

## FOREST GUARDIANS

IBLA 2004-236

Decided September 8, 2006

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, dismissing protest against the offering of parcels at a competitive oil and gas lease sale. NMNM-111516, et al.

Affirmed.

1. Endangered Species Act of 1973: Section 7: Consultation–Oil and Gas Leases: Discretion to Lease

BLM is not required to reinitiate consultation with the Fish and Wildlife Service pursuant to section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536 (2000), in connection with its decision to offer lands for competitive oil and gas leasing where there is no new information disclosing that leasing and potential oil and gas development may affect listed species or critical habitat in a manner or to an extent not previously considered in previous consultations.

2. National Environmental Policy Act of 1969: Environmental Statements–Oil and Gas Leases: Discretion to Lease

BLM is not required to supplement an EIS prepared in connection with a land-use plan when it is deciding whether to offer lands for competitive oil and gas leasing, where it has taken a hard look at the environmental consequences of leasing and reasonable alternatives thereto in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (2000), considering all relevant

matters of environmental concern. BLM's decision not to supplement the EIS will be affirmed where the appellant fails to demonstrate, by reason of new information or circumstances, that leasing will affect the environment in a significant manner or to a significant extent not previously considered in the EIS.

APPEARANCES: Nicole J. Rosmarino, Endangered Species Director, Forest Guardians, Santa Fe, New Mexico; Dale Pontius, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HUGHES

Forest Guardians (FG) has appealed the April 27, 2004, decision of the New Mexico State Office, Bureau of Land Management (BLM), denying in part its January 20, 2004, protest against the offering of parcels for leasing in BLM's January 21, 2004, competitive oil and gas lease sale.

On November 14, 2003, BLM issued a Notice of Competitive Lease Sale (Oil and Gas) offering to lease 70 parcels at its January 2004 competitive oil and gas lease sale. FG filed its protest with BLM on January 20, 2004, challenging BLM's decision to include 32 specific parcels in the sale.<sup>1/</sup> FG stated in its protest that its review indicated that several of those parcels possess important ecological values that would be compromised by oil and gas leasing; it alleged that BLM "failed to provide an up-to-date, site-specific analysis of the proposed action that takes into account the special qualities of the area and the cumulative impacts of oil and gas development in the region," under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000); and it stated its concern that "the discretionary stipulations attached to the lease offerings fail to adequately protect" the resources of the area. (Protest filed Jan. 20, 2004, (Protest) at 1-2, 11-34.) FG also argued that the proposed lease sale violated the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531-1543 (2000), alleging that BLM had failed to prepare a biological assessment (BA) in an area "in which it has been determined that an endangered species may be present." Id. at 3-4.

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<sup>1/</sup> BLM's parcel numbers for those 32 parcels were 200401003 (located in Kansas), and 200401027, -30 through -35, -38, -45 through -55, -58, -59, and -61 through -70 (all located in New Mexico). As discussed below, of those parcels, only eight (200401045 through -47, -53, -61, -64, and -66, and -67) are still at issue in the present appeal.

FG specified that “at least fifteen of the proposed parcels” (which it identified)<sup>2/</sup> “and possibly more” parcels (which it did not identify) “contain habitat for which scientific data obtained by [FG] indicates suitability for and/or occupation by the northern aplomado falcon.” (Protest at 4.) FG argued that the 15 identified parcels must either be withdrawn from the lease sale or sold with no-surface-occupancy (NSO) stipulations. *Id.* at 4, 5, and 8. <sup>3/</sup> FG also argued that “[m]any of the parcels being offered for lease in eastern [New Mexico] and western [Oklahoma] are located within the historical ranges of the black-footed ferret,” citing the presence of complexes of prairie dog colonies in the area. <sup>4/</sup> *Id.* at 10. FG named two parcels (20040165 and -66) that “should be assessed for prairie dog habitat and potential black-footed ferret occupancy, given that they occur in Lea County,” New Mexico, which (as discussed below) is known to contain prairie dog towns. *Id.* at 10. <sup>5/</sup>

In its April 27, 2004, decision, BLM upheld FG’s protest in part, deciding to withhold eight parcels (200401027, 200401030 through -035, and 200401038) from

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<sup>2/</sup> BLM’s parcel numbers for those 15 parcels were 200401027, -30 through -35, -38, -45, -47, -53, -58, -61, -64, and -66. Of those parcels, only six (200101045, -47, -53, -61, -64, and -66) are still at issue in the present appeal.

<sup>3/</sup> FG also asserted that “[f]ive of the disputed parcels are located near the Bitter Lakes National Wildlife Refuge \* \* \* and Pecos River, and their development for oil and gas will therefore threaten the Pecos Bluntnose Shiner (Notropis simus pecosensis) [and] Pecos gambusia (Gambusia nobilis),” two fish species. *Id.* at 4, 11. However, it identified only four parcels (200401049 and -50, -52, and -54) involving the fish species (*id.* at 11; Petition for Stay dated May 22, 2004, (Stay Petition) at 12-13). As noted below, none of those four parcels remains at issue in the instant appeal, and there is consequently no need to burden this decision with a discussion of BLM’s extensive and current ESA compliance as to those fish species.

FG cited in its protest four parcels (200401049 and -50, -52, and -54) that assertedly contain habitat for four invertebrate species that were proposed for ESA listing. (Protest at 3 and 27-28; Stay Petition at 12-13.) None of those parcels is presently at issue.

FG also raised in its protest whether BLM was required to address the likely environmental impacts of coal-bed methane development. (Protest at 16-18, 21.) Since it does not seek on appeal to demonstrate any error in these respects in BLM’s April 2004 decision, we decline to consider that issue.

<sup>4/</sup> The black-footed ferret preys on black-tailed prairie dogs. See Appellant’s Statement of Reasons (SOR) at 5-6. As FG explains it, the “ferret’s natural habitat is aggregations of prairie dog colonies in large complexes,” and the ferret is “a species dependent on prairie dogs for survival.” (Protest at 10.)

<sup>5/</sup> One of those parcels (200401066) remains at issue.

leasing pending a determination of compliance with the ESA. Noting that FG had alleged that those eight parcels had northern aplomado falcon habitat and that FG believed that they should undergo section 7 consultation, BLM decided that a “field assessment is necessary to make a determination of habitat potential.” BLM announced that “a determination on the status of oil and gas leasing (continue leasing, lease with stipulations, lease closure), and a re-assessment of ESA compliance [were] scheduled to be completed” in the Fall of 2004. BLM decided accordingly not to issue leases on those eight parcels at that time. (BLM Decision dated Apr. 27, 2004 (BLM Decision) at 2.)

BLM denied FG’s protest as to the other 24 parcels and decided to go forward with leasing. This appeal ensued, and by order dated July 19, 2004, we denied FG’s petition to stay the effect of BLM’s April 2004 decision during the pendency of its appeal. In that order, we also granted in part and denied in part BLM’s motion to dismiss the appeal for lack of standing under 43 CFR 4.410(a), finding that FG had demonstrated standing to appeal as to only eight of the 24 parcels, *viz.*, 200401045 through -47, -53, -61, -64, -66, and -67. Accordingly, the appeal now concerns only those eight parcels. <sup>6/</sup>

In its SOR, FG reiterates its contention that BLM’s decision to lease the parcels at issue violates section 7 of the ESA, citing BLM’s asserted failure to consult with FWS prior to leasing (SOR at 7-17), and section 102(2)(C) of NEPA. (SOR at 17-24.) It asks us to declare that BLM violated those statutes in deciding to offer the parcels for oil and gas leasing, to void the competitive oil and gas lease sale, and to order BLM to comply with the statutes in deciding whether to reoffer the parcels for leasing. (SOR at 25.)

Concerning the ESA, FG recognizes that BLM conducted a statewide consultation with FWS in 1996-97 in connection with issuance of the Carlsbad and Roswell RMP and RMP Amendment. However, it states that such consultation did not specifically consider the site-specific impacts of leasing and potential oil and gas

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<sup>6/</sup> BLM issued competitive oil and gas leases to the high bidder for each of the eight parcels still at issue in the instant appeal. Lease NMNM-111516 was issued for Parcel 200401045 to Abo Petroleum Corp., Myco Industries, Inc., and Yates Drilling Co.; NMNM-111517 for Parcel 200401046 to Caza Energy LLC; NMNM-111518 for Parcel 200401047 to Abo Petroleum Corp., Myco Industries, Inc., and Yates Drilling Co.; NMNM-111523 for Parcel 200401053 to Magnum Hunter Production Inc. (NMNM-111523); NMNM-111530 for Parcel 200401061 to Rubicon Oil & Gas I LP; NMNM-111533 for Parcel 200401064 to Rubicon Oil & Gas I LP; NMNM-111535 for Parcel 200401066 to Crown Oil Partners II LP; and NMNM-111536 for Parcel 200401064 to Samson Resources Co.

development of the parcels at issue and is outdated. (SOR at 10.) FG argues that leasing and resulting oil and gas development (as well as roadbuilding, pipeline construction, and other related activity) may adversely affect two threatened and endangered (T&E or “listed”) species, the Northern aplomado falcon (Falco femoralis septentrionalis) (a bird) and the black-footed ferret (Mustela nigripes) (a mammal), as a consequence of human disturbance, habitat fragmentation, sedimentation, contamination, and other modifications to their habitat. (SOR at 2.) FG asserts that “significant new information” concerning the presence of Federally-listed T&E species in the proposed lease area and the likely impact of oil and gas development on the falcon and ferret has arisen since the 1996-97 consultation, thus requiring that BLM reinitiate consultation with FWS. (SOR at 3.) FG asserts that the new information consists of the fact that six of the parcels remaining at issue in the appeal (200401045, -47, -53, -61, -64, and -66) appear to be occupied or to be suitable for occupancy by both of the species. (SOR at 2.) It states that there is a “growing likelihood” that falcons occupy the area in which the New Mexico disputed parcels are located, based on the facts that the total number of falcon sightings in the State increased from 8 reports of 9 to 11 birds during the period 1950-1986 to 18 reports of 25 birds during the period 1987-1998, and that the successful breeding of falcons in the wild in the State was documented for the first time since 1952 in 2000 and thereafter. Id. at 4. FG also asserts that parcels 200401046, -53, -66, and -67 are among those situated in an area of New Mexico containing the “greatest extent” of black-tailed prairie dog habitat, which also constitutes habitat for the ferret, since prairie dogs are the principal prey of ferrets. See SOR at 5. <sup>7/</sup>

FG asserts that, despite this new information, BLM improperly failed to reinitiate consultation before deciding whether to issue the leases. It states that BLM has instead decided to defer further consultation until the applications for permits to drill (APD) are filed and that BLM is deciding whether to authorize drilling in violation of section 7 of the ESA. It argues that BLM was required to consult with FWS at the leasing stage to determine whether NSO or other stipulations, or withdrawal of parcels from leasing is necessary to protect listed species within the lease sale area. (SOR at 8.)

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<sup>7/</sup> Parcel 200401046 is located in Lincoln County, which is depicted in FG’s supporting data as having 500-1,000 acres of prairie dog town. Parcel 200401053 is located in Eddy County, which is depicted as having from 500.01 to 1,500 acres of prairie dog town. Parcels 200401066 and -67 are located in Lea County, which is depicted as having from 5,000 to 23,703.51 acres of prairie dog town. (Remote Sensing Survey of Black-tailed Prairie Dog Towns in the Historical New Mexico Range dated Feb. 28, 2003, at 19 Fig. 4 (“Black-tailed prairie dog town acreage by county”) (Ex. G attached to SOR).)

Section 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (2000), imposes a substantive obligation on BLM and other Federal agencies for the protection of T&E species:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined \* \* \* to be critical[.]

BLM has an affirmative duty to ensure that its actions do not jeopardize listed species. See Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1127 (9th Cir. 1998), cert. denied, 526 U.S. 1111 (1999).

In order to assist BLM in complying with its substantive obligation, section 7 of the ESA and its implementing regulations (50 CFR Part 402) impose procedural duties. Where a listed species may be present in the area of a proposed action, BLM is directed to prepare a BA 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” and to determine whether formal consultation with FWS is required. 50 CFR 402.12(a); see 16 U.S.C. § 1536(c)(1) (2000); Enos v. Marsh, 769 F.2d 1363, 1368 (9th Cir. 1985); Save Medicine Lake Coalition, 156 IBLA 219, 258 (2002); Oregon Natural Resources Council, 116 IBLA 355, 366-67 (1990).

When it is determined that a proposed action either may affect or is likely to adversely affect a listed species or its critical habitat, BLM is required by section 7(a)(2) of the ESA to formally consult with FWS to ensure that such action is not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. 50 CFR 402.14(a) and (b); Natural Resources Defense Council v. Houston, 146 F.3d at 1125; Enos v. Marsh, 769 F.2d at 1368; Umpqua Watersheds, Inc., 158 IBLA 62, 81 (2002). Formal consultation concludes with issuance of a biological opinion (BO) by FWS containing (1) a determination by FWS whether the proposed action is likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat, and (2) in the case of a jeopardy determination, a statement of reasonable and prudent alternatives that BLM may take to avoid violating its substantive obligation under section 7(a)(2) of the ESA. 50 CFR 402.14(h) and (l).

However, formal consultation is not required when BLM determines, with the concurrence of FWS either through informal consultation or submission of a BA, that

the proposed action may affect, but is not likely to adversely affect, a T&E species. 50 CFR 402.12(k), 402.13(a), and 402.14(b)(1); Natural Resources Defense Council v. Houston, 146 F.3d at 1126; In Re Big Deal Timber Sale, 165 IBLA 18, 32 (2005); Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 115 (2000).

The record establishes that BLM prepared BAs concerning the species at issue in this appeal for the lands at issue both in connection with its formulation of resource management plans (RMPs) in 1996 and 1997 and associated review of the environmental effects of oil and gas leasing in the area under NEPA and, more recently, in late 2003 in connection with its decision to offer lands for oil and gas leasing in January 2004. It is appropriate to set out in some detail the development of BLM's RMPs and its ESA and NEPA review, as the adequacy of both is presently under challenge.

BLM analyzed the potential environmental impacts of oil and gas leasing on the lands issue on appeal, among the other lands throughout its area of authority, in environmental impact statements (EISs) that were prepared in connection with the promulgation of the applicable land-use plans for the resource areas in which they are located. The environmental impacts of oil and gas leasing were addressed in various EISs: (1) The EIS prepared in September 1986 for the 1988 Carlsbad Resource Area (CRA) RMP; (2) the September 1994 EIS prepared jointly for the 1994 CRA Draft RMP Amendment and the new Roswell Resource Area (RRA) <sup>8/</sup> Draft RMP; and (3) the January 1997 Final EIS prepared jointly for the 1997 CRA RMP Amendment and the new 1997 RRA RMP. Those EISs together address some 14.025 million acres of Federal surface and/or mineral estate. In the September 1994 EIS, BLM analyzed five management alternatives for each resource area, considering different mixtures of lands open or closed to oil and gas leasing or subject to no surface occupancy or other restrictions on leasing. See, e.g., 1994 EIS at 2-153 to 2-161 (analyzing Alternative E (Preferred)). BLM also made projections for Reasonably Foreseeable Development for both areas, estimating the number of wells drilled or to be drilled and resulting acres of disturbance over a 20-year period. Id. at AP 18-1 to 18-6.

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<sup>8/</sup> In 1997 BLM split the Carlsbad Resource Area in two. One area retained the name CRA; the other was named the RRA. The CRA RMP was amended; a new RMP was adopted for the RRA. BLM provided that management of other public-land resources in the CRA was to continue to be governed by the 1988 CRA RMP, but addressed alternatives for such resources in the RRA in the land-use planning that led to promulgation of the 1997 RRA RMP.

All but one of the eight parcels now at issue fall under the jurisdiction of the CRA and thus are covered by the 1997 CRA RMP Amendment. The remaining parcel (200401046) is covered by the 1997 RRA RMP.

In October 1997, the New Mexico State Office approved the CRA RMP Amendment and the new RRA RMP, adopting a modified preferred alternative (Alternative E) opening most of the lands in which the United States owns the oil and gas mineral estate in the resource areas to leasing and development. This entailed opening about 3.9 million acres (95 percent) in the CRA (1997 CRA Amended RMP at 4) and about 9.3 million acres (96 percent) in the RRA. (1997 RRA RMP at 4.)

In 1996, as part of ongoing informal consultations with FWS, BLM prepared BAs for the RMPs. On July 3, 1996, BLM requested that FWS review a BA evaluating the effects of the current CRA land use plan on species that are Federally endangered, threatened, proposed, or candidate. (1997 CRA RMP Amendment at AP4-2.)<sup>2/</sup> As to the black-footed ferret, BLM concluded (as summarized by FWS in its August 5, 1996, response) that:

There are no extant black-footed ferrets in the CRA, and it is questionable whether the CRA falls within the historic range of the species. The CRA currently provides no suitable recovery habitat. The only prairie dog habitat on BLM-administered land in the CRA occupies just 6 acres.

(Memorandum dated Aug. 5, 1996, from FWS to BLM (Cons.#2-22-96-I-128) at 2.) BLM determined that, “[b]ased on the lack of [occurrence] within the [CRA], the activities/proposed actions outlined in the RMP,” including extensive oil and gas development, “will have ‘no effect’ on” the black-footed ferret,” so that “further informal consultation is not necessary.” (1997 CRA RMP Amendment at AP4-27.) FWS noted its concurrence with BLM’s “no effect” determination in its August 5, 1996, memo. *Id.* at 3. As a result, as discussed above, no formal consultation was required for that species.

As to the Northern aplomado falcon, BLM concluded in its July 1996 BA (as summarized by FWS in its response): “The historical distribution of the northern aplomado falcon included the southeastern quarter of the CRA. The species now breeds only in Mexico, but there have been several recent sightings on White Sands Missile Range. The only recent sightings in the CRA, both unconfirmed, were in 1987 and 1988.” *Id.* at 4. BLM made a finding that “a ‘not likely to adversely affect’ situation exists and further informal consultation is not necessary at this time.” (1997 CRA RMP Amendment at AP4-27.) In its August 5, 1996, memorandum, FWS

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<sup>2/</sup> BLM’s July 3, 1996, BA for the CRA RMP Amendment is found at pages AP4-8 through -134 of the October 1997 CRA RMP Amendment.

concurred with BLM's findings of "not likely to adversely affect" for the Northern aplomado falcon. *Id.* at 5. <sup>10/</sup> No formal consultation was required as to that species.

BLM's July 8, 1996, BA and September 20, 1996, BA Addendum for the RRA <sup>11/</sup> also considered the potential impacts of implementing the RMP, including large-scale oil and gas leasing, on the Northern aplomado falcon and black-footed ferret. (1997 RRA RMP at AR11-2 and -3.) The BA made findings of no effect for both the black-footed ferret and the Northern aplomado falcon as there are no known records of these species having occurred on public lands in the RRA (RRA RMP at AP11-24 and -25, AP11-26 and -27.) On August 5, 1996, FWS concurred with determinations of "no effect" for those species. *See* BO (Cons. #2-22-96-F-102) dated May 14, 1997, at AP11-62. Again, as a result, formal consultation was not required as to either species.

On October 2, 2003, BLM forwarded another BA to FWS concerning the effect of proposed oil and gas development of lands on the Northern aplomado falcon in the CRA. Noting that a newly-prepared habitat assessment report by the New Mexico Cooperative Fish and Wildlife Unit (Coop Unit) constituted "new information under the ESA," BLM ruled that it had to "conduct an area specific Section 7 consultation for oil and gas development in those areas containing suitable habitat for the falcon." (Biological Assessment of the Effects of Oil and Gas Development of Lands on the Northern Aplomado Falcon in the Carlsbad Field Office, Bureau of Land Management, dated October 2003 (October 2003 BA) at 3.) The lands addressed in the October 2003 BA were described as the Hope Study Area; <sup>12/</sup> they appear to include only Parcel 200401046, the only parcel still at issue that is situated in the RRA, in southern Chavez County.

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<sup>10/</sup> On Apr. 30, 1997, and May 13, 1997, FWS issued Biological Opinions (BOs) under the same case number (Cons. #2-22-96-F-128) concerning the effect of the CRA RMP amendment on a bird and a fish species not at issue here, the American peregrine falcon and Pecos bluntnose shiner. (1997 CRA RMP Amendment at AP4-135 through -158.) It was necessary to prepare a BO because FWS "could not concur with CRA determinations of 'not likely to affect' for" those species "due to insufficient information." (1997 RMP Amendment at AP4-138.) That is consistent with the procedures described above.

<sup>11/</sup> Its July 8, 1996, BA and Sept. 20, 1996, BA Addendum for the RRA RMP are found at pages AP11-7 through -60 of the RRA RMP.

<sup>12/</sup> The Hope Study Area is referred to as the lands within a 20-mile radius of Hope, New Mexico, which is located about 21 miles west of Artesia. The area ostensibly includes lands in both the CRA and the RRA.

BLM's October 2003 BA contains an extensive discussion of the Northern aplomado falcon, noting that sightings of the bird had increased in the whole of New Mexico, but with no sightings in the Hope Study Area and no verified sightings in the CRA; that breeding populations exist in Mexico less than 200 kilometers from the border with the United States in New Mexico; and that there soon may be releases of captive reared Aplomado falcons in west Texas and southern New Mexico. The BA reported that a habitat suitability model released by the Coop Unit identified as suitable areas centered around Hope and in the Indian Basin and Bogle flats south of Hope. (2003 BLM BA at 8.)

BLM's October 2003 BA proposed allowing development of the Federal mineral estate underlying Federal, State, and private surface while protecting habitat suitable for the Northern aplomado falcon. Development was proposed to occur at three different levels throughout the Hope Study Area: (1) Development of oil and gas leases with only standard terms and conditions, but requiring "decreased disturbance" from pad construction and reclamation, applicable only to areas within the study area that are "not within habitat suitable for the falcon" (*id.* at 11-12); (2) development of oil and gas leases with significant habitat protective measures applied to all oil and gas development activities, as well as substantial administrative controls on development activities applicable to those areas that are within habitat identified as suitable habitat by the model and/or the grassland mapping initiative (*id.* at 12-13); and (3) deferring lands from leasing, applicable to areas that meet the highest levels of suitability." Any unleased tracts within such areas would be "deferred from leasing" until "addressed through the" RMP amendment process; also, as leases expire in those areas, they would also be "deferred from leasing." *Id.* at 13.

On December 1, 2003, FWS notified BLM by memorandum that it "concur[s] with BLM's determination of 'may affect, not likely to adversely affect' for the falcon" and other species, so that formal consultation was not required. (Memorandum dated Dec. 1, 2003, from FWS to BLM (Consultation #2-22-04-I-0059) at 3.) FWS expressly noted in its memorandum that the entire project area consists of approximately 482,000 acres with 279,000 acres identified as suitable falcon habitat. It also noted that surveys for the falcon have been conducted in the project area, but no falcons have been documented, so that the effects of oil and gas development on the falcon and on suitable habitat will be insignificant and discountable. *Id.* at 2. Further, FWS stressed that BLM's proposal to employ three levels of development based on the presence or absence of suitable and/or available habitat and the leased status of the mineral estate will reduce the amount of disturbance in the identified suitable falcon habitat, reducing the level of fragmentation and overall disturbance. *Id.* at 3.

As to the black-footed ferret, BLM's October 2003 BA reported that there is only one highly probably record of ferret sightings in the northwestern corner of Lea County, which is not near any of the eight parcels at issue in the present appeal. *Id.* at 6-7. The BA reports that "only one active prairie dog town [is] known to exist" in the CRA and cites some "extant prairie dog towns" that appear to have been abandoned. *Id.* at 7. The BA contained a determination that oil and gas development in the Hope Study area "will have 'no effect' on the black-footed ferret, or any habitat suitable for the species." *Id.* at 16. Although no mention was made in FWS' December 1, 2003, memorandum of the black-footed ferret, we are not aware that FWS prepared a separate BO or otherwise conducted formal consultation for that species. We have no basis to conclude that FWS did not concur with the BA's "no effect" finding.

[1] Against this background, we reject FG's challenge to the adequacy of BLM's ESA review. It is established that a BLM decision to offer Federal lands for oil and gas leasing, such as the one at issue here, may trigger the requirement that it consult with FWS pursuant to section 7 of the ESA, in order to determine whether leasing and "all post-leasing activities through production and abandonment" are likely to jeopardize the continued existence of any listed species, or destroy or adversely modify its critical habitat. *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). However, that obligation only arises where a listed species is not only present in the proposed lease area, but is also affected by leasing and potential oil and gas development. *See* 848 F.2d at 1452-54.

The BLM/FWS consultation undertaken in 1996-97 amounts to a determination that neither the Northern aplomado falcon nor the black-footed ferret is to found on the parcels at issue herein. Most recently, just weeks before the action protested herein, BLM consulted with FWS concerning whether to put parcels in the vicinity up for oil and gas leasing, again concluding that the lands in question do not contain those species, and FWS concurred in that determination. Accordingly, the obligation to conduct formal consultation as to those parcels did not arise. 50 CFR 402.12(k), 402.13(a), and 402.14(b)(1); *Natural Resources Defense Council v. Houston*, 146 F.3d at 1126; *In Re Big Deal Timber Sale*, 165 IBLA at 32; *Klamath-Siskiyou Wildlands Center*, 153 IBLA at 115.

Under 50 CFR 402.16(c), the reinitiation of consultation is required when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." (Emphasis added.) Indeed, BLM cited that provision in contacting FWS in October 2003, noting the existence of the newly-prepared habitat assessment report by the Coop Unit. Thus, BLM may be obligated to reinitiate consultation concerning the potential impacts to listed species when such species are later found to be present in a project area, or

when scientific understanding of the effect of a human activity on such species has been subsequently altered by new information. See Blake v. BLM (On Reconsideration), 156 IBLA 280, 284-85 (2002).

Although, in view of the short time between the October 2003 consultation and the January 2004 lease sale, it is most unlikely that BLM could be required to reinitiate consultation with FWS in connection with its current determination to lease these specific parcels, we do not rule out the possibility that a party might be able to present evidence of the presence of one or more listed species in an area slated for leasing; that evidence could be presented to BLM as part of a protest against the proposed activity. 43 CFR 4.450-2; see generally California Association of Four-Wheel Drive Clubs, 30 IBLA 383 (1977). However, FG offered no convincing evidence, either in its protest or on appeal, that either the Northern aplomado falcon or the black-footed ferret has been found to be occupying any lands in the resource areas or is likely to be adversely affected by any leasing.

FG submits no evidence that the Northern aplomado falcon, black-footed ferret, or any other T&E species actually occupies any of the specific parcels now at issue, asserting instead that these parcels might provide “habitat suitable for recolonization by these species.” See Protest at 19. In the absence of any evidence that either of these species is, in fact, present, in any of the parcels, we cannot find that BLM’s failure to initiate a new consultation with FWS, in addition to that undertaken immediately prior to the lease sale, violated 50 CFR 402.01.

Nor are we persuaded that consultation was required owing to a change of circumstances because FG has shown that the parcels at issue may contain suitable habitat for those species. BLM stated in its decision that “field reviews by biologists and consulting experts in 2002 revealed a lack of suitable habitat [for the Northern aplomado falcon] of sufficient size in areas around parcels [20040153], \* \* \* -61, -64 and -66,” (BLM Decision at 2), four of the six parcels which FG now says contain suitable habitat. FG states only that new scientific data “indicates” that the parcels contain suitable habitat. (SOR at 2.) Further, FG submits statements from State wildlife officials acknowledging that the components of suitable habitat for the falcon are not well understood (id. at Ex. C) and that it is unclear if current habitat conditions in New Mexico will support a successful reintroduction of falcons. Id. at Ex. D.

The weakness of FG’s proof is exemplified by the fact that it argues that the parcels may provide habitat for the black-footed ferret on the basis that the counties that those parcels are in contain some prairie dog towns. (SOR at 5.) The presence or absence of prairie dog towns in the parcels at issue is not a matter of possibility; if a town is present on a parcel, it should be a simple matter for FG, as an asserted user

of the lands in that parcel, to record that fact. FG has failed to show that prairie dog towns are present in the parcels at issue.

We also are not persuaded that the “significant increased frequency of the [Northern] aplomado falcon in the state” (SOR at 4, emphasis added), which is on the order of a total of an additional 14 to 16 birds statewide, demonstrates that any of the parcels are likely to be occupied by a falcon. Our doubts are not assuaged by the fact that FG can point to only four falcon sightings in Eddy and Lea Counties in the nearly 40 years from 1962 to 1999. (SOR at Ex. F at 4 and 5.)

In its protest, FG stated that parcels 200401047, -053, -061, -064, and -066 contain “potential habitat” for the Northern aplomado falcon based on “[h]abitat modeling,” which appears to have been undertaken by FG pursuant to BLM criteria. (Protest at 5 n.2, 33, and attached maps.) FG did not set forth the criteria or the methodology employed in the modeling or explain how any of the potential habitat was identified, but states that the “[h]abitat modeling was based [on] BLM’s Guidance Criteria for Grazing Effects in BLM.” (Protest at 5 n.2.) BLM Biological Evaluations dated June and September 2000 both refer to interim guidance criteria temporarily (pending results of a study in southern New Mexico) defining parameters of potential aplomado falcon habitat. (SOR Ex. E at 22 and Ex. F at 6.) However, in a March 17, 2003, memorandum in the record, Gary Stephens, a BLM employee with Minerals and Lands, noted the limited utility of the model in the absence of on-the-ground assessment of habitat components:

A model to assist in identifying potential aplomado falcon habitat was developed in cooperation with the Wildlife Coop Unit at New Mexico State University. The falcon model is being used as part of an on-the-ground assessment of habitat potential that will incorporate additional habitat components that can not be addressed using the model by itself. An on-the-ground assessment is necessary to make a determination of habitat potential.

The only probative indication in the present record that any of these parcels contains habitat suitable for the Northern aplomado falcon is that Parcel 200401046 appears to be located within the Hope Study Area, at least some of which was considered by BLM and FWS to provide habitat for the falcon. Plainly, not all the land in the Hope Study Area, encompassing more than 300 square miles, is suitable habitat. BLM acknowledged as much in its October 2003 BA by preserving the option to develop areas within the study area that are “not within habitat suitable for the

falcon.” (BLM’s October 2003 BA at 11-12.) <sup>13/</sup> Appellant has not shown that this parcel contains habitat suitable for the falcon.

Further, we think that BLM has made adequate provision for protecting any T&E species that may later be found to be occupying, or which may later occupy, any of the leased land at issue. In Wyoming Outdoor Council v. Bosworth, 284 F. Supp. 2d 81 (D.D.C. 2003), the Court indicated that BLM’s failure to consult with FWS concerning potential impacts to T&E species would not violate the ESA, as BLM, in deciding to issue the lease, “retained the authority post-lease issuance ‘to condition, and even to deny, a lessee the use of the leased property if required by the ESA,” thus avoiding an irreversible and irretrievable commitment of resources. <sup>14/</sup> Id. at 93 (emphasis added). The Court found such authority in Departmental regulation 43 CFR 3101.1-2, which provides that “[a] lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to \* \* \* restrictions deriving from specific, nondiscretionary statutes[.]” (Emphasis added.) The Court interpreted this reservation as allowing BLM to “impose restrictions required by the ESA, a ‘nondiscretionary statute,’ including those restrictions that could ‘cause a portion of the leased land to be restricted from operational activities or . . . deny access to the leased area without the requirement of a lease stipulation.’” 284 F. Supp. 2d at 91. The regulation is equally applicable here. <sup>15/</sup>

<sup>13/</sup> BLM contemplated issuing leases on such parcels with only standard terms and conditions, but requiring “decreased disturbance from pad construction and reclamation.” Id. We note that it is not clear from the record how BLM implemented that requirement in connection with Parcel 200401046. Although BLM imposed four stipulations on lease NMNM-111517, none appears directed toward that goal.

<sup>14/</sup> By contrast, referencing Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), the Court suggested no departure from the rule that a BLM decision to issue a lease without “retain[ing] its authority to preclude all surface-disturbing activities after lease issuance” would violate section 102(2)(C) of NEPA, as BLM would have failed to address the potential impacts of oil and gas development prior to irreversibly and irretrievably committing resources. Id. at 92.

<sup>15/</sup> Section 6 of the standard lease terms appears to enforce that authority: “If in the conduct of operations, threatened or endangered species \* \* \* are observed, lessee shall immediately contact lessor. Lessee shall cease any operations that would result in the destruction of such species or objects.” We note that one of the leases at issue, NMNM-111516, incorporated a “Lease Notice” (SENM-LN-3 (February 1992)), entitled “Protection of Endangered or Threatened or Sensitive Species,” which provides that a “restriction to the lessee’s proposal or even denial of any beneficial

(continued...)

The Bosworth Court's holding that issuance of an oil and gas lease does not, by itself, authorize activity that could jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat formed the basis for its ultimate conclusion that the plaintiffs' claim that BLM had violated section 7 of the ESA by failing to consult with FWS prior to lease issuance was not ripe for review. However, we find persuasive the Court's interpretation of BLM's section 7 pre-lease obligations and its conclusion that BLM may, after lease issuance, restrict or even preclude any oil and gas activity where, based on consultation with FWS, it determines that the proposed activity is likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. Further, BLM will have ample opportunity to determine whether any surface-disturbing activity is likely to do so, since the approval of any APD or other such activity will be subject to further environmental review, and, if necessary, consultation with FWS, pursuant to section 7 of the ESA, before any such approval is given. See, e.g., Deganawidah-Quetzalcoatl University, 164 IBLA 155, 163-64 (2004).

[2] We turn to FG's contention that BLM violated section 102(2)(C) of NEPA. FG argues that, in the absence of an NSO stipulation or other preclusion of surface-disturbing activity, BLM's decision to offer the parcels at issue for oil and gas leasing triggers the requirement to prepare an EA or EIS addressing the potential site-specific impacts of oil and gas development. It asserts that BLM failed to undertake such environmental review specifically in connection with the proposed lease sale and instead unjustifiably relied on an outdated EIS prepared in connection with the Carlsbad and Roswell RMP and RMP Amendment, because "significant new information" has become available in the last 7 years that shows that leasing the parcels at issue will affect the quality of the human environment in a significant manner or to a significant extent not already considered. (SOR at 22.) FG argues that, with the advent of new information concerning the presence of two T&E species (the Northern aplomado falcon and the black-footed ferret) in the lease area and the potential for adverse impacts, BLM is required to prepare an EA or EIS considering the new information and that, having failed to do so, BLM violated section 102(2)(C) of NEPA.

It is well established in the NEPA context that the decision to issue an oil and gas lease that does not contain an NSO stipulation or otherwise preclude all surface-disturbing activity constitutes the point of irreversible and irretrievable commitment to drilling and other oil and gas activity somewhere, at some time, and in some manner within the leased area. BLM is thus required by section 102(2)(C) of

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<sup>15/</sup> (...continued)

use of the lease may result" when it is determined that a proposed surface-disturbing activity may detrimentally affect a T&E species.

NEPA to fully evaluate the potential environmental ramifications of such activity before deciding whether to lease. Wyoming Outdoor Council, 159 IBLA 388, 401-02 (2003), and cases cited. Where BLM does so in an EIS, the adequacy of the EIS under section 102(2)(C) of NEPA must be judged by whether it constituted a “detailed statement” that took a “hard look” at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (2000); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Center for Biological Diversity, 162 IBLA 268, 275 (2004), and cases cited.

An EIS must generally fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that BLM, in exercising the substantive discretion afforded it here to decide whether to offer lands for oil and gas leasing pursuant to the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (2000), is fully informed regarding the environmental consequences of such action. 40 CFR 1500.1(b) and (c); Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1285-86 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987). In deciding whether an EIS promotes informed decisionmaking, it is well settled that a “rule of reason” will be employed. As the court stated in County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978):

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The critical question is whether the EIS contains a “reasonably thorough discussion of the significant aspects of the probable environmental consequence” of the proposed action and alternatives thereto. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982); Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). In order to overcome BLM’s decision to offer the lands at issue for oil and gas leasing following preparation of the EIS, FG must carry its burden to demonstrate by a preponderance of the evidence with objective proof that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. Colorado Environmental Coalition, 142 IBLA 49, 52 (1997).

Further, where, following preparation of an EIS, there arise “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” the EIS must be supplemented. 40 CFR 1502.9(c). As the Supreme Court stated in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74 (1989):

[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. \* \* \* Application of the “rule of reason” \* \* \* turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: \* \* \* [I]f the new information is sufficient to show that the remaining action will “affec[t] the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. [Footnotes omitted; emphasis added.]

See State of Wisconsin v. Weinberger, 745 F.2d 412, 418, 420 (7th Cir. 1984) (A supplemental EIS is required when the new information presents “a seriously different picture of the likely environmental consequences of the proposed action not adequately envisioned by the original EIS”); Wyoming Outdoor Council, 159 IBLA at 410.

We do not think that FG has carried its burden to demonstrate that new information has arisen since the RMP/RMP Amendment EIS was prepared that establishes, or even indicates, that oil and gas leasing providing for development of the parcels at issue “will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered[.]”<sup>16/</sup> Marsh v. Oregon Natural Resources Council, 490 U.S. at 374; see, e.g., Colorado Environmental Coalition, 149 IBLA 154, 159 (1999). The new information cited by FG is limited to the asserted presence of listed species on the lots in question. As noted above, FG has failed to show that any of the those species are present within any of the eight parcels at issue, or even that the land is suitable for their occupancy. Most importantly, whether they are present or the land simply contains suitable habitat, FG presented no evidence that any of these species is likely to be affected in a significant manner or to a significant extent which has not already been considered

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<sup>16/</sup> FG also argues that “[b]ecause BLM has failed to conduct a NEPA analysis—either an environmental assessment or environmental impact statement—it has failed to consider a range of reasonable alternatives.” (Petition for Stay at 16.) BLM’s “NEPA analysis” is found in the RMP/RMP Amendment EIS, which contains the requisite range of alternatives to oil and gas leasing.

by BLM and FWS in the RMP/RMP Amendment EIS and associated BAs and BOs. Nor do we think that FG has established that there is even “a substantial likelihood of impacts to listed species.”<sup>17/</sup> (SOR at 25.)

Finally, FG states that BLM was required to address potential cumulative impacts to T&E species because “there are already over 2,000 oil and gas” well pads, both active and abandoned, within potential habitat of the endangered [Northern] aplomado falcon.” (SOR at 24; Protest at 6.) BLM is required by section 102(2)(C) of NEPA to consider the potential cumulative impacts of a proposed action, together with any other past, present, and reasonably foreseeable future actions. 40 CFR 1508.7; see Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 623 (10th Cir. 1987); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff’d, Keck v. Hastey, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). However, FG does not offer any evidence that oil and gas development of the eight parcels and any other lands is likely, by reason of some interaction owing to geographic proximity or other factor, to have an enhanced or modified effect on the falcon or any other T&E species, or indeed any aspect of the environment, which was not previously considered. FG has thus failed to demonstrate that BLM did not consider a potential cumulative impact, in violation of section 102(2)(C) of NEPA. Wyoming Outdoor Council, 159 IBLA at 406-07.

We therefore conclude that BLM, having found no violation of section 7 of the ESA or section 102(2)(C) of NEPA, properly denied FG’s protest against the inclusion of the eight parcels 200401045 through 200401047, 200401053, 200401061, 200401064, 200401066, and 200401067, in the January 2004 competitive oil and gas lease sale.

To the extent not explicitly addressed herein, FG’s arguments have been considered and rejected.

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<sup>17/</sup> FG argues that site-specific impacts could not have been addressed in the RMP/RMP Amendment EIS given the brevity of the discussion, which is only 14 pages long, despite its coverage of some 3.6 million Federal surface and subsurface acres and an additional 10 million subsurface acres. (Protest at 19.) We find no evidence that BLM overlooked any site-specific impact which might have justified, at the leasing stage, precluding surface occupancy or otherwise restricting surface-disturbing activity, and thus which should have been considered at that stage of potential oil and gas development.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge