

FOREST GUARDIANS

IBLA 2004-271

Decided September 29, 2006

Appeal from a decision issued by the New Mexico State Office, Bureau of Land Management, denying a protest to the offering of parcels at a competitive oil and gas lease sale.

Affirmed.

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

BLM is not required to initiate or reinitiate consultation with the U.S. 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 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. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Competitive Leases

A BLM decision dismissing a protest challenging a competitive oil and gas lease sale will be affirmed when the record shows that existing environmental documentation provided BLM with a hard look at the environmental consequences of leasing, supporting the conclusion that the impacts from exploration and development of coalbed methane would not be

significantly different than those associated with conventional oil and gas exploration and development.

APPEARANCES: Nicole J. Rosmarino, Santa Fe, New Mexico, for appellant; Dale Pontius, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Forest Guardians has appealed from the May 27, 2004, decision issued by the Deputy State Director, Minerals and Lands, New Mexico State Office, Bureau of Land Management (BLM), denying its protest to the inclusion of certain parcels, as identified below, in BLM's April 21, 2004, competitive oil and gas lease sale. For the reasons set forth herein, we dismiss Forest Guardians' appeal as to one parcel and affirm BLM's decision for the remaining parcels.

On April 20, 2004, Forest Guardians protested the inclusion of 57 parcels in the April 21, 2004, competitive oil and gas lease sale held by the New Mexico State Office, BLM. BLM removed three of the disputed parcels prior to the sale. BLM included the remaining 54 parcels in the sale but refrained from issuing leases on the parcels until after it had reached its decisions on the merits of Forest Guardians' protest.^{1/} On May 27, 2004, the Deputy State Director dismissed appellant's protest as to seven parcels within BLM's Farmington, Phoenix, and Oklahoma planning areas, and within the Cimarron National Grassland in Kansas,^{2/} and continued to withhold lease issuance for the remaining 47 parcels. (Decision at 1.) Forest Guardians had claimed that three of those seven parcels contain habitat for the Gunnison's prairie dog and that three parcels overlap potential habitat for the lesser prairie chicken. The Deputy State Director issued a second decision on June 18, 2004, dismissing Forest Guardians' protest as to 46 parcels and removing parcel 060(NM) from the

^{1/} BLM assigned each parcel a nine-digit number in which the first six digits, "200404," identified the sale, and the last three digits identified the parcel within the sale. We will refer to the parcels by the last three digits of their parcel numbers and their state of location, *i.e.*, parcel 200404004 in Kansas would be 004(KS).

^{2/} The seven parcels are: Parcels 001(AZ), 002(AZ), 004(KS), 005(NM), 010(NM), 079(OK), and 080(OK). Parcel 004(KS) is located on lands within the Cimarron National Grassland, which is administered by the Forest Service, U.S. Department of Agriculture.

sale. BLM issued the leases between May and July 2004, with effective dates of June 1, 2004, and July 1, 2004.

Forest Guardians separately appealed each dismissal. The appeal from the May 27, 2004, decision was docketed by the Board as IBLA 2004-271, and the appeal from the June 18, 2004, decision was docketed as IBLA 2004-281. On August 27, 2004, the Board issued an order consolidating the appeals sua sponte for purposes of deciding Forest Guardians' stay request, which the Board denied. We also dismissed the appeal as to 001(AZ) and 002(AZ) for lack of standing.^{3/} In this decision we address only the merits of Forest Guardians' appeal docketed as IBLA 2004-271.^{4/}

On appeal, Forest Guardians asks the Board to “[v]oid the disputed lease sales,” and to determine that BLM violated section 7 of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. § 1536 (2000), and implementing regulations, by failing to initiate or reinstate consultation with the U.S. Fish and Wildlife Service (FWS) before deciding to offer the parcels for lease sale. (Statement of Reasons (SOR) at 22.) Specifically, appellant argues that BLM must consult at the lease sale stage on impacts to two listed species, the bald eagle (Haliaeetus leucocephalus) and the black-footed ferret (Mustela nigripes), and to other species, including the lesser prairie chicken (Typanuchus pallidicinctus), the black-tailed prairie dog (Cynomys ludovicianus), and the Gunnison's prairie dog (Cynomys gunnisoni).^{5/} Appellant

^{3/} After we issued our Aug. 27, 2004, Order, Forest Guardians submitted a motion requesting that we reconsider our decision dismissing the appeal as to parcels 001(AZ) and 002(AZ). Attached to the motion are declarations from two of its members which had been “inadvertently omitted” from their original exhibits in support of standing. We decline to reconsider our decision as to these parcels because Forest Guardians has not established that extraordinary circumstances exist to explain why these declarations were not timely submitted. Cf. Ulf T. Teigen (On Reconsideration), 159 IBLA 142, 144 (2003). We note, however, that the declarations provided for these parcels do not allege actual use of the parcels and thus would not likely support standing if we did reconsider our decision.

^{4/} The five parcels remaining in the present appeal are 004(KS), 005(NM), 010(NM), 079(OK), and 080(OK).

^{5/} A “candidate species” is one considered “for listing as an endangered or threatened species, but not yet the subject of a proposed rule.” 50 CFR 424.02(b). It is not afforded the protections of section 7(a)(2) of the ESA, and, unlike a proposed species, is not the subject of the ESA conferencing provision in section 7(a)(4). At the time of the lease sale, the black-tailed prairie dog was a candidate species.

(continued...)

also argues that BLM violated section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), by failing to prepare an Environmental Impact Statement (EIS) prior to leasing the parcels, relying instead on allegedly out-dated analyses prepared in connection with outstanding land-use plans.^{5/} Forest Guardians bases its argument upon “significant new information [which] has emerged that was not previously considered” since BLM’s last consultation under the ESA and earlier NEPA analyses for the land use documents. (SOR at 3.)

BLM analyzed the potential environmental impacts of oil and gas leasing on the lands at issue in environmental documents that were prepared in connection with the promulgation of applicable land-use plans, including the 1994 Oklahoma Resource Management Plan (RMP), the 2003 Farmington RMP, and the 1992 Forest Plan Amendment 23 to the Land and Resource Management Plan for the Pike and San Isabel National Forests and Comanche and Cimarron National Grasslands, Morton and Stevens Counties, Kansas (Forest Plan Amendment 23), prepared by the

^{5/} (...continued)

Shortly after the lease sale, however, the FWS published a finding for the resubmitted 12-month petition for the black-tailed prairie dog, stating that “proposing a rule to list the species is not warranted,” because the species “is not likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Therefore, the black-tailed prairie dog is no longer a candidate species. 69 FR 51217 (Aug. 18, 2004). On Feb. 23, 2004, Forest Guardians and 73 other organizations filed a petition to list the Gunnison’s prairie dog. The FWS issued a “notice of 90-day petition finding,” denying the petition to list because “the petition does not present substantial scientific and commercial data indicating that listing the Gunnison’s prairie dog may be warranted.” 71 FR 6241 (Feb. 7, 2006). Therefore, the Gunnison’s prairie dog also is not a candidate, proposed or listed species. Subsequent to the lease sale, the lesser prairie chicken became a candidate species and remains so today. 71 FR 53756 (Sept. 12, 2006).

^{6/} In addition, appellants assert that BLM violated its own guidance at BLM Manual Section 6840.06C (regarding candidate species), the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1732(a) (2000) (by failing to conform the leasing decision to the applicable land use management plans), and the National Forest Management Act of 1976, as amended, 16 U.S.C. §§ 1600 et seq. (2000) (by failing to ensure the maintenance of viable populations of native vertebrates).

Forest Service.^{7/} In developing these land use documents, BLM and the Forest Service prepared related EISs addressing approximately 8,818,000 acres of Federal surface and/or mineral estates. In addition, BLM prepared biological assessments (BAs) and conducted section 7 consultations with the FWS, as required by the ESA, on all applicable species and critical habitat that may be affected.^{8/}

More specifically, in the Draft EIS supporting the Oklahoma RMP, BLM analyzed four management alternatives for oil and gas leasing in the resource area, considering various restrictions on leasing for different lands. See, e.g., Oklahoma Draft EIS at S-3, summarizing the varying impacts anticipated as a result of the different alternatives. Under the Preferred Alternative, which was adopted in the RMP, BLM estimated the number of wells drilled or to be drilled, using projections for Reasonably Foreseeable Development (RFD) over 20 years, and estimated that 85 acres would be disturbed each year, with an anticipated total of 900 acres to be disturbed by 2010. In 1994, the New Mexico State Office approved the Oklahoma RMP, adopting the Preferred Alternative, which would use a “balanced approach” of allowing mineral exploration subject to site-specific stipulations designed for environmental protection.

There are no listed species at issue in this appeal in connection with the Oklahoma parcels. In 1993, as part of an informal consultation process with FWS, BLM prepared an “Evaluation of Special Status Species” which served as BLM’s BA. BLM concluded that the Preferred Alternative was likely to have no effect on any of the listed or candidate species listed in Table 3-2 of the Draft EIS with the use of leasing stipulations, lease notices, impact assessments, and agency coordination prior to site-specific Federal actions. (Oklahoma Draft EIS at 5-1.) FWS concurred with BLM’s “no effect” determination by letter dated July 14, 2003. (Final EIS at 5-53.) Therefore, BLM did not initiate formal consultation under section 7 of the ESA.

In the Farmington Draft and Final EISs, BLM analyzed in depth four management alternatives for the resource area, considering various restrictions on

^{7/} With its Record of Decision (ROD) dated Feb. 11, 1992, the New Mexico State Office, BLM, approved and concurred in Forest Plan Amendment 23 and the related Final EIS and planning review for oil and gas leasing within Morton and Stevens Counties, Kansas.

^{8/} The Forest Service followed a similar procedure, discussed infra, when it adopted Forest Plan Amendment 23, which governs parcel 004(KS). It did not consult with FWS when drafting Amendment 23 because it determined that there were no listed species in the planning area.

leasing for different lands. See, e.g., Final EIS at 2-29 through 2-253. BLM estimated the number of wells drilled or to be drilled, using projections for RFD to estimate that 18,577 net acres, after reclamation, would be disturbed in a 20-year period under the Selected Alternative. (Final EIS at 4-5.) On September 29, 2003, the New Mexico State Director approved the Farmington RMP, adopting Alternative D which would manage oil and gas leasing with a “balanced approach,” providing for 9,942 wells under certain lease restrictions.

In 2002, BLM prepared a BA in which it evaluated the biological effects of the Farmington RMP. BLM concluded that the Preferred Alternative may affect, but is not likely to adversely affect, the bald eagle, because no new oil and gas wells or accompanying development would be authorized in the Bald Eagle Area of Critical Environmental Concern, and construction in buffer areas would be strongly discouraged. On October 2, 2002, FWS concurred with BLM’s “may affect, not likely to adversely affect” determination regarding several species, including the bald eagle. (Farmington ROD for Farmington RMP and EIS at 18.)^{9/}

In the Final Oil and Gas Leasing EIS for the Pike and San Isabel National Forests and Comanche and Cimarron National Grasslands, the Forest Service analyzed four management alternatives for each resource area, considering various restrictions on leasing for different lands. See, e.g., Final EIS at II-1 through II-37. In consultation with BLM, the Forest Service estimated the number of wells drilled or to be drilled in the Cimarron National Grassland, using projections for RFD that predicted 11 production wells per year over the next 15 years for a total of 165 wells, with an estimated 394 total acres of disturbance. In February 1992, the Forest Supervisor approved Forest Plan Amendment 23, which specifically addressed oil and gas leasing policy on these four Forest Service resource areas. The Forest Service adopted Alternative III, which would make Forest Service lands in the four resource areas available for leasing with both standard and stipulated lease terms, while removing 100,271 acres from leasing. The Final EIS includes a letter from the Office of Environmental Affairs, U.S. Department of the Interior, which comments on the treatment of wildlife in the Final EIS and encourages future consultation under section 7 of the ESA, as appropriate. (Final EIS at VI-37.) The Forest Service did not find evidence of listed species in the resource area. (Final EIS at III-81; III-104.)^{10/}

^{9/} As discussed below, Forest Guardians also protested BLM’s leasing of this parcel due to the effect on the Gunnison’s prairie dog, which is not a listed, proposed, or candidate species.

^{10/} The impact of oil and gas leasing on air quality was reviewed in the Oklahoma (continued...)

Before addressing the merits of Forest Guardians' appeal, we will consider BLM's motion to dismiss the appeal as to parcel 005(NM). For good cause shown, we grant that motion.

In its protest to the State Director, Forest Guardians protested the inclusion of the Taos parcel, parcel 005(NM), in the lease sale but did not state the basis for its protest as to this parcel. In its petition for stay, Forest Guardians argued that parcel 005(NM) should be removed from the sale because it may contain habitat for the Gunnison's prairie dog, and because it believes the parcel is located in the Rio Chama Wilderness Study Area.^{10/} We do not reach these issues, as Forest Guardians did not raise them in its protest to the State Director. Grynberg Petroleum Co., 137 IBLA 76, 79 (1996); Henry A. Alker, 62 IBLA 211, 212 (1982); cf. Southern Utah Wilderness Alliance (SUWA), 128 IBLA 52, 59 (1993) (holding that "the Board may limit its review of an SDR [State Director Review] decision to allegations of error in the disposition of the issues presented during SDR"). Since Forest Guardians has not presented any arguments with respect to parcel 005(NM) that were properly raised in its protest to the State Director, we dismiss the appeal as to this parcel.

[1] We start with Forest Guardians' argument that BLM violated section 7 of the ESA by offering the parcels for lease. Section 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (2000), imposes a substantive obligation on each Federal agency, in consultation with and with the assistance of the Secretary, "to insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered * * * or threatened [or

^{10/} (...continued)

Draft and Final EISs, the Farmington Proposed RMP Draft and Final EISs, and the Final Oil and Gas Leasing EIS for the Pike and San Isabel National Forests and Comanche and Cimarron National Grasslands prepared in connection with the Oklahoma RMP, the Farmington RMP, and Forest Plan Amendment 23. See, e.g., Pike and San Isabel National Forests and Comanche and Cimarron National Grasslands Oil and Gas Leasing Final EIS (1991) at III-7, IV-105; Oklahoma Proposed RMP/Final EIS (1993) at S-3, 3-1, 4-4 through 4-5; and Farmington Proposed RMP/Final EIS (2003) at 2-11 through 2-12, 3-48 through 3-53, 4-16 through 4-19, 4-58 through 4-70, 4-89 through 4-91, 4-108 through 4-110, and 4-124.

^{11/} Although appellant cites the potential presence of the Gunnison's prairie dog as the basis for the appeal as to this parcel, it does not identify 005(NM) as within the range of the species and cites only the proximity of the parcel to the Rio Chama Wilderness Study Area as the basis of the appeal for parcel 005(NM). (SOR at 2-3.)

listed ^{12/} species or result in the destruction or adverse modification of habitat of such species * * *.” See, e.g., Southern Utah Wilderness Association v. Smith, 110 F.3d 724, 728 (10th Cir. 1997).

The various consultation mechanisms adopted in the regulations, including early consultation, preparation of BAs, and appropriate informal and formal consultations, assist agencies in assessing a Federal action’s impact on listed species and critical habitat. Where a listed species may be present in the area of a proposed action, BLM must prepare a BA, which may occur as part of a NEPA review (50 CFR 402.06(a)), 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 whether formal consultation with the FWS is required. 50 CFR 402.12(a); see 16 U.S.C. § 1536(c)(1) (2000); 50 CFR 401.12(f); Enos v. Marsh, 769 F.2d 1363, 1368 (9th Cir. 1985); Native Ecosystems Council, 160 IBLA 288, 298 (2004); Save Medicine Lake Coalition, 156 IBLA 219, 258 (2002), aff’d sub nom. Pit River Tribe v. BLM, 306 F. Supp. 2d 929 (E.D. Cal. 2004).

When the BA indicates that a proposed action may affect, and is likely to adversely affect, a listed species or critical habitat, or the consulting agency declines to concur in a no adverse effect determination, the action agency must initiate formal consultation. 16 U.S.C. § 1536(a)(3); 50 CFR 402.14; Natural Resources Defense Council v. Houston, 146 F.3d at 1118, 1125 (9th Cir. 1998); Enos v. Marsh, 769 F.2d at 1368; Umpqua Watersheds, Inc., 158 IBLA 62, 81 (2002). ^{13/} Formal consultation is not required, however, 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 listed species. 50 CFR 402.12(k), 402.13(a), and 402.14(b)(1); Natural Resources Defense Council v. Houston,

^{12/} “Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11-17.12.” 50 CFR 402.02.

^{13/} If the action agency determines that the proposed action is likely to jeopardize the continued existence of a proposed species or result in the destruction or adverse modification of critical habitat proposed to be designated for such species, the agency must “confer” with the Secretary. 16 U.S.C. § 1536(a)(4) (2000). The ESA does not impose additional requirements upon Federal agencies regarding proposed species following the conferencing process.

146 F.3d at 1126; In re Big Deal Timber Sale, 165 IBLA 18, 32 (2005).^{14/} Formal consultation concludes with the issuance of a Biological Opinion, which contains a determination by FWS as to whether the proposed action is likely to jeopardize the continued existence of the species, or is likely to destroy or adversely modify its critical habitat, and which contains, in the case of a jeopardy determination, reasonable and prudent alternatives which BLM may take to avoid violating its substantive obligations under section 7(a)(2) of the ESA. 16 U.S.C. § 1536(b); 50 CFR 402.02, 402.14(h) and (l).^{15/}

A land management agency must reinitiate consultation when, inter alia, a new species is listed or critical habitat is designated that may be affected by the action, or a specific action is proposed that is likely to affect a listed species present in the area in a manner or to an extent not previously considered. 50 CFR 402.16; Wyoming Outdoor Council v. Bosworth (Bosworth), 284 F. Supp. 2d 81, 94 (D.D.C. 2003).

Forest Guardians alleges generally that “[a]t least 6 of the 7 disputed parcels contain habitat for which new scientific data indicates suitability for and/or occupation by federally listed endangered species or candidate species for [ESA] listing.” (SOR at 2.) There are two listed species at issue in this appeal, the black-footed ferret and the bald eagle. Forest Guardians avers that parcel 004(KS) is located in the Cimarron National Grassland, where black-tailed prairie dog colonies are known to exist. (SOR at 3.). On appeal, Forest Guardians states that “[t]he fates of prairie dogs and the listed black-footed ferret are inextricably linked. The ferret’s natural habitat is aggregations of prairie dog colonies in large complexes.” (SOR at 3.)^{16/} However, our review of the record discloses no evidence showing the

^{14/} Moreover, if an action agency determines that the proposed action will have no effect–beneficial or adverse–formal consultation is not required.

^{15/} After initiation of formal consultation for a listed species, the action agency and the permit or license applicant, “shall not make any irreversible or irretrievable commitment of resources * * * which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d). The ESA does not provide a similar limitation on the commitment of resources during agency conferencing over proposed actions that are likely to jeopardize the continued existence of any proposed species.

^{16/} Forest Guardians states that since BLM’s NEPA analyses for the RMPs and Forest Plan Amendment, “significant new information has emerged that was not previously
(continued,,,)”

presence of black-tailed prairie dog colonies or the existence of black-footed ferrets on 004(KS) or on any of the remaining four parcels. This is understandable since, in the course of preparing the Final EIS for Forest Plan Amendment 23, the Forest Service also could not establish the presence of black-footed ferrets in the planning area. (Final EIS at III-81, III-104.) Forest Guardians also claims that parcel 010(NM) is within the range of the Gunnison's prairie dog, which they and 71 co-petitioners petitioned for listing on February 23, 2004. (SOR at 3.) Forest Guardians contends that “[p]rior to offering the disputed parcels for lease, these parcels [004(KS) and 010(NM)] should be assessed for prairie dog habitat and potential black-footed ferret occupancy.” *Id.* The record does not substantiate Forest Guardians’ assertion that black-footed ferrets, black-tailed prairie dogs, Gunnison’s prairie dogs or prairie dog colonies are present on any of the disputed parcels. *See Forest Guardians*, 170 IBLA 80, 91 (2006); *SUWA*, 158 IBLA 212, 216 (2003). We conclude, therefore, that Forest Guardians has not shown that BLM was required to initiate or reinstate consultation with FWS before leasing these parcels.

Forest Guardians also states that “[t]here is no evidence that BLM conducted site-specific, up-to-date analysis of the impacts of leasing the 7 disputed parcels on * * * the bald eagle.” (SOR at 10.) BLM concedes that “[t]he bald eagle is present seasonally in the vicinity of parcel [010(NM)] in San Juan County, New Mexico.” However, as explained in connection with parcel 010(NM), BLM prepared a BA on the potential impacts on the bald eagle. The FWS concurred in BLM’s “may effect, not likely to adversely affect” finding. Furthermore, BLM placed a number of stipulations on the leases to protect eagles during their nesting season. (Answer at 14.) Our review of BLM’s Notice of Competitive Lease Sale for Parcel 010(NM) confirms this statement. (Lease Sale Notice at 3; 35 (F-3-Timing Limitation Stipulation (TLS) for critical bald eagle areas); 36 (F-4-TLS for important seasonal wildlife habitat); 37 (F-10-no surface occupancy (NSO) for Negro Canyon Special Management Area for certain acreage); and 44 (F-37-Right-of-Way (ROW) notice for Negro Canyon).)

^{16/} (...continued)

considered” and then states that in February 2000, the black-tailed prairie dog was determined to warrant ESA listing. (SOR at 3.) As noted above, section 7(a)(2) of the ESA establishes an affirmative consultation requirement in connection with listed species that does not apply to candidate species. We note also that, shortly after Forest Guardians filed its SOR, the FWS announced that there was no substantial scientific information indicating that the black-tailed prairie dog warranted listing, and therefore the species was no longer a candidate species. 69 FR 51217 (Aug. 18, 2004).

Moreover, in addressing a similar issue in Forest Guardians, supra, the Board stated:

[W]e think that BLM has made adequate provision for protecting any [listed] 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 [listed] 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. 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. [Footnotes omitted.]

170 IBLA at 93.

Likewise, in the present appeal, BLM noted that section 7 consultation would be initiated in the future if site-specific proposals may affect listed species and has stated that additional stipulations and specific mitigation measures may be applied. (Final EIS at VI-37; BLM's Decision at 4.) ^{17/} Should future information indicate that

^{17/} Indeed, the lease term, WO-ESA 7, "Endangered Species Act Section 7 Consultation Stipulation," notifies lessees that BLM "may recommend modifications to exploration and development proposals to further its conservation and management objective to avoid BLM-approved activity that will contribute to a need to list such a [listed or other special status species] or their habitat. BLM may require modifications to or disapprove proposed activity that is likely to result in jeopardy to
(continued...)

the black-footed ferret is present on these parcels or that additional measures are necessary to protect any listed species or critical habitat, BLM has retained sufficient authority pursuant to 43 CFR 3101.1-2 to restrict any development, if required by the ESA. Bosworth, 284 F. Supp. 2d at 91.

With regard to the lesser prairie chicken, Forest Guardians alleges that “[i]nformation since the [lesser prairie chicken] was designated a candidate in 1998 has demonstrated lesser prairie chickens to be in decline in all five states within their historic range (CO, KS, NM, OK, TX).” (SOR at 4.) Forest Guardians asserts that “[i]n Kansas, roadside lek surveys have exhibited downward trends from 1964-1998,” and that “[w]hile there was a slight recovery from 1998-2001, there were subsequent population declines in 2002 and 2003.” They aver that in Oklahoma, the State wildlife agency in 2002 reported that, “[a] summary of data collected to date illustrates an alarming downward trend in population indices in all counties.” (SOR at 5 (footnotes omitted.)) However, regarding the particular leases at issue in this appeal, Forest Guardians alleges only that parcels 004(KS) and 079-80(OK) contain “potential” lesser prairie chicken habitat and that BLM’s consideration of the environmental impacts of leasing on the lesser prairie chicken was inadequate, given that it was declared a candidate species in 1998. (SOR at 5.) In stating that BLM has failed to provide “a rational connection” between evidence on the lesser prairie chicken and BLM’s “failure to reinitiate consultation,” (SOR at 10), Forest Guardians is mistaken in the apparent belief that the regulations implementing the ESA provide for the initiation and reinitiation of consultation in connection with candidate species. And, while BLM’s Manual at Section 6840.06C instructs BLM to ensure that its actions “do not contribute to the need for the [candidate] species to be listed,” Forest Guardians has provided no evidence to support a claim that BLM’s decision to lease Parcels 004(KS) and 079(OK) will contribute to such need. ^{18/} To the contrary,

^{17/} (...continued)

the continued existence of a proposed or listed * * * species or result in the destruction or adverse modification of a designated or proposed critical habitat. BLM will not approve any ground-disturbing activity that may affect any such species or critical habitat until it completes its obligations under applicable requirements of the [ESA], including completion of any required procedure for conference or consultation.” (Lease Sale Notice at 74.)

^{18/} Unlike the regulations, the BLM Manual is not binding on this Board or the public. Nevertheless, we have held that BLM is responsible for following its own guidance. Fallini v. BLM, 162 IBLA 10, 38 (2004); U.S. v. Kaycee Bentonite Corp., 64 IBLA 183, 214, 89 I.D. 262, 279 (1982).

the record shows that both the Forest Service and BLM considered impacts to the lesser prairie chicken during the land use planning and the lease sale stages.

The Final EIS for the Pike and San Isabel National Forest describes the breeding season of the lesser prairie chicken as ranging from mid-March to early June and states that “any activity during this period could have a significant impact on prairie chickens.” (Final EIS at IV-73.) The Final EIS suggested that a timing stipulation be attached to leases in areas including lesser prairie chicken dancing grounds and nesting areas. (Final EIS at A-18 through A-19.) Similarly, in preparing the Draft EIS for the Oklahoma RMP, BLM noted “concern over the potential adverse impacts that oil and gas development could have on roost sites for wild turkeys and prairie chickens while on their leks.” (Draft EIS at 3-13 and 3-14.) At the lease sale stage, BLM reviewed the parcels proposed for leasing, and imposed SENM-S-22, a seasonal limitation stipulation, for the period of March 15 through June 15 each year, to protect lesser prairie chicken habitat on appropriate leases. (Lease Sale Notice at 14, 16, 17, 18, 71.) We conclude, therefore, that Forest Guardians has not shown that BLM was required to initiate or reinstate consultation with FWS in connection with the lesser prairie chicken before leasing Parcels 004(KS) and 079(OK).

[2] BLM did not complete an EA or an EIS specifically in connection with its decision to include the remaining four parcels in the April 2004 lease sale.^{19/} Instead, each field office completed a Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) worksheet for the parcels in the sale within its jurisdiction. These worksheets document BLM’s reliance on existing environmental analyses which it believes adequately analyze the environmental effects of the proposed actions. Wyoming Outdoor Council (WOC), 170 IBLA 130, 146 (2006); Coalition of Concerned National Park Service Retirees, 169 IBLA 366, 369-70 (2006). We discussed BLM’s use of DNAs in Coalition of Concerned National Park Service Retirees, in which we reaffirmed that DNAs are an acceptable method for BLM to assess existing environmental analysis but may not be used to supplement existing environmental analysis or address site-specific environmental effects not previously considered. 169 IBLA at 370. In the present case, BLM adopted Forest Plan Amendment 23 and the Final EIS as the land use planning document for oil and gas leasing decisions in the areas covered in a ROD dated February 1, 1992. The Forest Service confirmed and updated its consent in a NEPA Validation and Verification Form (NEPA V & V), a form equivalent to BLM’s DNA, completed for the parcels.

^{19/} Parcel 004(KS) in the Cimarron National Grassland is administered by the Forest Service and is therefore subject to different administrative procedures, discussed above.

The adequacy of the environmental analysis supporting these lease sales, then, is measured by the adequacy of the preexisting environmental analysis, and the appellant's burden of proof is the same as it would be if an EA or an EIS were prepared for the proposed action. See WOC, 170 IBLA at 148-49. Forest Guardians asserts that the lease sales are based on "generally outdated RMPs" and for support, noting that at the time of the lease sale, Forest Plan Amendment 23 was 12 years old and the Oklahoma RMP was 10 years old (noting, however, that the Farmington RMP was only one-year old). (SOR at 19.)

Forest Guardians further emphasizes that one of the leases under appeal, 010(NM), approved for oil and gas leasing in the Farmington RMP, has high potential for coalbed methane (CBM), and alleges that there are "significant environmental consequences" from CBM development. (SOR at 19.) Forest Guardians requests the Board "to find [that] BLM's lease sales in this case violated NEPA by failing to initiate an environmental assessment to evaluate the impacts of lease issuance on the 7 disputed parcels." (SOR at 19.) We decline.

BLM agrees that only one of the leases under appeal, 010(NM), is considered to have any potential for CBM. (Answer at 11.) Our review of the Farmington EIS showed that it contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequence" of the proposed action and alternatives thereto. Forest Guardians, 170 IBLA at 95 (quoting State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982).) Throughout most of its analysis, the Farmington RMP discusses gas leasing in general, without differentiating between the kinds of formation from which the gas will be drawn. In one case, however, it does reference technology specific to CBM. See RMP/Final EIS at 2-328. The RMP also includes a discussion of San Juan Basin CBM as it differs from Powder River Basin CBM in Wyoming. (RMP/Final EIS, Appendix L; Preface to the Farmington RMP and Final EIS.) We find this to be evidence that BLM considered the potential impacts from CBM development in the San Juan Basin. Moreover, as BLM explains and the record confirms, the lease for parcel 010(NM) includes NSO stipulations and a timing limitation NSO stipulation on the entire lease from November 1 through March 31 each year, for the protection of wildlife, including bald eagle nesting sites, on all but approximately 80 of the 1,241.85 acres in the parcel. We find that BLM has satisfied the "hard look" test for the leases at issue. BLM plans to undertake additional site-specific NEPA analysis, as necessary, when and if development on the lease is proposed.

Forest Guardians argues, inter alia, that none of the land resource plans at issue in this appeal adequately addresses the cumulative impacts on air quality caused by oil and gas leasing. Our review of the land management plans shows that

each incorporates an analysis of the impact on air quality as well as the overall air quality of the region.^{20/} Appellant has not demonstrated that BLM failed to adequately consider the impact on air quality. See Umpqua Watersheds, Inc., 158 IBLA 62, 73-74 (2002).

In the present appeal, “[w]e do not think that [Forest Guardians] has carried its burden to demonstrate that new information has arisen since [the land use plans and EISs were prepared] that establishes, or even indicates, that oil and gas leasing providing for development of the parcels at issue ‘will affect the quality of the human environment’ in a significant manner or to a significant extent not already considered[.]” Forest Guardians, 170 IBLA at 96, quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989). Forest Guardians has failed to show that BLM violated its NEPA obligations in offering these parcels for lease.

Having found no violation of section 7 of the ESA or section 102(2)(C) of NEPA, we therefore conclude that BLM properly denied Forest Guardians’ protest against the inclusion of the parcels at issue in the April 21, 2004, competitive oil and gas lease sale.

To the extent not explicitly addressed herein, Forest Guardian’s arguments have been carefully and fully considered and rejected.

^{20/} See Pike and San Isabel National Forests and Comanche and Cimarron National Grasslands Oil and Gas Leasing Final EIS (1991) at III-7, IV-105; Oklahoma Proposed RMP/Final EIS (1993) at S-3, 3-1, 4-4 through 4-5; and Farmington Proposed RMP/Final EIS (2003) at 2-11 through 2-12, 3-48 through 3-53, 4-16 through 4-19, 4-58 through 4-70, 4-89 through 4-91, 4-108 through 4-110, and 4-124.

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.

Christina S. Kalavritinos
Administrative Judge

I concur:

James F. Roberts
Administrative Judge