



DEBORAH REICHMAN

173 IBLA 149

Decided December 13, 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

DEBORAH REICHMAN

IBLA 2007-43

Decided December 13, 2007

Appeal from a decision of the Acting Deputy State Director, Division of Resources, Montana State Office, Bureau of Land Management, dismissing a protest of the inclusion of a parcel in a competitive oil and gas lease sale. NDM 95807 (Parcel 05-06-35).

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act: Environmental Statements--Oil and Gas Leases: Competitive Leases

The “reasonably foreseeable development” (RFD) scenario for oil and gas is a long-term projection of oil and gas exploration, development, production, and reclamation activity in a defined area for a specified period of time. The RFD scenario serves as an analytical baseline for identifying and quantifying direct, indirect, and cumulative impacts of oil and gas activity, under standard lease terms and conditions, on all potentially productive areas open to oil and gas leasing, and forms the foundation for the analysis of the effects of oil and gas management decisions in planning and environmental documents. When an appellant contends that new information undermines the validity of the RFD scenario underlying the environmental analysis supporting the decision to include a parcel in a competitive oil and gas lease sale, but the number of wells projected in the RFD scenario has not yet been exceeded and the appellant has not shown that the impacts of leasing the parcel at issue will surpass or significantly differ from those analyzed in the applicable documents, BLM need not prepare a supplemental environmental document before leasing the parcel.

2. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability--Oil and Gas Leases: Stipulations

In issuing Federal oil and gas leases, BLM may adopt a phased approach to compliance with section 106 of the National Historic Preservation Act, *as amended*, 16 U.S.C. § 470(f) (2000), as long as no surface disturbing activity will occur until after the section 106 process is complete.

3. Environmental Quality: Environmental Statements--National Environmental Policy Act: Environmental Statements--Oil and Gas Leases: Stipulations

A challenge to the sufficiency of lease terms and stipulations to protect topographical and wildlife resources on the basis that the terms and stipulations were not derived from on-the-ground observations of those resources will be rejected where BLM will conduct onsite inspections at the application for permit to drill stage and will analyze the impacts of any site specific proposal and mitigate those impacts with site-specific resource protection measures developed in consultation with the private surface owner.

APPEARANCES: Tom W. Stonecipher, Esq., Bozeman, Montana, for appellant; Karan L. Dunnigan, Esq., Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GREENBERG

Deborah Reichman has appealed the October 25, 2006, decision of the Acting Deputy State Director, Division of Resources, Montana State Office, Bureau of Land Management (BLM), dismissing her protest of the inclusion of Parcel 05-06-35 (NDM 95807) in the May 31, 2006, competitive oil and gas lease sale of Federal lands in Montana, North Dakota, and South Dakota. Reichman has not shown that significant new information undermines the current validity of the reasonably foreseeable development (RFD) scenario underlying the environmental analysis upon which the sale was based or that the impacts of leasing the affected parcel will surpass or differ significantly from the analyzed impacts. She also has not demonstrated that cultural, topographical, and wildlife resources will not be adequately protected by the imposed lease stipulations, as supplemented by additional resource protection measures developed during subsequent evaluations of

any proposed site-specific surface activities. We therefore reject her appeal and affirm BLM's decision dismissing her protest.

BACKGROUND

Parcel 05-06-35 encompasses 1,879.04 acres of land described as all of sec. 20, lots 1, 2, 3, and 4, the E $\frac{1}{2}$, and the E $\frac{1}{2}$ W $\frac{1}{2}$ sec. 30, and all of sec. 32, T. 146 N., R. 103 W., Fifth Principal Meridian, McKenzie County, North Dakota, within the Little Missouri National Grasslands (LMNG).¹ The lands within sec. 20 fall within the jurisdiction of the McKenzie Ranger District, FS; the lands in secs. 30 and 32 are split estate lands (non-Federal surface, Federal minerals) managed by BLM. Reichman owns the surface of secs. 30 and 32 as well as land adjacent to sec. 20.

Before including Parcel 05-06-35 in the May 31, 2006, competitive oil and gas lease sale, BLM sought FS's consent to the leasing of sec. 20 as required by 43 C.F.R. § 3101.7-1. *See* 30 U.S.C. § 352 (2000); *see also* 30 U.S.C. § 226(h) (2000). FS evaluated the parcel and, prepared a "Dakota Prairie Grasslands Decision Verification" (Decision Verification), finalized on February 14, 2006, which concluded that the inclusion of the parcel conformed to the July 2002 DPG Final Environmental Impact Statement (FEIS) and Land and Resource Management Plan (LRMP) Record of Decision (ROD) and the June 2003 DPG/Montana State Office Oil and Gas Leasing ROD (O&G Leasing ROD)² and that no new information or changed circumstances existed. FS consented to the leasing of the parcel with various specified stipulations.

BLM offered Parcel 05-06-35 for competitive bidding in the May 31, 2006, oil and gas lease sale, with the FS stipulations as well as its own notices and stipulations. One of the notices and stipulations applicable to the parcel was a notice for split estate lands explaining BLM's role in placing necessary lease stipulations and conditions of approval (COAs) on permitted activities, in cooperation with the surface owner, to minimize adverse impacts from Federally-authorized mineral lease activities as required by the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544

¹ The LMNG is part of the Dakota Prairie Grasslands (DPG) and is administered by the United States Forest Service (FS), U.S. Department of Agriculture.

² The O&G Leasing ROD contains both BLM and FS oil and gas leasing decisions and includes BLM's express adoption, as a cooperating agency, of the DPG FEIS, LRMP, and supporting documents and analysis as its environmental analyses for offering lands for competitive bidding and issuing leases within the project area, subject to the specified stipulations, and for offering split estate lands within the boundaries of the LMNG for competitive bidding and issuing leases for the mineral estate of those lands. O&G Leasing ROD at 20-21; *see* 40 C.F.R. § 1506.3(a), (c).

(2000), the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000), and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (2000), and explaining BLM's responsibility for processing and approving applications for permit to drill (APDs). Additional notices and stipulations included (1) an ESA section 7 consultation stipulation authorizing BLM to modify or disapprove activities likely to jeopardize the continued existence of a proposed or listed threatened or endangered species or destroy or adversely modify designated or proposed critical habitat; (2) a notice for lands under FS jurisdiction identifying FS's obligation to ensure the protection of cultural, paleontological, and riparian resources; (3) no surface occupancy (NSO) restrictions on slopes greater than 40 percent and within one-half mile of golden eagle, merlin, and ferruginous hawk nests; (4) timing limitations for sharp-tailed grouse display grounds; (5) controlled surface use (CSU) constraints for water, wetlands, woody draws, and riparian areas, and areas containing paleontological resources; and (6) a threatened, endangered, and sensitive (TES) plant or animal species lease notice authorizing additional restrictions or prohibitions to protect TES species or their habitats.

On May 16, 2006, Reichman filed a protest of the inclusion Parcel 05-06-35 in the May 31, 2006, competitive oil and gas lease sale.³ She supplemented her protest on September 27, 2006, and met with both BLM and FS representatives on that date to present additional information related to her concerns. Her protest, as augmented, raised five main issues. First, she argued that, in light of new information indicating the existence of significantly increased recoverable oil reserves in the Bakken Formation and unforeseen dramatic increases in oil prices, the DPG FEIS/LRMP and the O&G Leasing ROD, and the May 31, 2001, RFD scenario upon which they were based,⁴ grossly underestimated the level of development likely in the LMNG. Accordingly, she asserted that those documents were inadequate to assess the impacts of that heightened development and had to be augmented with supplemental environmental analyses in order to support offering the parcel for leasing. Second, she alleged that the stipulations attached to secs. 30 and 32 did not sufficiently address the topographical and wildlife values of those lands because those stipulations were based on less detailed and less accurate computer-generated maps and models developed in 2002, rather than on hand-drawn representations created in 1991 from direct visual inspection of the land. Third, she complained that, as the owner of the surface estate, she did not receive adequate notice of the inclusion of

³ BLM chose not to withdraw the parcel from the sale after receiving the protest, and Summitt Resources Inc. (Summitt) was the high bidder for the parcel. BLM issued lease NDM 95807 to Summitt on Nov. 30, 2006.

⁴ The RFD scenario, a copy of which was attached to Reichman's Statement of Reasons (SOR) as Ex.1, forecast that 660 wells of all ownership, including 405 Federal wells, would be drilled over the ensuing 10 years.

the parcel in the oil and gas lease sale. Fourth, she contended that a cultural resources inventory should have been performed and appropriate cultural resources stipulations imposed before the parcel was offered for competitive bidding. Finally, she averred that the pertinent documents failed to assess the impacts of oil and gas leasing on the use and availability of water, including the effects of salt water disposal from oil exploration and production.

PROTEST DECISION

In his decision dismissing the protest, the Acting Deputy State Director responded to each of the issues raised. He rejected Reichman's claim that the DPG FEIS and LRMP and the O&G Leasing ROD were inadequate to assess the true impacts of oil development within the LMNG. He explained that the 10-year 660 well (405 Federal well) RFD scenario for the DPG FEIS and the O&G Leasing ROD was based on historical drilling data and incorporated the scenarios prepared for the 1991 Northern LMNG Oil and Gas Leasing EIS (NLMNG EIS) (50 conventional wells per year on lands north of T. 139 N. based on the historic rate from 1951-1988) and the 1995 Southern Little Missouri and Cedar River National Grasslands Oil and Gas Leasing EIS (SLM & CRNG EIS) (9 conventional wells on lands south of T. 139 N. based on the historic rate from 1955-1992). He noted that the historical periods used for both predictions included the boom period of 1979 through 1985, as well as low points in drilling activity, and that the RFD scenario foresaw another boom period such as might come from the Bakken Formation. He further pointed out that the RFD scenario briefly addressed the potential of horizontal drilling on the LMNG into the Bakken and other possible producing formations and observed that, in addition to the 60 conventional wells per year, the RFD scenario assumed that a total of 60 coal bed natural gas wells in all ownership categories would be drilled during the life of the plan. Protest Decision at 2.

The Acting Deputy State Director determined that the RFD scenario was still reasonable and did not underestimate the level of activity on the LMNG. He based this determination on data provided by the DPG indicating that a total of 58 Federal wells were drilled on the area covered by the RFD scenario from 2003 through July 2006, which was well within the projected count in the scenario; that during the first 3 years after adoption of the O&G Leasing ROD, approximately 15 percent of the total forecast Federal conventional wells had been drilled; and that from the 2001 completion of the RFD scenario through July 2006, a total of 75 Federal wells or approximately 20 percent of the forecast number of wells had been drilled in the planning area. He also stated that, as drilling came closer to reaching the levels predicted in the RFD scenario, BLM would evaluate the need for an amendment or a new plan. Protest Decision at 2-3.

As to the adequacy of the wildlife and topography lease stipulations, the Acting Deputy State Director noted that the lease terms were based on the O&G Leasing ROD, which relied on the analyses in the DPG FEIS and the earlier NLMNG and SLM & CRNG EISs. He explained that when nominations for oil and gas leasing within the LMNG were submitted, BLM provided those nominations to FS for its review, which, by agreement, included review of split estate lands as well as FS-administered lands within the boundary of the Grasslands, to determine, among other things, whether information available since issuance of the O&G Leasing ROD warranted changing the lease stipulations specified in the ROD. He informed Reichman that, in response to her request that FS re-examine the stipulations applicable to her land, FS had updated its maps of slopes greater than 40 percent, which were encumbered with NSO stipulations, on February 3, 2006, and had revised its delineations of golden eagle, merlin, and ferruginous hawk nests, sharp-tailed grouse display grounds, and prairie falcon and burrowing owl nests, which were subject to NSO and timing limitation stipulations, on February 14, 2006. Protest Decision at 4.

The Acting Deputy State Director pointed out that section 6 of the lease provided for resource protection by requiring the lessee to conduct operations in a manner that minimized adverse impacts to the land, air, water, cultural, biological, visual, and other resources and to other land uses or users and by specifying various actions the lessee might be required to take to fulfill that requirement. He explained that, before approving an APD, BLM would conduct an onsite inspection and that the surface owner of split estate lands would be invited to participate in the inspection and to provide input into the development of site-specific COAs to be placed on the APD to protect surface and subsurface resources. He advised Reichman that the information she had presented at the September 27, 2006, meeting would be used to develop the site-specific COAs for any APD for the parcel in addition to those identified in the O&G Leasing ROD and analyzed in the DPG FEIS and LRMP. He further informed Reichman that for surface disturbing activity to occur on leased split estate lands, the lease operator had to provide a statement in any APD or sundry notice indicating that it had obtained one of the following: (1) a surface owner agreement for access to enter the leased lands; (2) a waiver from the surface owner for access to the leased lands; (3) an agreement regarding compensation to the surface owner for damages for loss of crops and tangible improvements; or (4) in lieu thereof, an adequate bond to secure payment for such damages.⁵ Protest Decision at 4-5.

⁵ These requirements were derived from the Stock Raising Homestead Act, 43 U.S.C. § 299(a) (2000), and have been adopted by BLM as applicable to all split estate lands. See *Deganawidah-Quetzalcoatl University*, 164 IBLA 155, 163 n.11 (2004).

Finally, the Acting Deputy State Director addressed Reichman's complaint that cultural resource values were not properly surveyed or protected with specific lease stipulations.⁶ He acknowledged that the lands in Parcel 05-06-35 were subject to the NHPA and that BLM and FS were obligated to ensure enforcement of that statute and its implementing regulations through appropriate lease terms and stipulations. He pointed out that the lands administered by FS were covered by a lease notice specifying both FS duties under the applicable cultural resource protection statutes and regulations and lessee actions necessary to meet the requirements imposed pursuant to those responsibilities. As to split estate lands, he stated that BLM would enforce the NHPA through lease terms advising the lessee that the rights granted were subject to existing laws, regulations, and policies, and through lease stipulations and notices, adding that before any APD was approved, the proposed disturbed area would be surveyed and appropriate mitigation measures would be imposed. He also noted that Summitt, the high bidder for the parcel, had signed a lease stipulation covering cultural resources protection on the split-estate portion of the parcel that explicitly reserved BLM's authority to modify or even disapprove proposed surface-disturbing lease activities that did not comply with applicable laws and executive orders.⁷ Protest Decision at 6-7.

DISCUSSION

Reichman raises three issues on appeal. First she contends that new information, including the unanticipated three-fold increase in the price of crude oil, the discovery of tremendously greater oil reserves in the area, and the consequent increase in state-wide drilling activity, undermine the validity of the environmental analyses supporting the leasing decision and mandate the suspension of oil and gas leasing until BLM and FS evaluate the environmental impacts of oil and gas leasing in light of this new information and determine whether a supplemental EIS is required. Second, she objects to FS's failure to produce existing cultural resource information related to sec. 30 and to the lack of specific, rather than generic, cultural resource lease stipulations for this potentially cultural-resource rich parcel. Finally, she maintains that the maps used to generate the topographical and wildlife stipulations

⁶ The Acting Deputy State Director also rejected Reichman's water-related challenges, finding that these concerns had been adequately addressed in the NLMNG EIS, and her inadequate notice contention, determining that she had been sufficiently notified of the impending sale. Reichman does not pursue these issues on appeal and we will not address them further.

⁷ The cultural resources lease stipulation attached to the Notice of Competitive Lease Sale for the May 31, 2006, sale inexplicably did not identify Parcel 05-06-35 as one of the parcels subject to the stipulation. This omission was corrected by Summitt's subsequent signing of the stipulation.

for secs. 30 and 32 were inaccurate and did not represent the best available information, and that those stipulations are therefore inadequate to protect topographical and wildlife values. We find none of these arguments persuasive and affirm the Acting Deputy State Director's decision dismissing her protest.

1. New Information

Reichman contends that significant new information undermines the basis for the projected environmental effects of oil and gas leasing in the LMNG and must be considered before additional oil and gas leases issue. According to Reichman, this new information includes the recent steep rise in oil prices, the increased amount of oil reserves projected for the LMNG, and the rising number of requests for drilling permits, all of which, she submits, render the RFD scenario underlying the environmental analyses supporting the O&G Leasing ROD grossly inaccurate. Specifically, she avers that the RFD scenario anticipated that the world oil price in 2020 would be no more than \$23.51 per barrel in 1999 dollars (SOR Ex. 1, RFD Scenario, at 10, Table RFDS-T2), while the actual price has reached as high as \$77 per barrel and, as of May 30, 2007, was \$63.15 per barrel.⁸ See SOR at 6-8. She further avers that the amount of recoverable reserves projected for the Bakken Formation underlying the LMNG has jumped from some unspecified millions of barrels at the time the RFD scenario was issued to the current estimated reserves of over 200 to 300 billion barrels, including 550 million barrels of proved developed oil reserves, 660 million barrels of probable reserves, and 1.6 billion barrels of possible oil reserves in the State of North Dakota. See SOR at 10 and Ex. 7.⁹ Finally, she maintains that the unprecedented rise in oil prices has led to an unanticipated significant increase in the number of wells permitted and completed in North Dakota, with 1,002 wells completed and 332 APDs for Federal wells approved within the state since 2001. She maintains that these numbers exceed the 660 wells projected in the RFD scenario. See SOR at 8-9 and Exs. 3A, 6.

Reichman insists that the high oil prices, the new recoverable reserve estimates, and the resultant increase in drilling activity render the RFD scenario grossly inadequate to serve as the basis for analyzing the environmental impacts of current oil and gas leasing decisions. She asserts that BLM and FS must take a hard look at this significant new information and determine whether supplemental environmental documentation is necessary to accurately assess the impacts of continued oil and gas leasing before they issue additional leases in the LMNG. See SOR at 16-17.

⁸ The record does not indicate what these prices would be in 1999 dollars.

⁹ Reichman does not identify the author, source, or date of Ex. 7, nor does the exhibit itself contain that information.

In response, BLM contends that drilling within the LMNG planning area is well below the RFD scenario predictions, averring that 100 Federal wells have been drilled in the planning area since 2001, including 58 Federal wells in the 3-year period since the adoption of the O&G Leasing ROD (July 2003-July 2006), which is well under the predicted 6-year total of 240 Federal wells (*i.e.*, 60 percent of the 405 Federal wells forecast for the 10-year period) and the projected 120 Federal wells for the 3-year period. BLM discounts Reichman's reliance on state-wide drilling statistics, asserting that state-wide data, including the number of Federal APDs approved for the whole state, have no relevance to leasing decisions for the LMNG, since that planning area is not coextensive with the entire state. BLM similarly maintains that oil prices and oil reserve estimates are not pertinent to the question of whether oil and gas development and production impacts were properly analyzed and relied upon in the planning and decision documents. BLM submits that, unless drilling activity in the LMNG comes closer to the levels forecast in the RFD scenario, the current NEPA documents are adequate to evaluate leasing proposals. BLM Answer at 4-5.

In reply, Reichman questions the accuracy of BLM's statement that only 100 wells have been completed in the LMNG since 2001, citing an August 30, 2007, e-mail message from the Assistant Field Manager, Minerals, BLM North Dakota Field Office (Reply Ex. 1), which indicates a total of 134 wells drilled for Federal minerals, including 90 wells on FS surface/Federal minerals and 44 wells on non-FS surface/Federal minerals.¹⁰ According to Reichman, this and other available data lead irrefutably to the conclusion that significant drilling is occurring in the LMNG and is increasing rapidly in response to the unanticipated tripling of crude oil prices, so much so that the number of wells to be drilled in the area by 2011 will "far exceed" those predicted in the RFD scenario. Reply at 2. Reichman also maintains that state-wide data directly relates to drilling activity on the LMNG and can be used to extrapolate future drilling activity on these grasslands. *Id.* at 2-4. Reichman adds that proven and probable oil reserves in western North Dakota have been estimated at 550 million and 660 million barrels, respectively, that the available rig count has increased in response to the rise in oil price and reserve estimates, and that the North Dakota legislature has enacted tax breaks for oil and gas production, all of which will boost drilling in the LMNG. *Id.* at 5-6. We find Reichman's arguments to be unpersuasive.

[1] The RFD scenario for oil and gas is a long-term projection of oil and gas exploration, development, production, and reclamation activity in a defined area for a specified period of time. The RFD scenario serves as an analytical baseline for identifying and quantifying direct, indirect, and cumulative impacts of oil and gas

¹⁰ We note, however, that, although Reichman represents it to be a "summary report of wells drilled on federal minerals since 2001" (Reply at 2), this exhibit does not state the time period during which enumerated wells were drilled.

activity, under standard lease terms and conditions, on all potentially productive areas open to oil and gas leasing, and forms the foundation for the analysis of the effects of oil and gas management decisions in planning and environmental documents. *Wyoming Outdoor Council*, 164 IBLA 84, 99-100 (2004). The RFD scenario does not establish a point beyond which further oil and gas exploration and development are prohibited. Nor does the underlying environmental analysis lose its validity beyond the RFD scenario. *Id.*; see also *National Wildlife Federation*, 170 IBLA 240, 249 (2006). The critical question when an RFD scenario has been exceeded is whether the case-specific facts demonstrate that further environmental analysis is warranted. *Wyoming Outdoor Council*, 164 IBLA at 102; see also *National Wildlife Federation*, 170 IBLA at 249. As the party challenging BLM's decision, Reichman has the burden of affirmatively demonstrating error in that decision. *National Wildlife Federation*, 170 IBLA at 251, and cases cited. She has failed to meet that burden here.

The RFD scenario has not yet been exceeded in this case. For the 10-year period 2001-2011, the RFD scenario forecast that 660 wells would be drilled in the grasslands, including 405 wells on Federal mineral interests. SOR Ex. 1, RFD scenario at 19. According to page 2 of BLM's October 25, 2006, decision, as of July 1, 2006, 75 wells had been drilled on Federal mineral interests in the grasslands – only 18.5 percent of the projected total of 405 wells, with more than 50 percent of the period having elapsed. Further, assuming, *arguendo*, that the BLM e-mail of August 30, 2007 (Reply Ex. 1) gives the number of wells drilled beginning in 2001 to the date of the e-mail, 134 wells have been drilled on Federal mineral interests in the grasslands during that period – 33 percent of the total, with more than 66 percent of the period elapsed. Additionally, the fact that, according to SOR Exhibit 6, 173 wells were completed state-wide on minerals of all ownership during 2005, and 648 wells were completed in the entire state over the 5-year period 2001 through 2005, for an average of 130 wells per year, does not demonstrate that the RFD scenario's projection of an average of 40.5 wells drilled annually on Federal mineral interests in the LMNG has been exceeded.

Reichman nevertheless contends that the new evidence she presents demonstrates the inevitability of exceeding that scenario before the end of the 10-year period it covers and that supplemental environmental analysis must therefore now be undertaken before BLM issues a lease for Parcel 05-06-35. We disagree.

The regulations implementing section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), direct an agency to prepare a supplemental EIS if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(ii). In developing its 10-year projection of 660 wells, consisting of 405 Federal wells (including 24 coal bed methane (CBM) wells) and 255 non-Federal wells (including

36 CBM wells) (SOR Ex. 1, RFD Scenario, at 19, Table RFDS-T6), the RFD scenario considered economic trends such as oil and gas prices, national growth, and supply and demand; technology and equipment trends including technological advances and equipment supply; and past drilling activity. *Id.* at 10. In so doing, it acknowledged that oil and gas activity varies with the price of crude oil and that pricing is one of the most important factors affecting U.S. oil production. *Id.* at 10-11. It also recognized the potentially high productivity of the Bakken Formation and the advances in horizontal drilling technology and exploration theories affecting the petroleum potential of the LMNG. *Id.* at 6, 8, 12. Finally, it relied on historic drilling trends between 1951 and 1999, a time frame that included both boom and slow periods. *Id.* at 12.

BLM does not deny that the recent unprecedented rise in oil prices may affect the amount the oil and gas activity in the LMNG. Even the rise in price, however, does not demonstrate that the RFD scenario will soon be exceeded or that the scenario and consequent environmental analyses are inadequate to support BLM's decision to offer Parcel 05-06-35 for competitive bidding.¹¹ Reichman's reliance on well drilling and completion statistics for the entire State of North Dakota, including state-wide BLM APD approvals, is similarly misplaced. Those numbers do not show the number of wells permitted or completed in the LMNG and thus cannot be used to prove that the RFD scenario, which only projected oil and gas activity in that planning area, has already been or will soon be exceeded.

In addition, the varying estimates of the amount of recoverable oil reserves in the entire Bakken Formation, some of which are more speculative than others,¹² do not establish that the RFD scenario for the limited planning area will be exceeded before the end of the 10-year planning period. Given the lack of any existing or imminent surpassing of the RFD scenario or any evidence showing that the specific impacts of leasing Parcel 05-06-35 will exceed or significantly differ from those assessed in the RFD scenario and supporting environmental analyses, Reichman's conclusory allegations of error do not show the existence of significant new

¹¹ The relationship between higher prices and the number of wells drilled is not mathematically linear. Consistently higher prices should make some oil economically recoverable that was not economically recoverable at lower price levels. But variances in price levels do not change the underlying geology.

¹² Reichman's own SOR Ex. 7 recognizes that the much higher estimates of reserves in the Bakken Formation are the subject of some dispute and controversy. But even assuming, *arguendo*, that the estimated reserves in the Bakken Formation (which in addition to the LMNG encompasses parts of North Dakota, Montana, and Canada) are of the magnitude Reichman asserts, it is still unknown how much will be recoverable or what the impacts of recovery will be.

information establishing that leasing Parcel 05-06-35 will affect the quality of the human environment in a significant manner or to a significant extent not already considered. *See Forest Guardians*, 170 IBLA 253, 267 (2006); *Forest Guardians*, 170 IBLA 80, 96 (2006); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989); *Colorado Environmental Coalition*, 171 IBLA 256, 267 (2007). We, therefore, reject her contention that supplemental environmental analyses were necessary prior to leasing that parcel.¹³ *See Southern Utah Wilderness Alliance*, 163 IBLA 14, 28 (2004).

2. Cultural Resources

Reichman also attacks the adequacy of the cultural resource protection stipulations attached to the parcel. She first complains that FS has failed to respond to her requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000), for information about cultural resources discovered on the parcel and that this failure has prevented her from assessing the sufficiency of the cultural resources stipulations. The Board's jurisdiction is limited to reviewing decisions rendered by Department of the Interior officials related to, among other things, the use and disposition of public lands and their resources. *See* 43 C.F.R. § 4.1(b)(3); *see also* 43 C.F.R. §§ 2.28-2.33 (setting out specific procedures for Departmental FOIA appeals). The Board, therefore, is not the proper forum for considering Reichman's FOIA issues and these issues will not be addressed further.¹⁴

Reichman also questions the adequacy of the cultural resources stipulation attached to the lease issued for the parcel, contending that the stipulation provides no meaningful guidance and protections. SOR at 18. Reichman asserts that more particularized stipulations should especially be developed for sec. 30 because that section contains more than half of Flat Rock Butte, a large table of rock atop the Butte, which contains inscriptions, initials, names, and other evidence of visitation by settlers arriving after the Native Americans, including some markings over a century old. SOR at 21.

¹³ Reichman herself apparently realizes that supplementation is not mandatory at this point. *See* SOR at 6-7 (suggesting that relevant authority does not prohibit the Board from "enjoining leasing decisions at this point" and averring that the prudent, cautious, and appropriate way to address the developments would be to suspend leasing now until suitable action can be taken in light of the new information).

¹⁴ We note, however, as BLM points out, that the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470hh(a) (2000), prohibits the disclosure of site specific cultural resource information under certain circumstances.

In response, BLM explains that it uses a phased approach to ensure that cultural resources are adequately identified and considered at each stage of the oil and gas leasing and development decision-making process. In conformance with that approach, BLM notes that it added the cultural resources stipulation quoted above to sec. 30 to protect cultural resources on the private surface. It asserts that it will complete its NHPA review at the APD stage and will modify or disapprove activities if necessary to protect cultural resources. BLM therefore submits that the lease stipulation provides adequate protection for cultural resources at this point. Answer at 6-7.

[2] The NHPA is essentially a procedural statute designed to ensure that an agency identifies and considers significant cultural resources in its decision-making process. *The Mandan, Hidatsa, and Arikara Nation (Mandan)*, 164 IBLA 343, 347 (2005), and cases cited. Section 106 of the NHPA, 16 U.S.C. § 470(f) (2000), requires the head of any Federal agency having authority to license any undertaking to take into account the effects of the undertaking on any property eligible for inclusion in the National Register of Historic Places. *See Mandan*, 164 IBLA at 348. Both the Board and the Federal courts have endorsed BLM's use of a phased approach to section 106 compliance as long as no surface-disturbing activity will occur until the section 106 process is complete. *Mandan*, 164 IBLA at 354, and cases cited.

The phased approach does not allow BLM to defer all NHPA analysis until the site-specific APD stage; rather, the record must show that BLM conducted appropriate NHPA identification and protection activities at the land use planning and lease sale stages, as well. *See Montana Wilderness Association v. Fry*, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004); *Mandan*, 164 IBLA at 348-51; *Southern Utah Wilderness Alliance*, 164 IBLA 1, 22-24. Reichman concedes that the parcel was inventoried for cultural resources before the challenged decision to offer the parcel for leasing was made. *See* SOR at 17; Sept. 26, 2007, Supplementation to Protest at 8. The stipulations attached to the parcel reflect the results of this inventory. We therefore conclude that BLM and FS undertook the requisite appropriate NHPA evaluation at the pre-leasing stage. *See Mandan*, 164 IBLA at 355.

The cultural resources stipulation attached to the parcel provides:

Cultural Resources Lease Stipulation

This lease may be found to contain historic properties and/or resources protected under the [NHPA], American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, [Executive Order] 13007, or other statutes and executive orders. The BLM will not approve any ground disturbing activities that may affect such properties or resources until it completes its obligations under applicable requirements of the NHPA and other authorities. The BLM may require

modification to exploration or development proposals to protect such properties, or disapprove any activity that is likely to result in adverse effects that cannot be successfully avoided, minimized or mitigated.

This stipulation notifies the lessee that the parcel might contain historic or cultural resources requiring protection under the NHPA and other authorities, that BLM will not approve any ground-disturbing activities until BLM completes its obligations under those authorities, and that BLM reserves the authority to modify or disapprove activities to protect cultural resources. Although Reichman asserts that these protections are insufficient, we disagree. BLM's preservation of the right to prohibit contemplated surface-disturbing activities that would harm cultural resources suffices at this stage to protect those resources. Reichman's concerns about Flat Rock Butte are more properly addressed at the APD stage when the lessee has presented site-specific surface-disturbing activities. We therefore reject Reichman's challenge to the adequacy of the cultural resource stipulation attached to the lease.¹⁵

3. Topographical and Wildlife Values

Finally, Reichman avers that FS used inadequate information to generate lease stipulations addressing the topographical and wildlife values associated with secs. 30 and 32. She asserts that, although FS admittedly possessed hand drawings, created in 1991 from direct observation, depicting the topographical and wildlife features of the parcel, it nevertheless used less accurate computer-generated maps of the topographical features derived from overflights of the area beginning in 2000 to develop the stipulations attached to the parcel. Reichman insists that FS and BLM should be required to use the earlier, allegedly more accurate, maps to formulate appropriate topographical and wildlife stipulations for the parcel. SOR at 22-23; Reply at 7-8; *see* SOR Ex. 8 (Reichman Affidavit submitted in IBLA 2006-58).

BLM denies that the topographical and wildlife stipulations for the parcel are inadequate. According to BLM, in addition to standard lease terms, FS updated the stipulations for the parcel based on additional review performed in February 2006 and added NSO stipulations for slopes greater than 40 percent and for golden eagle, merlin, and ferruginous hawk nests, as well as a timing limitation based on the presence of sharp-tailed grouse nests. Answer at 8. BLM also notes that Onshore Oil and Gas Order No. 1, Sec. III., C. 48 Fed. Reg. 48915, 48922-23 (Oct. 21, 1983),

¹⁵ We note that, in addition to BLM's cultural resource stipulation, the notices and stipulations attached to the parcel and the subsequently issued lease (NDM 95807) include the FS cultural resources and vertebrate paleontology notice (R1-FS-2820-13d (01/01)) and the FS CSU stipulation to protect paleontological resources (R1-FS-2820-16 (1/90)), the latter of which explicitly applies to lands within secs. 30 and 32.

requires an onsite inspection prior to approval of an APD and an invitation to the surface owner of split estate lands to participate in the inspection and provide input on site-specific COAs for the APD. BLM adds that an operator is required obtain a surface owner's agreement for access or waiver thereof and an agreement regarding compensation for surface damages or a bond before operations commence. Answer at 8. BLM submits that, given the lack of any evidence or documentation supporting her claims that the NEPA analysis relied upon to make the leasing decision is flawed or that the imposed stipulations are inadequate to protect wildlife values, Reichman's complaint that aerial topographical maps rather than on the ground maps were used in the planning and decision-making process does not suffice to overturn the decision to offer the parcel for leasing. *Id.* at 8-9.

As BLM points out, the parcel and the subsequently issued lease contain various stipulations precluding or limiting surface disturbing activities affecting various topographical and wildlife values. These stipulations include (1) an Endangered Species Act Section 7 Consultation Stipulation reserving BLM's right to require modification or to disapprove proposed activity that is likely to result in jeopardy to the continued existence of a proposed or listed threatened or endangered species or result in the destruction or adverse modification of designated or proposed critical habitat; (2) FS NSO stipulations precluding surface use or occupancy on slopes greater than 40 percent and within .5 miles of golden eagle, merlin, and ferruginous hawk nests (R1-FS-2820-14 (1/90)); (3) a FS timing limitation stipulation prohibiting surface use from March 1 through June 15 within 1 mile of active sharp-tailed grouse display grounds (R1-FS-2820-15 (1/90)); (4) a FS CSU stipulation directing activities and facilities away from riparian areas, woody draws, wetlands, and floodplains (R1-FS-2820-16 (1/90)); and (5) a FS Threatened, Endangered, and Sensitive Plant or Animal Species Lease Notice advising the lessee that the lease area might contain TES species or critical habitat protected under the ESA and that a biological evaluation and mitigation measures, including the disallowance of the use, might be necessary to comply with the ESA, other statutes, and applicable regulations (R1-FS-2820-18a (5/02)).

Reichman has not shown that these stipulations and notices are inadequate to protect the topographical and wildlife values of the parcel. To the extent she challenges these stipulations on the ground that the areas specifically identified in the NSO, timing limitation, and CSU stipulations were not based on accurate information, she ignores the fact that FS reviewed the parcel in February 2006 and specifically added portions of the NE¹/₄SW¹/₄ sec. 32 to the CSU for woody draws and portions of the E¹/₂, SE¹/₄NW¹/₄, and E¹/₂SW¹/₄ sec. 20, of the NE¹/₄NE¹/₄, NE¹/₄NW¹/₄, SE¹/₄SW¹/₄, SE¹/₄, and Lot 2, sec. 30, and of the N¹/₂, W¹/₂SW¹/₄, NE¹/₄SW¹/₄, W¹/₂SE¹/₄, and SE¹/₄SE¹/₄ sec. 32 to the NSO for 40 percent slopes. *See* Decision Verification at unnumbered p. 2. Additionally, BLM will have the further opportunity to analyze impacts of any site-specific proposal at the APD stage and mitigate those impacts with

site-specific resource protection measures, and Reichman will be invited to participate in pre-APD approval inspections. *See* Onshore Oil and Gas Order No. 1, Sec. III. C., 48 Fed. Reg. 48915, 48922-23 (Oct. 21, 1983). As part of that process, BLM notes that Reichman will be given the opportunity to provide input into the development of appropriate COAs for any APDs. Reichman has not shown that the lease terms and stipulations and BLM's preservation of the authority to supplement those terms and stipulations at the APD stage do not adequately protect topographical and wildlife resources. Accordingly, we uphold the dismissal of her protest of the inclusion of Parcel 05-06-35 in the May 31, 2006, competitive oil and gas lease sale.

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 decision appealed from is affirmed.

_____/s/_____
Sara B. Greenberg
Administrative Judge

I concur:

_____/s/_____
Geoffrey Heath
Administrative Judge