



WYOMING OUTDOOR COUNCIL, ET AL.

171 IBLA 108

Decided February 20, 2007

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IBLA 2005-147

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Appeal from decisions of the Wyoming State Office, Bureau of Land Management, dismissing a protest against offering certain parcels in competitive oil and gas lease sales. WY-0408-063, WY-0408-064, WY-0408-066, WY-0408-069, WY-0408-070, WY-0408-071, WY-0408-095, WY-0408-096, and WY-0408-108.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Generally--Federal Land Policy and Management Act of 1976: Coordination with State and Local Governments--
Oil and Gas Leases: Generally--Oil and Gas Leases:
Discretion to Lease--Oil and Gas Leases: Stipulations

When BLM coordinates an oil and gas lease sale with the State of Wyoming in accordance with applicable memoranda of understanding, there is no violation of section 202(c)(9) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1712(c)(9) (2000), as contended by appellants.

2. Federal Land Policy and Management Act of 1976:
Generally--Federal Land Policy and Management Act of 1976: Coordination with State and Local Governments--
Oil and Gas Leases: Generally--Oil and Gas Leases:
Discretion to Lease--Oil and Gas Leases: Stipulations

BLM's decision to issue oil and gas leases subject to a timing limitation standard without also imposing the State of Wyoming's policies, plans, and guidelines does not amount to a failure to take an "action necessary to prevent unnecessary or undue degradation of the [public]

lands” under section 302(b) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1732(b) (2000).

APPEARANCES: Bruce M. Pendery, Esq., Logan, Utah, for appellants; Phillip Wm. Lear, Esq., and J. Matthew Snow, Esq., Salt Lake City, Utah, for Yates Petroleum Corporation; Jack D. Palma, P.C., Jenifer E. Scoggin, Esq., Cheyenne, Wyoming, for Questar Exploration & Production Company; Laura Lindley, Esq., and Robert C. Mathes, Esq., Denver, Colorado, for EOG Resources, Inc. (*Amicus Curiae*) and Donald B. Anderson Ltd.; and John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Wyoming Outdoor Council (WOC) and Biodiversity Conservation Alliance (BCA) (hereinafter appellants) have appealed a February 28, 2005, decision of the Wyoming State Office, Bureau of Land Management (BLM), on state director review (SDR), dismissing their protest against an offering of 97 parcels of land at an August 3, 2004, competitive oil and gas lease sale. In their protest against the lease sale, appellants and several other entities not parties to this appeal^{1/} advanced four principal arguments as to why the 97 parcels should not have been offered: (1) the sale of certain parcels would foreclose consideration of a reasonable range of alternatives during preparation of the environmental impact statement (EIS) for the Pinedale Resource Management Plan (RMP) amendment; (2) the sale of certain parcels in the Green River Basin was being made without a required stipulation being attached; (3) the sale of certain parcels in crucial big game winter ranges failed to

^{1/} Appellants requested that the Board dismiss non-adversely affected parties from this appeal, stating that they, as the successful bidders for parcels not involved in their appeal, were not adversely affected parties. By order dated July 19, 2005, the Board agreed, dismissing from this appeal the following entities identified in BLM’s decision as adverse parties: Carpenter & Sons; Tyler Wymond; Azalea Oil Co., LLC; W.A. Moncrief, Jr.; Baseline Minerals, Inc.; Carlyle, Inc.; and Contex Energy Company. In its July 19, 2005, order, the Board recognized Questar Exploration and Production Company (Questar) and Yates Petroleum Company (Yates) as parties to the case given that they were the high bidders on certain of the subject parcels. Questar has filed an answer herein. Donald B. Anderson Ltd. (Anderson), the high bidder on one parcel (WYW-161382), has also filed an answer as a party to the appeal. In addition, in its July 19, 2005, order, the Board accepted the motion for leave to file an *amicus curiae* brief by EOG Resources Inc. (EOG).

consider the policies of the State of Wyoming and was not coordinated with the Wyoming Game and Fish Department (WGFD); and (4) certain parcels were being offered for sale without proper compliance with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), because the parcels had a high likelihood for development of coalbed methane (CBM). (Statement of Reasons (SOR) at 2.) BLM denied appellants' protest in its entirety and proceeded to sell the parcels at issue.^{2/} This appeal followed.

In their SOR, appellants state that they intend for their appeal to cover only nine lease parcels,^{3/} all of which are located in BLM's Rawlins and Rock Springs Field Offices (063,^{4/} 064, 066, 069, 070, 071, 095, 096, and 108). Further, they state that of the four general concerns raised in their protest of the lease sale, they now advance only their third argument, *i.e.*, that "the sale of lease parcels in big game crucial winter ranges [proceeded] without consideration of the policies, programs, and guidelines of the State of Wyoming, and the sale of these parcels with only the standard stipulation prohibiting drilling from November 15 through April 30 will cause unnecessary or undue degradation of the public lands."^{5/} (SOR at 6.)

Each of the Crucial Winter Range Parcels contains a standard timing limitation stipulation (TLS) that provides that no surface use is allowed during the period from November 15 to April 30 for the protection of big game crucial winter range. (Ex. 3 to SOR at 14-17, 25, 27, unnumbered page entitled "Timing Limitation Stipulation-TLS".) Appellants state that "the Crucial Winter Range Parcels lie on pronghorn, mule deer, or elk crucial winter ranges, with parcels 070 and 071 lying on

^{2/} As noted by appellants, certain parcels protested by the Center for Native Ecosystems and BCA were withheld from sale due to the issues raised in that protest, but those issues are not raised by appellants in the present case. See Ex. 2 to SOR at 1-2.

^{3/} Appellants refer to the nine parcels by the last three numbers of the parcel number; for example, parcel WY-0408-064 is referred to as parcel 064. We will do likewise

^{4/} Appellants note that parcels 063 and 064 did not sell at the August 2004 competitive sale (Ex. 4 to SOR), but they intend to address them in their appeal because they may be sold at a future noncompetitive sale.

^{5/} In their protest and SOR, appellants refer to the nine parcels remaining in this appeal as the "Crucial Winter Range Parcels," and we maintain that terminology in this opinion.

overlapping pronghorn and mule deer crucial winter ranges, which is particularly important wintering habitat.” (SOR at 8; see Ex. 8 to SOR.) Appellants argue on appeal that “the standard TLS for protecting big game crucial winter ranges [does not] in fact protect these vital habitats,” with “[t]he primary reason [being that] the standard TLS * * * only prohibits drilling during certain times of the year (November 15 to April 30),” and “by its own terms it ‘does not apply to operation and maintenance of production facilities.’” (SOR at 8, quoting Ex. 3 at unnumbered page entitled “Timing Limitation Stipulation-TLS.”)

Appellants assert that in their protest they presented two arguments, inter alia, as to why the standard TLS was not sufficient to protect the big game crucial winter ranges. First, they contended that section 202(c)(9) of the Federal Land Policy and Management Act (FLPMA), as amended, 43 U.S.C. § 1712(c)(9) (2000), requires BLM to consider and adopt State policies, programs, and guidelines that are not contrary to BLM policy, and that in this case the WGFD has policies, programs, and guidelines that require much more protection than the standard TLS in protecting crucial winter ranges. (Protest, Ex. 1 to SOR, at 8-11.) Second, they maintained that sale of the Crucial Winter Range Parcels with only the standard TLS would cause unnecessary or undue degradation of the public lands in contravention of section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000). Id. at 11-12. They state that they “specifically argued that the standard TLS was not sufficient for protecting big game winter ranges because it does not regulate ongoing operations,” and that it “only regulates drilling during a short period of time in the winter.” (SOR at 9.)

In appellants’ view, BLM’s decision on SDR fails to address their basic concerns with the adequacy of the standard TLS. That decision stated: “We coordinated with WGFD and did not receive any objection to issuing the subject parcels for sale. Therefore we do not agree with your allegation that offering the subject parcels is inconsistent with State of Wyoming Policy.” (SDR Decision, Ex. 2 to SOR, at 8.) Appellants assert that “[n]o evidence has been presented to date of any such coordination,” and that most of the SDR Decision “sought to explain the process and rationale BLM uses to grant exceptions, modifications, or waivers to the standard TLS,” matters “not central” to their protest. Id. at 8-9. They emphasize that their “key point throughout the Protest was that the policies, programs, and guidelines of the State of Wyoming, and the scientific literature, make it clear the standard TLS standing alone, even when applied, does not ensure there is no loss of function of crucial winter ranges.” (Protest, Ex. 1 to SOR, at 8-11.)

Appellants contend that section 202(c)(9) of FLPMA, 43 U.S.C. § 1712(c)(9) (2000), requires BLM to “consider the policies, programs, and guidelines of a State,” to “coordinate BLM management policies with those of a State,” and to “attempt to reconcile any inconsistencies between State and Federal management policies and

programs to the extent consistent with Federal policy,” and “that these requirements apply to specific management actions, such as leasing, as well as to land use planning.” (SOR at 13-14.) ^{6/} Appellants argue that even if section 202(c)(9) of FLPMA is not construed to apply to specific actions such as oil and gas leasing, that provision requires the public lands to be managed “in accordance” with land use plans developed under section 202 of FLPMA, so that “to the extent RMPs developed under section 202 require consideration of State policies, programs, or guidelines, BLM must abide by such provisions.” (SOR at 14-15.)

Appellants assert that the governing RMPs require compliance with section 202(c)(9) of FLPMA. Parcels 095, 096, and 108, situated in the Rock Springs Field Office, are subject to the 1987 Green River RMP, which provides that “[t]o the extent possible, suitable wildlife habitat and forage will be provided to support the Wyoming

^{6/} Because section 202(c)(9) of FLPMA serves as the cornerstone of appellants’ argument that the standard TLS is inadequate for protecting crucial winter ranges for big game, we set it forth below:

“In the development and revision of land use plans, the Secretary shall * * * to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of * * * the States and local governments within which the lands are located, including, but not limited to, statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended, and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.” [Emphasis added by appellants.]

Game and Fish Department 1989 Strategic Plan objectives.” (Ex. 12 to SOR at 24.) Parcels 063, 064, 066, 069, 070, 071, and 095, situated in the Rawlins Field Office, are subject to the 1988 Great Divide Resource Area Record of Decision and Approved RMP (Great Divide RMP), which states that it is “consistent with the plans, programs, and policies of * * * the state of Wyoming, and local governments within the planning area.” (Ex. 13 to SOR at 2.) The Great Divide RMP states that “[w]hen considering needs for protective measures, the [WGFD] will be consulted concerning proposals involving surface disturbance and other disruptive activities in important habitats,” and, “other special management practices [besides the standard TLS] will be used as appropriate to focus management emphasis on important resources or to minimize potential conflicts.” (Ex. 13 to SOR at 45.) Appellants conclude that “the RMPs at issue here specifically adopt provisions similar to those in section 202(c)(9) and thus under section 202(a) of FLPMA, BLM must abide by those provisions.” (SOR at 15.)

Appellants base their section 202(c)(9) argument largely upon the 1991 Umbrella Memorandum of Understanding (Umbrella MOU) between BLM and WGFD regarding “cooperative wildlife management,” and Appendix 5G to the Umbrella MOU, added in 1995, which relates to cooperative wildlife management when oil and gas activities occur (Oil and Gas MOU). (Exs. 14 and 15 to SOR, respectively.) Appellants emphasize that “[t]he Umbrella and Oil and Gas MOUs are built on an understanding that there will be ongoing coordination between BLM and WGFD relative to BLM’s oil and gas program with respect to the policies, programs, and guidelines of the WGFD.” (SOR at 16.)

Appellants contend that under the Umbrella MOU, BLM has agreed to consult and coordinate with WGFD “to ensure that all wildlife habitat concerns have been considered in any decisions that may modify terrestrial vegetation or influence aquatic habitat.” (Ex. 14 to SOR at 8-9.) They assert that “BLM has a responsibility that extends beyond planning to ‘[r]ecognize existing State comprehensive or strategic long-range plans and cooperatively manage toward these goals and objectives.’” (SOR at 16, quoting Ex. 14 to SOR at 9.) Also, appellants state that in the Umbrella MOU, BLM and WGFD commit “to cooperate in the formulation and application of objectives, plans, and programs for wildlife and wildlife habitat, and ‘revise such plans and programs to keep them current.’” (SOR at 16, quoting Ex. 14 to SOR at 10.) Appellants further state that BLM has agreed to “(1) prevent the destruction or deterioration of habitat, (2) utilize the best available knowledge and techniques to ensure the balance between wildlife numbers and habitat consistent with multiple use planning, and (3) improve existing wildlife habitat through habitat development and enhancement programs.” (SOR at 16-17, quoting Ex. 15 to SOR at 10.)

Similarly, the Oil and Gas MOU states that “it is in the U.S. Government’s (and therefore, the American public’s) interest to consult with, and solicit, additional technical wildlife ‘input’ regarding the effects of mineral management activities on wildlife from the State wildlife management agency.” (Ex. 15 to SOR at unnumbered 1.) Appellants underscore that planning is an ongoing process, and “not a discrete effort that ends with a period when an RMP is completed,” and that, as recognized in the Oil and Gas MOU, land use plans (LUPs) “are dynamic, and continuous monitoring of, and necessary modifications made thereto, are expected to keep LUPs current.” (SOR at 17, quoting Ex. 15 to SOR at unnumbered 3-4.) In short, appellants state that “it is clear BLM has committed itself through other mechanisms to fully consider, and if possible adopt or abide by, State policies, programs, and guidelines.” (SOR at 17.)

Appellants view the policies, programs, and guidelines adopted by Wyoming as specifically applicable to BLM’s management of oil and gas leasing on the Crucial Winter Range Parcels. First, they describe Wyoming’s “formal policy” relating to disturbance of crucial habitats, including crucial winter ranges (referred to as the “Wyoming Mitigation Policy”). (Ex. 16 to SOR.) The term “crucial habitat” is defined in the Wyoming Mitigation Policy as habitat “which is the determining factor in a population’s ability to maintain and reproduce itself * * * over the long term.” Id. at 7. Appellants state that “[t]he State of Wyoming’s policy is that there should be ‘no loss of habitat function’ in vital crucial winter ranges, and even though some modification may be allowed, the location, essential features, and species supported must remain ‘unchanged.’” (SOR at 18, quoting Ex. 16 to SOR at 6.)

Second, appellants argue that BLM should adhere to WGFD’s Strategic Habitat Plan, the mission of which is to “[r]estore and/or manage habitat to enhance and sustain wildlife population in the future.” (Ex. 17 to SOR at 3.) This Strategic Habitat Plan is considered by appellants to be a “specific component of implementing the Wyoming Mitigation Policy, and a specific component of the Strategic Plan is to develop guidelines for application when management actions such as leasing are taken.” (SOR at 19.)

And third, appellants view as important WGFD’s Recommendations Report, a document they describe as “a compliment to and component of the Mitigation Policy and the Strategic Plan,” and as providing “detailed guidelines to implement these policies and programs, particularly to ensure there is ‘no loss of habitat function’ in crucial winter ranges.” (SOR at 20 and Ex. 9 to SOR.) The specifics of this Recommendations Report provide the principal basis for appellants’ argument that the standard TLS is inadequate for meeting the requirement imposed upon BLM by section 202(c)(9) of FLPMA to abide by Wyoming’s policies, programs, and guidelines. Appellants contend that “[a]mong many other things, the

Recommendations Report recognizes the ineffectiveness of the standard TLS standing alone for protecting crucial winter ranges.” (SOR at 20.)

The Recommendations Report identifies “impacts to wildlife due to oil and gas development as occurring at three levels, Moderate, High or Extreme,” so that, for example, “High impacts are defined as occurring when well densities are 5-16 well locations per section and there are 20-80 acres of surface disturbance per section.” *Id.*, citing Recommendations Report at 11. Recommendations for mitigation are made according to the level of impacts to specific wildlife. As appellants emphasize, the level of impacts varies among wildlife species, but “[a]ll three levels of impact ‘cause loss of habitat function.’” (SOR at 20, quoting Recommendations Report at 10.) More specifically, “even one well per section is viewed as causing Moderate impacts to deer and pronghorn crucial winter ranges, meaning there is no level of oil and gas development that does not negatively affect crucial winter ranges,” and “[f]or elk, all impacts from oil and gas development (even from one well) are at least High.” (SOR at 20, citing Recommendations Report at 10-12.)

Appellants point out that the Recommendations Report makes specific provisions for protecting mule deer, pronghorn, and elk crucial winter ranges, and for overlapping vital habitats, and claim that “[i]n all cases, the Recommendations Report recommends going beyond just the winter drilling timing limitation in the standard TLS to also include a suite of additional standard management practices outlined in Appendix B.” (SOR at 20, citing Recommendations Report at 11-12, 71-76.) They assert that “there is a need for the standard management practices described in Appendix B and the habitat improvement practices described in Appendix C, in addition to the standard TLS, so as to reduce the area affected by each well and so as to offset impacts.” (SOR at 21, citing Recommendations Report at 13.)

Appellants state that the WGFD recommendations were developed in response to “the ‘adverse effects’ WGFD anticipates from the ‘greatly accelerated’ pace of fluid minerals ‘leasing, permitting, and development’ in Wyoming.” (SOR at 22, quoting Recommendations Report at I.) The WGFD recommendations represent a “programmatically attempt to integrate wildlife protection and mitigation criteria ‘into the Bureau of Land Management’s (BLM’s) resource management planning and implementation processes.’” *Id.* (emphasis added by appellants). Further, they “are intended to implement the Wyoming Mitigation Policy.” *Id.* at 2. Appellants assert that the Recommendations Report “documents a number of misconceptions about how wildlife responds to oil and gas development,” and “specifically addresses the misconception that ‘[e]xisting seasonal use stipulations, standard operating procedures, and reclamation practices are adequate consideration for wildlife resources affected by oil and gas development.’” (SOR at 23, quoting Recommendations Report at 7.) In emphasizing “the misconception that the

standard TLS standing alone is sufficient to ensure the function of crucial winter ranges are maintained,” appellants quote the following portion of the Recommendations Report:

Although seasonal restrictions are intended to protect specific habitats (e.g., winter and reproductive habitats) and species (pronghorn, mule deer, elk, sage grouse) at critical times of year, they generally have been most effective during the exploration and drilling phases of oil field development. However, oil and gas operations also disturb and displace wildlife throughout the production phase (up to 40 years and longer). A variety of [other] management and mitigation tools are available to minimize effects of oil field development (Appendix B) and offset unavoidable impacts by providing replacement resources. [Emphasis added by appellants.]

(SOR at 23-24, quoting Recommendations Report at 8.) ^{z/}

Appellants summarize that “[t]he Wyoming Mitigation Policy, Strategic Plan, and Recommendations Report should be read together as constituting the management policies, program, and guidelines of the State of Wyoming relative to crucial winter ranges.” (SOR at 24.) Further, under section 202(c)(9) of FLPMA, the Green River and Great Divide RMPs, and the Umbrella and Oil and Gas MOUs, BLM must “at a minimum * * * adopt such recommendations to the extent possible.” Id. at 25. In their opinion, “BLM has failed to do this.” Id.

Appellants reiterate arguments raised in their protest, specifically that “BLM must at least consider going beyond the standard TLS so as to meet its obligation to consider, and to the extent possible adopt, the policies, programs, and guidelines of the State of Wyoming relative to crucial winter range in the context of oil and gas leasing.” (SOR at 25, citing Protest, Ex. 1 to SOR, at 8-12.) In their view, BLM’s assertion that it did not receive any “objection” to the sale of the Crucial Winter Range Parcels is insufficient for meeting BLM’s obligations under the Mitigation Policy, Strategic Plan, and Recommendations Report. They contend that the Oil and Gas MOU requires that “information sharing be continuous, current and complete,

^{z/} Appellants emphasize that the Recommendations Report, which was “prepared by probably the lead experts relative to wildlife issues and ecology in the State of Wyoming, makes it abundantly clear that its provisions must not only be considered but in fact adopted if big game crucial winter ranges are to receive sufficient protection from oil and gas development to maintain their function, and that the standard TLS standing alone does not meet this standard.” (SOR at 34.)

and that information be readily available between the WGFD and BLM and be fully utilized by BLM in the course of reaching its decisions.” (SOR at 26, quoting Oil and Gas MOU, Ex. 15 to SOR, at 3.) Similarly, they point out that under “the Umbrella MOU, BLM has agreed to consult with WGFD and coordinate with it ‘to ensure that all wildlife habitat concerns have been considered in any decisions that may modify terrestrial vegetation or influence aquatic habitat.” (SOR at 26, quoting Umbrella MOU, Ex. 14 to SOR, at 9 (emphasis added).) They state that BLM cannot meet these responsibilities when ignoring the recommendations of the Wyoming Mitigation Policy, Strategic Plan, and Recommendations Report, which “apply to all sales of oil and gas lease parcels in crucial winter ranges.” (SOR at 26.)

Further, appellants assert that BLM has failed to ensure that the sale of the Crucial Winter Range Parcels is in compliance with BLM’s policy, as embodied in the Green River and Great Divide RMPs. Id. at 27-28; see Ex. 12 to SOR at 12; Ex. 13 to SOR at 45. BLM’s policy, they contend, is to “independently seek out and apply special management practices in areas important to wildlife” (SOR at 28), including those described in the Wyoming Mitigation Policy, Strategic Plan, and Recommendations Report, as well as the Umbrella and Oil and Gas MOUs. Id. at 29. According to appellants, these documents contain “the standing recommendations to BLM regarding the mitigation measures that should apply in crucial winter ranges, including the Crucial Winter Range Parcels, and a standing recommendation that BLM go beyond requiring just the standard TLS on parcels that are offered in crucial winter ranges.” Id. at 30. Appellants conclude that section 202(c)(9) of FLPMA, the governing RMPs, and the Umbrella and Oil and Gas MOUs, require BLM “to adopt these recommendations or abide by these State policies so long as they do not contradict BLM policy,” and that “the policies of WGFD are entirely consistent with those of BLM.” Id. at 31.

As noted, appellants also contend that in deciding to lease the Crucial Winter Range Parcels imposing only the standard TLS stipulation, BLM violates section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), which requires BLM to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” They refer to this standard as “non-discretionary,” and claim that it cannot be met by “only attaching the standard TLS to the Crucial Winter Range Parcels, and not requiring the additional protections that application of the State of Wyoming’s policies, programs, and guidelines would provide.” (SOR at 40.) They claim that “[a]bsent these additional protections the function of crucial winter ranges cannot be maintained, which is undue, * * * since there are many well known and recommended options available from WGFD to eliminate or at least reduce these negative effects.” Id. They conclude that “[b]y failing to require these protections at the leasing stage, the die is cast making it difficult if not impossible to require stricter protections when an APD is filed,” and “BLM’s ability to protect the public lands becomes increasingly problematic and uncertain.” Id. at 40-41.

[1] In its answer,^{8/} BLM disputes appellants' argument that section 202(c)(9) of FLPMA required BLM to incorporate the WGFD wildlife policies found in the Wyoming Mitigation Policy, Strategic Plan, and Recommendations Report into each of the nine subject parcels. BLM responds that appellants "misconstrue BLM's duties and discretion under the provisions of § 202(c)(9), as well as BLM's actions taken thereunder." *Id.* at 8. BLM recognizes that under the plain language of

^{8/} BLM frames much of its analysis in terms of appellants' failure to carry its burden under NEPA of "demonstrating with objective proof and by preponderant evidence that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance of the proposed action." (Answer at 3, citing Western Slope Environmental Resource Council, 163 IBLA 262, 286 (2004).) Thus, BLM responds to appellants' argument that BLM violated NEPA in failing to consider the policies, plans, and guidelines of the State of Wyoming, as required under sections 202(c)(9) and 302(b) of FLPMA. See BLM's Answer at 3; see also Appellants' Reply at 5-6. BLM argues that by failing to demonstrate noncompliance with sections 202(c)(9) and 302(b) of FLPMA, appellants therefore fail to show error under NEPA.

BLM engages in an analysis of whether it would be appropriate or necessary, as a NEPA matter, to impose restrictions and stipulations on leases at the leasing stage, as opposed to later, when BLM considers applications for permit to drill (APDs). BLM contends that "[i]ssuance of the subject leases did not approve or result in any surface-disturbing activity or otherwise cause a change in the physical environment," and "[n]o ground disturbing activities may take place on a subject lease parcel until the lessee submits an [APD], which includes both a drilling plan and a surface use plan of operations." *Id.* at 5, citing 43 CFR 3162.3-1(c) and (d). BLM states that "[b]efore ruling on the APD," it will "undertake site-specific environmental review of the APD required under § 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) [(2000)], which includes the assessment of cumulative impacts." (BLM Answer at 5-6; see Southern Utah Wilderness Alliance, 159 IBLA 220 (2003).) Further, following BLM's argument, the imposition of additional conditions at the APD stage will supplement the TLS and adequately protect the crucial winter range areas. Thus, BLM contends that appellants incorrectly argue that the TLS will "stand alone" in protecting the Crucial Winter Range Parcels.

BLM contends that the framework established by the regulations and lease terms affords protection to big game species and their crucial winter habitat. (BLM Answer at 7.) Questar refers to the system just described as "BLM's tiered system," which "allows the BLM to make appropriate decisions concerning surface disturbing activities at the site-specific level when more detailed development plans are available." (Questar Answer at 3; Anderson Answer at 17; see Southern Utah Wilderness Alliance, 108 IBLA 308, 326-27 (1989); Colorado Environmental Coalition v. BLM, 932 F. Supp. 1247, 1252-54 (D. Colo. 1996, aff'g, Colorado Environmental Coalition, 135 IBLA 356 (1996).

section 202(c)(9), it “is required to coordinate with a State, and provide a State a meaningful role, in the federal land use planning process,” and “is to ensure that its land use plans, such as RMPs, are consistent with State and local plans to the maximum extent found by BLM to be consistent with Federal law and the purposes of FLPMA.” *Id.* at 9, citing William J. & Grace Gondolfo, 161 IBLA 7, 12 (2004).^{2/}

However, BLM rejects appellants’ contention that it “violated section 202(c)(9) of FLPMA by failing to incorporate free-standing WGFD wildlife policies into the subject leases at the lease sale stage.” (BLM Answer at 9.) BLM construes the plain language of section 202(c)(9) as requiring BLM to ensure, “*in the development and revision of land use plans*,” that such plans are consistent with State and local land use plans, but not “that each oil and gas lease must conform to free-standing State wildlife management policies * * * at the lease sale stage.” *Id.* at 10. BLM states that WGFD wildlife policies, standing alone, are not themselves a land use plan within the meaning of § 202(c)(9) of FLPMA to which a BLM planning, or even implementation, decision must attempt to conform,” but “are merely planning directives whose requirements do not have the force and effect of law.” *Id.* In fact, BLM points out that the Recommendations Report was not issued until December 6, 2004, well after BLM’s issuance of leases for the Crucial Winter Range Parcels on August 3, 2004, so that “WGFD’s most recent policy statement could not have been contemplated by BLM when it issued the subject leases.” *Id.* at 11.^{10/}

Even though BLM does not construe the coordination requirement of section 202(c)(9) as applying to such activities as holding an oil and gas lease sale,

^{2/} In response to appellants’ contention that the standard TLS is deficient, Anderson emphasizes that the Great Divide RMP, which applies to the lease for which it was high bidder, “extensively addresses the intent of the TLS and the extent of the BLM’s authority to regulate production-related activities in crucial winter range.” (Anderson Answer at 17.)

^{10/} On the subject of appellants’ argument that imposition of the standard TLS is alone insufficient to protect big game species on the Crucial Winter Range Parcels, EOG, in its *Amicus Curiae* Brief, states that in June 2005, the State of Wyoming issued an oil and gas lease on crucial winter range to Anderson covering lands immediately adjacent to the Anderson Federal parcel at issue in this appeal. EOG views it “most telling” that the State of Wyoming lease “contains no stipulations restricting use of the surface in order to protect big game, as does the federal lease.” (*Amicus Curiae* Brief at 4 and Ex. B. thereto.) EOG asserts that “[t]he fact that the State leases its own lands in crucial wildlife habitat may explain why the State is not a party to this appeal, seeking to enforce the Recommendations which the Appellants believe are binding on the BLM.” (*Amicus Curiae* Brief at 4.)

^{11/} BLM recognizes, nevertheless, that it has committed to coordinating oil and gas lease sales with WGFD under the Umbrella MOU. Moreover, we agree with BLM that appellants' assertion that it failed to coordinate the August 3, 2004, sale with WGFD is "wrong." BLM agrees that under the Umbrella MOU, it committed "to transmit a copy of every preliminary notice of competitive oil and gas lease sale to WGFD." (BLM Answer at 9, citing Umbrella Agreement, Ex. 14 to SOR, at Part VI.A.) BLM states: "In compliance with this agreement, approximately five months prior to the August 3, 2004, lease sale, BLM sent preliminary notice to WGFD of the plans to offer the subject leases for sale. WGFD, however, did not object to issuance of leases for the subject parcels." ^{12/} (BLM Answer at 9.) BLM contends that it, in fact, coordinated the subject lease sale with WGFD, in accordance with its commitment under the Umbrella MOU.

We see no basis for holding that BLM's August 3, 2004, lease sale reflected a failure on BLM's part to comply with the coordination requirements of section 202(c)(9) of FLPMA. The existence of the Umbrella and Oil and Gas MOUs

^{11/} Questar agrees, stating that "neither the statute nor the corresponding regulations provide for coordination with state and local governments in BLM's oil and gas leasing activities and decisions." (Questar Answer at 5.) Questar asserts that the "legislative history concerning FLPMA further confirms that Section 202 does not apply to BLM's oil and gas leasing activities." *Id.*; see H.R. Rep. 94-1163 (1976), *reprinted in* U.S.C.C.A.N. 6175. In addition, Questar quotes BLM's Land Use Planning Handbook as stating that "Section 202(c)(9) of FLPMA, as paraphrased, requires the BLM to provide for involvement of other Federal agencies and state and local government in developing **land use decisions** for public lands." (Questar Answer at 6, quoting BLM Handbook, H-1601-1 (2005), at 5. Questar asserts that "[t]here is no legal support for Appellants' argument that Section 202 applies to BLM oil and gas leasing activities and requires BLM to consider, incorporate and reconcile the WGFD policies, programs, and guidelines with BLM management policies." (Questar Answer at 6; see also Anderson Answer at 8.)

Anderson maintains that, contrary to appellants' position, the Great Divide RMP states that "BLM will consult with, not comply with, the WGFD." (Anderson Answer at 12.)

^{12/} In its answer, Questar underscores the fact that BLM sent the preliminary notice to all eight WGFD offices located in Wyoming, and did not receive an objection. (Questar Answer at 10; see Ex. 2 to SOR at 7; see also Anderson Answer at 14.) Questar adds that under 43 CFR 1610.3-2(c), BLM is allowed to proceed with the lease sale in the absence of receipt of a written response from WGFD. (Questar Answer at 7.) Questar states that "BLM received no objection nor any indication of inconsistency from WGFD concerning any of the lease parcels." *Id.*

are evidence that BLM in fact coordinated with WGFD on management programs involving oil and gas exploration and development. We conclude that the subject lease sale demonstrates BLM's compliance with the MOUs.

[2] Further, we reject appellants' argument that BLM's failure to incorporate WGFD wildlife policies, plans, and guidelines into each of the subject leases amounts to a violation of section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), which requires BLM to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands." (SOR at 39.) As the Board has noted, "[n]either FLPMA nor implementing regulations defines the term 'undue or unnecessary degradation.'" Colorado Environmental Coalition, 165 IBLA 221, 229 (2005); see 43 U.S.C. § 1702 (2000). In other contexts, BLM has promulgated regulations defining the term. See, e.g., 43 CFR 2800.0-5(x) (rights-of-way); 43 CFR 3600.0-5(l) (exploration and mining and wilderness review); 43 CFR 3809.5 (surface management). No similar definition appears in the onshore oil and gas regulations. Compare 43 CFR 3100.0-5 (definitions for Onshore Oil and Gas Leasing: General) and 3160.0-5 (definitions for Onshore Oil and Gas Operations). However, those regulations provide that the right of a lessee to

explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold [is] subject to: Stipulations attached to the lease, restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed.

In establishing that BLM's failure to impose the policies, plans, and guidelines, on the leases covering the Crucial Winter Range Parcels amounts to a violation of section 302(b) of FLPMA, appellants would have to show, at a minimum, that issuance of the leases without incorporating WGFD's policies, plans, and guidelines would result in adverse impacts to resource values of the Parcels. See Continental Land Resources, 162 IBLA 1, 7 (2004) (BLM rejected successful bids pending more in-depth consideration of impacts of leasing on crucial big game winter range). We are not convinced that appellants' construction of section 302(b) of FLPMA, as applied to this case, is plausible. Moreover, even if we subscribed to appellants' argument, we are unpersuaded that they have shown that BLM's failure to incorporate WGFD's policies, plans, and guidelines into the leases will result in injury to big game species and their habitat, and thus cause unnecessary and undue degradation to the Parcels. See BLM's Answer at 12.

We agree with BLM that "[w]ithout evidence that * * * future injury will occur, it cannot be argued that 'degradation of the lands' will occur, or that the future degradation could have been prevented if only BLM had incorporated the WGFD

policies into the subject leases at the lease sale stage, or that the future degradation is ‘unnecessary or undue.’” Id. at 13; see also Questar Answer at 16; Anderson Answer at 23. Despite appellants’ insistence that BLM’s position is based upon “plain factual error” (Appellants’ Reply at 6), we view their argument as somewhat of a distortion of BLM’s position as reflected in its actual practice regarding the Crucial Winter Range Parcels. BLM has made clear its view that the standard TLS does not in fact “stand alone,” but serves to address the principal concern that oil and gas drilling and operations will negatively impact the Crucial Winter Range Parcels primarily during November 15 through April 30. As to whether additional measures may be necessary for the protection of crucial winter range areas, BLM has committed to coordinating its sale of oil and gas leases with the State of Wyoming, as occurred in this case.

Appellants’ disagreement with BLM’s approach “does not suffice to overturn BLM’s decision to offer the lease parcels here.” (Questar Answer at 16, citing Fred Wilkinson d.b.a. Miller Creek Mining Co., 135 IBLA 24, 26 (1996).) We see no violation of section 202(c)(9) or section 302(b) of FLPMA. To the contrary, we conclude that BLM’s leasing decision comports with the provisions of the governing RMPs and the Umbrella and Oil and Gas MOUs.

To the extent not specifically addressed herein, any additional arguments offered by appellants in support of reversing BLM’s decision have been considered and rejected.

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 affirmed.

James F. Roberts
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge