



BIODIVERSITY CONSERVATION ALLIANCE
CENTER FOR NATIVE ECOSYSTEMS
WYOMING WILDERNESS ASSOCIATION
CLARK RESOURCE COUNCIL

171 IBLA 313

Decided June 26, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203



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IBLA 2005-214, 2006-69

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Appeals from two decisions of the Wyoming State Office, Bureau of Land Management, dismissing protests against the offering of parcels for leasing in two competitive oil and gas lease sales. WY-0502-055 *et al.*; WY-0506-019 *et al.*

Appeals Consolidated, Motion to Dismiss Denied as Moot, Decisions Affirmed.

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

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. 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. Where an appellant asserts a failure to perform NEPA review in the context of an "RMP level" document, this argument alone is insufficient to prove a violation of NEPA. Where recent Board and judicial precedent affirm that the question of whether additional environmental analysis is required in any given case depends on whether an appellant can show that existing NEPA documents failed to analyze the likely effects of the action at hand, and an appellant fails to

show why arguments expressly considered and rejected in recent precedent remain viable, the Board properly rejects such arguments.

APPEARANCES: Suzanne Lewis, Esq., Laramie, Wyoming, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management; Robert C. Mathes, Esq., Denver, Colorado, for Cabot Oil & Gas Corporation; Jack D. Palma, Jenifer E. Scoggin, Esq., Cheyenne, Wyoming, for Questar Exploration and Development Company; and J. Matthew Snow, Salt Lake City, Utah, for Yates Petroleum Corporation.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Biodiversity Conservation Alliance (BCA), Center for Native Ecosystems (CNE), Wyoming Wilderness Association (WWA), and Clark Resource Council (CRC) have appealed from two decisions of the Wyoming State Office, Bureau of Land Management (BLM), dismissing protests against the offering of parcels for leasing in two competitive oil and gas lease sales held February 5, 2005, and June 7, 2005. Appellants seek consolidation of the two appeals, which the Board has docketed as IBLA 2005-214 and IBLA 2006-69, on the ground that they involve identical issues, *i.e.*, whether BLM violated Instruction Memorandum (IM) No. 2004-110 Change 1 (Change IM) when it sold lease parcels in citizens' proposed wilderness (CPW) areas without applying Best Management Practices (BMPs) to the parcels prior to sale, and without considering whether to defer leasing in the areas identified as containing "special values"; and whether BLM violated the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (2000), by granting leases within areas of critical environmental concern (ACECs)¹ prior to completing the revision of governing resource management plans (RMPs) under section 202 of FLPMA, 43 U.S.C. § 1712 (2000). Motion to Consolidate Appeals at 2. We grant appellants' Motion to Consolidate these appeals for review.

I. Factual and Procedural Background

A. IBLA 2005-214

In IBLA 2005-214, BCA, CNE and WWA challenge a May 5, 2005, decision of the State Director, Wyoming State Office, BLM, dismissing two protests against an

¹ ACECs 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."

offering of numerous parcels of land at a February 5, 2005, competitive oil and gas lease sale. BLM denied appellants' protests in their entirety and proceeded to issue leases for the parcels that were at issue. This appeal followed.

The appeal involves the following 11 lease parcels: WY-0502-055, 060, 061, 062, 064, 065, 066, 067, 068, 069, and 072. Parcels 065-067 are in the Kinney Rim South CPW area within the administrative jurisdiction of the Rawlins, Wyoming, Field Office; two additional parcels, 068 and 069, are in the same citizens' proposal but within the authority of the Rock Springs, Wyoming, Field Office. Parcel 072 is in the Kinney Rim North CPW on lands managed by the Rock Springs Field Office. Parcels 061 and 064 "fall within the proposed Powder Rim ACEC, which was proposed by citizens for leasing under No Surface Occupancy stipulations." 2005-214 Statement of Reasons (SOR) at 15. The parties refer to these parcels as "Special Values Parcels." While specific information as to particular parcels may be found in the record, other than the above information, we find no reason to delve into the specifics of any particular parcel for reasons that will become clear in our analysis.

Appellants state that they here advance only three arguments made in their protests and rejected by BLM. The first of these arguments relates to the Change IM. Appellants claim that the Change IM imposes mandatory duties on BLM at the lease sale stage. They assert that BLM was obligated to, but did not, evaluate whether BMPs should be required when selling parcels that are located in CPW areas. 2005-214 SOR at 1-2. They also argue that the Change IM compelled BLM to consider deferring leasing in such areas, but BLM failed to do so.

Second, appellants claim that BLM gave insufficient consideration to the proposed Powder Rim ACEC in its leasing decisions. As they explain it, BLM's Rawlins Field Office is currently in the process of revising the Great Divide Resource Management Plan (RMP), and has produced a Draft Environmental Impact Statement (DEIS) for the revision. This Rawlins DEIS "wrongfully dismissed" the proposed Powder Rim ACEC from consideration as a special management area. 2005-214 SOR at 15. Appellants contend BLM was wrong in its analysis of the proposed ACEC and point to other ACECs BLM was willing to consider in an ACEC Evaluation Report (Jep Canyon, Chain Lakes, and Laramie Peak Bighorn Sheep potential ACECs) which, according to appellants, have attributes no more significant than those found in the proposed Powder Rim ACEC. *Id.* at 15-16, citing Ex. H (ACEC Evaluation Report). Appellants also aver that the Change IM required BLM to consider BMPs for parcels within the proposed ACEC boundaries, and also to consider deferring leasing of such parcels, but did neither.

Third, appellants contend that the parcels in question are likely to be developed for coalbed methane (CBM) and that the record is insufficient to

demonstrate that BLM analyzed the environmental effects of CBM development under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2). They assert that lease sales cannot go forward “where the current Management Plan does not permit this type of development.” IBLA 2005-214 SOR at 2; *see also* 2005-214 Reply at 7, 14. To summarize dozens of pages of argument, it suffices to say that appellants rest their argument on the complicated development of Federal court and Board precedent regarding this issue as it relates to public lands covered by the 1988 Great Divide RMP over the last 5 years, to conclude that “leasing for coalbed methane in the absence of a [RMP] that fully considers its impacts violates NEPA.” 2005-214 Reply at 14. As BLM’s obligation to prepare RMPs and attendant EISs stems from section 202 of FLPMA, 43 U.S.C. § 1712 (2000), and the obligation to conform implementation decisions to governing RMPs derives from FLPMA section 302, 43 U.S.C. § 1732 (2000), we consider this argument to be based both upon FLPMA and NEPA.

BLM submitted an answer. Three successful bidders at the lease sale, Questar Exploration & Production Company, Cabot Oil and Gas, and Yates Petroleum, did so as well, in support of BLM’s protest decision.

B. IBLA 2006-69

In IBLA 2006-69, BCA and CRC challenge an October 18, 2005, decision of the State Director, Wyoming State Office, BLM, dismissing their protest against the offering of dozens of parcels at the June 7, 2005, competitive oil and gas lease sale in Wyoming. Appellants limit their appeal to 59 lease parcels located in CPW areas and the proposed Powder Rim ACEC. The parties identify these parcels as “Special Values Parcels.” Appellants identify six parcels, WY-0506-060, 061, 092, 100, 108, and 110, as located within the same CPW areas identified in IBLA 2005-214. The remaining parcels are located within appellants’ proposed Powder Rim ACEC and managed variously, depending on location, by BLM’s Rawlins, Casper, Pinedale, and Kemmerer Field Offices, all within Wyoming.² 2006-69 SOR at 6-7.

BCA and CRC put forth two arguments in IBLA 2006-69, which appellants describe as identical to those in IBLA 2005-214. First, they repeat the argument made in IBLA 2005-214 that the Change IM imposed a duty on BLM to consider “the requirement of [BMPs] for oil and gas extraction as stipulations attached to the leases.” They adopt by reference the briefing submitted with respect to this issue in IBLA 2005-214, and presumably therefore also contend that the

² These parcels are WY-0506-019, 033, 036, 038, 042, 043, 049, 051, 063, 073, 074, 076, 077, 078, 081, 083, 084, 140, 141, 142, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 168, 169, 170, 171, 172, 173, 174, 181, 186, 187, and 189.

Change IM requires BLM to have considered deferring the lease sale for the six leases at issue. The second issue, a variation of the second issue in IBLA 2005-214, is defined in appellants' Motion to Consolidate, at 2, as follows: "Did BLM violate FLPMA by granting leases in Field Offices while RMP revision is being prepared in those Field Offices?" Motion to Consolidate at 2.

BLM has moved to dismiss the appeal in IBLA 2006-69 for lack of standing. Because our resolution of the two issues raised in IBLA 2005-214 covers identical issues in IBLA 2006-69, it is unnecessary for us to venture into the issue of standing and therefore we deny that motion only on grounds that it is moot.

II. Analysis

This Board has addressed all of the issues presented by appellants in recent precedent. BLM is correct to note that the Board is not required to relitigate the same issues *ad infinitum*. We have addressed all of the issues presented in detailed and lengthy decisions, and direct the parties to the following sources without further ado.

In *Wyoming Outdoor Council*, 171 IBLA 153 (2007), we undertook an analysis of the issues regarding the obligations imposed by the Change IM, argued there by appellants that included BCA. That case included the Kinney Rim CPWs also at issue in the appeals before us now. After detailing the administrative history of the same several pertinent IMs, also construed by appellants here, we disagreed that the Change IM imposed any of the mandatory obligations claimed there.³ We held:

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." [*Joe E. Fallini, Jr. v. BLM (Fallini)*, 162 IBLA 10, 38 (2004).] 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

³ See 2005-214 SOR at 12 (discussing Change IM and IM Nos. 2004-110, 2004-194, and 2003-275). This Board analyzed and described those IMs in *Wyoming Outdoor Council*, 171 IBLA at 157-59, and we direct the parties to those pages for our construction of them.

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.

171 IBLA at 168. This analysis fully responds to appellants' arguments in both IBLA 2005-214 and 2006-69, that the Change IM compels BLM to consider BMPs and deferral of lease parcels from the sale for either proposed CPW areas or for the proposed Powder Rim ACEC. We affirm BLM's protest decisions in both appeals on this issue, presented in appellants' first and second arguments.

We turn to appellants' second argument based on FLPMA instead of the Change IM. In the Motion to Consolidate, appellants argue that BLM is prohibited as a matter of law from issuing leases for parcels which are located within citizens' proposed ACECs during the course of an RMP revision. We have addressed this legal issue, both with respect to citizens' proposed ACECs and citizens' proposed wilderness areas, and need do no more here to reject appellants' assertions than revisit our precedent.

We have repeatedly rejected the notion that BLM must manage the public lands in light of proposals by the public to designate lands as wilderness. *Colorado Environmental Coalition*, 162 IBLA 293, 301-02 (2004), *Colorado Environmental Coalition*, 161 IBLA 386, 393-94 (2004); *Colorado Environmental Coalition*, 149 IBLA 154, 156 (1999); *Colorado Environmental Coalition*, 142 IBLA 49, 53-54 (1997); *see also Southern Utah Wilderness Alliance*, 163 IBLA 14, 25-27 (2004). We have applied similar principals in the context of ACECs. *E.g.*, *Southern Utah Wilderness Alliance*, 141 IBLA 85, 90 (1997).

We have repeatedly held that we "know of no legal mandate that requires BLM to manage [a public land area] on the basis that, although finally rejected as a

[wilderness study area], it might, at some unspecified future time, be designated by Congress as a protected wilderness area.” *Colorado Environmental Coalition*, 142 IBLA at 51-52, citing *Southern Utah Wilderness Alliance*, 128 IBLA 52, 65-66 (1993); *Southern Utah Wilderness Alliance*, 122 IBLA 17, 21 (1992). We have rejected the logic of construing FLPMA to prohibit BLM from following its current land use plans every time a citizens’ group proposes a different approach, because following such logic would place in the hands of interest groups the ability to halt Federal projects by papering the government with citizens’ proposals. We again reject the notion that citizens’ groups may negate or undermine BLM’s statutory authority and discretion by conducting their own inventory and then arguing that BLM must reconsider its inventories when it attempts to undertake land use decisionmaking. *Southern Utah Wilderness Alliance*, 163 IBLA at 27.

The only issue left of appellants’ second argument is their various claims that BLM erred when it disagreed in the Rawlins DEIS with appellants’ views of the special values of the lands proposed for the Powder Rim ACEC. We do not have jurisdiction to consider this question. The draft RMP and DEIS are not before us. Moreover, they never will be, in a direct appeal from a final RMP decision. In *Rainer Huck*, 168 IBLA 365, 396 (2006), we noted: “Because an RMP guides and controls future management actions and establishes management policy, its approval is subject only to protest to the Director of BLM, whose decision is final for the Department.”

43 C.F.R. § 1610.5-2. We are hardly empowered to involve ourselves in decisionmaking at the Draft RMP level. We address this issue no further, affirming BLM’s protest decisions in both appeals with respect to the second issue.

[1] This brings us to the third argument, raised only in IBLA 2005-214. This issue is complicated by an extensive history of litigation and we begin by carefully articulating the argument we address here in light of that history. Some years ago, this Board issued a Board decision regarding analysis of CBM impacts within the area managed under the Great Divide RMP. This Board decision was the subject of Federal court decisions both reversing (Wyoming District Court) and then affirming (10th Circuit Court of Appeals) our conclusions. In the interim, while appeals were pending before the Federal courts, this Board issued additional orders or decisions construing what we thought were the limits of our authority after being reversed, and then again after the District Court’s reversal was itself reversed. The series of decisions became identified as the *WOC* and *Pennaco* cases.⁴ The arguments in IBLA

⁴ *Wyoming Outdoor Council (WOC I)*, 156 IBLA 347 (2002); *Wyoming Outdoor Council (On Reconsideration) (WOC II)*, 157 IBLA 259 (2002); *Wyoming Outdoor Council (WOC III)*, 158 IBLA 384 (2004); *Wyoming Outdoor Council (WOC IV)*, 160 IBLA 387 (2004); *Pennaco Energy, Inc. v. U.S. Department of the Interior (Pennaco I)*, 266 F.Supp. 1323 (D.Wyo. 2003); *Pennaco Energy v. USDI*, 377 F.3d (continued...)

2005-214, like those in several other appeals before this Board, proceed from these various decisions to seek a ruling from the Board regarding the state of the law on the need for BLM to issue further NEPA or FLPMA documents regarding CBM development. In this particular appeal, appellants BCA, CNE, and WWA argue that we should consider the body of cases just described to conclude that, for the lands governed by the 1988 Great Divide RMP, BLM may not issue further oil and gas leases that may be subject to CBM development without first preparing a new RMP and associated EIS. Appellants thus contend that the upshot of the various *WOC* and *Pennaco* decisions is that, before BLM may issue leases at least within the area subject to the Great Divide RMP, BLM must address CBM development in a NEPA document at the “RMP level.” 2005-214 Reply at 7.

This Board has considered the various precedent, argued extensively before us in the consolidated appeals, in concurring opinions each of which would reject the conclusion appellants want us to reach. In *Wyoming Outdoor Council*, 170 IBLA 130 (2006), the lead opinion rejected the argument that the final import of the *WOC* and *Pennaco* decisions was that BLM could not rely on information supplemental to that provided in NEPA documents supporting the Great Divide RMP. 170 IBLA at 145. We stated that the “fact that BLM continues to rely on the Great Divide RMP/EIS is not dispositive, because on remand BLM undertook an examination of all existing environmental documentation concerning both conventional and CBM gas operations in the [Rawlins Field Office] management area and prepared the New [Determination of NEPA Adequacy (DNA)]. It is that new examination” that the Board relied on to affirm BLM. 170 IBLA at 146. The concurring opinion also noted the extensive development of BLM’s consideration of CBM issues since the issuance of the Great Divide RMP/EIS, and held that *WOC* had not met its burden of showing that this body of information was insufficient to meet BLM’s NEPA obligations. *Id.* at 159-60.

That Board decision is the end of the road for the various arguments made here to extend the *WOC I-IV* and *Pennaco I-II* decisions to compel BLM to stop issuing leases which may ultimately be explored and produced for CBM without completing, or in this case finalizing, an RMP directly addressing the issue of CBM development. We reject these arguments, affirming BLM’s protest decisions in both appeals on this basis.

In doing so, we recognize that appellants believe that BLM has not adequately addressed CBM development effects in NEPA documents. Considering the complexity of matters at issue in the Great Divide management area as they were being litigated,

⁴ (...continued)
1147 (10th Cir. 2004) (*Pennaco II*).

the Board and other courts proceeded to consider the applicability of NEPA in the oil and gas leasing context in other appeals and to establish principals that are not controlled by the *WOC I-IV* or *Pennaco I-II* decisions. Those subsequent decisions establish the state of Board precedent on those topics. For example, on November 22, 2006, we issued *Center for Native Ecosystems*, 170 IBLA 331 (2006), relying on our analysis of the same topics in *Southern Utah Wilderness Association (SUWA)*, 166 IBLA 270, 276-77 (2005). In *SUWA*, we made clear that BLM may be allowed, depending on the facts, to employ DNAs, which are *not* NEPA documents, to support a lease sale. Further, we held that BLM is not required to perform new or additional NEPA analysis in every case that it conducts a lease sale. We explained in *Center for Native Ecosystems*:

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) [footnote deleted].

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 [BLM] examined existing NEPA statements to identify the

portions of those statements that analyzed the effects of oil and gas development on the [question at issue].

170 IBLA at 344-46. This should give appellants guidance as to the burden of showing a violation of NEPA in future cases. It is simply not enough to continue to pull at the threads of the *WOC I-IV* and *Pennaco I-II* decisions in an effort to unravel subsequent Board and Federal court precedent affirming that the question of whether additional environmental analysis is required in any case depends on whether it can be shown that existing NEPA documents failed to analyze the likely effects of the action at hand. Appellants' assertions that an "RMP level" document, with associated NEPA analysis, is required before BLM can issue a lease which may be subject to CBM development are not enough for them to prevail. In similar circumstances, where the Board had issued a decision which would effectively resolve appeals, we concluded that the earlier decision is dispositive in the absence of an explanation based upon newer precedent. *National Wildlife Federation*, 170 IBLA 240 (2006). There, we "decline[d] to shoulder the burden of a more exhaustive discussion . . . [when appellant] has not shown why the arguments expressly considered and rejected in the previous decision remain viable in these cases." *Id.* at 248-49.

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 C.F.R. § 4.1, the decisions appealed from are affirmed.

_____/s/
Lisa Hemmer
Administrative Judge

I concur:

_____/s/
T. Britt Price
Administrative Judge