



SOUTHERN UTAH WILDERNESS ALLIANCE

177 IBLA 29

Decided March 20, 2009



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

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2008-119

Decided March 20, 2009

Appeal from a decision issued by the State Director, Utah State Office, Bureau of Land Management, denying a protest to offering certain parcels in an oil and gas lease sale. UT-922.

Affirmed.

1. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements

NEPA is a procedural statute designed to ensure that decisionmakers are fully apprised of likely effects of alternative courses of action so that a fully informed decision can be made. When BLM has satisfied the procedural requirements of section 102(2)(C) of NEPA, it will be deemed to have complied with NEPA, regardless of whether a different substantive outcome would be reached by others.

2. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements--Federal Land Policy and  
Management Act of 1976: Land-Use Planning

BLM may fulfill its obligation under NEPA to consider the impacts of leasing before offering lands for lease where it has prepared an environmental impact statement at the land use planning stage which considers leasing with (or without) no surface occupancy or other stipulations and reasonable alternatives thereto, including the no action alternative of not leasing public lands.

3. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements

BLM is required to supplement existing NEPA documentation to address significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or its impacts. Where new circumstances or information are shown to exist and BLM has not prepared a supplemental environmental analysis of these new circumstances or information, it is appellant's burden to demonstrate that such new circumstances or information will affect the quality of the human environment in a significant manner or to a significant extent not analyzed in an existing NEPA document.

APPEARANCES: Stephen H.M. Bloch, Esq., Salt Lake City, Utah, for appellant; Kathleen C. Schroder, Esq., Denver, Colorado, for Petro-Canada Resources (USA) Inc., intervenor; James E. Karkut, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Southern Utah Wilderness Alliance (SUWA) has appealed the February 19, 2008, decision (Decision) by the State Director, Utah State Office, Bureau of Land Management (BLM), denying its protest to offering 12 specified parcels in the oil and gas lease sale held on May 22, 2007 (May 2007 lease sale). SUWA's protest alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.* (2000). SUWA filed a statement of reasons (SOR); BLM and Intervenor Petro-Canada Resources (USA) Inc., the high bidder on certain of these parcels, each submitted an Answer, to which SUWA replied (Reply). For the reasons discussed below, we affirm BLM's denial of SUWA's protest.<sup>1</sup>

*BACKGROUND*

BLM issued a Notice of Competitive Lease Sale for the May 2007 lease sale on April 6, 2007, which included 59 parcels in Utah on lands administered by BLM's

<sup>1</sup> Although its protest also raised issues under the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.* (2000), SUWA does not raise those issues on appeal. See Decision at 5-8.

Moab, Price, Salt Lake, Cedar City, and Vernal Field Offices. In advance of that notice, each Field Office examined existing NEPA analyses and applicable land use plans and issued a Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA).<sup>2</sup> These DNAs identified parcels under consideration for possible leasing, environmental documents considered, and applicable land use planning documents reviewed by each Field Office:

- Moab Field Office: 1976 Moab District Oil and Gas Leasing Environmental Analysis Record; 1983 Grand Resource Area Resource Management Plan/Draft Environmental Impact Statement (EIS); 1985 Grand Resource Area Management Plan/Final EIS (Grand RMP/EIS); and 1988 Supplemental Environmental Assessment (EA) for Oil and Gas Leasing.
- Price Field Office: 1975 Price District Oil and Gas Environmental Analysis Record; 1984 Price River Management Framework Plan Supplement; 1988 Price River Resource Area EA Supplement on Cumulative Impacts on Oil and Gas Lease Categories; and 1991 San Rafael Resource Management Plan/Final EIS (San Rafael RMP/EIS).
- Cedar City Field Office: 1976 Cedar City District Oil and Gas Leasing Environmental Analysis Record (EAR); 1984 Cedar Beaver Garfield Antimony Proposed Resource Management Plan/Final EIS; 1986 Cedar Beaver Garfield Antimony Resource Management Plan/Final EIS (Cedar RMP/EIS); and 1988 Supplemental EA for Oil and Gas Leasing.
- Salt Lake Field Office: 1975 Salt Lake District Oil and Gas EAR; 1985 Box Elder Proposed Resource Management Plan/Final EIS (Box Elder EIS); 1986 Box Elder Resource Management Plan (Box Elder RMP<sup>3</sup>); and 1989 Box Elder Oil and Gas Supplemental EA.

SUWA protested the inclusion of certain parcels in the May 2007 lease sale. Protest at 1-2.<sup>4</sup> Since three were deferred from that sale, the State Director addressed the

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<sup>2</sup> As neither SUWA's protest nor this appeal involve lands administered by the Vernal Field Office, its DNA is not at issue in this case.

<sup>3</sup> For ease of reference, the Box Elder RMP and its supporting Final EIS are collectively referred to as the Box Elder RMP/EIS.

<sup>4</sup> SUWA identified 15 parcels in its protest, including UT0507-076 which had been identified in the Notice of Competitive Lease as being on lands administered by both the Moab and Price Field Offices. Since UT0507-076 is wholly on lands managed by the Moab Field Office, BLM deleted its reference to the Price Field Office by errata

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merits of SUWA's protest as to the 12 other parcels it had identified, UT0507-004 through 006, 041 through 044, 067, 068, 074, 075, 077. SUWA claimed that BLM's pre-leasing environmental analyses failed adequately to consider a "no action" alternative and that a supplemental environment analysis was required to address significant new circumstances or information. The State Director disagreed and denied SUWA's protest, concluding that the DNAs sufficiently documented compliance with NEPA. Decision at 2-5. This appeal followed.

### *DISCUSSION*

SUWA's principal argument on appeal is that BLM failed adequately to consider a "no leasing" alternative prior to including 12 identified parcels in the May 2007 lease sale. SOR at 7-19. It also argues that BLM failed to take a hard look at significant new information (*i.e.*, adverse effects to "The Sun Tunnels" from leasing parcel UT0507-005 (Salt Lake parcel)).<sup>5</sup> SOR at 20-21. We address each of these claims separately below.

#### I. BLM's Consideration of a "No Leasing" Alternative.

Each parcel at issue is located on lands open to oil and gas leasing under an applicable resources management plan, which was based on an underlying EIS (RMP/EIS) and placed public lands into one of four categories: open for leasing; open with special stipulations; open with no surface occupancy (NSO) stipulations; or closed to leasing.<sup>6</sup> Thus, the EISs supporting these land use planning decisions

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<sup>4</sup> (...continued)

sheet dated May 15, 2007; this parcel, along with UT0507-031 and 100, were deferred from inclusion in the May 2007 lease sale. Decision at 2.

<sup>5</sup> The Utah Arts Council describes The Sun Tubes (Nancy Holt, 1976), popularly known as The Sun Tunnels, as four cast concrete drain pipes penetrated by constellation patterns and aligned with the winter and summer solstices. SOR Exhibit E. They are identified on topographic maps as "Astronomical Observation Tunnels." See BLM Staff Report dated Feb. 7, 2007, at 2-3 (unpaginated) (Staff Report). The Sun Tunnels are adjacent to and a quarter mile distant from the Salt Lake parcel. *Id.*; SOR at 20.

<sup>6</sup> The Grand RMP/EIS considered closing up to 245,118 acres to oil and gas leasing, as well as leasing with NSO stipulations. Grand RMP/EIS at S-11. The San Rafael RMP/EIS and Cedar RMP/EIS categorized public lands similarly and considered closing up to 1,217,340 and 120,000 acres to leasing in their respective resource areas. San Rafael RMP/EIS at 2-16, 2-81; Cedar RMP/EIS at 3.1 through 3.5. The Box Elder RMP/EIS is to the same effect, but it did not place any public lands in the

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examined the impacts of leasing and alternatives thereto, including not leasing public lands or imposing protective stipulations before offering them for lease. *See Southern Utah Wilderness Alliance*, 159 IBLA 220, 241-43 (2003), *citing Connor v. Burford*, 848 F.2d 1441, 1448-51 (9th Cir. 1988). SUWA contends that these RMP/EISs and other NEPA documents identified in the DNAs failed adequately to consider a no action/no leasing alternative and that NEPA precludes BLM from offering these parcels for lease without first preparing a sufficient pre-leasing analysis. SOR at 14.

[1] The general framework for considering NEPA-based challenges to BLM decisions was recently set forth in *Biodiversity Conservation Alliance*, 174 IBLA 1, 13-14 (2008) (footnotes omitted):

NEPA is a procedural statute designed to “insure a fully informed and well-considered decision.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). NEPA does not bar actions which affect the environment, even adversely. Rather, the process assures that decisionmakers are fully apprised of likely effects of alternative courses of action so that selection of an action represents a fully informed decision. *In re Bryant Eagle Timber Sale*, 133 IBLA 25, 29 (1995). When BLM has satisfied the procedural requirements of section 102(2)(C) of NEPA, it will be deemed to have complied with NEPA, regardless of whether a different substantive outcome would be reached by appellants, this Board, or a reviewing court. *National Wildlife Federation*, 169 IBLA 146, 155 (2006).

More directly applicable to the circumstances of this case is *Colorado Environmental Coalition*, 173 IBLA 362, 372 (2008):

[A] DNA is an acceptable method for BLM to assess the adequacy of existing environmental analysis for a proposed action, but it is not a NEPA document and may not be used to supplement existing environmental analysis or address site-specific environmental effects not previously considered. *The Coalition of Concerned National Park Service Retirees*, 169 IBLA 366, 370 (2006); *Southern Utah Wilderness Alliance*, 166 IBLA [270,] 282-83 [(2005)]; *see Pennaco Energy Inc. v. U.S. Department of the Interior*, 377 F.3d 1147, 1151, 1162 (10th Cir.

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<sup>6</sup> (...continued)

closed to leasing category. Instead, it placed them “in the least restrictive category which would adequately protect the resources” and imposed NSO stipulations on 157,111 acres then “open to leasing.” Box Elder RMP at 10, 13; *see* Box Elder EIS at 5, 15-19.

2004). Here, BLM prepared the cited environmental documents to analyze the environmental impacts of various land use planning decisions, including whether or not particular areas of land were to be subject to mineral leasing. See 43 C.F.R. §§ 1601.0-2, 1601.0-5(n). Consequently, the question before us is whether the documents identified in the DNA adequately considered the environmental impacts of oil and gas leasing. Those analyses may be held to be deficient either because they failed to adequately address a relevant environmental concern or because significant new circumstances or information require that it be supplemented. See 40 C.F.R. § 1502.9(c)(1)(ii); *Forest Guardians*, 170 IBLA 80, 96 (2006).

To meet its burden on appeal, an appellant must demonstrate, by a preponderance of the evidence and with objective proof, that BLM's decision is based on a clear error of law or demonstrable error of fact, failed to consider a substantial environmental question of significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997); see also *Wyoming Outdoor Council*, 176 IBLA 15, 25 (2008); *Missouri Coalition for the Environment*, 172 IBLA 226, 250 (2007); *Biodiversity Conservation Alliance*, 171 IBLA at 226. We have also held that conclusory allegations of error and mere differences of opinion are insufficient to meet that burden. See *Western Watersheds Project*, 175 IBLA 237, 246 (2008); *Wilderness Workshop*, 175 IBLA 124, 133 (2008); *Deborah Reichmann*, 173 IBLA 149, 159-60 (2007); *Southern Utah Wilderness Alliance*, 163 IBLA 14, 29 n.11 (1999). It is against these principles that we decide whether SUWA has met its burden to show that BLM's consideration of a "no leasing" alternative was inadequate under NEPA.

[2] NEPA requires that a "no leasing" alternative be considered before leasing occurs. See e.g., *Wyoming Outdoor Council*, 157 IBLA 259, 264-65 (2002), *rev'd on other grounds*, *Pennaco Energy, Inc. v. U.S. Department of Interior*, 266 F. Supp.2d 1323 (D. Wyo. 2003), *rev'd and remanded*, 377 F.3d 1147 (10th Cir. 2004). Where that alternative was not considered in a NEPA document applicable to parcels offered for lease, we have reversed BLM's decision to include those parcels in a lease sale. See *Southern Utah Wilderness Alliance*, 164 IBLA 118, 123-24 (2004); *accord Southern Utah Wilderness Alliance*, 166 IBLA at 278-79, 282, 285. But where a pre-leasing NEPA document addresses the impacts of and alternatives to leasing the lands at issue, including a "no leasing" alternative, we have affirmed BLM's decision to proceed with a lease sale. See *Colorado Environmental Coalition*, 173 IBLA at 377-78; *Colorado Environmental Coalition*, 161 IBLA 386, 397-98 (2004); see also *Southern Utah Wilderness Alliance (On Reconsideration)*, 166 IBLA 270A (2006) (EARs adequately considered a "no leasing" alternative).

The issue here presented is whether the NEPA documents identified in the Field Office DNAs adequately considered a no leasing alternative for the lands at issue. SUWA contends that the Price, Moab, Cedar City, and Salt Lake EARs (all issued in 1975 and 1976) failed to consider seriously a no leasing alternative and are therefore inadequate to support leasing the parcels at issue, arguing that they are all similar and that the Price EAR was deemed inadequate in *Southern Utah Wilderness Alliance v. Norton*, 457 F. Supp.2d 1253 (D. Utah 2006). SOR at 11-19; *but see Southern Utah Wilderness Alliance (On Reconsideration)*, 166 IBLA at 270D-E (Price EAR adequate under NEPA). This argument ignores the fact that NEPA documents have since been prepared for RMPs applicable to these resource planning areas. Whatever deficiency may arguably exist in these 30-year old EARs is irrelevant to this case because it is clear that the no leasing alternative was considered in EISs underlying subsequent land use planning decisions made in these RMPs. *See* n.6; Answer at 4-10.

SUWA counters that BLM's consideration and analysis of a no leasing alternative in the above-identified RMP/EISs is brief, perfunctory, and inadequate to support the May 2007 lease sale. Reply at 7, 9-10, 11-12, 13. Substance (not length) is what matters under NEPA, particularly where the issue presented is the adequacy of BLM's consideration of a "no action" alternative. As we explained in affirming in an EA which only briefly considered a no action alternative:

[F]or alternatives and impacts already considered and answered with a conclusion to commit resources, BLM need not reconsider what amounts to a pre-existing decision. In the leasing context, this is particularly true because after a lease is issued, resources have been committed to a particular authorized land use, presumably after the agency considered and rejected the alternative of taking no action to lease.

*Southern Utah Wilderness Alliance*, 159 IBLA at 243; *see Bark*, 167 IBLA 48, 79-80 (2005) ("the fact that the no action alternative is given a brief discussion does not mean that it has been insufficiently addressed or that it was not given serious consideration; it may simply reflect that the concept of no action was considered to be self-evident"); *Headwaters, Inc.*, 116 IBLA 129, 135 (1990) ("It is sufficient that BLM set forth the many implications of either its proposed action or the no action alternative, which are at either end of the spectrum"). Accordingly, we find SUWA has not met its burden to show, by a preponderance of the evidence and with specific, objective proof, that BLM gave inadequate consideration to the "no leasing" alternative.<sup>7</sup> *See Colorado Environmental Coalition*, 142 IBLA at 52.

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<sup>7</sup> To the extent SUWA would have this Board second guess land use planning  
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## II. The Salt Lake Parcel and New Circumstances or New Information.

[3] SUWA contends that a supplemental NEPA analysis was required before BLM could properly include the Salt Lake parcel in the May 2007 lease sale. SUWA points to “The Sun Tunnels” as constituting a change in circumstances or new information that requires supplemental environmental analysis under rules which implement NEPA and direct agencies to supplement their environmental documents 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)(1)(ii); *see* SOR at 14-15.

The Supreme Court has explained when and in what circumstances NEPA requires the preparation of a new environmental analysis:

[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand, . . . NEPA does require that agencies take a “hard look” at the environmental effects of their planned action, even after a proposal has received initial approval . . . . Application of the rule of reason thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains “major Federal actio[n]” to occur, and if the new information is sufficient to show that the remaining action will “affec[t] the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

*Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989) (footnotes omitted). Thus, an appellant must not only show there is something new, but also that these new circumstances (or information) present “a seriously different picture of the likely environmental consequences of the proposed action not adequately envisioned by the original EIS.” *Forest Guardians*, 170 IBLA at 96, *citing State of*

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<sup>7</sup> (...continued)

decisions made in approved RMPs identifying which lands (if any) to place in a “no leasing” category, we note that the approval of an RMP or RMP amendment is subject to protest to the Director of BLM and that his decision is final for the Department and therefore beyond our appellate review authority. 43 C.F.R. § 1610.5-2(b); *see e.g.*, *Southern Utah Wilderness Alliance*, 160 IBLA 225, 229 (2003), and cases cited.

*Wisconsin v. Weinberger*, 745 F.2d 413, 420 (7th Cir. 1984), and other cases; see *Deborah Reichmann*, 173 IBLA at 159-60.

BLM evaluated The Sun Tunnels and whether a supplemental NEPA analysis of cultural resources was required. Salt Lake Field Office DNA at 4-5. As directed by the Box Elder RMP/EIS,<sup>8</sup> BLM conducted a cultural resources assessment consistent with the NHPA and its implementing rules. See 16 U.S.C. § 470f (2000); 36 C.F.R. Part 800; Staff Report at 3 (unpaginated). The BLM expert who prepared that assessment, Laird P. Naylor II, noted that The Sun Tunnels “may qualify as Traditional Cultural Property” but concluded that leasing “should result in No Effect to Historic Properties” because even if The Sun Tunnels were so designated, a well could likely be sited somewhere within the 2,560 acre Salt Lake parcel “without conflict.” Staff Report at 4 (unpaginated); see Salt Lake Field Office DNA at 4. The Utah State Historic Preservation Officer (SHPO) concurred in the Staff Report’s conclusions and expressed his appreciation for “considering the Sun Tunnels issue.” SHPO Concurrence dated Feb. 15, 2007, Salt Lake Field Office DNA, Att. 4; see 36 C.F.R. § 800.5(b). Based on the Staff Report, concurrence by the SHPO, and applicable guidance, BLM determined there would be no adverse effect on The Sun Tunnels and that a stipulation to protect cultural resources would be attached to any lease of the Salt Lake parcel. Salt Lake Field Office DNA at 5.

NEPA does not, by its terms, require a supplemental environmental document every time BLM is made aware of a potential cultural resource or historic property. Instead, it requires BLM to consider new circumstances or information and, if determined to be significant, to prepare a supplemental environmental analysis. BLM did so in this case by considering The Sun Tunnels in its cultural resource assessment and by making a case-by-case determination that leasing with stipulations would not adversely affect cultural resources that may be eligible for inclusion on the National Register of Historic Places.<sup>9</sup> See *Save Medicine Lake Coalition*, 156 IBLA 219, 264

<sup>8</sup> The Box Elder RMP specifies that “[c]ultural resources will continue to be inventoried and evaluated on a case-by-case basis[,] . . . [s]tipulations will be attached as appropriate to assure compatibility of projects with management objectives for cultural resource,” and mitigation measures undertaken to minimize disturbing a historic property’s “environmental setting.” Box Elder RMP at 32; see 36 C.F.R. § 800.4(b)(2) (where large land areas are addressed in a NEPA document, agencies may use a phased process for identifying and evaluating cultural and historic properties); see also 36 C.F.R. § 800.5(a)(3).

<sup>9</sup> To be eligible, The Sun Tunnels must be of “exceptional importance,” “possess integrity of location, design, setting, materials, workmanship, feeling, and association,” and either “represent the work of a master” or be of “high artistic value.”

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(2002) (“while BLM has not fully evaluated the eligibility of the sites, it has rendered such evaluation unnecessary by fully protecting the sites from any adverse effects”). Having obtained the opinions of its expert and the SHPO, responded to legitimate concerns over siting wells in close proximity to The Sun Tunnels, imposed a cultural resources stipulation, and provided a reasoned analysis, we find BLM’s assessment and evaluation of The Sun Tunnels satisfied its obligation to consider new circumstances or information under NEPA. See *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1238 (10th Cir. 2002); *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999).

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/\_\_\_\_\_  
James K. Jackson  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
T. Britt Price  
Administrative Judge

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<sup>9</sup> (...continued)  
36 C.F.R. § 60.4. We express no view whether these criteria are here met.