they trigger every time a new argument or impact is raised. BLM may consider an impact in a subsequent document, so long as its consideration meets the requirements of NEPA.

Whether or not BLM tiered the EA for the Fogarty Creek wells to analysis in the Riley Ridge EIS for other issues and impacts, BLM could not incorporate NEPA analysis of the threatened lynx because no such analysis was a part of the EIS. There was therefore no analysis of impacts on lynx in the EIS that could be incorporated into the later EA. In such a case, the question becomes whether the agency "concentrated on the issues specific to the statement subsequently prepared" and in so doing conducted sufficient analysis to comply with NEPA in the context of the action proposed. Approval of wells/sundry notices may be tiered to the Riley Ridge Project EIS. There is no doubt that tiering to the Riley Ridge Project EIS, on the specific topic of the lynx as a threatened species, is not possible.^{8/} Southern Utah Wilderness Alliance, 164 IBLA 118, 122 (2004). That the EIS did not analyze impacts on the lynx as a threatened species means that we must review the site-specific project NEPA document to determine whether BLM conducted sufficient analysis, consistent with NEPA regulations, of the lynx.

^{8/} There is some dispute as to whether the decision to approve the two wells is tiered to the Riley Ridge Project at all. BLM asserts that the Project is a sour gas, deep well project which would be produced from "below 14,000 feet in [the] Madison Formation," while the two wells are expected to produce sweet gas from "the Frontier Formation estimated at approximately 10,000 feet." (Response to Petition for Stay (Response) at 2.) The Fogarty Creek Unit, however, is identified in the EIS as one of several "component units" of the Riley Ridge Project, and is described as containing eleven sweet gas wells drilled to an approximate depth of 8,000 feet. (Riley Ridge Project Draft EIS at 1-14.) It is clear that for the issue relevant here -- impacts of drilling on the Canada lynx -- BLM could not and did not tier to the Project EIS.

In the context of an EA and FONSI, appellants must demonstrate, with objective proof, that BLM failed to consider a substantial environmental problem of significance to the proposed action, or otherwise failed to comply with NEPA's mandates. Umpqua Watersheds, Inc., 158 IBLA 62, 67 (2002); Southern Utah Wilderness Alliance, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993). BLM's compliance with NEPA as it relates to listed species in the Fogarty Creek well project area consists of the record of the consultation under the ESA. Undoubtedly, the ESA and NEPA both anticipate that the analyses required under one statute may be relied upon and integrated with the analyses required under the other. Compare 50 CFR 402.506 with 40 CFR 1500.4(j) and (k), 1500.2(c), 1502.21, and 1502.25. In defining the term "significance," NEPA regulations require the consideration of the intensity of the effects of an action. "Intensity" expressly includes the "degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical" under the ESA. 40 CFR 1508.27(9). Thus, in the context of NEPA, appellants must show that BLM failed to consider the information pertaining to the lynx in the well project area. Whether further consultation, and hence further NEPA review, is required depends on whether the information regarding the radio-collared lynx demonstrates that BLM failed to utilize the best data available regarding the presence of the species and to that extent failed to consider a substantial environmental problem. It is not enough to cite the fact that supplementation of the EIS on that topic is not complete.

Having rejected appellants' arguments that BLM was prohibited by the ESA or NEPA from considering the Fogarty Creek well project prior to considering the Riley Ridge Project under those statutes as a whole, we turn to their assertions that BLM's actions in issuing the BA violate section 7 of the ESA because the BA was inadequate to provide FWS with the best available science as required by 50 CFR 402.14, and because the BLM failed to list interrelated and interdependent activities as required by 50 CFR 402.02. (SOR at 12-13.)^{2/} This argument relies on appellants' views of the significance of information regarding the radio-collared lynx. (SOR at 14.)

As described above, when BLM first submitted the BA to FWS, it had not completed analysis of the habitat or established LAUs. FWS and BLM further discussed the topic in writing. There is no question that BLM gave FWS information updating the latter about LAU 41 and about the lack of resident lynx activity there. There is also no question that FWS considered the information regarding the radio-collared lynx in its biological opinion. FWS did not consider the information to be as

^{2/} Under the ESA, the proposing agency must compile and submit the best available scientific data describing the effects of the action it intends to take on the listed species and prepare a biological evaluation of the proposed action. 50 CFR 402.14(d); see also 50 CFR 402.02 (information submitted must include interrelated activities).

significant as appellants find it to be; it is obvious that appellants disagree with FWS' biological opinion. But the proper forum for review of biological opinions is the Federal court system. The Secretary has not delegated authority to this Board to review the merits of FWS biological opinions. Wyoming Outdoor Council, 159 IBLA 388, 409 (2003). To the extent appellants' argument is a procedural claim that BLM did not provide adequate information to FWS, based on the best available science -- when BLM was in the process of rendering habitat conclusions that it later supplied to FWS and when the end product of the full consultation with FWS was a biological opinion considering the very information appellants claim should have been presented to FWS by BLM -- we will not delve into how BLM provided the information under 50 CFR 402.14. It is enough that FWS already has the information and has already reached an independent conclusion regarding the meaning of the data, which we have no jurisdiction to review.

Finally, we turn to appellants' last argument under NEPA. The proper place for this Board to review the information regarding the Canada lynx is in the review of the EA. As we noted in Wyoming Outdoor Council, 159 IBLA at 409:

CEQ regulations contemplate and provide for compliance with the ESA as an element of complying with NEPA: "To the fullest extent possible, agencies shall prepare draft [NEPA documents] concurrently with and integrated with environmental impact analyses and related surveys and studies required by the * * * [ESA] * * * and other environmental review laws and executive orders." 40 CFR 1502.25(a). Thus, in evaluating whether BLM took the requisite "hard look" at the environmental impacts of a proposed action required by NEPA, it is an entirely proper exercise of the Board's authority to consider impacts on threatened and endangered species and whether BLM has complied with the mandates of the ESA.

On this basis we turn to the EA, and appellants' challenge that it did not adequately consider impacts on the Canada lynx.

Appellants argue that in the case of the two wells at issue here, lynx have been reported to be present in sec. 33, in the vicinity of the well sites, and that the location of the well platform is proposed "in known, recently occupied, and likely still occupied, lynx habitat." (SOR at 11.) They assert that BLM failed to take this information into account in its BA and EA, and especially the fact that the male radio-collared lynx had, by 2000 or 2001, purportedly moved its home range to about 5 to 10 miles northwest of the two wells. Thus, appellants claim that in discussing the home range of a male and a female lynx as being 40 miles north of the wells, BLM did not use the "best scientific * * * data available" in its consultation with FWS, violating section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2000), and 50 CFR

402.14(d), or give “[a]ccurate scientific analysis,” thus violating section 102(2)(C) of NEPA, and 40 CFR 1500.1(b). Id. at 13-14, 19. In addition, appellants argue that BLM failed to consider general scientific information regarding the likely impacts of human activity on lynx, particularly given the fact that lynx do not confine their activities solely to forests or rely solely on snowshoe hares as their preferred prey species. Id. at 15, 20.

BLM counters that two lynx which had been known to appear in the vicinity of the wells died of starvation during the winter of 2000 (female lynx) and winter of 2002-2003 (male lynx), and that “lynx are not known to be present in LAU-41.” (Response at 4; Biological Opinion at 17.) Appellants acknowledge the death of the two lynx. (Reply to BLM Response to Petition for Stay (Reply) at 7-8 (citing Ex. 1, Ex. D, at 12 n.9).) They assert that the death of the lynx does not negate the overriding fact that “their presence shows lynx occupy this part of the Wyoming Range, and utilize the lands at issue in this appeal.” (Reply at 7-8; see id. at 8 (“The record clearly shows lynx have used this area historically and very recently, and almost certainly continue to use it.”).) Nonetheless, the absence of lynx from the proposed action area is not disputed by evidence most recently provided by appellants, in the form of the declaration of the former Wildlife and Fisheries Program Leader for the Bridger-Teton National Forest, who conducted his own assessment of the well site and surrounding area on May 5, 2004, and observed the presence of lynx habitat, but no evidence of lynx. (Declaration of Timothy Kaminski (Attachment 2 to Supplement to Appellants’ Petition for Stay) dated May 6, 2004, at 4.)

We are not persuaded that BLM violated NEPA in the context of considering the impacts of the drilling on lynx.^{10/} BLM issued its FONSI based both on the BA and the FWS 2003 Biological Opinion. BLM’s conclusion that the action was not likely to adversely affect the lynx was premised on the analysis in those two documents, as well as its August 7, 2003, letter to FWS analyzing data related to LAU 29 and 41, then described as the Deadline Ridge LAU, containing approximately 6,419 acres of suitable Canada lynx habitat. BLM attached data regarding the location of the proposed wells and timber-types adjacent to the project, and from photos and data concluded that the project lies outside but adjacent to “primary” suitable Canada lynx habitat as defined in the LCAS. (Aug. 7, 2003, letter from BLM to FS at 2.) FWS examined BLM’s information. FWS noted that 44 percent of LAU 41 is described as unsuitable habitat, and that the proposed action will not convert

^{10/} To support a FONSI, and, hence, the conclusion that an EIS is not required, an EA must take a hard look at the environmental consequences of a proposed action, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts from it are insignificant. Lee & Jody Sprout, 160 IBLA 9, 12-13 (2003); Kendall’s Concerned Area Residents, 129 IBLA 130, 138 (1994).

suitable habitat within LAU 41 to “unsuitable.” FWS stated that lynx had not been observed in the proposed action area, and noted that denning components do not appear in the action area, nor does it support snowshoe hare. FWS acknowledged that alternative prey species (squirrel) may be impacted, but concluded that the impacts on that species were negligible. FWS was not impressed that the activities of the radio-collared male demonstrated much about the nature of the site as lynx habitat. (Biological Opinion at 16.) FWS addressed the visits of the male lynx, but noted that they were only “[s]everal of the 477 locations obtained from this lynx’ [radio collar],” amounting to “only a transitory use of the LAU.” (Biological Opinion at 15.) Otherwise, the opinion documented evidence of random appearances of lynx within various miles of the site only in 1960, 1970, and 1975. *Id.*

Nothing the appellants have submitted undercuts BLM’s conclusions. While appellants’ commentary regarding the male lynx implies that one or more lynx took up residence at or near the action site, their evidence shows such comments to be overstated. Close examination of the appellants’ exhibits reveals very little information regarding sec. 33, where the well pad would be located. Moreover, the scale of the exhibits is misleading in overemphasizing the rare radio-collared lynx visitation to LAU-41. Map 1: Lynx Observation Data Overview, for the Bridger Teton National Forest, shows considerable telemetry data for lynx. The viewer must provide her own conclusion regarding the proper placement of the box representing T. 28 N., R. 114 W. Only one satellite telemetry data point appears in this box representing the entire township, while the closest observation points from the years 1842 through 2000 (for all but the single male lynx) appear several sections away and are heavily concentrated to the north and west of the relevant township. In smaller scale, Map 2 shows the same information for a more focused area. On Map 2, T. 28 N., R. 114 W. is shown to have 3 data points, all from the single radio-collared lynx, with at most one data point in or near sec. 33, the depiction of which is ambiguous. Again, the map shows that even the single male lynx in question, upon which appellants’ entire presentation regarding the significance of the project area as lynx habitat is based, clearly spent the vast majority of its time to the north and west of the township. ^{11/}

^{11/} We recognize that in their supplemental pleading submitted Mar. 20, 2005, appellants draw attention to other events taking place in the Pinedale Resource Area, to suggest that BLM did not consider cumulative or incremental impacts. We do not discount this information or address whether appellants could show that the other actions identified in that pleading, represented by decisions that were not appealed here, might have such impacts. But on this record, for the reasons stated above, we cannot find that appellants have met their burden of showing impacts of any sort from drilling the Fogarty Creek wells.

We note as well that the photographs in the record show that the well site is situated 300 feet from an existing road and an existing power line. The well pad has clearly been removed from the forested site (which would more plausibly support lynx habitat), the approval of which in 2001 drew no word of complaint from appellants. Their silence on the approval of three wells in 2001, in habitat which is superior to the location to which the wells were moved so as to avoid disturbing potential lynx habitat, plainly suggests that this appeal may derive from appellants' desire for obtaining supplemental NEPA analysis for the Riley Ridge Project.

Moreover, while appellants complain of the alleged lack of information in BLM's analysis, they identify no specific impacts of the two wells on lynx or lynx habitat, whether arising from habitat fragmentation or other causes, which were ignored or overlooked by BLM in preparing the EA. Further, appellants have not identified any specific cumulative impacts which were ignored or overlooked by BLM.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Deputy State Director's February 2004 decision is affirmed.

Lisa Hemmer
Administrative Judge

I concur:

T. Britt Price
Administrative Judge