

CENTER FOR NATIVE ECOSYSTEMS

IBLA 2003-352

Decided November 22, 2006

Appeal from decision of the Utah State Office, Bureau of Land Management, denying in part protest against competitive oil and gas lease sale. UT-80654, et al.

Set aside and remanded.

1. Environmental Policy Act--Environmental Quality:  
Environmental Statements--Mineral Leasing Act:  
Environment--National Environmental Policy Act of 1969:  
Environmental Statements--Oil and Gas Leases: Discretion  
to Lease--Oil and Gas Leases: Competitive Leases

Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2000), requires consideration of potential environmental impacts of a proposed action in an environmental impact statement if that action is a “major Federal action significantly affecting the quality of the human environment.” The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public land for oil and gas purposes, because leasing without stipulations requiring no surface occupancy constitutes an irreversible and irretrievable commitment to permit surface-disturbing activity.

2. Environmental Policy Act--Environmental Quality:  
Environmental Statements--Mineral Leasing Act:  
Environment--National Environmental Policy Act of 1969:  
Environmental Statements--Oil and Gas Leases: Discretion  
to Lease--Oil and Gas Leases: Competitive Leases

In considering the potential impacts of oil and gas exploration and development when BLM proposes to lease public lands for oil and gas purposes, BLM may properly

use “Documentation of Land Use Plan Conformance and NEPA Adequacy” worksheets to assess the adequacy of previous NEPA documents. Although BLM may use DNAs to determine whether new NEPA documentation is required, DNAs cannot properly be used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them. Information developed after the last NEPA analysis may be used to determine whether supplemental analysis is required, but it cannot be used as a substitute for a NEPA analysis. When BLM decides on the basis of a DNA not to supplement an existing EIS or EA, its decision must rise or fall on the contents of previously issued NEPA documents.

3. Environmental Policy Act--Environmental Quality:  
Environmental Statements--Mineral Leasing Act:  
Environment--National Environmental Policy Act of 1969:  
Environmental Statements--National Environmental  
Policy Act of 1969: Finding of No Significant Impact--Oil  
and Gas Leases: Discretion to Lease--Oil and Gas Leases:  
Competitive Leases

A finding that impacts of issuing an oil and gas lease would not be significant due to the mitigative effects of a special status species stipulation must be based on NEPA analysis. The stipulation does not provide a basis for deferring an environmental analysis in the absence of an existing NEPA statement that includes an analysis of the mitigative effects of the stipulation.

APPEARANCES: Melinda Harm Benson, Esq., Laramie, Wyoming, for Center for Native Ecosystems; Jared C. Bennett, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Center for Native Ecosystems (CNE) has appealed from a March 17, 2003, decision of the Utah State Office, Bureau of Land Management (BLM), to the extent it denied their protest against 15 parcels in the February 18, 2003, Federal competitive oil and gas lease sale: UT 055, UT 056, UT 058, UT 059, UT 060, UT 061, UT 062, UT 063, UT 094, UT 095, UT 096, UT 097, UT 106, UT 107, and UT 108. These parcels were the subject of CNE's February 3, 2003, protest and are administered by BLM's Vernal Field Office (VFO).

In its protest, CNE argued that the parcels contain important habitat for white-tailed prairie dog colonies that provide potential reintroduction sites for the black-footed ferret. CNE contended that the cited parcels overlie the Shiner and Snake John prairie dog colony subcomplexes of the Coyote Basin.<sup>1/</sup> Parcels UT 055, 056, and 058 through 063 lie within the area covered by the 1994 Resource Area Management Plan/Record of Decision (RMP/ROD) for the Diamond Mountain Resource Area (DMRA) and are associated with the Shiner subcomplex. The Diamond Mountain Resource Management Plan/Environmental Impact Statement (EIS) was issued in 1993. Parcels UT 094 through 097 and 106 through 108 are located within the 1985 Book Cliffs RMP area and are associated with the Snake John subcomplex. CNE contended that the Department has expressly considered use of the two subcomplexes as reintroduction sites for the ferret and that the United States Fish and Wildlife Service (FWS) has explained that impacts possibly resulting from oil and gas leasing activities on those sites would reduce or eliminate their reintroduction potential by having negative consequences on the prairie dog colonies.

CNE requested that BLM not lease the parcels until BLM completed the then-pending Vernal RMP revision and associated EIS (which would include both the Diamond Mountain and Book Cliffs Resource Areas), or otherwise complete a supplemental EIS. BLM denied CNE's protest and thereafter issued leases for the parcels including the following "special status species stipulation"<sup>2/</sup>:

The lease area may now or hereafter contain plants, animals, or their habitats determined to be threatened, endangered, or other special status species. BLM may recommend modifications to exploration and development proposals to further its conservation and management objective to avoid BLM-approved activity that would contribute to a need to list such a species or their habitat. BLM may require modifications to or disapprove proposed activity that is likely to result

<sup>1/</sup> The "Coyote Basin" is a term used to describe a large white-tailed prairie dog complex, or group of subcomplexes, extending from Vernal, Utah, east into Colorado. The precise size and extent of the area described as the Coyote Basin differs depending on the document referenced.

<sup>2/</sup> Section 7(a)(2) of the Endangered Species Act (ESA) requires BLM to consult with 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.

in jeopardy to the continued existence of a proposed or listed threatened or endangered species or result in the destruction or adverse modification of a designated or proposed critical habitat. BLM will not approve any ground disturbing activity until it completes its obligations under applicable requirements of the Endangered Species Act as amended, 16 U.S.C. 1531 et seq., including completion of any required procedure for conference or consultation.

In its Statement of Reasons (SOR), CNE alleges that BLM violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000), in failing to analyze the effects of its actions under the procedural restrictions of that statute, and also under the requirement of the Federal Land Policy and Management Act (FLPMA), as amended, 43 U.S.C. § 1732(a) (2000), that management actions be undertaken “in accordance with” applicable land use plans. We set aside BLM’s decision and remand this case because no existing NEPA document identified by BLM describes the impacts of leasing these parcels on the ferret reintroduction program involving black-footed ferrets and the prairie dog subcomplexes. Although BLM attached a stipulation to the leases for the protection of special status species, BLM has identified no NEPA document containing an analysis of the mitigative effect of that stipulation on the reintroduction program.

### Background

The white-tailed prairie dog (*Cynomys leucurus*) is not listed as threatened or endangered under the ESA, 16 U.S.C. §§ 1531 et seq. (2000). It was not considered a sensitive species at the time of the events surrounding CNE’s protest, though the State of Utah identified it as a species of concern in December 2003, 10 months after the lease sale.<sup>3/</sup> It has long been recognized, however, that prairie dogs are prey, and their towns provide habitat, for threatened, endangered, and sensitive species such as the black-footed ferret, ferruginous hawk, burrowing owl, and mountain plover. See Administrative Record (AR) “NEPA Book” Volume 2, Dec. 16, 2002, Memorandum from Utah Field Supervisor for Ecological Services, FWS, to BLM VFO Manager (Dec. 16, 2002, FWS Memorandum); Johnson County Weed and Pest Control Board, 155 IBLA 98, 102 (2001).

By contrast, the black-footed ferret has been listed as endangered under the

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<sup>3/</sup> The species appears on the Dec. 18, 2003, Utah Sensitive Species List as a “Wildlife Species of Concern.” (Reply, Attachment 1.) This designation was based on the susceptibility of the prairie dog to sylvatic plague and threats from poisoning, grazing, fire suppression, agricultural conversion, urbanization, and oil and gas development. Id. In addition, a petition for ESA listing filed by CNE and others was pending. Id. The petition was later denied. 69 FR 64889 (Nov. 9, 2004).

ESA and predecessor statutes since 1967. 50 CFR 17.11(h). The black-footed ferret is “the rarest mammal in North America, and one of the rarest in the world.” (Cooperative Plan for the Reintroduction and Management of Black-footed Ferrets in Coyote Basin, Utah Department of Wildlife Resources, Sept. 16, 1996 (1996 Cooperative Plan) at 5.) Prairie dog control programs were one important factor in the decline and near extinction of the ferret. Id.

The record reveals that the study of the white-tailed prairie dog in association with ferret habitat has been ongoing for decades, independent of the lease sale at issue in this case. Relevant here, the white-tailed prairie dog has been studied at least since 1982 as a prey species for listed endangered and threatened species, most particularly the ferret. In 1982, Congress amended the ESA by adding section 7(j) to encourage species reintroduction; that provision permits FWS to designate reintroduced populations of a listed species as “experimental,” so as to avoid certain management prescriptions and limitations otherwise imposed for native-born members of such species. 16 U.S.C. § 1536(j) (2000). FWS began to study ferret reintroduction and a Utah Working Group was formed in 1987. By 1991, FWS had successfully reintroduced black-footed ferrets into sites in the State of Wyoming. By 1992, the Utah Working Group proposed reintroduction of the ferret into sites yet to be decided within the Vernal Resource Area.<sup>4/</sup>

Decisions regarding the ferret had direct consequences on BLM’s land management planning process in the Vernal Resource Area. BLM had issued the Book Cliffs RMP/ROD and EIS for a portion of the lands managed by the VFO in the early 1980s. These documents did not address impacts of oil and gas leasing on the prairie dog or on the ferret, even though the Book Cliffs boundary enclosed lands in the historic range of the ferret, apparently because no ferrets had been found there for some time. In its single reference to the prairie dog, the Book Cliffs EIS stated: “Eagles are occasionally observed in whitetailed prairie dog towns several miles from the rivers.” (Book Cliffs EIS at 117.) Accordingly, the Snake John prairie dog colony subcomplex was not mentioned in NEPA documents for the Book Cliffs RMP/ROD.

By the 1990s, by contrast, when the Diamond Mountain RMP documents were issued, the focus on ferret reintroduction into the area managed by the VFO was clear. The Diamond Mountain RMP/ROD contained explicit management prescriptions for ferret reintroduction, and identified the Shiner colony subcomplex as a potential reintroduction site. The RMP/ROD anticipated that five prairie dog colonies within the Diamond Mountain Resource Area would be examined for

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<sup>4/</sup> The VFO jurisdiction includes the Vernal Resource Area; at all times relevant to this appeal this area encompassed both the Diamond Mountain and Book Cliffs Resource Areas.

potential use as a ferret reintroduction site. The Shiner colony was described as one of the five potentially suitable sites. (Diamond Mountain RMP/ROD at 2-13.)

The Diamond Mountain EIS described the history of ferret reintroduction efforts, and identified the Vernal Resource Area as containing the ferret's historic range and, consequently, the site for potential reintroduction in Utah. It explained the choice of potential sites as follows:

The existence of suitable habitat to continue this reintroduction process is of critical national importance if the species is to be preserved. The Uinta Basin has been identified as known historical range of the black-footed ferrets. \* \* \*

Approximately 33,500 acres of active prairie dog towns within the resource area are classified as potential black-footed ferret habitat (refer to Map 3-4). Biological information collected in 1985, has identified Eight Mile Flat and Twelve Mile as potentially suitable for supporting a viable population of black-footed ferrets. Additionally, Sunshine Bench, Shiner, and Antelope Flat have been identified as potentially suitable for black-footed ferret reintroductions based only on USF&WS criteria. All five areas are scheduled to be evaluated, beginning in 1992, to determine their current suitability.

(Diamond Mountain EIS at 3.9 (emphasis added).) Notably, the EIS went on to discuss reintroduction within the Book Cliffs Resource Area, which had not been addressed in the Book Cliffs RMP/ROD, and to explain that further NEPA review would be conducted for ferret reintroduction.

The Utah Black-footed Ferret Working Group, comprised of representatives from [the Utah Department of Wildlife Resources], UDWR, BLM, USF&WS and APHIS [of the Department of Agriculture], following criteria established by the Black-Footed Ferret Interstate Coordinating Committee, have selected two potential ferret reintroduction sites within the State of Utah, both outside of DMRA. The primary release site was identified as Coyote Basin, within the Book Cliffs Resource Area of the Vernal District, in eastern Uintah County. A black-footed ferret steering committee, composed of approximately 15 members from various agencies, local government, and private interests, is currently drafting a reintroduction and management plan for the Coyote Basin area, which will serve as the proposed action for NEPA analysis. \* \* \* The earliest possible release date for the Coyote Basin site would be the fall of 1994. Any sites approved by this RMP would be the first approved in Utah, ahead of the two primary

reintroduction sites. If problems arose with the first two sites, any sites approved by the DMRA RMP could be used as alternates. The same steering committee procedures described above to develop a reintroduction and management plan \* \* \* would be utilized.

Id. (emphasis added). Map 3-4 prominently displayed the Shiner site.

The Diamond Mountain EIS included guidelines to protect prairie dog habitat for potential black-footed ferret reintroduction that were derived from 1990 draft FWS guidelines. Id. at Appendix 2 at A2.9 - A2.11. The guidelines provided: “As leases are reissued, notification would be given that the lessee is in potential BFF habitat and additional restrictions could apply as listed in these guidelines.” Id. at A2.10. They established specific limitations on surface disturbing activities to protect habitat prior to ferret reintroduction. Id. BLM acknowledged that if FWS developed more restrictive guidelines than those listed in the RMP, an RMP amendment would be necessary. Id. at A2.9. The alternatives for habitat management all included a requirement that surface disturbing activities would be limited to a maximum of 10% of the area within the chosen reintroduction site. Id. at A2.10.

The Diamond Mountain RMP/ROD established an objective for the “Diamond Mountain-Ashley Creek” habitat management plan of “maintain[ing] existing prairie dog colonies as potential black-footed ferret habitat.” (Diamond Mountain RMP/ROD at 2-11.) Although the RMP identified the Eight Mile Flat colony as providing “the best opportunity for a successful reintroduction,” consistent with the EIS it identified the five potential reintroduction areas, including “Shiner,” and required new studies to determine current suitability. Id. at 2-13. Following those studies, one of the sites would be selected and protected from activities that would render the site unsuitable. Id. The RMP established restrictions for Eight Mile Flat, but which would also apply to colonies selected as reintroduction sites after further study. Id. at 2-14. These restrictions included limiting “[n]ew surface-disturbing activities” to “a maximum of a cumulative total of 10%” of potential ferret habitat. Id. They also required surface-disturbing activities to avoid potential ferret habitat or, if they cannot avoid disturbance, to be funneled to areas of low or no prairie dog use. Id.

The Utah Working Group of the ferret reintroduction team proceeded to study prairie dog colonies, including target sites in and around the Coyote Basin over the ensuing decade. In 1996, the Utah Department of Wildlife Resources, with input from the Departments of the Interior (FWS and BLM), and Agriculture (APHIS) issued the 1996 Cooperative Plan. This Plan proposed that reintroduction in Utah would occur in the Coyote Basin complex in Uintah County and Duchesne County. The record documents that the Shiner and Snake John subcomplexes were studied along with other subcomplexes, as part of the broader Coyote Basin prairie dog complex in the Vernal Resource Area. The 1996 Cooperative Plan proposed

particular approaches to working with other resources users, as well as mitigation stipulations and guidelines for potential reintroduction sites. (1996 Cooperative Plan, Appendix E, Guidelines for Managing Surface Disturbances.)

The studies led to the first reintroduction of ferrets in Utah in the Coyote Basin in the summer of 2002. (BLM Answer, Ex. A, Attachment 1 at 1-5, "Update on Status of CO/UT Black-footed Ferret Reintroduction Effort – November 2002.") The 1996 Cooperative Plan identifies a "primary management zone," which in 1996 was mapped in a location south of the Shiner and Snake John parcels. FWS asserted that the 2002 reintroduction took place in the "PMZ" in the Coyote Basin. (Dec. 16, 2002, FWS Memorandum.) (BLM Answer, Ex. A, Attachment 1 at 1-5.)

CNE expressed an interest in the white-tailed prairie dog that predated the lease sale. On July 11, 2002, CNE and others submitted a petition to FWS to list the white-tailed prairie dog as threatened or endangered under the ESA, 16 U.S.C. § 1536 (2000), and for designation of its critical habitat. (CNE SOR Exhibits, Tab 9.) The petition included descriptions of the status of the prairie dogs in three states, specifically referring to the Shiner and Snake John subcomplexes in Utah (Petition at 125-27), and the impacts of oil, gas, and mineral extraction on prairie dogs and their habitat. (Petition at 205-237.)<sup>5/</sup>

It is against this backdrop regarding the FWS ferret reintroduction that we examine the lease sale record. On October 22, 2002, BLM's Utah State Office sent its draft list of parcels for the February 2003 sale to various field offices to identify appropriate stipulations and for review "under an appropriate level of NEPA documentation." The list was based on expressions of interest in certain parcels from potential lessees that BLM had received since July 2002. A memorandum referencing a list of parcels appears in the administrative record at Volume 1, Tab "Prelim Memos." The list apparently appeared attached to an e-mail or at an internet site; it may also be the list found at Tab "Prelim." See also Tab "Expressions of Interest."

The VFO conveyed the parcel list to various resource specialists, including wildlife specialists, for their review. One such reviewer (Mary Hammer) sent an undated memorandum to VFO's Assistant Field Manager for Minerals Resources captioned "Resource Review for Oil and Gas Lease Parcel List" that recommended

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<sup>5/</sup> Although CNE's petition for listing was still pending at the time BLM made its decision in this case, the FWS subsequently declined to initiate a further status review, finding that the petition and other information did "not provide substantial scientific or commercial information indicating that listing this species may be warranted." 69 FR 64889 (Nov. 9, 2004). FWS gave explicit consideration to the status of the Shiner and Snake John subcomplexes, 69 FR at 64892-93, 64898, and the effects of oil and gas leasing. 69 FR at 64894-96.

that portions of certain parcels containing white-tailed prairie dog populations, including those found in the Snake John subcomplex, be eliminated from leasing. See AR “NEPA Book” Volume 2, Tab “T & E Species.”<sup>6/</sup> Hammer’s recommendation referred to the pending petition for listing, BLM’s responsibility to ensure that actions do not contribute to the need to list a species, and the possibility that future development on the portions of the parcels occupied by prairie dogs may lead to a decline in their population and available habitat, leading to their listing.

By letter dated December 12, 2002, CNE filed objections to 39 parcels being considered for that sale. (CNE SOR Exhibits, Tab 6; AR “NEPA Book” Volume 2, Citizens’ Group Comments.) CNE identified 31 parcels as containing white-tailed prairie dog colonies,<sup>7/</sup> and 7 parcels as located within 1/2 mile of the colonies.<sup>8/</sup> BLM responded by letter dated December 16, 2002, stating that the VFO was recommending including in the February sale 17 of the 39 parcels identified by CNE and that each parcel would be subject to a special status species stipulation. (AR “NEPA Book” Volume 2, Citizens’ Group Comments.)<sup>9/</sup>

On the same date, however, the Utah Field Supervisor for Ecological Services, FWS, wrote his memorandum to BLM’s VFO Manager objecting to the sale of parcels in the Shiner and Snake John subcomplexes which could constitute reintroduction sites for the ferret. According to that December 16, 2002, FWS Memorandum, the Snake John and Shiner subcomplexes provide the best potential black-footed ferret habitat in the lease sale area as well as habitat for other sensitive species. FWS objected to the effects of oil and gas leasing on these prairie dog colonies, and noted the discussions of the Shiner subcomplex in the Diamond Mountain RMP documents. (Dec. 16, 2002, FWS Memorandum.) FWS observed that BLM’s proposal to lease parcels in the Snake John and Shiner subcomplexes would result in placing under lease approximately 84% of the mapped white-tailed prairie dog habitat in the Vernal Resource Management Area. Acknowledging that BLM has adopted protective measures for black-footed ferret reintroduction efforts in the PMZ, some of which focus on conservation of the white-tailed prairie dog, FWS pointed out that those measures encompass only 25% of the mapped habitat managed by BLM’s VFO and expressed concern that approval of the parcels for leasing “would have direct, indirect, and cumulative impacts on habitat, and preclude future conservation efforts.” FWS recommended that leases include stipulations to mitigate impacts on white-tailed prairie dogs similar to mitigation guidelines in the 1996 Cooperative

<sup>6/</sup> This recommendation is not made for all of the parcels later identified by CNE but appears for parcels UT 077, 078, 080, 081, 089 - 097, and 102 - 108.

<sup>7/</sup> UT 056, 058 - 068, 077, 078, 080 - 082, 089 - 091, 093 - 097, and 102 - 108.

<sup>8/</sup> UT 042, 046, 049, 051, 055, 092, and 101.

<sup>9/</sup> UT 046, 055, 056, 058 - 063, 094 - 097, 103, and 106 - 108.

Plan. As we understand FWS' position, the 2002 reintroduction in the PMZ was successful, and was protected by special stipulations. FWS believed that placing 84% of the Vernal Resource Area under lease in large part without stipulations such as those associated with the PMZ would negatively impact reintroduction options outside the PMZ and, in particular, at the Shiner and Snake John sites.

BLM's Deputy State Director (DSD) signed what he called a Decision Record/FONSI [Finding of No Significant Impact] on December 17. (AR Volume 1, Tab "ROD.") He recommended offering 69 parcels for sale and concluded that the lease sale would have "no significant impacts on the human environment other than those already analyzed in existing NEPA documents." *Id.* The DSD reached this conclusion in direct contrast with and without reference to the FWS' objections issued the day before. It is unclear whether the DSD was aware of FWS' views when he issued this decision or, if he was, why he did not address them.

The VFO prepared an "Interim Documentation of Land Use Conformance and NEPA Adequacy" worksheet (DNA) on December 19, asserting that the proposed action, including the leasing of the parcels in this appeal, was consistent with land use plans and the following NEPA documents: (1) the Diamond Mountain EIS (1993); (2) the Book Cliffs EIS (1985); (3) the Environmental Assessment for Oil and Gas Leasing in the Book Cliffs Resource Area, No. UT-080-89-02 (1988) (Book Cliffs 1988 EA); and (4) the Supplemental Environmental Assessment for Oil and Gas Leasing in the Book Cliffs Resource Area, No. UT-080-89-02 (1989) (Book Cliffs 1989 EA Supp.). *See* AR "NEPA Book" Volume 2, Vernal Tab.

On December 20, the State Office issued a Notice of Competitive Lease Sale, Oil and Gas. (AR Volume 1 Tab "ROD.") The Notice advised the public that 69 parcels of land would be offered in a competitive oil and gas lease sale on February 18, 2003, subject to a protest period that would end on February 3, 2003.

On December 21, 2002, the VFO Manager submitted recommendations to the State Office. He recommended dropping some parcels to which CNE objected, but not due to the white-tailed prairie dog; rather, he cited the Notice of Intent issued for a Plan (RMP) Amendment and noted that further environmental review was required for some parcels.<sup>10/</sup> Except for parcel 096, the recommendation for leasing the parcels was accompanied by a comment that they were identified in the Diamond Mountain or the Book Cliffs EIS and subject to the special status species stipulation.

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<sup>10/</sup> The VFO Manager recommended dropping parcels UT 042, 049, 064 - 068, 077, 078, 080 - 082, 089 - 093, 101, 102, 104, and 105 for potential effects to archaeological, cultural, or paleontologic resources and for further analysis to be included in the Vernal RMP. He cited sensitive and candidate plants as a reason for dropping parcels UT 054, 066 - 068, and 082.

On January 21, 2003, CNE submitted to BLM nominations for the designation of 25 large white-tailed prairie dog complexes as areas of critical environmental concern (ACECs), including the Shiner and Snake John subcomplexes in the area administered by the VFO. (CNE SOR Exhibits, Tab 7.)<sup>11/</sup> On February 3, 2003, CNE submitted the protest at issue here, objecting to the inclusion of 16 parcels associated with those prairie dog subcomplexes, requesting that the protested parcels be withdrawn from the February 2003 lease sale, or at a minimum, be protected by a no surface occupancy (NSO) stipulation and that half-mile buffers around colonies should likewise be protected. *Id.* at Tab 2, page 2. CNE noted that the VFO was in the process of developing a new Vernal RMP which would consider CNE's ACEC nominations, and that sites were being selected for reintroduction of the black-footed ferret. CNE asserted that leasing the parcels would undermine the planning process and limit the choice of reasonable alternatives in developing the RMP in violation of 40 CFR 1506.1(a).<sup>12/</sup> CNE contended that NEPA requires BLM to supplement an EIS when new information arises, pointing to the lack of analysis of prairie dogs and their habitat in existing NEPA documents, the new information contained in CNE's petition for listing the prairie dog, and the importance of the prairie dog as a "keystone" species. CNE argued that the Diamond Mountain RMP/ROD required BLM to

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<sup>11/</sup> "Areas of critical environmental concern" are defined by section 103 of FLPMA, 43 U.S.C. § 1702(a) (2000), as "areas within the public lands where special management attention is required \* \* \* to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or to protect life and safety from natural hazards." Proposals for designating ACEC's are made through BLM's land use planning process. See 43 CFR 1610.7-2.

<sup>12/</sup> A regulation of the Council on Environmental Quality (CEQ), 40 CFR 1506.1, Limitations on actions during NEPA process, provides in part as follows:

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

\* \* \* \* \*

(c) While work on a required program [EIS] is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives. \* \* \*

maintain prairie dog complexes, including the Shiner subcomplex, and that development of leases would destroy habitat and create potential obstacles to black-footed ferret reintroduction. CNE also contended that BLM failed to take a hard look at the impacts to sensitive species and identified 15 animal species on Utah BLM's Sensitive Species List, but this list did not include the prairie dog.<sup>13/</sup>

In a February 10, 2003, memorandum, a VFO wildlife resource specialist commented on various protests. While he recommended postponing the sale of four parcels that were the subject of a protest by another organization because the agency may have failed to take a hard look at new information regarding certain wildlife concerns, he recommended proceeding with the proposal to lease the parcels CNE identified as prairie dog habitat, because he believed that "should the white-tailed prairie dog either be listed, or proposed for listing, or designated by the Utah Division of Wildlife Resources as a State Sensitive Species," BLM's special status species stipulation "would allow BLM the flexibility to modify or disapprove any proposed surface disturbing activity on the lease." (AR "NEPA Book" Volume 2, Tab "Sensitive Species" at 2.) This recommendation thus presumed that BLM could disapprove surface disturbance on the leases in the event that the prairie dog were listed or designated a special status species. The memorandum did not address, however, the manner in which the stipulation's language allowing BLM to "disapprove proposed activity that is likely to result in jeopardy to a proposed or listed species" or its habitat would apply in the case of experimental populations of ferrets.

In its March 17 decision, BLM eliminated parcel UT 103 in order to allow "sufficient time to consider new information" relating to a proposal for a wilderness unit (Decision at 2), and denied CNE's protest with respect to the other 15 parcels.<sup>14/</sup> In finding that there was no significant new information requiring further NEPA analysis, BLM referred to Part D(4) of the Vernal DNA; this portion of the DNA cites existing NEPA documents without reference to the prairie dog/ferret reintroduction issue. (Decision at 4.)<sup>15/</sup> The Decision explains that the "VFO is currently

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<sup>13/</sup> Many of CNE's protest arguments are not carried forward in this appeal, including arguments relating to other animal species besides the prairie dog and the potential effects of coalbed methane (CBM) development.

<sup>14/</sup> BLM asserts that it "withdrew parcels UT-100 and UT-103 from the lease sale based on [CNE's] information, so CNE has no right to complain." (Answer at 11.) These parcels were dropped in response to wilderness objections filed by another organization. CNE did not protest the inclusion of parcel UT 100 and BLM's decision makes clear that eliminating UT 103 had nothing to do with CNE's protest or issues.

<sup>15/</sup> Part D(4) states that the "methodology and approach used in the EISs are still appropriate for the current proposed action because the methods of extraction, land

(continued...)

developing a[n] RMP for approximately 1.8 million acres in northeastern Utah. This plan, know[n] as the Vernal RMP will combine the existing Diamond Mountain and Book Cliffs RMPs into a single plan. As part of this project a supporting EIS will be prepared.” (Mar. 17, 2003, Decision at 2.) The response to CNE’s objection is this:

[A]s indicated in its DNA, the VFO determined that all new information and circumstances were insignificant. See Appendix D, Part D(4). The Shiner population of the White-tailed Prairie Dog was discussed in decision FW32 of the Diamond Mountain [RMP/]ROD (Fall 1994), where it was stated that new studies would be completed on all five potential reintroduction areas to determine their current suitability for reintroduction of the Black-footed Ferret. The Shiner population has been mapped and studied for several years to determine population density and stability. Therefore, CNE has not provided BLM with significant new information about this population. Likewise BLM has mapped and studied the Snake John population of White-tailed Prairie Dog and will very likely propose a future [B]ook [C]liffs RMP amendment to allow for reintroduction of Black-footed Ferret into this site, using the [C]oyote [B]asin Black-footed Ferret management plan as a template. BLM will also consider proposing the Snake John area as part of a larger ACEC designed to protect the Black-footed Ferret/White-tailed Prairie Dog complex. Therefore, CNE has not provided BLM with significant new information about this population.

Id. at 4 (emphasis added). BLM acknowledged that “it can certainly be implied that future impacts could be expected if the leases are developed” but asserted that the special status species stipulation would protect prairie dogs and their habitat. Id. BLM rejected CNE’s argument that issuing the leases would violate the Diamond Mountain RMP/ROD’s requirement to maintain existing prairie dog colonies in an area that includes the Shiner subcomplex, noting that the area is open to leasing under the RMP and that the special status species stipulation would provide protection if the leases were to be developed. Id. at 7.

#### Issues on Appeal

In its SOR CNE contends that BLM failed to take a “hard look” at the

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

requirements for exploration and development and potential have not changed substantially since the EISs were completed.” (DNA at 5.) The remainder of Part D(4) addresses reasonably foreseeable development scenarios. Id. at 5-6. Nothing in that section directs the reader to a discussion in prior NEPA documents of the prairie dog, ferret, or any other species.

environmental impacts of its decision in failing to supplement its existing NEPA documents in order to address significant new information regarding the Shiner or Snake John white-tailed prairie dog colonies. (SOR at 28, 29-33.) CNE also contends that BLM violated NEPA's prohibition on "interim actions" by leasing these parcels while revising its RMP because such action forecloses management alternatives in the new plan, citing 40 CFR 1506.1(a). (SOR at 28, 33-35.) CNE contends that BLM cannot defer NEPA analysis by substituting a "special status species" stipulation. Citing Klamath Siskiyou Wildlands Center, 157 IBLA 332, 338 (2002), CNE argues that, when an agency relies on measures to mitigate impacts, "NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance." (SOR at 28-29, 35-38.)

CNE argues that BLM has violated the FLPMA requirement that management actions be "in accordance with" the Diamond Mountain RMP. 43 U.S.C. § 1732(a) (2000). (SOR at 38.) CNE contends that prior to leasing the parcels, BLM either should have amended its Diamond Mountain and Book Cliffs RMPs to consider information regarding potential impacts of oil and gas leasing on prairie dogs and ferret reintroduction, or waited until the pending Vernal RMP which would supersede both RMPs. (SOR at 39.) CNE contends that BLM has not conformed to the Diamond Mountain RMP's requirement to maintain existing prairie dog colonies. (SOR at 39-40.) Finally, CNE cites BLM's failure to protect potential ACECs, when ACEC designation is a focus of the Vernal RMP revision. (SOR at 41.)

### Analysis

[1] NEPA is designed to "insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). NEPA does not require agencies to elevate environmental concerns over other appropriate considerations, Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983), but only requires them to take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). NEPA assures that decision-makers are fully apprised of the likely effects of alternative courses of action so that their decisions are informed. Forest Guardians, 170 IBLA 80, 95 (2006). "NEPA does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989); Western Exploration Inc., 169 IBLA 388, 398-99 (2006).

NEPA section 102(2)(C) requires consideration of potential environmental impacts of a proposed action if that action is a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2000). Such a statement must adequately discuss not only the environmental impact, but also the unavoidable adverse impacts of the proposed action, alternatives to it, the

relationship between short-term uses of the environment and its long-term productivity, and irreversible commitments of resources from implementing the proposed action. 42 U.S.C. § 4332(2)(C)(i) through (v) (2000). The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public land for oil and gas purposes, because leasing without stipulations requiring no surface occupancy (NSO) constitutes an irreversible and irretrievable commitment to permit surface-disturbing activity. Southern Utah Wilderness Alliance (SUWA), 166 IBLA 270, 276-77 (2005), and cases cited therein.

An EIS or an environmental assessment (EA) is required unless an agency has established a procedure under which a proposed action is categorically excluded from the requirement pursuant to 40 CFR 1507.3(b)(2). An EA serves to (1) briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI; (2) aid an agency's compliance with NEPA when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary. 40 CFR 1508.9; see Wilderness Watch, 168 IBLA 16, 34-35 (2006). An EA may be employed to "provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 CFR 1508.9(a)(1). It must include "brief discussions of \* \* \* environmental impacts of the proposed action and alternatives." 40 CFR 1508.9(b). If an EA demonstrates that significant impacts will occur from a proposed action, and the agency wishes to move forward with that action rather than with an alternative which mitigates the impacts, see 40 CFR 1508.20 (mitigation), then it must prepare an EIS. 40 CFR 1508.9(a)(3). If the EA leads to the conclusion that no significant impacts will occur from the proposed action or from that same action with mitigation, then the agency prepares a FONSI. 40 CFR 1508.13. Thus, NEPA establishes that preparation of an EA or EIS that analyzes the effects of a proposed action and its reasonable alternatives is a procedural threshold an agency must cross before it may go forward with that action.

[2] BLM prepared no EIS or EA for the February 18, 2003, lease sale. The VFO prepared instead a DNA to determine whether including the parcels in the lease sale conformed to existing land use plans and whether existing EAs and EISs were adequate to support that action. In Pennaco Energy v. USDI, 377 F.3d 1147, 1162 (10th Cir. 2004) (Pennaco), the court noted that "DNAs, unlike EAs and FONSI, are not mentioned in the NEPA or in the regulations implementing the NEPA." The Court acknowledged that "agencies may use non-NEPA procedures to determine whether new NEPA documentation is required." Id. This Board has stated, however, that "DNAs cannot properly be used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them." SUWA, 166 IBLA at 283. Thus, a DNA serves to identify for a BLM decision-maker the location of existing NEPA analysis. The DNA cannot supplement what is not sufficient in NEPA documentation.

The mere identification of a topic not mentioned in prior NEPA documents does not mean that a new or supplemental analysis is required if the environmental effects related to the topic have already been addressed. In SUWA, even though existing NEPA documents did not contain express analysis of CBM development, we held that “BLM may properly rely on existing land use documents and their associated environmental statements where there is no foreseeable likelihood of CBM development or where the impacts of CBM development do not differ significantly from the effects of oil and gas development already described in existing NEPA documents.” 166 IBLA at 288-89, citing Wyoming Outdoor Council, 164 IBLA 84, 103-105 (2004), and Western Slope Environmental Resource Council, 163 IBLA 262, 289-90 (2004) (emphasis added).<sup>16/</sup>

Accordingly, whether more NEPA analysis based on new information is required depends on the nature of the NEPA analysis already completed, and the nature of the information available at the time of the agency action. If no NEPA analysis has been completed at all, this raises not only the question of NEPA supplementation, but also the fundamental question of initial NEPA compliance. Bearing in mind that “DNAs cannot properly be used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them,” SUWA, 166 IBLA at 283, this record must show that the VFO examined existing NEPA statements to identify the portions of those statements that analyzed the effects of oil and gas development on the prairie dog subcomplexes considered by FWS for potential ferret reintroduction. After identifying existing NEPA analysis, it was then incumbent upon the VFO reviewers to determine whether there were “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” See 40 CFR 1502.9(c). If information developed after the NEPA statements was sufficiently new and significant when compared to the information upon which the NEPA statements were based, a new NEPA statement was required. See SUWA v. Norton, No. 2:04CV574 DAK, 2006 U.S. Dist. LEXIS 53621, at \*35-37; Forest Guardians, 170 IBLA at 96.

Starting with the Snake John parcels governed by the Book Cliffs RMP and EIS, we have cited the single reference to the prairie dog and ferret. Neither the Book Cliffs 1988 EA nor its 1989 Supplement, cited in the DNA at 4.D, makes any reference to prairie dogs or ferrets or the FWS reintroduction program. Thus, in terms of NEPA compliance, any information concerning the Snake John prairie dog colony must be considered new. See SUWA v. Norton, No. 2:04CV574 DAK, 2006 U.S. Dist. LEXIS 53621, at \*36-49. That the DNA cited prior NEPA documents does

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<sup>16/</sup> In SUWA, we upheld BLM’s decision based on a Price Environmental Assessment Report, found later to contain insufficient NEPA review of oil and gas leasing. SUWA v. Norton, No. 2:04CV574 DAK, 2006 U.S. Dist. LEXIS 53621, at \*35-37, appeal filed Oct. 13, 2006.

not mean that there has been NEPA compliance if the cited documents themselves do not address an issue of significance. Id.

BLM argues that CNE has failed to show that any new “information is not redundant to information already analyzed.” (Answer at 11.) BLM submits a Declaration by VFO’s Assistant Field Manager for Renewable Resources (Answer, Ex. A), stating that in making the recommendation to offer the Snake John parcels, she relied on survey data collected from 1988 to the present. Id. Attachment 1.) She attaches documents explaining the current status of ferret reintroduction efforts and studies of the prairie dog colonies. See “Update on Status of CO/UT Black-footed Ferret Reintroduction Effort – November 2002” (Answer, Ex. A, Attachment 1 at 1-5); “Inventory of Potential Black-Footed Ferret Habitat in Uintah County, Utah” (Jan. 1998) (Answer, Ex. A, Attachment 1 at 76-90).

BLM fails to grasp the full import of the Assistant Field Manager’s Declaration with respect to BLM’s fulfillment of its NEPA obligations. A DNA is a “determination of NEPA adequacy.” This means the DNA must show to the decisionmaker not only that NEPA review took place but that it is “adequate” for the issue at hand. The DNA before us cites to NEPA documents that exist; it cites nothing to suggest that the issue in question – the impact of oil and gas leasing on FWS’ reintroduction program in association with the Snake John subcomplex – was ever the subject of a cited NEPA document. The Assistant Field Manager Declaration attached to the Answer confirms the absence of an existing NEPA document that has addressed the impacts of oil and gas leasing on potential reintroduction, despite considerable subsequent development of significant data regarding the Snake John subcomplex. The fact that the Assistant Field Manager relied exclusively on non-NEPA documents to support her recommendation is itself an admission of BLM’s failure to comply with NEPA with respect to Snake John parcels. See SUWA v. Norton, No. 2:04CV574 DAK, 2006 U.S. Dist. LEXIS 53621, at \*36-49.

If we correctly understand BLM’s intent in proffering her Declaration, it is to show that the Snake John subcomplex may not be as significant a reintroduction site as CNE suggests. The attachment to the Declaration explains ferret reintroduction efforts, and notes that the Snake John subcomplex prairie dog population has increased “by 9.8% but is no longer the most populous prairie dog colony in the area,” and therefore the drafter “cannot speculate” as to the reason for the increase. Id. at 2. The difficulty is that there has been no procedural NEPA compliance on the point and this Board is not the proper entity to create NEPA documentation by inferring BLM’s intent in not undertaking it. The record fails to show that BLM analyzed impacts of leasing the Snake John parcels on FWS’ reintroduction program.

Information regarding the Shiner colony likewise was not studied in a NEPA document in the record before us, beyond what was presented in the Diamond

Mountain EIS and RMP/ROD. As noted above, BLM expressly identified that population as one of five to study, and BLM now submits information regarding studies of the subcomplex. As with the Snake John subcomplex, we infer from BLM's Declaration that it concluded the Shiner site may no longer be relevant for reintroduction because it was hit by the sylvatic plague and the population was reduced dramatically by 1999. But, as we stated before, it is BLM's legal obligation to consider such information in a NEPA document.

Such a conclusion would be especially difficult here because, notwithstanding BLM's suggestion in the documents attached to its Answer that the Shiner and Snake John subcomplexes may no longer be as significant as they once were, FWS persisted in asserting their importance on December 16, 2002. FWS presumably was not only aware of the information available to BLM but had a significant role in developing it. It is incumbent on BLM, when effectively disagreeing with an objection by a sister agency contending that BLM's action will have a significant impact on an issue of environmental significance, to point to a NEPA document explaining its FONSI.<sup>17/</sup> Here, however, BLM issued a "FONSI" without mention of the impacts of oil and gas leasing on the ferret reintroduction program or the prairie dog colonies studied for that purpose and thus never explained its seeming rejection of FWS' expertise and point of view.<sup>18/</sup>

We note as well that there is no rational basis in this record for conclusions in the March 17, 2003, protest decision. In the single paragraph addressing potentially new information regarding the reintroduction program, quoted above, BLM made clear that it was fully aware of the Coyote Basin reintroduction program, the obligations addressed in the Diamond Mountain RMP/ROD and EIS to undertake studies to identify black-footed ferret reintroduction sites, and existing studies of the Shiner and Snake John populations. BLM expressly noted plans to "very likely

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<sup>17/</sup> We recently decided a case in which the appellants similarly argued that BLM had failed to consider the effect on leasing parcels on prairie dog colonies that could provide habitat for black-footed ferret, but appellants provided no evidence that the prairie dog colonies were present near the particular parcels in that sale. Forest Guardians, 170 IBLA 80, 91-92 (2006). Unlike Forest Guardians, there is no dispute here that the parcels in this appeal contain or abut prairie dog colonies.

<sup>18/</sup> BLM is in no position to assert that ferret reintroduction is not a matter of environmental significance, given language of the Diamond Mountain EIS stating that it is of "critical national importance if the species is to be preserved." (Diamond Mountain EIS at 3.9.) Likewise the EIS explained, id., that NEPA review for the reintroduction program was anticipated. Given that BLM acknowledged that NEPA review is required for ferret reintroduction, it would seem incumbent upon BLM to follow the same course with respect to a lease sale that FWS contends could negatively impact the reintroduction program.

propose a future Book Cliffs RMP amendment to allow for reintroduction of Black-footed Ferret into” the Snake John site, as well as to include the Snake John area as part of an ACEC. Yet, BLM concludes from this recital that “[t]herefore, CNE has not provided BLM with significant new information about [either] population.” (Mar. 17, 2003, Decision at 2.) Such a conclusion, dependent on an apparent and unsupportable view that CNE was itself required to present new information before the obligation to undertake supplemental NEPA analysis was triggered, is not the proper construction of the requirement to consider new information under 40 CFR 1502.9(c). BLM is responsible for conducting supplemental NEPA review of “new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* This obligation thus depends on the nature of the allegedly new information, not on who develops it. An agency’s compliance with governing CEQ rules at the time it prepares its DNA is not to be confused with burdens of proof.

It is evident that BLM’s decision to lease these parcels was not based on analysis contained in any prior NEPA statement but on its view that the special status species stipulation provided an adequate basis for deferral of NEPA review of the effects of oil and gas leasing of the subcomplex parcels on the potential reintroduction program. This is the only possible explanation for BLM’s conclusion that impacts on, for example, wilderness values compelled further review for some parcels, but that impacts on potential ferret reintroduction sites did not. (Mar. 17, 2003, Decision; Dec. 21, 2002, VFO recommendation.) <sup>19/</sup> BLM’s logic is premised on the notion that an NSO stipulation would be a sufficient basis on which to justify deferring NEPA review.

This special status species stipulation in question, however, does not provide for NSO. Moreover, CNE is correct that the stipulation provides no assurance that impacts to the reintroduction program can be mitigated to insignificance. The stipulation undoubtedly reserves to BLM the authority to modify activities that jeopardize threatened or endangered species or their habitat. It is also true that Utah has, as of December 2003, listed the white-tailed prairie dog as a “species of concern.” It is not clear, however, whether such a denomination on Utah’s list would constitute a “special status species” under the stipulation, nor is it clear that the lessees would understand this to be a proper construction of their lease terms. Even if the stipulation does apply in such circumstances, however, BLM’s authority is limited to “recommending modifications” to exploration and development proposals to avoid “contribut[ing] to a need to list” such a special status species or jeopardizing the continued existence of a proposed or listed threatened or endangered species or

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<sup>19/</sup> We note, however, that the VFO Manager did not rely on the special status species stipulation to protect the sensitive and candidate plant species for which he recommended dropping other parcels from the sale. *Id.*; see footnote 10, *supra*.

its critical habitat. Clearly, FWS could not invoke the stipulation based on impacts to an introduced ferret population which is experimental under section 7(j) of the ESA. Presumably understanding the limitations of the special status species stipulation, FWS objected to the sale without the imposition of stipulations particularly designed to be effective for the reintroduction of an experimental population.

[3] Moreover, CNE is correct that the stipulation cannot be proffered to avoid BLM's NEPA obligation to ensure when it issues a FONSI that a proposed action has no significant impacts. If an EA demonstrates that such impacts will occur from a proposed action, BLM may nonetheless move forward with an alternative which mitigates impacts to a point that they are no longer significant. 40 CFR 1508.13, 1508.20. As we have stated:

Where a FONSI is predicated on a finding that restrictions on a project will eliminate any significant environmental impact, NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance. Nez Perce Tribal Executive Committee, 120 IBLA 34 (1991); Idaho Natural Resources Legal Foundation, Inc., 115 IBLA 88, 91 (1990); see Cabinet Mountains Wilderness v. Peterson, [685 F.2d 678, 682 (D.C. Cir. 1982)].

Powder River Basin Resource Council, 120 IBLA 47, 60 (1991); SUWA, 166 IBLA at 175-76. Thus, in the absence of a stipulation preventing any surface-disturbing effects altogether, such as an NSO stipulation, a finding that impacts of a proposed action would not be significant due to mitigation resulting from a stipulation must be based on analysis of the operative effects of the stipulation in an EA.

Although BLM prepared a FONSI with respect to this sale,<sup>20/</sup> it has identified no EA that addresses the proposed action, its effect on the reintroduction program, or the mitigative effect of its special status species stipulation with respect to that program, nor does any NEPA statement address by comparison the alternative stipulations recommended by FWS in its December 16, 2002, Memorandum. In Wyoming Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 93 (D.D.C. 2003), the

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<sup>20/</sup> CEQ's regulations make no provision for a FONSI that is not based on an EA. Because BLM prepared no EA for this sale, a logical basis for BLM's FONSI is difficult to discern, particularly in view of the fact that the DNA relied on EISs, which are prepared for major actions having significant impacts. FONSI's are NEPA documents under 40 CFR 1508.10, see Pennaco, 377 F.3d at 1162, and if a DNA is correct in finding that existing NEPA documents are sufficient, then no new FONSI should be necessary. Although BLM may have meant to say that the lease sale would have no significant impacts that have not already been addressed in existing NEPA documents, that is not the same as saying that there are no significant impacts at all.

court deemed unripe a challenge to the issuance of oil and gas leases by BLM and the United States Forest Service in grizzly bear habitat based on alleged violations of section 7 of the ESA, finding that in an ESA lease stipulation “the defendants have 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.’” The Court distinguished cases holding in a NEPA context that lease issuance constitutes the point at which there is an irreversible and irretrievable commitment of resources, noting that in such cases “the agency had chosen not to retain its authority to preclude all surface-disturbing activities after lease issuance.” *Id.* In this case, the stipulation reserves no such authority with respect to the prairie dog colonies or the ferret.

Because we conclude that BLM has failed to comply with NEPA’s procedural requirement to prepare an environmental analysis describing the effects of the proposed action or the adequacy of its stipulation, it is premature to consider the merits of other arguments advanced by CNE such as BLM’s violation of the prohibition on interim actions or its failure to conform with provisions of land use plans. Whether BLM’s actions violate the terms of the Diamond Mountain RMP, under FLPMA, or whether they improperly constrain future decisions under 40 CFR 1506.1(a), would depend on results of the NEPA review BLM did not undertake.

Therefore, 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 set aside and the case remanded for further action consistent with this opinion.

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Lisa Hemmer  
Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge