



WYOMING OUTDOOR COUNCIL, ET AL.

171 IBLA 153

Decided March 29, 2007

WYOMING OUTDOOR COUNCIL, ET AL.

IBLA 2005-156, 2005-189

Decided March 29, 2007

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, dismissing protests against offering certain parcels in competitive oil and gas lease sales. WY-0410-110, WY-0410-112, and WY-0410-021 (IBLA 2005-156); WY-0412-074, WY-0412-075, WY-0412-080, WY-0412-081, WY-0412-082, and WY-0412-083 (IBLA 2005-189).

Affirmed.

1. Administrative Authority: Generally--Regulations: Force and Effect as Law

A BLM instruction memorandum is not a regulation, has no legal force or effect, and is not binding on the Board or the public at large.

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

BLM's decision to issue oil and gas leases without an evaluation of best management practices prior to leasing is not contrary to a BLM instruction memorandum, which was issued to guide the exercise of BLM's discretionary authority regarding whether to temporarily defer oil and gas leasing during periods when land use plans are being revised or amended.

APPEARANCES: Bruce M. Pendery, Esq., Logan, Utah, for appellants; Scott M. Campbell, Esq., Denver, Colorado, for OXY USA WTP LP; J. Matthew Snow, Esq., Salt Lake City, Utah, for Yates Petroleum Corporation; and Jennifer E. Rigg, 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 from two decisions of the Wyoming State Office, Bureau of Land Management (BLM), dismissing their protests against the offering of numerous parcels in competitive oil and gas lease sales. Appellants have filed a motion to consolidate these appeals, which the Board has docketed as IBLA 2005-156 and IBLA 2005-189, on the basis that they involve a virtually identical issue, *i.e.*, whether BLM violated Instruction Memorandum (IM) No. 2004-110 Change 1 (Change IM or Change 1) when it sold lease parcels in citizens' proposed wilderness (CPW) areas without applying Best Management Practices (BMPs) to the parcels prior to sale. (Motion to Consolidate Appeals at 1.) We hereby grant appellants' motion and consolidate these appeals for review.

I. Factual and Procedural Background

A. IBLA 2005-156

In IBLA 2005-156, appellants challenge a March 15, 2005, decision of the Wyoming State Office, BLM, dismissing two protests ^{1/} against an offering of numerous parcels of land at an October 5, 2004, competitive oil and gas lease sale. ^{2/} In their protests, appellants advanced four principal arguments as to why the parcels should not have been offered: (1) the sale of certain parcels would foreclose consideration of a reasonable range of alternatives during revision of the Pinedale and Rawlins Resource Management Plans (RMPs); (2) BLM was precluded from offering for sale certain parcels found on big game migration routes; (3) BLM

^{1/} Appellants, along with Powder River Basin Resource Council, filed a protest dated Sept. 30, 2004, against the Oct. 5, 2004, lease sale regarding parcels WY-0410-008, -009, -011, -025, -026, -027, -098, -110, -112, and -121. Further, along with The Wilderness Society, the Jackson Hole Conservation Alliance, and the Greater Yellowstone Coalition, appellants filed a protest dated Oct. 1, 2004, against the lease sale regarding parcels WY-0410-148, -152, -153, -154, and -155.

^{2/} Specific information as to the parcels included in the sale, such as the legal description of the location of the parcel and the entity that purchased the parcel, may be found in Exs. 3 and 4 to appellants statement of reasons (SOR) in IBLA 2005-156. While the arguments in IBLA 2005-156 and IBLA 2005-189 are identical, for the most part, occasionally they differ. In this opinion, we identify a pleading by IBLA docket number, *e.g.*, "2005-156 SOR" or "2005-156 Answer."

violated section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), by not preparing an environmental impact statement (EIS) that considered the impacts of offering certain parcels for sale that might be developed for coalbed methane (CBM); and (4) BLM violated the Change IM by not evaluating the application of BMPs to lease parcels in CPW areas. See 2005-156 SOR at 2. BLM denied appellants' protests in their entirety and proceeded to issue leases for the parcels that were at issue. This appeal followed.

Appellants indicate that their appeal involves only lease parcels WY-0410-110, -112, and -121,^{3/} all located in CPW areas.^{4/} The parties refer to these parcels as "Special Values Parcels." Appellants state that of the four general concerns raised in their protest of the lease sale, they intend only to advance claims related to their fourth argument, i.e., "the sale of lease parcels in citizens' proposed wilderness areas [was made] without evaluation of the application of BMPs to the parcels." (2005-156 SOR at 6.)

B. IBLA 2005-189

In IBLA 2005-189, appellants challenge an April 7, 2005, decision of the Wyoming State Office, BLM, dismissing their protest against the offering of 73 parcels^{5/} at the December 7, 2004, competitive oil and gas lease sale in Wyoming. In their protest, appellants made four principal arguments as to why these parcels should not have been offered: (1) BLM's offering the lease parcels was error because they are located in a proposed area of critical area of environmental concern; (2) BLM violated section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), by not preparing an EIS that considered the potential impacts of CBM development on lease parcels administered by the Rawlins Field Office; (3) BLM violated

^{3/} Appellants assert that Craig Settle, OXY USA WTP LP (OXY), and Questar Exploration & Production Company, as purchasers of parcels WY-0410-110, -112, and -121, respectively, "are potentially adversely affected by this Appeal if they choose, and if they can show they have standing." (2005-156 SOR at 3.) OXY, the successful bidder on parcel WY-0410-112, has filed an answer in IBLA 2005-156.

^{4/} Parcel WY-0410-110 is located in the Honeycomb Buttes CPW area administered by BLM's Lander and Rock Springs Field Offices; parcel -112 is located in the Bobcat Draw Badlands CPW area administered by BLM's Worland Field Office; and parcel -121 is located in the Kinney Rim North CPW area administered by BLM's Rock Springs Field Office. See IBLA 2005-156 SOR, Ex. 1a at Ex. 3, map entitled "Jeffrey City Area Lease Parcels."

^{5/} Specific information as to the parcels included in this sale, including the legal description of the location of the parcel and the entity that purchased the parcel may be found in Exs. 3 and 4 to the 2005-189 SOR.

section 102(2)(C) of NEPA by not preparing an EIS that considered the potential impacts of CBM development on lease parcels administered by the Casper Field Office; and (4) BLM violated the Change IM by not evaluating the application of BMPs to lease parcels in CPW areas.

Appellants state that their appeal involves only lease parcels WY-0412-074, -075, -080, -081, -082, and -083, all located in CPW areas.^{6/} The parties refer to these parcels as “Special Values Parcels” also. Again, they state that of the four general concerns raised in their protest, they intend only to advance claims concerning their fourth argument, i.e., that “the sale of lease parcels in citizens’ proposed wilderness areas [was made] without evaluation of the application of BMPs to the parcels.” (2005-189 SOR at 6.)^{7/}

C. Appellants’ Protests and BLM’s Decisions

In their protests, appellants argued, inter alia, that the Change IM requires BLM to “evaluate the application of BMPs (see WO IM 2004-194)” when taking leasing actions. They argued that the Documentations of Land Use Plan Conformance and NEPA Adequacy Worksheets (DNAs) prepared by the various Field Offices gave no indication that BLM considered adopting BMPs as lease stipulations with respect to the Special Values Parcels so as to protect their wilderness values. They contended that because neither the DNAs nor the underlying RMPs evaluated the application of BMPs to the Special Values Parcels, the Change IM was violated. See Sept. 30, 2004, Protest at 10; Oct. 1, 2004, Protest at 5.

In its decisions, BLM recognized that BMPs could be “applied either as lease stipulations or conditions of approval,” and are potentially more “effective in mitigating adverse environmental or social impacts than certain standard lease stipulations.” (Mar. 15, 2005, Decision at 5; Apr. 7, 2005, Decision at 6.) However, BLM stated that it need not evaluate the application of BMPs at the leasing stage, but that BMPs are more appropriately considered at the application for permit to drill (APD) stage of oil and gas development. (Mar. 15, 2005, Decision at 5-6; Apr. 7, 2005, Decision at 6.) BLM stated that “nowhere in either [the Change IM

^{6/} Parcels WY-0412-074 and -080 are situated in the Kinney Rim South CPW area. (Appellants’ Ex. 1, map entitled “Sweetwater County Area Lease Parcels”.) Parcel -075 is located in the Kinney Rim South and the Adobe Town CPWs. Id. And parcels -081, -082, and -083 are located in the Honeycomb Buttes CPW area. (Appellants’ Ex. 1, map entitled “Great Divide Area Lease Parcels”.)

^{7/} Yates Petroleum Corporation (Yates), the successful bidder on parcel WY-0412-074, has filed an answer in IBLA 2005-189.

or IM 2004-194] does it say that the BLM should not issue an oil and gas lease if BLM did not consider or use BMPs as lease stipulations.” (Mar. 15, 2005, Decision at 6; Apr. 7, 2005, Decision at 6.)

II. The Change IM

The Director of BLM issued the Change IM on August 13, 2004, for the purpose of offering “clarification of guidance” previously provided in IM 2004-110. We will first briefly review key provisions of IM 2004-110, IM 2004-194, and IM 2003-275, all of which, according to appellants, support their position that the Change IM requires BLM to consider imposing BMPs as conditions at the leasing stage of oil and gas development.

The Director of BLM issued IM 2004-110 on February 23, 2004, in order to provide guidance under NEPA as to the manner in which BLM should process oil, gas, and geothermal decisions “authorized under existing land use plans.” (IM 2004-110 at 1.) The Director of BLM sought to clarify “existing NEPA guidance” and to provide for “clearer policy direction in regard to implementing existing land use plan decisions, especially during * * * the process [of] preparing a land use plan amendment or revision.” IM 2004-110 states that BLM’s policy is to “follow current land use allocations and existing land use plan decisions * * * when preparing land use plan amendments or revisions.” *Id.* at 2. IM 2004-110 states that “[f]luid mineral leasing allocation decisions are made at the planning stage”; that an EIS associated with an RMP is intended to meet requirements under NEPA, 42 U.S.C. § 4332(2)(C) (2000), for subsequent “leasing decisions”; and that “[p]reparation of another NEPA document, plan amendment or additional activity planning is not normally required prior to issuance of an oil and gas * * * lease.” *Id.* at 2. IM 2004-110 provides that “[t]he next phase of Bureau NEPA analysis occurs when the lessee or the operator submits an application for exploration or development,” and that “[w]hen permit applications are submitted, site-specific NEPA impact analyses, as appropriate, are conducted to provide another tier of environmental protection through the development of conditions of approval to be included in the approved permits.” *Id.* IM 2004-110 quotes 43 CFR 1610.5-3(a) as providing that “[a]ll future resource management authorizations * * * shall conform to the approved plan.” *Id.* at 3-4 (emphasis in original).

The purpose of IM 2004-194, issued by the Director of BLM on June 22, 2004, was to establish a policy that BLM Field Offices consider BMPs in NEPA documents “to mitigate anticipated impacts to surface and subsurface resources,” and also to encourage operators to actively consider BMPs during the APD process. (IM-2004-194 at 1.) IM 2004-194 emphasizes that the appropriate time for considering application of BMPs is at the APD stage of development. IM 2004-194

states that “BMPs are innovative, dynamic, and economically feasible mitigation measures applied on a site-specific basis to reduce, prevent, or avoid adverse environmental or social impacts,” and that “[t]he early incorporation of BMPs into * * * APDs by the oil and gas operator helps to ensure an efficient and timely APD process.” IM 2004-194 provides that BLM Field Offices “shall incorporate appropriate BMPs into proposed APDs and associated on and off-lease rights-of-way approvals after appropriate NEPA evaluation.” IM 2004-194 enumerates a series of “BMPs to be considered in nearly all circumstances,” as well as others deemed “more suitable for Field Office consideration on a case-by-case basis.” Id. at 1-2. IM 2004-194 recognizes that whether to apply a BMP in a given situation is a matter left to the discretion of the authorized officer:

Field Offices must be cautious to avoid the “one size fits all” approach to the application of BMPs. BMPs, by their very nature, are dynamic innovations and must be flexible enough to respond to new data, field research, technological advances, and market conditions. Following implementation, Field Offices should monitor, evaluate, and modify BMPs as necessary for use in future permit approvals.

Id. at 2.

The Director of BLM issued IM 2003-275 on September 29, 2003, to provide “guidance regarding the consideration of wilderness characteristics in the land use planning process.” (IM 2003-275 at 1.) IM 2003-275 states that BLM can utilize a broad variety of land use plan decisions to protect wilderness characteristics, such as “establishing conditions of use to be attached to permits, leases, and other authorizations to achieve the desired level of resource protection.” Id. at 2. IM 2003-275 outlines the possible purposes for which information gathered during wilderness inventory may be used, and sets forth BLM policy regarding significant new circumstances or information relevant to environmental concerns that come to light during wilderness inventory. Such new information may be used in “day-to-day operations” involving, inter alia, “on-the-ground projects” and the implementation of land use plans. IM 2003-275 states: “Provided relevant new information is considered in the NEPA document * * *, it is not necessary to analyze the impacts to the area identified by BLM wilderness inventories or public wilderness proposals as having wilderness characteristics.” Id. at 4.

The Change IM was issued on August 13, 2004, to offer “clarification” of the “guidance” previously provided in IM 2004-110. The Change IM resulted from “the need for policy direction in regard to implementing existing land use plan decisions, especially while preparing land use plan amendments or revisions.” The Change IM states that “State Directors have discretion to temporarily defer leasing on specific tracts of land based on information under review during planning (see

WO IM 2004-110).” The Change IM then states that it provides “additional guidance” when BLM has released a draft RMP/EIS for public review. The Change IM announced that BLM’s policy is to consider temporarily deferring oil and gas leasing on Federal lands that are subject to an RMP that is being revised or amended, with such deferral potentially including, inter alia, lands designated in an existing land use plan as restricted, closed to leasing, or open to leasing under no surface occupancy. With regard to BMPs, the Change IM states:

In addition, the appropriate offices shall also evaluate the application of BMPs (see WY IM 2004-194). Often, BMPs, applied either as stipulations or conditions of approval, are more effective in mitigating impacts to wildlife resources than stipulations such as timing limitations or seasonal closures.

For existing leases, BMPs can usually be applied as conditions of approval at the permitting stage to accomplish the management goals of newly revised or amended RMPs. Section 6 of the standard federal oil and gas lease (Form 3100-11) provides the Bureau with authority to require reasonable measures to minimize adverse impacts to land, air, and water, to cultural, biological, visual, and other resources and to other uses or users. These measures may include, but are not limited to siting, design, timing, and reclamation of oil and gas facilities. Therefore, for new surface disturbing activities, FOs [Field Offices] are directed to evaluate during the NEPA process the application of BMPs to provide the necessary level of protection for critical resources on existing leases consistent with lease rights granted. [Emphasis added.]

(Change IM at 2.) The Change IM specifically states that “[t]his policy is intended to provide flexibility and to re-emphasize the discretionary authority of the State Director to temporarily defer leasing of specific tracts when there are legitimate BLM-recognized resource concerns.” Id. (emphasis added).

III. Arguments of the Parties

A. Appellants’ SORs

In their SORs, appellants argue that the Change IM requires BLM to evaluate the potential application of BMPs at the leasing stage. They assert that in IM 2004-110 BLM set out its “policy for conducting oil and gas leasing during RMP revisions.” (2005-156 SOR at 8; 2005-189 SOR at 9; see IM 2004-110 at 2.) Appellants emphasize that IM 2004-110 “was not intended to apply to the APD stage: ‘This IM replaces all discussion pertaining to oil and gas leasing (not APD or other

permit processing) contained in IM No. 2001-191.” (2005-156 SOR at 8 and 2005-189 at 9, quoting IM 2004-110 at 1.)

Appellants point to IM 2004-194, and not the Change IM, as providing specific guidance for the application of BMPs at the APD stage of development. Thus, appellants assert, IM 2004-194 was issued to “guide the application of BMPs at the APD stage of development, and provides that certain BMPs are to be considered ‘in nearly all circumstances.’” (2005-156 SOR at 8 and 2005-189 SOR at 9-10, quoting IM 2004-194 at 1-2.)

Appellants claim that the Change IM was intended to address the gap remaining after issuance of IM 2004-110 and IM 2004-194, *i.e.*, the application of BMPs at the leasing stage of development. (2005-156 SOR at 9; 2005-189 SOR at 10.) The Change IM “provides additional clarification of guidance provided in WO IM 2004-110 * * * in regard to * * * the processing of oil, gas, and geothermal leasing decisions.” (Change IM at 1.) According to appellants, “[m]uch of the Change IM was directed at clarifying when BLM can defer leasing decisions during the revision of an RMP, but it also provides guidance on ‘further application of Best Management Practices (BMPs)’ at the leasing stage.” (2005-156 SOR at 9 and 2005-189 SOR at 10, quoting Change IM at 1.) They assert that “[t]he entire IM is focused on guiding BLM actions during the leasing stage, not the subsequent APD stage,” and that “the intent of this provision was to require that BLM evaluate the potential application of BMPs at the leasing stage, given that the whole purpose of the Change IM was to guide leasing actions.” (2005-156 SOR at 9; 2005-189 SOR at 10 (emphasis in original).)

Appellants summarize their review of the IMs in the following terms: “Taken together, the Change IM and IM Nos. 2004-110, 2004-194, and 2003-275 [^{8/}] make

^{8/} Appellants read IM 2003-275 as supporting their argument that BLM must evaluate application of BMPs at the leasing stage. Their discussion of IM 2003-275, however, relates to BLM’s responsibility to protect wilderness characteristics, and other uses and values, in areas not considered for wilderness designation or wilderness study area status during preparation of land use plans. (SOR at 9; see IM 2003-275 at 2.) They state that IM 2003-275 “authorize[s] BLM to fully consider these and other values of citizens’ proposed wilderness areas during land use planning and in ongoing management.” (SOR at 10.) Appellants fail to relate what they view as BLM’s failure to meet its obligations under IM 2003-275 to their argument that BLM’s issuance of leases on the Special Values Parcels violates the Change IM. In any event, because we reject appellants’ argument concerning the effect and scope of the Change IM, we do not address further the possible applicability of IM 2003-275 to BLM’s decision to issue the leases on the Special

(continued...)

it clear that BLM has a duty to evaluate BMPs at the leasing stage that may help protect the values of citizen proposed wilderness areas such as the Special Values Parcels. BLM has failed to meet that duty.” (2005-156 SOR at 10; 2005-189 SOR at 12 (emphasis in original).)^{8/} Appellants dismiss BLM’s argument “that it can take care of any problems or issues relative to oil and gas leases at the APD stage [as] trivializing the significance of leasing (and BLM’s actions or lack of actions at that stage).” (2005-156 SOR at 12; 2005-189 SOR at 13.) Appellants insist that “[t]he time to protect wilderness values, which IM 2003-275 recognizes as valid and important concerns, is at the leasing stage via the use of BMPs (and stipulations) as required by the Change IM.” (2005-156 SOR at 12; 2005-189 SOR at 13.)^{10/}

^{8/} (...continued)

Values Parcels

^{2/} Appellants also argue that in the DNAs prepared for the lease sales, BLM “never evaluated the application of BMPs to these parcels.” (2005-156 SOR at 10; 2005-189 SOR at 12; see DNAs from the Worland, Lander, and Rock Springs Field Offices, Exs. 7, 8, and 9 to 2005-156 SOR.) Appellants assert that the DNAs do not provide for the kinds of BMPs recognized in IM 2004-194 as “worthy of consideration ‘in nearly all circumstances’ (such as camouflage painting).” (2005-156 SOR at 11; 2005-189 SOR at 12.) For example, regarding the DNA prepared by the Rock Springs Field Office prior to the sale of parcel WY-0410-121, appellants contend that application of only the timing limitation stipulation (TLS) intended to protect sage grouse and big game, “do[es] not in any way protect aesthetic qualities, primitive and unconfined recreation, or other potential wilderness values, many of which could be protected had BMPs such as those specified in IM No. 2004-194 (e.g., camouflage painting, below ground wellheads) at least been evaluated by BLM.” (2005-156 SOR at 11-12; see Ex. 8 (Rock Springs Field Office DNA).) However, appellants fail to relate their DNA argument to their central theme that BLM violated the Change IM in not evaluating BMPs for leases on the Special Values Parcels.

^{10/} Appellants cite camouflage painting as an example showing that “BLM does know enough” at the lease stage to evaluate the utility of certain BMPs in protecting the wilderness values present on the Special Values Parcels:

“[I]t is known that parcel[s] * * * in the Honeycomb Buttes citizens’ proposed wilderness and * * * this area ha[ve] spectacular and important natural features. Thus, BLM knows all it needs to know to attach a BMP to [the] parcel[s] requiring the use of camouflage painting (leaving the details to the APD stage) and certainly it can evaluate whether such a BMP should be applied at the leasing stage. The Change IM requires this.”

(2005-156 SOR at 13; 2005-189 SOR at 14.)

B. BLM's Answers

In its Answers, BLM rejects appellants' argument that inclusion of the parcels in the subject sales violates BLM's own guidance regarding BMPs, as stated in the Change IM, contending that such guidance has no application to the issuance of leases on the Special Values Parcels. (2005-156 Answer at 3; 2005-189 Answer at 4.)

BLM asserts that IM 2004-110 "addresses the circumstances where BLM is considering a lease sale *and* BLM is engaged in the process of revising or amending the applicable lease plan," and that the Change IM applies when BLM is in the process of revising its land use plan and "the Bureau has developed alternatives *and has released a draft Resources Management Plan/Environmental Impact Statement (RMP/EIS) for public review.*" (2005-156 Answer at 3-4 and 2005-189 Answer at 4-5, quoting Change 1, BLM's Attachment A (emphasis in original).) BLM concedes that while the Lander Field Office has taken preliminary steps toward revising its RMP, "it has not released, and is not yet ready to release, a draft RMP." (2005-189 Answer at 5.) BLM states that even though the Rawlins Field Office is currently in the process of revising its RMP, inclusion in the December 2004 lease sale of WY-0412-074, -075, -080, and -084 did not violate the IMs. Id. at 5-6.

BLM asserts that the IMs themselves "contradict virtually all of the Appellants' arguments." (2005-156 Answer at 4.) BLM states that IM 2004-110 and the Change IM "make very clear that pending CPWs, as 'new land use allocations proposals * * * submitted by a member of the public' are to 'be analyzed in the context of land use planning and its NEPA work [and] *not* in the context of current plan implementation.'" Id., quoting Change IM, BLM's Attachment A (emphasis added by BLM). BLM reasons that "[b]ecause the lands involved here are all identified as open to oil and gas leasing in the Lander, Rock Springs, and Worland field office RMPs, the inclusion of the three parcels in the lease sale here is nothing more than implementation of the existing land use plans." (2005-156 Answer at 4; see 2005-189 Answer at 7-8.) The purpose of the Change IM, according to BLM, was "to clarify that State Directors do have discretion to temporarily defer leasing on specific tracts of land 'based on information under review *during planning.*'" (2005-156 Answer at 5, quoting Change IM, BLM's Attachment A (emphasis added by BLM); see 2005-189 Answer at 8-9.)

BLM construes the discussion of BMPs in the Change IM as "not directed only at leasing," noting that the use of the term "condition of approval" suggests that BMPs should be evaluated, and may be applied, "at the permitting stage." (2005-156 Answer at 5-6; 2005-189 Answer at 9.) Further, BLM states that the reference to "new surface disturbing activities" means that BMPs should be evaluated

“only at the later APD stage,” given that “leasing, by itself, does not involve any surface disturbing activities.” (2005-156 Answer at 6.) BLM concludes:

The IMs simply clarify that, where BLM is in the process of revising or amending the applicable RMP, BLM may consider deferring the leasing of specific parcels or the imposition of BMPs as lease stipulations when BLM has “designated [the specific parcels] in the preferred alternative [of a draft RMP] as 1) lands closed to leasing; 2) lands open to leasing under no surface occupancy; 3) lands open to leasing under seasonal or other constraints with an emphasis on wildlife concerns; or 4) other potentially restricted lands.”

Id., quoting Change IM, BLM’s Attachment A.

As a related matter, BLM explains that “BLM’s policy [is] to consider incorporating BMPs into APDs and associated on and off-lease rights-of-way approval after appropriate NEPA analysis.” (2005-156 Answer at 7; see BLM’s Attachment F, (Frequently Asked Questions Regarding BMPs).) By way of example, BLM points to BMPs related to visual resources such as placement of centralized storage facilities in a hidden location, and BMPs related to potential noise impacts, such as use of mufflers and pointing stacks away from sensitive areas. However, BLM maintains that “[t]he appropriate time for determining exactly what measures will be required is when specific activities are proposed.” (2005-156 Answer at 7, citing Colorado Environmental Coalition, 161 IBLA 386, 400 (2004); see 2005-189 Answer at 9.) BLM concludes that “[t]he IMs relied upon by the Appellants have no bearing on this case.” (BLM Answer at 8.) ^{11/}

C. OXY’s Answer in IBLA 2005-156

OXY was the successful bidder on parcel WY-0410-112, which is located within the Grass Creek Planning Area managed by the Worland District Office, BLM. The Grass Creek Planning Area is managed in accordance with the Approved RMP and Final EIS for the Grass Creek Planning Area (Grass Creek RMP/EIS).

OXY opposes BCA’s argument that BLM was “required” to evaluate BMPs at the leasing stage “solely by virtue of BLM policy statements” contained in the Change IM.

^{11/} BLM states that “[t]he very fact that BLM decided to withdraw certain parcels from the * * * lease sale[s] tends to show that BLM ‘made a genuine review of the possible effects of oil and gas leasing of specific parcels’ on other resource values.” (2005-189 Answer at 11, quoting Southern Utah Wilderness Alliance, 166 IBLA 270, 282 (2005).

(OXY Answer at 6.) ^{12/} OXY's response is that the Change IM is "irrelevant" to BLM's decision to sell parcel WY-0410-112, for which it was the high bidder, "because IM 2004-110 Change 1 is limited to those periods when an RMP is being revised or amended," and that "[t]he Grass Creek RMP is neither being revised nor amended." Id.

OXY also opposes BCA's contention that the Change IM requires BLM to consider application of BMPs at the leasing stage, and that IM 2004-110 and IM 2004-194 "discloses a 'potential gap relative to the application of BMPs at the leasing stage' which ostensibly caused BLM to issue the [Change IM]." (OXY Answer at 9, quoting SOR at 9.) To the contrary, OXY agrees with BLM that the purpose of the Change IM was to provide "additional guidance" when BLM had released a draft RMP/EIS for public review. OXY concludes that the Change IM "is therefore inapplicable unless an RMP is in the planning stage." (OXY Answer at 9.)

OXY states that parcel -112 was designated under the Grass Creek RMP as "open to oil and gas leasing * * * subject to standard lease terms and conditions, and seasonal or other requirements." (Grass Creek RMP, OXY's Ex. C, at 15.) Noting that, by its terms, the Change IM specifically "does not apply to 'areas designated in the alternative as open to leasing under the terms and conditions of the standard lease form,'" OXY asserts that the IM does not apply to its parcel. Id., quoting Change IM at 2.

Moreover, OXY states that BLM made the management decision to designate parcel -112 as open to leasing "after accounting for visual resources, recreational resources, and citizens' proposed wilderness resources." (OXY's Answer at 12.) OXY notes that the "RMP/FEIS and DNA required that Lease Notices be attached at the leasing stage to parcel -112, which preserved BLM's ability to impose mitigating measures, such as BMPs, at the APD stage." Id. OXY states that through this approach BLM has "already evaluated and implemented BMPs at the leasing stage." Id. at 13. ^{13/} OXY states that the DNA demonstrates that BLM "considered at the

^{12/} OXY asserts that only BCA has standing to challenge BLM's decision to issue a lease for parcel -112 and further, that BCA is limited by 43 CFR 4.410(c) to the arguments advanced in the Sept. 30, 2004, protest, which addressed parcel -112, and that arguments made in the Oct. 1, 2004, protest are irrelevant to this appeal since that protest did not address parcel -112.

^{13/} For example, under the subject of "visual resources," OXY states that parcel -112 is located in a Class IV visual resource management (VRM) class, so that "changes in the basic elements of the landscape can attract attention and may be dominant features of the landscape in terms of scale, but the changes should repeat the form,

(continued...)

leasing stage all of the values identified by the Appellant, and preserved at the leasing stage BLM's ability to implement BMPs at the APD stage if necessary." *Id.* at 16. OXY notes that the DNA states that "the current proposed action is substantially the same action that was previously analyzed in the Grass Creek Planning Area FEIS," and that "the existing EIS and ROD [Record of Decision] identify the appropriate level of mitigation necessary to allow leasing of the identified lands." (DNA, Appellants' Ex. 7.) Thus, concludes OXY, BLM's failure in the DNA to expressly acknowledge BMPs is "immaterial," given that "the RMP/FEIS in conjunction with the Lease Notices nonetheless demonstrate that BMPs, in substance, though not labeled as such in the RMP/FEIS, DNA or Lease Notices, were evaluated at the lease stage." (OXY's Answer at 16.)

D. Yates' Answer in IBLA 2005-189

Yates bid successfully on, and was awarded, parcel WY-0412-074 (the Yates Lease). The Yates Lease is located in Sweetwater County, Wyoming, and is within the jurisdiction of BLM's Rawlins Field Office. In its answer, Yates argues, consistent with BLM and OXY, that "neither the Change IM nor the associated instructional memorandum mandate BLM consider the application of BMPs prior to lease issuance," and that "[i]nstead, the APD stage of development is the optimal time to assess potential application of BMPs." (Yates Answer at 3.)

Yates contends that the Change IM is "devoid of any mandatory language requiring BLM to consider BMPs prior to lease issuance." *Id.* at 4. Yates rejects appellants' argument that the statement in the Change IM that "the appropriate offices shall also evaluate the application of BMPs (see WO IM 2004-194)" mandates that BLM evaluate BMPs prior to lease issuance. Yates points out that the title of

^{13/} (...continued)

line, color and texture of the characteristic landscape." *Id.*, quoting Grass Creek RMP, OXY's Ex. C, at 40. The Grass Creek RMP provides that "[f]acilities or structures, such as power lines, oil wells and storage tanks will be screened, painted or otherwise designed to blend with the surrounding landscape" in the context of a given VRM class. *Id.* at 20. OXY points out that Lease Notice No. 1 provides:

"Under Regulation 43 CFR 3101.1-2 and terms of the lease (BLM Form 3100-11), the authorized officer may require reasonable measures to minimize adverse impacts to other resource values, land uses, and users not addressed in leases stipulations at the time operations are proposed. Such reasonable measures may include, but are not limited to, modification of siting or design of facilities, timing of operations, and specification of interim and final reclamation measures." (Lease Notice 1, Appellants' Ex. 3 (emphasis added by OXY).)

IM 2004-194, “Integration of Best Management Practices into Application for Permit to Drill Approvals and Associated Rights-of-Way,” plainly indicates that it was issued to guide BLM Field Offices in evaluating BMPs for possible incorporation into APDs. Yates asserts that IM 2004-110 is consistent with IM 2004-194, in which BLM determined that BMPs need only be assessed at the APD stage of oil and gas development. *Id.* at 6. In this connection, Yates states that “BLM will be far better equipped to appropriately evaluate the applicability of BMPs once an APD has been filed which includes the actual location of the well-site, access-road[s], and related oil and gas facilities.” *Id.* at 8.

In addition, Yates opposes appellants’ contention that IM 2003-275, when read in conjunction with IM 2004-110, the Change IM, and IM 2004-194, places an obligation upon BLM to evaluate, prior to leasing, all BMPs that might protect the values of citizens’ proposed wilderness areas. Yates contends that IM 2003-275 “specifically applies to BLM’s land use planning, not oil and gas leasing.” *Id.* at 7. Thus, the “stated purpose of [IM 2003-275] is to provide ‘guidance regarding the consideration of wilderness characteristics in the *land use planning process.*’” *Id.*, quoting IM 2003-275 at 1 (emphasis added by Yates). Yates views appellants’ argument as a challenge to the Great Divide RMP rather than to the BLM decision on appeal. Yates states that “it is undisputed that this Board does not have jurisdiction over the land use planning determinations made in the Great Divide RMP.” (Yates’ Answer at 7.)

IV. Analysis

Appellants contend that BLM was required by the terms of the Change IM to apply BMPs to the Special Values Parcels at the leasing stage of development. We will begin our analysis by stating that appellants clearly attempt to elevate BLM’s IMs to a legal status not allowed under this Board’s precedents.

A. The Legal Effect of an IM

[1] In Beard Oil Co., 111 IBLA 191 (1989), BLM sought remand of the case so that it could further consider a “future interest” oil and gas lease application in light of a newly issued IM. The Board stated:

BLM’s IMs are not binding on this Board. Nor are they binding on the public at large. Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986); Thunderbird Oil Corp., 91 IBLA 195 (1980). We have repeatedly held that duly promulgated regulations have the force and effect of law. An IM, however, is a document for internal use by BLM employees. Such documents are not regulations, have no legal force, and only serve as a guide for actions of subordinate officials of BLM. Thunderbird Oil

Corp., supra at 204; Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982).

111 IBLA at 194. The Board stated: “[T]he issuance of the IM cannot be deemed to have altered the significance of the regulatory requirements. Regulations cannot be amended by an IM.” Id. The Board held that on remand BLM was bound by its duly promulgated regulations and not by the “substantive change,” or “new procedures,” purportedly effected by the IM. Id.

More recently, in Joe E. Fallini, Jr. v. BLM (Fallini), 162 IBLA 10 (2004), the Board addressed the legal effect to be given an IM in the context of a BLM denial of an application for range improvement permits. The Board noted that in Kaycee Bentonite Corp., 64 IBLA at 214, 89 I.D. at 279, it had stated that while IMs “are not regulations and have no legal force, * * * BLM employees * * * are obliged by the conditions of their employment to abide by the policies and to follow the instructions handed down by their Director.” 162 IBLA at 38, quoting Kaycee Bentonite Corp., 64 IBLA at 214, 89 I.D. at 279. The Board agreed with Fallini that the IM at issue in that case improperly “established a ‘binding norm’ that applications for water improvements in [herd management areas] could only take the form of cooperative agreements, and thereby constricted the discretion enjoyed by BLM’s authorized officers under 43 CFR 4120.3-1(a) (1991).” 162 IBLA at 41. Thus, the Board ruled that “[i]n the absence of notice-and-comment rulemaking, the IM could not be used as a stand alone basis for rejecting the appellants’ applications.” Id. The Board then reviewed whether BLM’s rejection of appellants’ water improvement applications “was arbitrary, capricious, and an abuse of discretion,” since under 43 CFR 4120.3-1(a) such decisions may be “issued at the discretion of the authorized officer.” The Board reversed BLM’s rejection of Fallini’s applications on the basis of an IM which improperly constrained the discretion of BLM’s officers, noting that under BLM regulations, 43 CFR 4120.3-1, applications for water improvements could be granted in BLM’s discretion. 162 IBLA at 50. The import of Fallini here is that the Board reversed BLM for adopting an IM that amounted to a rule of substantive law without following rulemaking procedures required under the Administrative Procedure Act, 5 U.S.C. § 553 (2000). ^{14/}

^{14/} In determining whether an IM constitutes a statement of policy rather than a rule, the Board applied the following standard from Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987): “To the extent that the directive merely provides guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make ‘individualized determination[s], it constitutes a general statement of policy.” 813 F.2d at 1013-14, quoting Guardian Federal Savings and Loan Ass’n v. Federal Savings and Loan Insurance Corp., 649 F.2d 658, 666-67 (D.C. Cir. 1978). “In contrast,” stated the Mada-Luna

(continued...)

B. Appellants' Argument is Contrary to the Terms of the Change IM

[2] We will now review the Change IM, which appellants argue requires BLM to evaluate BMPs prior to leasing a parcel for oil and gas development, in terms of the principles set forth in Beard and Fallini. There is no question that an authorized officer is “obliged * * * to abide by the policies and to follow the instructions handed down by their Director.” Fallini, 162 IBLA at 38. However, we reject any suggestion that the Change IM “established a binding norm” for authorized officers to follow, which is the essence of appellants’ argument. There is no basis for interpreting the Change IM as placing a constraint on the authorized officer’s discretion concerning the range of terms and conditions to be imposed upon a lease at the leasing or subsequent stage.

In reaching our conclusion that the Change IM by its clear terms may not be given the mandatory effect advocated by appellants, we recognize and preserve the viability of its policy content, which BLM officials are bound to follow. To read the Change IM, and by implication IM 2004-110, as constraining the discretion of the authorized officer in oil and gas leasing matters would amount to elevating it to the status of a regulation, which we would then be required to state is of no binding effect under Fallini, since it was issued without notice-and-comment. We thus reject appellants’ argument that the Change IM requires the authorized officer to evaluate BMPs at the leasing stage of development. Our review of the Change IM shows that it involves no limitation on the authorized officer’s discretion as to whether BMPs should be applied in a given case. To the contrary, the Change IM not only expressly preserves BLM’s discretionary authority in matters involving application of BMPs to a given lease, but further makes clear that the appropriate time for the requisite evaluation of BMPs is at the APD, or site-specific, stage of development. We therefore reject appellants’ argument that the Change IM requires the authorized officer to evaluate BMPs at the leasing stage of development.

V. Conclusion

Our review of the Change IM, IM 2004-110, IM 2004-194, and IM 2003-275 makes clear our view that nothing in any of those documents plausibly supports appellants’ position in these appeals. The purpose of IM 2004-110 and the

^{14/} (...continued)

court, “to the extent that the directive ‘narrowly limits administrative discretion’ or establishes a ‘binding norm’ that ‘so fills out the statutory scheme so that upon application one need only determine whether a given case is within the rule’s criterion,’ it effectively replaces agency discretion with a new ‘binding rule of substantive law.’” 813 F.2d at 1014, quoting Ryder Truck Lines v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983).

Change IM was to provide guidance to BLM in oil and gas leasing matters during periods when land use plans are being developed or revised. The Change IM, in particular, stresses BLM's "flexibility" and "discretionary authority" in such matters. Further, IM 2004-194 by its explicit terms addresses the potential application of BMPs to an oil and gas lease during the APD phase of development. BMPs related to such measures as "siting, design, timing, and reclamation of oil and gas facilities," specifically noted in the Change IM, are appropriately considered for application at the site-specific, APD stage of development. We see no support for appellants' argument that BLM is under a mandate to evaluate BMPs at the time of lease issuance. Whether a BMP is called for in a given case is a matter left to BLM's discretion—at the leasing or APD stage.

Any other arguments raised by appellants not expressly addressed in this opinion 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:

Lisa Hemmer
Administrative Judge