



YATES PETROLEUM CORPORATION

176 IBLA 144

Decided September 30, 2008



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

YATES PETROLEUM CORPORATION

IBLA 2006-213, 2006-226

Decided September 30, 2008

Appeals from two decisions of the Deputy State Director, Wyoming State Office, Bureau of Land Management, affirming in part and remanding in part, on State Director Review, two Findings of No Significant Impact/Decision Records of the Field Manager, Buffalo Field Office, approving two plans of development for Federal oil and gas leases and applications for permits to drill in the Powder River Basin. SDR WY-2006-11, Skyward POD & SDR WY-2006-12, Nemesis POD.

Affirmed.

1. Administrative Procedure: Burden of Proof--Appeals:
Generally--Evidence: Burden of Proof--Oil and Gas Leases:
Generally--Rules of Practice: Appeals: Burden of Proof

When BLM approves an application for permit to drill and plan of development of oil and natural gas resources under Federal leases subject to a site-specific condition, which limits the timing and location of development, a party challenging the condition of approval as unnecessary must, in order to prevail, prove by a preponderance of the evidence that the condition is unreasonable or not supported by the record.

2. Federal Land Policy and Management Act of 1976: Generally--
Federal Land Policy and Management Act of 1976: Land Use
Planning--Oil and Gas: Generally--Oil and Gas Leases:
Generally

When making a decision regarding discrete surface-disturbing oil and gas development activities following site-specific environmental review, BLM has the authority to impose reasonable measures to minimize adverse impacts on other resource values, including restricting the siting or timing of lease activities.

APPEARANCES: Phillip Wm. Lear, Esq., and Jeffrey R. Taylor, Esq., Salt Lake City, Utah, for appellant; and Arthur R. Kleven, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Yates Petroleum Corporation (Yates or appellant) has appealed from two decisions of the Deputy State Director, Wyoming State Office, Bureau of Land Management (BLM), dated May 5, 2006, and May 26, 2006, respectively. The May 5 decision affirmed in part and remanded in part, on State Director Review (SDR) (SDR WY-2006-11) (Skyward SDR Decision), a September 23, 2005, Finding of No Significant Impact/Decision Record (Skyward FONSI/DR or Skyward Decision) of the Field Manager, Buffalo (Wyoming) Field Office (BFO), approving the Skyward Plan of Development (POD). The other decision affirmed in part and remanded in part, on SDR (SDR WY-2006-12) (Nemesis SDR Decision), a September 13, 2005, FONSI/DR (Nemesis FONSI/DR or Nemesis Decision) of the BFO, approving the Nemesis POD.¹

Each FONSI/DR approved a Coal Bed Natural Gas (CBNG) Plan of Development (POD) and Applications for Permit to Drill (APDs) on Federal oil and gas leases, authorizing the drilling, production, abandonment, and reclamation of CBNG resources from the Big George coal zone in the Powder River Basin (PRB), as described more fully below. Nemesis EA at 5-6; Skyward EA at 4-5.

The POD areas are located between Buffalo and Gillette, in Johnson County, Wyoming. Oil and gas leasing and associated activity in the POD areas is governed by the terms and conditions of the October 1985 Buffalo Resource Management Plan (Buffalo RMP), as revised in 2001, and as amended with issuance of a July 30, 2003, Record of Decision (ROD), adopting the April 2003 RMP for the PRB Oil and Gas Project (PRB RMP Amendment).² Nemesis EA at 5; Skyward EA at 4. BLM based its decisions to approve the Skyward and Nemesis PODs on a September 23, 2006, Environmental Assessment (WY-070-05-187) (Skyward EA) and a September 13, 2006, EA (WY-070-05-157) (Nemesis EA), prepared pursuant to section 102(2)(C) of

¹ The Board docketed Yates' appeal of the Skyward SDR Decision as IBLA 2006-226, and the appeal of the Nemesis SDR Decision as IBLA 2006-213. By Order dated July 25, 2006, the Board granted Yates' motion to consolidate the appeals.

² In August 2008, BLM announced its intention to again revise the RMP, outlining guidance for general management actions during the period of revision, which includes managing the lands in question under existing decisions in the RMP, revised in 2001 and amended in 2003. *See* www.blm.gov/pgdata/content/wy/en/programs/Planning/rmps/buffalo.html.

the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000).³ These EAs are tiered to the April 30, 2003, PRB Oil and Gas Project Environmental Impact Statement #WY-070-02-065 (PRB FEIS) prepared for the PRB RMP Amendment, and address site-specific resources and impacts not covered in the PRB FEIS. Nemesis EA at 5; Skyward EA at 4. In approving the Skyward and Nemesis PODs, the BFO Field Manager selected BLM's Environmentally Preferred Alternative in each respective EA.

With respect to both SDR Decisions, appellant challenges the Deputy State Director's affirmance of (1) the BFO's imposition of a condition of approval (COA) for a 3-mile instead of a 2-mile seasonal buffer zone around any active sage grouse leks (strutting areas) from March 1 through June 15 annually; and (2) the BFO's disapproval of treatment outfalls proposed by Yates. Statement of Reasons (SOR) at 2. Yates raises an additional challenge with respect to the Nemesis POD, contesting the Deputy State Director's affirmance of the BFO's denial of 5 APDs proposed by Yates.⁴ As to relief, appellant seeks an order remanding the Skyward and Nemesis SDR Decisions for the purposes of reducing the sage grouse COA to a 2-mile restriction, and approving its proposed water treatment outfalls and 5 additional Nemesis APDs. *Id.* at 3, 24-25.

For the reasons discussed below, we determine that Yates has not carried its burden of demonstrating error in the SDR Decisions, and affirm accordingly.

We begin by discussing the background of the Nemesis POD, the first of the two PODs that BLM approved, and follow with similarly salient information relating to the Skyward POD.

THE NEMESIS POD

On December 20, 2004, Yates filed an application for approval of its Nemesis POD and 48 APDs. Yates' proposal described the development of 48 CBNG wells on

³ The FONSI/DR and EA for each POD is a continuously paginated, single document. The FONSI/DR for the Skyward POD appears at pages 1-3 of the Skyward EA. The FONSI/DR for the Nemesis POD appears at pages 1-4 of the Nemesis EA.

⁴ On Aug. 11, 2006, Yates filed an unopposed motion for leave to file a supplemental SOR to augment its earlier pleading with an additional argument pertaining to Yates' challenges to the denial of the APDs for the Carrier 13 and Irving 2 wells, pertaining to the Nemesis POD. BLM, in its Answer, addresses the additional argument. We grant Yates' motion and consider the supplemental filing.

8 leases,⁵ and associated access and ancillary facilities, including construction of 40 conventional water impoundments to contain produced water from the project with conventional outfalls at each impoundment. Nemesis EA at 8-9. BLM met with Yates on January 31, 2005, and conducted field inspections of the proposed Nemesis POD area on February 10, 16, 18, 22-24, March 28, 30, April 18, and July 12, 2005. Nemesis EA at 14. Yates submitted an amended Water Management Plan, on May 23, 2005, and an additional update of that plan on July 12, 2005, which proposed installing recently designed, proprietary treatment outfalls at each water discharge point instead of the conventional outfalls. *Id.* at 42; Nemesis SDR Decision at 22-23.

Section 6 of the lease terms for each lease, as well as language included by lease notice or stipulation apprised Yates that the leases are subject to “reasonable measures” as necessary to “minimize adverse impacts” to land uses and other resource values not otherwise addressed in lease stipulations at the time operations are proposed. Yates Ex. 12, Nemesis Leases. To the extent consistent with lease rights, such measures “may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures.” *Id.*

BLM’s Interdisciplinary Team (IDT) identified several issues of concern relative to other resources, including: protection of the viewshed in this popular recreation and walk-in hunting area; reclamation problems of shallow, fragile soils and dramatic erosional features; importance of sagebrush cover for many species, including greater sage grouse;⁶ and safety of access roads to well sites. Nemesis EA at 5.

⁵ The Nemesis Federal oil and gas leases, which were issued between September 1992 and December 1998 on Standard Lease Form 3100-11, are identified as WYW-146909, WYW-127423, WYW-146910, WYW-143126, WYW-131237, WYW-143570, WYW-130297, and WYW-142841.

⁶ When BLM considered the POD, the greater sage-grouse was identified as a BLM sensitive species. Nemesis EA at 22; *see also* BLM Biological Assessment for Yates’ Nemesis CBNG POD (March 10, 2005) at 11. BLM’s Manual requires it to ensure that its actions conserve the species and its habitat, promotes removal of the species from its identification as a sensitive species and avoids contributing to the need to list the species as a threatened or endangered species under the Endangered Species Act of 1973, 16 U.S.C. §§ 1521-1543 (2000). *See* BLM Manual, §§ 6840.01, 6840.02, 6840.06, 6840.12, and 6840.22 (Rel. 6-121 (1/19/01)). At the direction of a Federal district court, the U.S. Fish and Wildlife Service (FWS) is currently reconsidering its decision that listing of the greater sage grouse is not warranted. *See Western Watersheds Project v. U.S. Fish and Wildlife Service*, 535 F. Supp.2d 1173 (D. Idaho 2007), *appeal pending* by Intervenor-Appellants Idaho Farm Bureau

(continued...)

BLM wildlife biologists reviewed for site-specific accuracy wildlife surveys and other information collected from BLM and the Wyoming Game and Fish Department (WGFD), as well as other resource information, including the *Wildlife Survey and Habitat Assessment* prepared for Yates' Nemesis POD by Thunderbird Wildlife Consulting, Inc. (TWC Wildlife Survey).⁷ The biologists evaluated possible impacts to wildlife resources and provided recommendations for project adjustments on the basis of those findings. *Id.* at 19. Working with Yates, the IDT requested many design feature changes to reduce the environmental consequences of development relative to the resource issues previously identified. *Id.* at 5-6.

Yates agreed to some, but not all, of the changes in the field. *Id.* at 6. BLM developed four alternatives for environmental analysis in the EA: Alternative A (the No Action Alternative); Alternative B (the Proposed Action submitted by Yates), including 48 APDs, 40 water impoundments and experimental treatment outfalls at every water discharge point; Alternative C (BLM's Environmentally Preferred Alternative), which incorporates all of the IDT recommendations and includes 43 of the 48 APDs, 30 of the 40 impoundments, and the originally proposed conventional water outfalls; and Alternative D (the Company Amended Proposed Action), which included 48 APDs, experimental treatment outfalls, and those changes that Yates agreed to during the on-site inspections, including some relocation of wells and routes. Nemesis EA at 6-13.⁸

Each of the action Alternatives incorporate mitigation measures contained in the Master Surface Use Plan, Drilling Program and Water Management Plan and the Standard COAs contained in the PRB FEIS ROD, Appendix A, as well as the Wildlife Habitat Management Decisions and Wyoming BLM Mitigation Guidelines (Mitigation Guidelines) provided in the Buffalo RMP. AR Vol. F, Tab 17. The EA specifically refers to the Wildlife Habitat Management Decision, which prohibits surface occupancy year-round within a 0.25-mile radius of active sage grouse leks and

⁶ (...continued)

Federation, *et al.*, No. 08-35353 (9th Cir. May 1, 2008). On Feb. 26, 2008, FWS initiated the process of status review by soliciting information from the public. The wildlife agency has not yet made a decision.

⁷ Thunderbird performed aerial surveys for greater sage grouse on Apr. 5 and 26, and May 10, 2004, and ground surveys on May 26, and June 6, 2004. TWC Wildlife Survey at 2, 4. Administrative Record (AR) Vol. A, Tab 7; *see also* EA at 19.

⁸ Table 2.1 provides a summary comparison of alternatives, comparing, for example, the number of wells, telemetry towers, and miles of overhead power. Nemesis EA at 7. In addition, a chart provided at section 2.3.1 and the discussion at sections 2.3 and 2.4 of the EA identify changes in well sitings from Alternative B as reflected in Alternatives C and D following BLM's on-site visits. *Id.* at 10-13.

restricts surface disturbance within an additional 1.75-mile buffer for active sage grouse leks during the nesting season from March 1 to June 15 (a 2-mile seasonal buffer). Nemesis EA at 38; Buffalo RMP at 27 of 107, AR Vol. F., Tab 17. It also references BLM Wyoming policy, which allows for modification of mitigation requirements, such as expanding the radius of a seasonal limitation, based on site-specific concerns and support. Nemesis EA at 52; *see also*, Mitigation Guidelines, Buffalo RMP, App. A at 39 of 107, AR Vol. F., Tab 17. In addition, the Nemesis EA explains that BLM's Instruction Memorandum (IM) WY-2004-057, "Statement of Policy Regarding Sage-Grouse Management Definitions and Use of Protective Stipulations and Conditions of Approval" (IM WY-2004-057), requires BLM to reclaim nesting/early brood-rearing and winter habitats with sagebrush. Nemesis EA at 39.

The EA also identifies two non-Federal groups that have developed sage grouse recommendations for the region. The Western Association of Fish and Wildlife Agencies (WAFWA) sage grouse management guidelines recommend the protection of suitable habitats within 5 km (3.1 miles) of leks where habitats are not distributed uniformly, such as in the Nemesis project area. Nemesis EA at 52. As the EA explains, "[t]he entire project area is within 5 km of the Flying E Creek lek and the southern third of the project area is within 5 km of an unnamed lek discovered in 2004." *Id.* In addition, the Partners in Flight's Western Working Group recommends no net loss of sagebrush habitat. *Id.*

In describing the affected environment and analyzing possible impacts from CBNG development, the EA focuses on several species, including sage grouse, explaining generally that sage grouse depend upon substantial sagebrush stands for nesting and winter survival (Nemesis EA at 24),⁹ and that "[s]ome of the sage grouse observations and scat indicate sage grouse likely winter within the project area." *Id.* at 39. The EA reports that "[s]uitable sage-grouse habitat is present throughout the Nemesis project area, sage-grouse scat was found during each site visit and grouse were observed during most field visits." *Id.* at 38. The EA provides the following specific information regarding the presence of sage grouse and their habitat in and around the project area: A successful nest from 2005 was discovered near proposed well 2ALERT, and a hen sage grouse was flushed from near the proposed well 10CARRIER. Nemesis EA at 38. Adult sage grouse were observed within the project area during a May 2004 visit, and a hen with chicks was observed during a June 2004 visit. *Id.* Regarding sage grouse leks, the EA reports the presence of two documented, active leks within 2 miles of the Nemesis project area ("Flying E Creek," located 1.2 miles west of the POD and "BLM," located 1.8 miles northwest of the

⁹ *See also* PRB FEIS at 3-95 (Table 3-19), 3-96 (Table 3-20), 3-194 to 3-199; 4-257, 4-266 to 4-273.

POD), and the sighting of four males and two females at a potential lek (“Indian Creek II,” located 1.76 miles south of the POD). *Id.* at 24.

BLM evaluated potential site-specific impacts to sage grouse from the Nemesis POD by considering the location of habitat suitable for sage grouse within the project area, the proposed locations of wells, reservoirs and other infrastructure within sagebrush cover, and the propensities of sage grouse and their predators. Nemesis EA at 32, 38, 52, 62. The EA identifies direct impacts to sage grouse and habitat from well, reservoir and other infrastructure sitings within sagebrush cover, and from occasional traffic collisions with sage grouse, particularly during the construction phase. Nemesis EA at 38. The analysis expects indirect habitat loss and fragmentation to occur as sage grouse avoid suitable habitat near the project because well houses, communication towers and overhead power lines provide habitats for mammal and avian predators. *Id.* at 38, Table 4.3 at 67.

BLM’s evaluation finds that winter activities are likely to increase stress and displace wintering grouse, under both Alternatives B and D, and that the 2-mile restriction within active sage grouse leks from March 1 to June 15 “leaves the majority of the project area unprotected.” Nemesis EA at 38-39, 62. It also finds that rehabilitation of surface disturbance activities in the nesting/early brood-rearing habitats and winter habitats would be “extremely difficult in some areas developed under Alternative B,” and that the disturbance to soil is only partially reduced by the changes in Alternative D. *Id.* at 39, 66.

BLM examined potential impacts from the Nemesis POD to other species as well, including raptors, also at issue in this appeal. The EA identifies six raptor nests within or near the Nemesis project area. Nemesis EA at 20. Two nests, nests 4 and 5, were found to be located near the sites proposed in Alternatives B and D for two wells, Carrier CS-13 and Irving CS-2. Nemesis EA at 37. Nest 5 was identified as active in 2005, and, while nest 4 was identified as inactive, the EA reports that raptors were flushed from the vicinity of both nests as trucks approached the well sites in March 2005. *Id.*

The EA cites a scientific study (Romin and Muck (1999)), indicating that human activities within 0.5 miles of a nest are prone to cause adverse impacts to nesting raptors, and stating that the sensitivity exhibited by the flushed raptors “indicates the wells and nests are too close, and that a timing limitation on drilling and construction would be insufficient to protect these nest sites during the project’s operation phase.” Nemesis EA at 37. Summarizing impacts to raptors under both Alternatives B and D, Table 4.3 states that “[t]wo wells [that] would be drilled in close proximity to nests, would likely lead to reduced productivity, and nest abandonment.” *Id.* at 66; *see also Id.* at 37, 62.

BLM developed Alternative C to reflect all site-specific recommendations of the IDT and, as a result, this Environmentally Preferred Alternative includes modifications to both design and mitigation measures, including those not agreed to by Yates. Nemesis EA at 55-60. Alternative C excludes the following design features, which Yates had proposed originally or in amended proposals: five wells (Irving CS-1, Motion CS-3, Carrier CS-1, Carrier CS-13, Irving CS-2), treatment outfalls at water impoundments, overhead power, and 40-foot tall telemetry towers at every well. Nemesis EA at 7, 10-13. It also includes all mitigation measures recommended by the IDT. *Id.* at 55-60.

To protect raptors and their habitat and reduce the likelihood of nest and chick abandonment, Alternative C omits the two wells near raptor nests 4 and 5 (Carrier CS-13 and Irving CS-2), and provides a number of other measures. *Id.* at 8, 57. To protect sage grouse and their habitat, Alternative C extends the 2-mile sage grouse buffer zone to 3-miles of active leks between March 1 and June 15, and eliminates overhead electricity and communication towers. *Id.* at 57-58. A chart comparing a summary of effects by alternatives (Table 4.3, Nemesis EA at 65-67) projects that Alternative C will result in the least impacts to sage grouse and raptors and their habitat. Nemesis EA at 65, 66.

BLM evaluated the conventional outfalls, which Yates had proposed in its original water management plan, but determined that Yates had provided insufficient information for BLM to determine the need for the later-proposed experimental treatment facilities or the impacts from them. Mitigation, included in Alternative D as a COA, states that if Yates “intends to pursue this option” it must submit additional information in a Sundry Notice, including toxicity testing results from wells in the POD, information on how and which chemicals will be used, and a copy of the required State permit. Nemesis EA at 63.

On September 13, 2005, the BFO issued the Nemesis Decision, adopting Alternative C as the approved Nemesis POD. It included several modifications from the amended application as proposed by Yates and several COAs. Of relevance to this appeal, the Nemesis Decision approved a reduced number of APDs (from 48 to 43); authorized 30 of the 40 proposed reservoirs with conventional outfalls, rather than the later-proposed treatment outfalls; and prohibited surface-disturbing activities within 3 miles of active sage grouse leks from March 1 through June 15, with exceptions for certain locations. Nemesis FONSI/DR at 1-4 and Surface Use COAs (Nemesis COAs) at 5-6. More specifically, the sage grouse COA applies to areas which contain suitable sage grouse nesting habitat and where leks have been surveyed and determined to be active. Nemesis COAs at 5-6. If a survey reveals an active lek, the 3-mile zone and timing restriction will be applicable and no

surface-disturbing activities will be permitted until after the nesting season. If, however, no active leks are present, surface-disturbing activities would be allowed until the following breeding season. *Id.*

On October 12, 2005, Yates filed a request for SDR, challenging various components of the Nemesis Decision, including the three at issue here. Following supplemental briefing and oral presentations on both the Skyward and Nemesis SDRs, the Deputy State Director, on May 26, 2006, issued the Nemesis SDR Decision. That decision affirmed the BFO's Nemesis Decision to the extent it included the COA establishing a 3-mile buffer zone around active sage grouse leks from March 1 through June 15, denied approval of water treatment outfalls, and denied five APDs. Nemesis Decision at 25. He remanded certain aspects of the Nemesis Decision to the BFO to, among other things, provide Yates information regarding obtaining an exception to the 3-mile sage grouse buffer COA. Yates does not challenge that part of the decision.

THE SKYWARD POD

On January 20, 2005, Yates filed an application for approval of its Skyward POD comprising 35 CBNG wells and associated access and ancillary facilities, and 40 conventional water outfalls, on two leases¹⁰ located adjacent to the Nemesis POD area. Skyward EA at 6-7, 21. BLM conducted field inspections and met with Yates on April 18-19, May 6, and June 16, 2005. *Id.* at 8. As with the Nemesis POD, Yates later submitted an amended Water Management Plan and update, proposing to install newly designed treatment outfalls at each water discharge point instead of conventional water outfalls. *Id.* at 50.

Section 2(q) of the leases authorize Yates to drill and develop oil and natural gas resources in the Skyward POD, requires Yates to take reasonable steps to protect surface resources and recognizes the lessor's right to "prescribe the steps to be taken and restoration to be made with respect to the lands of the United States and improvements thereon." Yates Ex. 2, Skyward Leases. Under the terms of Section 4 of the leases, BLM may impose drilling and producing restrictions in the public interest, as follows:

It is agreed that rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into

¹⁰ The Skyward Federal oil and gas leases were issued effective Dec. 1, 1964, on Standard Lease Form 4-1158, and are identified as WYW-0312434 and WYW-0312435.

consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both.

Following field visits by BLM biologists and others, BLM developed an EA that considered three alternatives: the No Action Alternative (Alternative A), the Proposed Action as originally submitted by Yates (Alternative B), and BLM's Environmentally Preferred Alternative (Alternative C). Skyward EA at 5-8. The proposed action in Alternative C incorporates the site-specific recommendations made by the IDT, and involves development of 32 out of the 35 proposed wells, construction of 23 of the 40 proposed water impoundments with conventional water outfalls, a 3-mile seasonal sage grouse restriction, and no telemetry towers. *Id.* at 7.

The EA states that “[s]uitable sage-grouse habitat is present throughout the Skyward project area, sage-grouse scat was found during each site visit and grouse were observed during most field visits.” Skyward EA at 35. BLM observed nine female grouse along the proposed access route to the proposed 22Flying well location. *Id.* The nearest documented lek, “Bear Draw,” is 0.45-mile northeast of the project area, and two others, “BLM” and “Flying E Creek,” are 1.5 miles west and 2.4 miles southwest of the project area, respectively. *Id.* at 17.

The Skyward EA described the same impacts that generally would be expected from oil and gas development as those reported in the Nemesis EA, and identified BLM's sage grouse management requirements and guidelines provided in the PRB RMP Amendment and Buffalo RMP, as well as recommendations including the 3.1 mile buffer put forward by WAFWA. Skyward EA at 35, 47. The EA states that “[t]he northern half of the project area is within 5 km of the Bear Draw lek,” and “[t]he southwestern edge of the project area is within 5 km of the BLM lek.” *Id.*

On September 23, 2005, the BFO issued the Skyward EA and Decision adopting Alternative C with a number of COAs. Skyward FONSI at 1. One COA provided that further consideration of Yates' amended water treatment outfalls option would be deferred until Yates submitted a Sundry Notice containing the same information described above regarding the COA for Alternative D in the Nemesis EA.

On October 25, 2005, Yates filed a request for SDR, which challenged, in part, imposition of the 3-mile buffer COA and denial of approval for the treatment outfalls at water discharge points. The May 5, 2006, Skyward SDR Decision affirmed the imposition of a 3-mile buffer from March 1 through June 15 and denied approval of water treatment outfalls until such time as Yates provides additional information and

proves their necessity.¹¹ In addition, the Skyward SDR Decision remanded the BFO's decision to, *inter alia*, provide Yates with information under which an exception to the 3-mile sage grouse buffer could be obtained.

On June 2, 2006, Yates submitted a Notice of Appeal (NOA) of the Skyward SDR Decision, followed on July 3, 2006, by its NOA of the Nemesis SDR Decision.

ANALYSIS

I. *Standard of Review and Burden of Proof*

[1] In *Grynberg Petroleum Co.*, 152 IBLA 300, 306-307 (2000), we articulated the standard of review in appeals involving challenges to COAs. The appellant in that case challenged BLM's decision to impose a COA, which required a specific procedure designed to reduce the risk of contamination between reservoirs during plugging and abandonment of Grynberg's oil and gas well. The appellant argued that the impacts BLM sought to avoid were *de minimus* and the mitigation measures unnecessary, while BLM projected the impacts as sufficiently serious to justify the COA. "In challenging that condition," we opined, "Grynberg must show by a preponderance of the evidence that such a requirement is excessive," citing *Daniel C. Wychgram*, 116 IBLA at 102. 152 IBLA at 307. We concluded that Grynberg "had failed to show that BLM's conclusions are unreasonable or not supported by the data," and that, "in the absence of a showing by a preponderance of the evidence that [BLM's] opinion is erroneous," the decision appealed will be affirmed. 152 IBLA at 308.

Similarly, Yates must show that BLM's decisions to impose a 3-mile COA establishing a seasonal sage grouse buffer for its proposed CBNG development projects at issue are "unreasonable or not supported by the data." When BLM approves an application for permit to drill and plan of development of oil and natural gas resources under Federal leases subject to a site-specific condition, which limits the timing and location of development, a party challenging the condition of approval as unnecessary must, in order to prevail, prove by a preponderance of the evidence that the condition is unreasonable or not supported by the record.

Yates must meet the same burden with respect to its other claims, and show, by a preponderance of the evidence, that BLM's decisions to require additional information on proposed treatment outfalls, and deny approval of five proposed

¹¹ The Skyward SDR Decision also upheld the BFO's disapproval of three of the proposed Skyward APDs. In its SOR, Yates notes that "[a]lthough Yates' Motion to Consolidate states that Yates is also challenging the denial of three APDs in the Skyward POD, Yates has since resolved that issue with the BFO and hereby withdraws that challenge from this appeal." SOR at 2, n.1.

Nemesis APDs are unreasonable and without a rational basis in the record. *See Biodiversity Conservation Alliance*, 174 IBLA 1, 8 (2008).

II. *The 3-Mile Sage Grouse COA*

Yates challenges BLM's authority to impose the 3-mile sage grouse seasonal limitations, arguing that they are inconsistent with the Buffalo RMP, Yates' leasehold rights, Departmental regulations and policies, and wildlife information.

[2] When making a decision regarding discrete surface-disturbing oil and gas development activities following site-specific environmental review, BLM has the authority to impose reasonable measures to minimize adverse impacts on other resource values, including restricting the siting or timing of lease activities. *National Wildlife Federation*, 169 IBLA 146, 164 (2006), *citing Colorado Environmental Coalition*, 165 IBLA 221, 227-28 (2005).

The Secretary has general statutory authority to condition post-lease approvals in accordance with section 17(g) of the Mineral Leasing Act of 1920, as amended by section 5102(g) of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), 30 U.S.C. § 226(g) (2000) (determine actions required "in the interest of conservation of the surface resources"), section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2000) (manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans), and section 301(b) of FLPMA, 43 U.S.C. § 1732(b) (2000) ("take any action necessary to prevent unnecessary and undue degradation of the lands").

Departmental regulations at 43 C.F.R. § 3101.1-2, which describe a lessee's surface use rights to drill for and remove oil and gas in a leasehold, also describe BLM's specific authority to impose post-lease, site-specific surface use controls. A lessee's right to use the leased lands is subject to

such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. At a minimum, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.

See also 43 C.F.R. § 3162.5-1 (providing that “[t]he operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality”). Yates acknowledges that, with respect to all of Yates’ leases at issue, BLM may impose COAs so long as they constitute a reasonable measure to minimize adverse impacts under 43 C.F.R. § 3101.1-2. SOR at 12-13. Yates posits an interpretation of the rule, however, that limits BLM’s authority to impose siting and timing parameters in COAs requiring relocation of proposed operations by no more than 200 meters or prohibiting surface disturbance for a period not to exceed 60 days. SOR at 13. But Yates’ constrained interpretation of a “reasonable measure” is at odds with the plain language of the regulation, which describes what measures “at a minimum” are deemed consistent with lease rights, and does not purport to prohibit as unreasonable *per se* measures that are more stringent. The Preamble to the regulation is just as clear: “[T]he authority of the Bureau to prescribe ‘reasonable,’ but more stringent, protection measures is not affected by the final rulemaking.” 53 Fed. Reg. 17,340-341 (May 16, 1988). Yates’ proffered interpretation of 43 C.F.R. § 3101.1-2 has failed to demonstrate that the sage grouse COA is inconsistent with the regulations or with rights under its leases.

Yates asserts that the 3-mile COA is an NSO measure that “wholly prohibits surface disturbing activities for a period in excess of 60 days,” and is inconsistent with its rights granted under the Nemesis and Skyward leases, since none of the leases contain NSO stipulations. SOR at 13. BLM need not impose an NSO stipulation on a lease in order to later condition approval of a POD with seasonal restrictions. As we stated above, BLM has authority to impose restrictions on the timing of lease activities. *National Wildlife Federation*, 169 IBLA at 164.¹²

Yates also challenges the COAs as inconsistent with the Buffalo RMP because the RMP imposes a 2-mile buffer. SOR at 11. Section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2000), requires the Secretary to manage public lands “in accordance with” land use plans. The regulations implementing that mandate provide “that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.” 43 C.F.R. § 1601.0-5(b); *Wilderness Workshop*, 175 IBLA 124, 140-41 (2008), citing *Tom Van Sant*, 174 IBLA 78, 91 (2008).

BLM developed the Wildlife Habitat Management Decisions in the Buffalo RMP to promote certain management objectives, including maintaining biological

¹² Moreover, as BLM points out, Yates employs inconsistent reasoning. Its argument, if it had merit, would apply equally to a 2- and a 3-mile buffer, but Yates, far from opposing both, requests that we substitute one for the other. Answer at 11; SOR at 3.

diversity of plant and animal species and, to the extent possible, to provide habitat for listed and special status species on public lands, as discussed above. Buffalo RMP at 25 of 107, AR Vol. F, Tab 17. Those management tools, including the prohibition against surface occupancy within 0.25 mile of active sage grouse leks and within 2 miles from March 1 to June 15, specifically provide for the possibility of an exception, waiver, or modification if approved by the BFO Manager. *Id.* at 27-107. The Mitigation Guidelines included in the Buffalo RMP also articulate the discretion and flexibility inherent in BLM's authority to impose such conditions, by reserving to BLM "the right to modify the operations of all surface and other human presence disturbance activities" to allow for "the addition of specific or specialized mitigation following the submission of a detailed plan of development or other project proposal, and an environmental analysis." *Id.* at 40 of 107.

The specific mitigation adopted by the BFO and upheld in the SDR Decisions was recommended by BLM's technical experts following submission of detailed PODs, on the basis of environmental analyses unrefuted with any specificity by Yates.¹³ "BLM's reasoned expert opinion, based on a firsthand knowledge of the wildlife resources in the project areas, is entitled to considerable deference." *Wyoming Outdoor Council*, 147 IBLA 105, 110 (1998), *citing Jon Roush*, 112 IBLA 293, 302 (1990).

BLM has exercised its discretionary flexibility, and, consistent with the Buffalo RMP, has also allowed for the possibility of granting exceptions. Moreover, BLM remanded the BFO's decisions to provide Yates information regarding the criteria necessary to obtain an exception to the 3-mile sage grouse buffer. *Nemesis SDR Decision* at 13-14, 26; *Skyward SDR Decision* at 11-12, 19. We find that BLM's BFO decisions, as modified by the Deputy State Director, conform with the approved land use plan.

We conclude that the SDR Decisions regarding sage grouse are fully consistent with BLM's statutory and regulatory authority, the Buffalo RMP, and Yates' lease rights, and are fully supported by the record.¹⁴ As such, the COAs are reasonable

¹³ Yates summarily discounts BLM's data and analyses, its finding that a 2-mile buffer would be insufficient to protect active sage grouse leks, and its consideration of the WAFWA recommendations. SOR at 15; *see Nemesis EA* at 24, 38-39, 62, 67; *Skyward EA* at 17, 35, 47. Yates has demonstrated its "conviction that BLM should have imposed . . . [less] intense mitigation measures," but while its "arguments clearly reveal a difference of opinion, they do not demonstrate an error of law or fact." *National Wildlife Federation*, 169 IBLA at 165.

¹⁴ The COA is consistent with BLM's Handbook H-1624-1, "Planning for Fluid
(continued...)

measures required by the authorized officer to minimize adverse impacts to a resource value not addressed in the lease stipulations at the time operations were proposed. *See* 43 C.F.R. § 3101.1-2; *see also National Wildlife Federation*, 169 IBLA at 164.

III. *The Treatment Outfalls*

Yates next challenges the affirmance of the BFO's approval of the conventional water discharge outfalls that Yates originally proposed. Yates asserts that BLM erred in declining to approve its experimental treatment outfalls instead. BLM points out that "Yates changed water management strategies during preparation of the [EAs] after the pre-approval, on-site inspections had been completed; *see Nemesis EA* at 14; *Skyward EA* at 8, submitting. . . revised water management plans. . . on March 23, 2005, and an update on July 12, 2005." Answer at 17. Referring to the extensive consultations between BLM and Yates, BLM details the basis for its determination that Yates failed to provide information that would allow BLM to appropriately assess the expected additional environmental impacts of the revised water management plan and consider such plan under the Wyoming Pollution Discharge Elimination System permitting process (WYPDES). *Id.* at 17-22. We find merit in BLM's response and conclude that Yates has not demonstrated error in BLM's decisions approving conventional water outfalls and requiring additional information necessary for BLM to consider possible environmental impacts of the revised proposals in light of all appropriate Wyoming Department of Environmental Quality permit requirements.¹⁵

¹⁴ (...continued)

Mineral Resources," which describes COAs as "site specific requirements or measures imposed to protect resources or resource values," and advises that such conditions "must be reasonable and consistent with lease rights." AR 19. BLM's decisions were also consistent with IM WY-2004-057, which advises BLM to base COAs on sage grouse populations and their habitat.

¹⁵ BLM explains that, although it has no regulatory authority to approve, disapprove, or modify a WYPDES permit or to require whole effluent testing in order to enforce State regulatory requirements, it does maintain authority over surface disturbance on public lands resulting from oil and gas development, such as the construction of treatment outfalls, and that operations at the point of origin to the point of discharge are under the jurisdiction of BLM. Answer at 19, *citing* Onshore Order No. 7, Disposal of Produced Water, 58 Fed. Reg. 47,354, 47,365 (Sept. 8, 1993).

IV. *Denial of Applications to Drill Five Wells*

Yates' final challenge is to the Nemesis SDR Decision to deny APDs for 5 of the 48 wells in the Nemesis CBNG project. Yates asks the Board to remand the Decision for approval of the five APDs. SOR at 20-25. We begin with the Nemesis SDR Decision to remand the BFO's denial of the Irving CS-1 well to address the reasons for denial. SOR at 21; *see* Nemesis SDR Decision at 17.

BLM acknowledges that the Nemesis DR/FONSI fails to explicitly identify the basis for the BFO's denial of the Irving CS-1 APD, but asserts that Yates is mistaken in believing that the absence of an explanation constitutes sufficient support for approving the APD. Answer at 23. BLM thus reasons that Yates has failed show error in the decision to remand the Irving CS-1 determination. *Id.* We agree, and note also the EA's discussion of concerns regarding the difficulties of safe access and adequate reclamation in parts of the Nemesis project area, including the proposed location of the Irving CS-1 well, where there are "steep slopes, fragile and highly erosive soils with shallow ecological communities." *Id.* at 22-23, *citing* Nemesis EA at 60.

The BFO also denied Yates' APDs for the Motion CS-3 and Carrier CS-1 wells, stating that, in withholding approval of those APDs with associated road construction, the decisions would reduce surface disturbance by 45 acres. Nemesis FONSI/DR at 3. The BFO explained that "[t]his is an area of shallow, fragile soils and dramatic erosional features," and that "[m]uch of the area disturbance would be in areas classified as badlands where the BLM WY Reclamation Policy [Wyoming IM No. WY-90-231] objectives could not be met." *Id.*; *see also* Nemesis EA at 49-50, 61; *Nemesis SDR Decision at 15-16.*¹⁶

The regulations require BLM to ensure that operations protect not only the mineral resource, but also "other natural resources, and environmental quality" (43 C.F.R. § 3160.5-1), and specifically require an operator, upon completion of operations, to "reclaim the disturbed surface in a manner approved or reasonably prescribed by the authorized officer." 43 C.F.R. § 3162.5-1(b). *See also* Section 6 of the standard lease form (Form 3100-11); BLM Oil and Gas Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development (Gold Book 2005). BLM provided Yates a copy of its Wyoming Reclamation Policy, and twice reviewed Yates' reclamation plan submissions, but did not deem them acceptable.

¹⁶ The Nemesis SDR Decision at 15 explains that, although IM No. WY-90-231 expired on Sept. 30, 1991, it is BLM practice to continue to use the guidance contained in the memorandum.

Yates asserts that the two APD denials “have the impact of preventing the most efficient extraction of oil and gas resources,” and that “allowing the resources to be drained by other wells has a significant negative impact on Yates.” SOR at 22. Yates appears to assert a violation of the regulations at 43 C.F.R. § 3161.2, which in addition to requiring that all operations be conducted in a manner that protects other natural resources and environmental quality, requires that operations shall protect life and property and result “in the maximum ultimate recovery of oil and gas with minimum waste.” Nowhere in the pleadings or record, however, does Yates demonstrate how denial of the APDs for the Motion CS-3 and Carrier CS-1 wells is inconsistent with BLM’s statutory and regulatory responsibilities, and specifically, how it will result in significant drainage from the Nemesis lease, as Yates asserts. We find it was reasonable for the Deputy State Director, in affirming the BFO, to rely on the EA’s determination that construction of access roads to the two wells would cross significant steep slopes, fragile and erosive soils and shallow ecological communities, raising significant safety and reclamation concerns. Nemesis SDR Decision at 15-16.

Finally, Yates challenges the decision to affirm denial of the APDs for the Carrier CS-13 and Irving CS-2 wells to protect raptors. As discussed above, the Nemesis EA examined potential impacts from the Nemesis POD to raptors, identifying six raptor nests within or near the Nemesis project area, two of which—nests 4 and 5—were found to be located near the sites proposed in Alternatives B and D, for the Carrier CS-13 and Irving CS-2 wells. Nemesis EA at 20, 37, 52. Appellant protests that “[n]either the SDR Decision nor the Nemesis EA examined whether the denials would result in an inefficient pattern of drainage for the [CBNG],” but does not assert that such drainage would occur or explain how. SOR at 24. In addition, Yates questions the validity of the EA’s determination that the wells are too close to active nests. *Id.*; see Nemesis EA at 20, 37, 52. Yates has not shown why it was error for the Deputy State Director to rely on “BLM’s reasoned expert opinion, based on a firsthand knowledge of the wildlife resources in the project areas.” *Wyoming Outdoor Council*, 147 IBLA at 110.

CONCLUSION

BLM chose the Environmentally Preferred Alternatives analyzed in the Nemesis and Skyward EAs. In doing so, BLM adopted the recommendations its technical experts made after numerous on-site visits with Yates and careful consideration of the surface resource needs and project information that Yates timely provided. This process of applying reasonable, site-specific measures that are consistent with the lessee’s lease rights fully comports with BLM’s statutory and regulatory authority and the underlying land use plan.

Appellant has failed to carry its burden to show, by a preponderance of the evidence, that BLM’s SDR Decisions are in error or not supported by the record.

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/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
H. Barry Holt
Chief Administrative Judge