BOARD OF COMMISSIONERS OF PITKIN COUNTY and
WILDERNESS WORKSHOP, *ET AL.*

173 IBLA 173 Decided December 20, 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

BOARD OF COMMISSIONERS OF PITKIN COUNTY and
WILDERNESS WORKSHOP, *ET AL.*

IBLA 2005-9, 2005-10 Decided December 20, 2007

Appeals of decisions by the Deputy State Director, Colorado State Office, Bureau of Land Management, dismissing protests against including three parcels in the sale of competitive oil and gas leases within the White River National Forest. COC-67538, COC-67540, COC-67541.

Appeals consolidated; Town of Carbondale, Western Colorado Congress, and Crystal Valley Environmental Protection Association dismissed as parties/appellants; decisions reversed in part and set aside in part.

1. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

   Standing to appeal requires an appellant to be a party to the case and be adversely affected by having a legally cognizable interest that the decision at issue has or is substantially likely to injure. An affected interest need not be an economic or a property interest; use of the land involved or ownership of adjoining land suffices, but mere interest in a problem or concern with the issues involved does not. For an organization to have standing to appeal, one or more of its members must have a legally cognizable interest that is or may be adversely affected by the decision on appeal.

2. Administrative Authority--Board of Land Appeals--Oil and Gas Leases: Consent of Agency--Rules of Practice: Appeals

   The Bureau of Land Management is jointly responsible with the Forest Service, U.S. Department of Agriculture, for oil and gas leasing within the national forests. The Forest Service must consent to leasing and can require the inclusion of appropriate stipulations; BLM has independent authority in deciding whether

to make national forest lands available for oil and gas leasing and/or to include additional stipulations. An appeal based on the failure of the Forest Service to comply with its own procedures or with laws solely applicable to the Forest Service is not properly considered by the Board as we will generally refrain from ruling on the consistency of another Department's actions with its statutory and regulatory mandates.

3. Administrative Authority--Board of Land Appeals--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Consent of Agency--Rules of Practice: Appeals

The Bureau of Land Management must comply with the National Environmental Policy Act in deciding whether to include national forest parcels in a competitive oil and gas lease sale. BLM may either adopt as its own the environmental documents of the Forest Service, U.S. Department of Agriculture, or rely on those documents in evaluating the impacts of a proposed action and in preparing its own environmental document.

4. Administrative Authority--Board of Land Appeals–Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Consent of Agency

In complying with the National Environmental Policy Act, the Bureau of Land Management may adopt the environmental impact statements of other agencies as its own, provided BLM performed its own independent review and determined for itself that they adequately address all likely significant environmental impacts.

5. Endangered Species Act of 1973: Section 7: Consultation--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Consent of Agency

Under the Endangered Species Act, BLM is obligated to ensure that its actions are not likely to jeopardize the continued existence of any threatened or endangered species or to result in the destruction of, or an adverse modification to, critical habitat. Where a listed species may be present in the area of a proposed action, BLM must consider whether the Act applies and, if so,

prepare a Biological Assessment/Evaluation and consult with the Fish and Wildlife Service, as appropriate.

APPEARANCES: Asimakis P. Zaterdis, Esq., and Josh A. Marks, Esq., Boulder, Colorado, and John Ely, Esq., for Board of Commissioners of Pitkin County; Mike Chiropolos, Esq., Boulder, Colorado, for the Wilderness Workshop, Colorado Mountain Club, Colorado Environmental Coalition, Western Colorado Congress, The Wilderness Society, White River Conservation Project, Crystal Valley Environmental Protection Association, and the Town of Carbondale, Colorado; John S. Retrum, Esq., Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management; Laura Lindley, Esq., and Robert C. Mathes, Esq., Denver, Colorado, for Contex Energy Company.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

This decision addresses an appeal filed by the Board of County Commissioners of Pitkin County (Pitkin County), IBLA 2005-9, and a joint appeal filed by the Wilderness Workshop, the Colorado Mountain Club, the Colorado Environmental Coalition, the Western Colorado Congress, the Wilderness Society, the White River Conservation Project, the Crystal Valley Environmental Protection Association, and the Town of Carbondale, Colorado (appellants), IBLA 2005-10. Each appeal challenges an August 30, 2004, decision by the Deputy State Director, Colorado State Office, Bureau of Land Management (BLM), dismissing their respective protests to the inclusion of three parcels, COC-67538, COC-67540, COC-67541 (parcels 538, 540, and 541), in the competitive oil and gas lease sale held by BLM on May 13, 2004 (May 2004 lease sale). The Statement of Reasons (SOR) and Reply filed by Pitkin County is a near verbatim restatement of appellants' SOR and Reply, *compare* Pitkin County SOR at 11-27 and Reply at 2-4, 12-26, *with* Appellants SOR at 8-25 and Reply at 6-19; the Answers filed by BLM and the Contex Energy Company (Contex)[1] in both appeals are also virtually identical. Since the factual and legal issues presented in each are the same or substantially similar, these appeals are consolidated.

The three parcels at issue encompass lands within the White River National Forest (WRNF) in central Colorado which are under the administrative jurisdiction of the Forest Service, U.S. Department of Agriculture (Forest Service). The Forest Service consented to lease these parcels with stipulations based upon the WRNF Land

[1] Contex, as agent for EnCana Oil & Gas (USA), Inc. (EnCana), was the high bidder and was issued leases for each of the parcels at issue. It did not seek intervention but states it is a party and was identified in the Deputy State Director's decision as a party which may be affected by an appeal. Contex Answer at 1; *see* 43 C.F.R. § 4.410(d). EnCana, through its agent, Contex, moved to consolidated these appeals.

and Resource Management Plan - 2002 Revision (2002 LRMP) and its associated EIS (2001 FS EIS).[2] Parcel 538 has two discrete tracts, both of which have a "no surface occupancy" (NSO) stipulation for lands within 350 feet of Colorado River cutthroat trout streams or on slopes steeper than 60 percent, but only one of these tracts has a stipulation which prohibits exploration, drilling, and development activity from June 1 through October 1.[3] Parcel 540 is also subject to an NSO stipulation which precludes activities on slopes steeper than 60 percent. Parcel 541 includes a prohibition on exploration, drilling, and development from December 1 through April 30 to protect elk and mule deer winter range.

ISSUES PRESENTED

Appellants' SORs [4] challenge the Forest Service's consent to lease these parcels as being violative of the "Roadless Rule" for national forest lands, 66 Fed. Reg. 3244, 3272-73 (Jan. 12, 2001) (amending 36 C.F.R. Part 294), related interim directives, and the Forest Service Handbook. SOR at 11-15. Appellants assert that issuing leases without NSO stipulations is an irreversible and irretrievable commitment of resources within roadless areas and that BLM was under an independent responsibility to comply with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000). They argue that BLM and the Forest Service violated NEPA by failing to prepare an EIS, recognize the controversial

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[2] The 2002 LRMP and 2001 FS EIS incorporated by reference the 1993 WRNF Oil and Gas Leasing EIS (1993 FS EIS) and related record of decision which established the Forest Service's general plan for competitive oil and gas leasing within the WRNF. *See* BLM Answer at 4. The administrative record submitted by BLM is exceedingly sparse and did not include any of these documents; selected extracts, however, were later provided by the parties in their briefs on appeal. The record, as supplemented by the parties, does not include any BLM documents for the time period between BLM's receipt of the Forest Service's consent to lease these parcels and BLM's issuance of the decisions on appeal, except for appellants' protests and the Forest Service's responses to those protests. *See* discussion *infra.*

[3] Most of parcel 538 consists of contiguous land in secs. 27, 33, and 34, T. 8 S., R. 89 W., 6th P.M., but for reasons not explained in the record, the parcel includes a second tract which is approximately 4 miles away in sec. 7 of the same township.

[4] For ease of reference and except where indicated, all references are to the pleadings filed in the joint appeal, IBLA 2005-10. BLM filed sur-replies and a withdrawal of argument in IBLA 2005-10 (but not in IBLA 2005-9), to which appellants responded, and both BLM and Contex replied. *See* discussion *infra*. As noted, *supra*, Pitkin County's pleadings are virtually identical to those filed by appellants in their joint appeal; references to "appellants" hereinafter include Pitkin County.

nature of this proposed leasing, and consider new information and site-specific environmental factors. SOR at 15-19, 22-25. Appellants also contend the Forest Service and BLM violated the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (2000). *Id*. at 19-21; Appellants' Consolidated Reply at 8, 10, 12-13. Since the Canada lynx is a threatened species, 65 Fed. Reg. 16052 (Mar. 24, 2000), and was addressed in both the 2002 LRMP and the 2001 FS EIS, appellants claim that this species should have been considered in deciding whether to include these parcels in the May 2004 lease sale (by the Forest Service in consenting and by BLM in including them in that lease sale) and that a Biological Assessment/Evaluation for the Canada lynx was then required. SOR at 19-21.

BLM and Contex filed Answers and challenged the Town of Carbondale's standing to appeal; Contex also claimed that the appeals of all parties should be dismissed because they had not demonstrated their standing to appeal. BLM Answer at 6-7; Contex Amended Answer at 5-7; Contex Answer to Pitkin County at 6-11. BLM and Contex argue that the Board should not review issues pertaining to the Forest Service's decision to allow leasing of these parcels because BLM had no responsibility to ensure that the Forest Service complied with the "Roadless Rule" or the Forest Service Handbook and because the Forest Service had sole authority to determine whether to make national forest lands available for leasing. BLM Answer at 7-10; Contex Amended Answer at 8-14. As to NEPA, BLM contends that a site-specific analysis was not required, pointing out that the areas identified for leasing are protected by NSO stipulations which exclude development from steep slopes and protect both trout fisheries and elk calving grounds and that further environmental review will occur when applications for permits to drill are filed. BLM Answer at 12-14. BLM concedes it did not evaluate the environmental impacts of its decision to include these parcels in the May 2004 lease sale [5] and had not adopted the Forest Service's environmental documents as its own, but nonetheless contends it complied with NEPA. BLM Amended Sur-Reply at 2-7; *see also* Contex Answer at 15-23. BLM did not answer appellants' ESA claims; Contex only briefly addressed those claims in responding to the alleged failure by BLM to consider new information. Contex Answer at 26-27.[6]

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[5] BLM initially argued that the Forest Service had sole authority to make the parcels available for leasing and that BLM had no responsibility to comply with NEPA, BLM Answer at 9-12, but later withdrew those arguments, BLM Withdrawal of Argument at 1-2.

[6] In reply, appellants contend that these leases were issued in violation of the acreage limitation established by 30 U.S.C. § 184(d) (2000). Consolidated Reply at 2-3. BLM responded by arguing that this new issue should be dismissed because it was first raised on appeal and is not ripe for our review, BLM Sur-Reply at 2; Contex

(continued...)

ANALYSIS

We first address appellants' standing to pursue this appeal. We next consider their claims challenging the Forest Service's decision to consent to leasing these parcels and then turn to BLM's compliance with NEPA and the ESA.

I. Several Appellants Have Standing to Appeal BLM's Decision.

[1] Standing to appeal is governed by 43 C.F.R. § 4.410(a), which provides that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board . . . ." In order to pursue an appeal, an appellant must not only be a "party" (*e.g.*, "participated in the process leading to the decision under appeal"), but also "adversely affected" (*i.e.*, "the decision on appeal has caused or is substantially likely to cause injury to [a party's legally cognizable] interest"). 43 C.F.R. § 4.410(b) and (d); *The Coalition of Concerned National Park Service Retirees*, 165 IBLA 79, 82 (2005). If either of these two requirements is unmet, an appeal must be dismissed for lack of standing. *Southern Utah Wilderness Alliance*, 140 IBLA 341, 346 (1997); *National Wildlife Federation v. BLM*, 129 IBLA 124, 125 (1994); *Mark S. Altman*, 93 IBLA 265, 266 (1986). Under the second prong, the adversely affected "interest need not be an economic or a property interest; use of the land involved or ownership of adjoining land suffices, but mere interest in a problem or concern with the issues involved does not." *Kendall's Concerned Area Residents*, 129 IBLA 130, 136-37 (1994); *Mark S. Altman*, 93 IBLA at 266.

It is an appellant's responsibility to demonstrate that it has met the requisite elements of 43 C.F.R. § 4.410. *Colorado Open Space Council*, 109 IBLA 274, 280 (1989). For an organization to have standing to appeal, one or more of its members must have a legally cognizable interest that was or is likely to be adversely affected by the decision. *See The Coalition of Concerned National Park Retirees*, 165 IBLA at 86; *Legal and Safety Employer Research, Inc.*, 154 IBLA 167, 172-73 (2001). Showing use of each parcel by an organization's member(s) is a direct way to establish standing, but a party may show an adverse effect "by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests." *The Coalition of Concerned National Park Service Retirees*, 165 IBLA at 84, and cases cited. Such interests may include cultural and aesthetic use and enjoyment of the public lands at issue. *Animal Protection Institute of America*, 117 IBLA 208, 210 (1990).

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[6] (...continued)
responded by asserting that appellants' claim is predicated upon a mistake of fact, Contex Sur-Reply at 2. For the reasons discussed below, we need not and, therefore, do not address these newly raised claims.

The Town of Carbondale is not a proper party to this appeal because it was not a party to the case. Carbondale was not named in the protest filed by the other appellants and does not aver (and the record does not indicate) that the town submitted a separate protest. Because Carbondale has not demonstrated that it was a party to this case, its appeal must be dismissed for lack of standing. The other parties to these appeals were named in the protests and are properly parties to the case. As to them, the issue to be decided is whether they assert interests that are adversely affected by the decision on appeal.

In addition to the appellants' discussion of standing in their pleadings, they submitted seven declarations/affidavits to support their claimed standing to pursue these appeals:

- Dale Will, Director of Open Space and Trails for Pitkin County, stated that Pitkin County had entered into a 1998 agreement to acquire a Conservation Easement for lands adjacent to parcel 538 and that exploration and development on parcel 538 "would negatively impact the resources that Pitkin County has sought to preserve under [that agreement]." Pitkin County SOR, Ex. 23; *see also* Pitkin County Reply, Ex. 31 (Affidavit of William E.L. Fales, president of the North Thompson Four Mile Mineral and Land Corporation, the owner of the lands subject to that conservation easement).

- Clare Bastable, a conservation coordinator for the Colorado Mountain Club and a member of the Wilderness Workshop and the Garfield County Energy Advisory Board, states she has visited parcel 538 and has "recreated in and around that area." SOR, Ex. 20.

- E. Sloan Shoemaker, Executive Director of the Wilderness Workshop, states he participated in a field inventory of lands in the Thompson Creek Roadless complex and "frequently recreate[s] on and enjoy[s] the public lands of the WRNF and lands in the Thompson Creek Roadless Complex leased in May of 2004," explaining that his use of these lands includes hiking, photography, cross-country skiing, mountain-biking, and enjoying open spaces. SOR, Ex. 21.

- Richard C. Compton, Director of the White River Conservation Project and a member of the Wilderness Society and the Wilderness Workshop, executed two declarations. The first explains his involvement in mapping roadless areas in the vicinity of the lands at issue. SOR, Ex. 19 ("research by myself and others," including field verification, mapped 135,994 acres in the Thompson Creek roadless area complex). Compton's second declaration adds that he can see parcel 538 from the kitchen, dining room, living room, and deck areas of his house and mentions his use of lands in the Divide Creek watershed and in

the Thompson Creek and Reno Mountain areas for various recreation activities. Consolidated Reply, Ex. 29.

- Steven W. Smith, Assistant Regional Director for The Wilderness Society and a member of the Colorado Environmental Coalition, states he has extensively visited and explored the Thompson Creek roadless lands that were offered for oil and gas leasing in May 2004 when hiking, skiing, bicycling, photographing, camping, backpacking, and sightseeing in the WRNF. Consolidated Reply, Ex. 30.

Based upon these declarations and pleadings, the Board finds that Pitkin County, the Colorado Mountain Club, the White River Conservation Project, the Wilderness Workshop, the Wilderness Society, and the Colorado Environmental Coalition have standing to pursue their appeals. Although parcels 540 and 541 are not specifically mentioned in the above-referenced declarations, they are sufficiently identified by Shoemaker (for the Wilderness Workshop) and Smith (for the Wilderness Society and the Colorado Environmental Coalition) declaring that they recreated on, visited, explored, or otherwise enjoyed the lands leased or offered for leasing by BLM in May 2004. *See The Coalition of Concerned National Park Service Retirees*, 165 IBLA at 83-84, 87-88. Since neither the Western Colorado Congress nor the Crystal Valley Environmental Protection Association has demonstrated by declaration or other credible evidence that its members use or would be adversely affected by the decision on appeal, they are dismissed as parties to this appeal.

II. Claims of Alleged Forest Service Noncompliance with its Rules, Internal Directives, or Guidance are not Properly Considered by this Board.

[2] The role of the Department in issuing oil and gas leases for public domain lands managed by the Forest Service and the role of the Board in reviewing appeals of those decisions was changed by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), which amended 30 U.S.C. § 226 (2000). Pub. L. No. 100-203, Title V, Subtitle B, 101 Stat. 1330-256 to 1330-263 (1987). As a result of FOOGLRA, the Forest Service must consent to leasing and can require the inclusion of appropriate stipulations, 20 U.S.C. § 226(h) (2000), but BLM retains separate, independent authority to decide whether to include national forest lands in a lease sale and, if so, to impose additional stipulations. *See* 43 C.F.R. § 3101.7-2; *Colorado Environmental Coalition*, 125 IBLA 210, 215-16 (1993). BLM is jointly responsible for oil and gas leasing of national forest lands, but "objections raised with respect to the conformity of the Forest Service's actions either with its own internal operating procedures or with laws solely applicable to the Forest Service are not properly considered either by BLM or this Board." *Colorado Environmental Coalition,* 125 IBLA at 218. We cannot and, therefore, will not review whether the Forest Service

complied with its "Roadless Rule," interim directives, and/or the Forest Service Handbook.[7]

III. BLM Failed to Comply With NEPA.

Since the leases at issue include stipulations which only limit (but do not prohibit) exploration and development operations, NEPA clearly applied to BLM's decision to offer these lands for oil and gas leasing. *See, e.g., Center for Native Ecosystems*, 170 IBLA 331, 345 (2006); *Southern Utah Wilderness Alliance*, 166 IBLA 270, 276-77 (2005), and cases cited, *vacated in part*, 166 IBLA 270A (2006). We do not here address whether the Forest Service complied with its NEPA obligations, but whether BLM complied with its own, independent NEPA responsibilities in deciding to include these national forest lands within its May 2004 lease sale. *See Wyoming Outdoor Council,* 159 IBLA 388, 401 (2003); *Colorado Environmental Coalition*, 125 IBLA at 215-16.

[3] In exercising its discretionary authority to lease national forest lands and in complying with NEPA, BLM may adopt Forest Service environmental documents as its own or rely on those documents in BLM's evaluation of environmental impacts. *See Colorado Environmental Coalition*, 125 IBLA at 215-16. In this case, however, BLM neither adopted the Forest Service's environmental documents nor conducted any environmental review of its own when deciding whether to make these parcels available for leasing, apparently because BLM was then under the mistaken belief that it had no NEPA responsibility for conducting any environmental review. *See* BLM Answer at 9-12. Had BLM either adopted the Forest Service's environmental documents or prepared its own analysis and environmental document, we would review whether BLM's decision to lease these parcels based on those environmental documents complied with NEPA, but such is not this case. *See Wyoming Outdoor Council*, 159 IBLA at 401; *Colorado Environmental Coalition*, 125 IBLA at 220; *see also The Mandan, Hidatsa, and Arikara Nation*, 164 IBLA 343, 347 n.3 (2005); *Southern Utah Wilderness Alliance*, 166 IBLA at 282-84, and cases cited (affirming the use of a Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) in lieu of

[7] Whether and, if so, under what circumstances an administrative appeal of a Forest Service decision can be pursued are decisions to be made by the Forest Service. *See* SOR at 8-10; BLM Answer at 9; Contex Amended Answer at 11-13. If a right of appeal is recognized by Forest Service rule or otherwise, it may be pursued; if no such right exists, judicial review could be sought. It simply is not the role of BLM, the Department, or this Board to ensure that adversely affected parties have a right to administratively appeal decisions made by the Forest Service.

preparing a NEPA document, but recognizing that a DNA is not a NEPA document and cannot supplement a NEPA document).[8]

BLM's decisions on appeal recognized that appellants' protests challenged whether BLM had complied with NEPA, but in dismissing these protests, BLM stated only that "the decision to offer the lands in parcels COC67538, COC67540, and COC67541 was done in accordance with U.S. Forest Service and Bureau of Land Management policy and regulations." Neither BLM's decisions nor their enclosed Forest Service responses to appellants' protests, dated Aug. 10 and 12, 2004 (FS Protest Response), addressed the claims presented in appellants' protests. *See* Appellants Protest at 5-6. Rather than responding to alleged NEPA deficiencies, the Forest Service represented that it had prepared validation and verification forms for each parcel and that its "validation and verification process . . . ensures that each parcel complies with the forest plan, the applicable oil and gas leasing decisions incorporated in the plan, and environmental analyses performed for the oil and gas leasing decisions," and that "no new information or changed circumstances requiring additional NEPA analysis have occurred since [those analyses were prepared]." FS Protest Response at 2.[9] Whatever the merits of appellants' contentions in their protest, neither the Forest Service responses nor the BLM decisions on appeal provided a substantive reply.

BLM correctly asserts that an agency is not required to prepare its own environmental document and may adopt the environmental documents of others as its own. Amended Sur-Reply at 6; *see Kendall's Concerned Area Residents*, 129 IBLA at 139-41. However, the record in this case confirms BLM's earlier acknowledgment that it "did not, prior to issuing its August 30, 2004, decision conduct its own environmental analysis pursuant to NEPA or adopt as its own, for purpose of compliance with NEPA, the environmental analysis or conclusions carried out by the Forest Service in its NEPA review." BLM Answer at 12. BLM nonetheless contends on appeal that as a cooperating agency with respect to the 1993 FS EIS and a reviewing agency with respect to the 2001 FS EIS, it should now be deemed to have adopted those EISs under 40 C.F.R. § 1506.3. Sur-Reply at 6-7. We disagree.

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[8] Once adopted by BLM, the environmental document of another agency becomes a BLM environmental document to which a BLM environmental document (*i.e.*, an EA/EIS) can be tiered, 40 C.F.R. § 1506.3, or which can be used by BLM in determining NEPA adequacy and demonstrating its compliance with NEPA.

[9] Validation and verification forms are the Forest Service analog to a BLM DNA. *See* 36 C.F.R. § 228.102(e)(1); *cf. Southern Utah Wilderness Alliance*, 166 IBLA at 282-84.

[4] Nothing in NEPA or the above-cited regulation authorizes or supports BLM's argument that it may comply with the statute in the manner suggested.[10] We have recognized in this vein that:

> A Federal agency is required by section 102(2)(C) of NEPA to undertake its own comprehensive analysis of the potential environmental impacts of a Federal action which it proposes to take, and cannot wholly defer to an analysis performed by another agency. *State of Idaho v. Interstate Commerce Commission*, 35 F.3d 585, 595-96 (D.C. Cir. 1994); *Anacostia Watershed Society v. Babbitt*, 871 F. Supp. 475, 483-86 (D.D.C. 1994); *Colorado Environmental Coalition*, 125 IBLA at 215-16, 220. This does not preclude the agency from adopting an EIS prepared by another agency in lieu of preparing its own EIS, especially where it cooperated in the preparation of the EIS. *Anacostia Watershed Society v. Babbitt*, 871 F. Supp. at 485. Indeed, it is expressly permitted by 40 CFR 1506.3(c). *See Colorado Environmental Coalition*, 125 IBLA at 220; *California Wilderness Coalition*, 98 IBLA 314, 319 n.7 (1987). *The adopting agency must perform its own "independent review,"* 40 CFR 1506.3(c), however, *and determine for itself that the EIS adequately addresses all of the likely significant environmental impacts.* In other words, it must accept responsibility for scope and content of the EIS. *State of North Carolina v. Federal Aviation Administration*, 957 F.2d 1125, 1130 (4th Cir. 1992).

Wyoming Outdoor Council, 159 IBLA at 414 (emphasis added); *see also* NEPA Handbook, H-1790-1 at III.E.3, III.E.4 (to adopt another agency's EIS, BLM must prepare its own ROD"). Where, as here, the record does not demonstrate that BLM adopted either the Forest Service's 1993 or 2001 FEISs,[11] we are as unwilling as we

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[10] We note that BLM has adopted Forest Service's environmental documents as its own consistent with applicable procedures. *See, e.g., Colorado Environmental Coalition*, 125 IBLA at 220; *see generally* NEPA Handbook, H-1790-1, III.E (procedures for adopting another agency's EA or EIS).

[11] As a "cooperating agency" in the preparation of the 1993 FS EIS, BLM could have adopted that EIS as its own "without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions were satisfied," 40 C.F.R. § 1506.3(c). As we observed in *Wyoming Outdoor Council*, 159 IBLA at 415: "CEQ guidance states that, following an EIS, a cooperating agency with jurisdiction by law over part of the proposed action "will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions."

(continued...)

are unable to assume that it did so. *See Center for Native Ecosystems*, 170 IBLA at 347 ("this Board is not the proper entity to create NEPA documentation by inferring BLM's intent in not undertaking it").

In addition or in the alternative, BLM claims that it complied with NEPA by referring to the Forest Service Protest Response in the decisions on appeal. Amended Sur-Reply at 5. At most, this oblique reference suggests that the Forest Service complied with its NEPA responsibilities; it neither suggests nor demonstrates that BLM complied with its NEPA responsibilities. As candidly acknowledged by BLM and demonstrated by the record, BLM conducted no environmental analysis and prepared no environmental document of its own. *See* Answer at 12. We simply are unwilling to "deem" a reference to the Forest Service Protest Response to be an environmental review by BLM or to demonstrate that BLM complied with its NEPA responsibilities.[12] *See Center for Native Ecosystems*, 170 IBLA at 347.

In sum, we find that BLM failed to comply with NEPA when it included the three parcels at issue in an oil and gas lease sale which did not prohibit surface occupancy on these parcels and, therefore, reverse BLM's decisions to the extent they rejected appellants' protests under NEPA.

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[11] (...continued)
46 FR 18026, 18035 (1981). Additionally, BLM's NEPA Handbook, H–1790–1 at III-7, states that BLM "must prepare its own ROD" when it is a cooperating agency in the preparation of an EIS. BLM Manual (Rel. 1-1547, Oct. 25, 1988).

[12] To the extent BLM suggest that its responses to appellants' protests were DNAs which complied with NEPA, we reject that claim. BLM's instructions for the use of DNAs states that they "may be used for documenting [resource management] plan conformance and NEPA compliance for proposed actions which . . . are fully covered by an existing EA or EIS prepared by the BLM (i.e., the existing BLM NEPA document satisfies all of the criteria for ensuring NEPA compliance for the proposed action). NEPA Handbook, H-1790-1 at III.E (Instructions for Completing Optional Plan Conformance/NEPA Compliance Record). A validation and verification prepared by the Forest Service simply is not an "existing BLM NEPA document."

IV. BLM Obligations Under and Compliance With the Endangered Species Act.

The Canada lynx was listed as a threatened species in 2000 under the ESA [13] and addressed in the 2001 FS EIS,[14] the 2002 LRMP, and the Forest Service's Biological Evaluation of that LRMP.[15] *See* 2001 FS EIS, Appendix N (Biological Evaluation) at N-10 to N-19. The Forest Service determined that since some proposed actions may alter suitable lynx habitat and since some disturbance to individuals may occur, "the proposed actions of all alternatives **MAY AFFECT THE SPECIES OR ITS HABITAT**," adding that oil and gas exploration and development "may result in permanent or long-term changes to [Canada lynx] foraging, denning or dispersal habitat, or increases in snow compaction because they would only be restricted or limited, and only minimize adverse effects." *Id*. at N-19 (emphasis in original). It then concluded that "[s]ince some actions may only minimize adverse affects, the proposed actions of the 2002 Forest Plan are LIKELY TO ADVERSELY AFFECT THE SPECIES OR ITS HABITAT." *Id.* (emphasis in original).

[5] Appellants assert that BLM's issuance of leases on the three parcels at issue violated the ESA "because the agencies failed to conduct any form of review, much less consultation, with respect to the potential impacts to recognized lynx habitat within the disputed lease parcels." Reply at 10, *citing Wyoming Outdoor Council*, 159 IBLA 288 (2003); SOR at 19-21. We extensively discussed BLM's ESA responsibilities in *Forest Guardians,* 170 IBLA 253 (2006):

> The various consultation mechanisms adopted in the regulations, including early consultation, preparation of BAs [Biological Assessments], and appropriate informal and formal consultations, assist agencies in assessing a Federal action's impact on listed species and critical habitat. *Where a listed species may be present in the area of a proposed action, BLM must prepare a BA, which may occur as part of a*

[13] The ESA imposes substantive obligations on each Federal agency "to insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered. . . or threatened species or result in the destruction or adverse modification of habitat of such species. . . ." 16 U.S.C. § 1536(a)(2) (2000); *see Southern Utah Wilderness Association v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997).

[14] The Forest Service completed an assessment and determined that the Canada lynx is of "viability concern on the White River National Forest." 2001 FS EIS at 3-95,
3-99; *see also Id*. at 3-136 through 3-143.

[15] A Biological Evaluation is the nomenclature used by the Forest Service for a Biological Assessment (BA), pursuant to 50 C.F.R. 402,12, which also addresses Forest Service-listed sensitive species. 2001 FS EIS at 3-95.

> *NEPA review (50 CFR 402.06(a)),* to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action," and whether formal consultation with the FWS [Fish and Wildlife Service] is required. 50 CFR 402.12(a); *see* 16 U.S.C. § 1536(c)(1) (2000); 50 CFR 401.12(f); *Enos v. Marsh*, 769 F.2d 1363, 1368 (9th Cir. 1985); *Native Ecosystems Council,* 160 IBLA 288, 298 (2004); *Save Medicine Lake Coalition*, 156 IBLA 219, 258 (2002), *aff'd sub nom. Pit River Tribe v. BLM*, 306 F. Supp. 2d 929 (E.D. Cal. 2004).
>
> When the BA indicates that a proposed action may affect, and is likely to adversely affect, a listed species or critical habitat, or the consulting agency declines to concur in a no adverse effect determination, the action agency must initiate formal consultation. 16 U.S.C. § 1536(a)(3); 50 CFR 402.14; *Natural Resources Defense Council v. Houston*, 146 F.3d at 1118, 1125 (9th Cir. 1998); *Enos v. Marsh*, 769 F.2d at 1368; *Umpqua Watersheds, Inc.,* 158 IBLA 62, 81 (2002). Formal consultation is not required, however, when BLM determines, with the concurrence of FWS, either through informal consultation or submission of a BA, that the proposed action may affect, but is not likely to adversely affect, a listed species. 50 CFR 402.12(k), 402.13(a), and 402.14(b)(1); *Natural Resources Defense Council v. Houston*, 146 F.3d at 1126; *In re Big Deal Timber Sale*, 165 IBLA 18, 32 (2005).

170 IBLA at 260-61 (emphasis added; footnotes omitted); *accord Missouri Coalition for the Environment,* 172 IBLA 226, 250-51 (2007). We have also recognized that a "no effect" determination obviates any need for formal consultations with FWS under the ESA. *Native Ecosystems Council*, 160 IBLA at 300, *citing Pacific Rivers Council v. Thompson*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995), and *Southwest Center for Biodiversity v. U.S. Forest Service*, 100 F.3d 1443, 1447 (9th Cir. 1996).

Turning to the facts of this case as discussed above, the Forest Service prepared a planning-level Biological Evaluation/Assessment which addressed potentially adverse affects to the Canada lynx or its habitat from oil and gas exploration and development and from other activities within the WRNF, as proposed in the 2002 LRMP. The record presented does not include FWS' response (if any) to the Forest Service's Biological Evaluation/Assessment, nor does it indicate whether BLM determined that additional compliance with the ESA was or was not required at the lease sale stage, nor does it reveal whether BLM considered lynx to be present in

the lease sale area.[16] We infer from the foregoing that BLM considered itself to be under no additional ESA requirements, but BLM neither explains in its pleadings nor demonstrates by record reference why such requirements are inapplicable. Since the protection of threatened species and ESA compliance requires more than can be gleaned from the pleadings and the record presented, we set aside BLM's decisions to the extent they rejected appellants' protests under the ESA.

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 August 30, 2004, decisions of the Deputy State Director, Colorado State Office, dismissing appellants' protests are reversed in part and set aside in part.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Lisa K. Hemmer
Administrative Judge

[16] Although the Forest Service prepared verification and validation forms for each parcel which identified other threatened and special status species, these forms do not mention the Canada lynx and, therefore, do not indicate that this species is not likely to be present on those parcels. We note in this vein that appellants contend that most (if not all) of parcels 538, 540, and 541 are located in the Thompson Creek and Reno Mountain Roadless Areas, that these areas provide important habitat for lynx and other species, and that the Thompson Creek Roadless Area is considered by biologists with the Colorado Department of Wildlife to be "the most important lynx habitat" in the WRNF. Appellants' Protest at 4, 5; *see also* Pitkin County Protest at 2.