



TOWN OF CRESTONE

178 IBLA 79

Decided July 30, 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

TOWN OF CRESTONE

IBLA 2009-48

Decided July 30, 2009

Appeal from a decision of the Colorado State Office, Bureau of Land Management, dismissing a protest of the inclusion of certain land in a competitive oil and gas lease sale. COC-72599 & COC-72600.

Affirmed.

1. Environmental Policy Act--Environmental Quality:  
Environmental Statements--National Environmental  
Policy Act of 1969: Environmental Statements--Oil and  
Gas Leases: Discretion to Lease--Oil and Gas Leases:  
Competitive Leases

In considering the potential impacts of oil and gas development when BLM proposes to lease public lands for oil and gas purposes, it is well established that Documentation of Land Use Plan Conformance and NEPA Adequacy worksheets is an acceptable method for BLM to assess the adequacy of existing environmental analysis for a proposed action. In doing so, BLM must determine whether the existing analysis takes a hard look at the potential environmental impacts of the proposed leasing, considering all relevant matters of environmental concern.

2. Environmental Policy Act--Environmental Quality:  
Environmental Statements--National Environmental  
Policy Act of 1969: Environmental Statements--Oil and  
Gas Leases: Discretion to Lease--Oil and Gas Leases:  
Competitive Leases

The party contesting BLM's decision to offer parcels for lease based on a finding that existing environmental analyses are adequate bears the burden of demonstrating with objective proof that the decision is premised on a

clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed actions. Mere differences of opinion provide no basis for reversal of a BLM decision, and the appellant bears the burden of demonstrating error by a preponderance of the evidence.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Competitive Leases

Where BLM had already adequately considered the likely environmental impacts of leasing and resulting exploration and development in an Environmental Impact Statement prepared for a Resource Management Plan, and when there has been no significant new information or circumstances sufficient to warrant supplementation, it was not required to prepare a new Environmental Impact Statement or Environmental Assessment.

APPEARANCES: Eugene L. Farish, Esq., Monte Vista, Colorado, for Appellant; Jeremy I. Ferrin, Esq. and Scott M. Campbell, Esq., Denver, Colorado, for Land Energy, Inc.; 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 M<sup>c</sup>DANIEL

The Town of Crestone, Colorado (Town), a municipal corporation, has appealed an October 1, 2008, decision of the Deputy State Director, Division of Energy, Lands and Minerals, Colorado State Office, Bureau of Land Management (BLM) (Decision), dismissing its protest of the inclusion of three parcels of public land in the May 8, 2008, Colorado Competitive Oil and Gas Lease Sale (Lease Sale).<sup>1</sup>

<sup>1</sup> The parcels, designated Parcels 4596 through 4598, encompass public lands in Saguache County, Colorado, within the San Luis Valley. On Oct. 1, 2008, BLM issued a 10-year competitive oil and gas lease (COC-72598) to Land Energy Inc. (Land Energy) for Parcel 4598. On the same date, BLM issued 10-year competitive oil and gas leases (COC-72599 and COC-72600) to Lamancha Enterprises LLC (Lamancha) for Parcels 4596 and 4597, respectively. Land Energy moved to dismiss the appeal due to lack of standing only as to Parcel 4598. Lamancha has not responded to the

(continued...)

*BACKGROUND*

In order to determine whether leasing the Parcels conformed with its land use plan and whether prior documentation satisfied its obligations under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), the Del Norte (Colorado) Field Office, BLM, acting through an interdisciplinary team of BLM resource specialists, prepared a Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) (CO-500-08-004) on January 28, 2008.<sup>2</sup> It considered whether leasing the Parcels conformed with the December 1991 San Luis Resource Area (SLRA) Resource Management Plan (RMP), and whether the likely impacts of leasing the Parcels, authorizing exploration and development for oil and gas purposes, and alternatives thereto, had been adequately addressed in the September 1991 SLRA Proposed RMP and Final Environmental Impact Statement (EIS), prepared in connection with BLM's adoption of the RMP.

In the DNA, BLM concluded that, in accordance with section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2006), leasing the Parcels conformed with the RMP, which had determined, based on the environmental analysis in the Final EIS, that the public lands in the Parcels were suitable for oil and gas leasing, exploration, and development, subject to appropriate stipulations. See SLRA Record of Decision and Approved RMP, dated Dec. 18, 1991, at 8-9, 12-13, Minerals Decisions Map.

BLM also concluded in the DNA that the Final EIS satisfied section 102(2)(C) of NEPA because it had adequately addressed the environmental consequences of leasing the Parcels and alternatives thereto. It held that the analysis in the Final EIS of the likely environmental consequences of leasing the Parcels remained valid, that no new information had been provided or obtained that would preclude leasing, and that “[a]dditional surface protection is provided via ‘Special Stipulation.’”<sup>3</sup> DNA

---

<sup>1</sup> (...continued)

appeal. See Order dated Mar. 19, 2009, in *Tom Tucker and Town of Crestone*, IBLA 2009-47 & 2009-48.

<sup>2</sup> BLM has provided an “Updated” version of the DNA, which appears to have been issued May 7, 2008, and is changed only by the addition of a discussion which concludes that the existing environmental review is not significantly changed by new information concerning the effects of greenhouse gas emissions by oil and gas leasing activities. We cite to the original DNA.

<sup>3</sup> BLM proposed to include the Parcels in the sale subject to several protective stipulations, including (1) timing limitations for protection of big game winter range, (continued...)

at unpaginated 5-6. It also noted that the environmental consequences of drilling and other specific activity within the leased area would be addressed in a site-specific environmental review, once such activity was proposed and before it could be approved. *Id.* at 3.

Based on his review of the DNA, the Field Manager, Del Norte Field Office, issued a February 13, 2008, Conclusion, holding that the proposed action conformed with the RMP and that BLM's prior "NEPA documentation . . . fully covers the Proposed Action and constitutes BLM's compliance with the requirements of NEPA."

On April 21, 2008, the Town filed its protest as to all three parcels, arguing that BLM violated section 102(2)(C) of NEPA by including the Parcels in the sale.<sup>4</sup> On October 1, 2008, the Deputy State Director issued his decision, dismissing the Town's protest, after addressing all of the arguments it raised.

The Town filed a timely appeal. On March 19, 2009, the Board granted Land Energy's motion to dismiss the appeal as to Parcel 4598 due to the Town's lack of standing to appeal as to that Parcel, denied the Town's Petition for Stay "as it relates to Parcels 4596 and 4597 because the Town . . . failed to satisfy its burden of showing that a stay is warranted," and left pending the Town's appeal as to Parcels 4596 and 4597.<sup>5</sup> See Order dated Mar. 19, 2009, in *Tom Tucker and Town of Crestone*, IBLA 2009-47 & 2009-48.<sup>6</sup>

---

<sup>3</sup> (...continued)

(2) procedures to protect threatened and endangered species and otherwise comply with the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (2006), and (3) timing limitations for the protection of nesting and foraging migratory birds. BLM considered four basic alternatives: Existing Management (No Action), Natural Resource Enhancement, Resource Protection Enhancement, and Preferred, each of which involved, from the standpoint of oil and gas management, different areas, within the SLRA, subject to leasing with standard terms and conditions, no leasing, no surface occupancy, and leasing with special stipulations. See Draft RMP and EIS, approved Aug. 15, 1989, at S-2 (Table S-1 (Summarized Comparison of Alternatives), 3-1 to 3-17, 3-22 to 3-23, 3-28, 3-29).

<sup>4</sup> Protests of the inclusion of the Parcels in the May 2008 Lease Sale were filed by 25 individuals and entities other than the Town. BLM dismissed all of the other protests. None of the other protestants besides Tucker appealed to the Board.

<sup>5</sup> No challenge had been made to the Town's standing to appeal as to Parcels 4596 and 4597.

<sup>6</sup> In that same order, but in regard to the separate appeal by Tom Tucker, the Board  
(continued...)

## ANALYSIS

The Town challenges the inclusion of the Parcels in the May 2008 competitive oil and gas lease sale on grounds that “BLM’s decision to do so violated [NEPA] 42 U.S.C. §§ 4321-4370(f) and [FLPMA], 43 U.S.C. 1712(c)(9).” Response at 1. The Town contends that BLM violated section 102(2)(C) of NEPA by failing to conduct an adequate environmental analysis of the impacts of the lease sale and failing to prepare “supplemental NEPA documentation” to address new information concerning “potentially significant impacts” of leasing the Parcels on water quality, wildlife and their habitat, and other natural resource values. Statement of Reasons (SOR) at 6, 9, 13.

[1] Here, instead of preparing an environmental assessment (EA) or EIS for this lease sale, BLM utilized a DNA to determine the adequacy under NEPA of the existing environmental documentation assessing the impacts of leasing the Parcels. In considering the potential impacts of oil and gas development when BLM proposes to lease public lands for oil and gas purposes, it is well established that “a DNA is an acceptable method for BLM to assess the adequacy of existing environmental analysis for a proposed action[.]” *Colorado Environmental Coalition (CEC)*, 173 IBLA 362, 372 (2008) (citing, e.g., *Pennaco Energy, Inc. v. U.S. Department of Interior*, 377 F.3d 1147, 1151, 1162 (10th Cir. 2004)). In the present case, the question before us is whether the NEPA documents identified in the DNA adequately considered the environmental impacts of oil and gas leasing, including whether there has been significant new information or circumstances sufficient to warrant supplementation of the EIS at issue. See CEC, 173 IBLA at 372. In doing so, “[w]e must measure the adequacy of BLM’s analysis by whether it reflects a ‘hard look’ at the potential environmental impacts of the proposed leasing, considering all relevant matters of environmental concern.” *The Coalition of Concerned National Park [Service] Retirees (Coalition)*, 169 IBLA 366, 369 (2006), and cases cited.

[2] As the party contesting BLM’s decision to lease the disputed parcels, the Town

bears the burden of demonstrating with objective proof that the decision [is] premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed actions. . . . Mere

---

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

affirmed BLM’s Oct. 1, 2008, dismissal of his protest of the Lease Sale.

differences of opinion provide no basis for reversal of a BLM decision, and the Coalition bears the burden of demonstrating error by a preponderance of the evidence.

*Id.*

BLM concluded, in its DNA, that it had already complied with NEPA by preparing the RMP/EIS.<sup>7</sup> The Town primarily argues that BLM's decision to offer the Parcels for sale violated NEPA because the supporting environmental document, the RMP/EIS, did not adequately address the impacts of oil and gas leasing, is outdated, and requires supplementation. *See* SOR at 5-6. However, we find that the Town has failed to demonstrate with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed actions. The Town has not established, with any convincing argument or objective proof, that the RMP/EIS did not adequately consider the impacts of leasing, exploration, and development of the Parcels or otherwise did not comply with NEPA, and thus has shown no NEPA violation. *See, e.g.,* Coalition, 169 IBLA at 368, 386-87; CEC, 173 IBLA at 371, 376-77. We agree with BLM that "[a]ppellant has offered only conclusory allegations of error or mere differences of opinion and therefore has failed to meet its burden of proof." Answer at 5. *See Southern Utah Wilderness Alliance*, 177 IBLA 29, 34 (2009); *Coalition*, 169 IBLA at 369.

For example, in order to demonstrate an error or deficiency in the RMP/EIS, it is not sufficient for the Town to simply assert that the EIS is "at least 18 years old and inadequate," or "outdated," or enumerate without specificity or objective proof the wildlife and habitat<sup>8</sup> and natural resource uses and values that appellant believes might be negatively impacted by leasing, eventual exploration, and development.

---

<sup>7</sup> BLM explained in its decision:

Prior to offering the parcels for oil and gas leasing, a DNA was prepared, and in analyzing the oil and gas leasing proposals, *the [Field Office] did not identify significant new information or circumstances in regard to the resource issues identified in your protest.* The DNA documented that the proposed leasing of these parcels has been adequately addressed in the SLRA RMP. In reviewing your protest, [the Field Office] confirmed that existing stipulations are adequate to protect the resource values listed in your protest. [Emphasis added.]

Decision at unpaginated 4-5.

<sup>8</sup> The Town claims, with general information but not with objective proof, that BLM failed to examine wildlife and its habitat, including the Canadian Lynx, that may be impacted by the lease sale. SOR at 9; Response at 7.

SOR at 5, 8; *see id.* at 9. We agree with BLM that the RMP/EIS “clearly considered the potential impacts of oil and gas leasing on big game, eagles, migratory birds, endangered or threatened species, and their habitat, and accordingly provided for stipulations or conditions of approval designed to protect those species.” Answer at 9. *See*, for example, SLRA RMP/EIS at 4-2, 4-7 to 4-10, App. C; n.3 above.<sup>9</sup>

Nor can the Town simply assert, without objective proof, that there are “site-specific impacts” of developing the Parcels that were not addressed at all in the EIS, or that circumstances have changed since the EIS was prepared, such that these impacts are likely to be different than what was addressed in the EIS. *Id.* at 10 (referring to the fact that the State “has experienced exponential growth in oil and gas development,” causing, along with other factors, “significant population declines” of wildlife “in Colorado and across their range,” which current lease stipulations cannot effectively mitigate).

We disagree with the Town’s argument that BLM should not have deferred addressing the site-specific environmental impacts of drilling and other specific activity until such activity is proposed. SOR at 10-11. In its Decision BLM stated that “Prior to any surface-disturbing activities, BLM will prepare a site specific NEPA document that will analyze potential environmental impacts and will develop mitigation measures to protect the environment from all identified potential impacts.” Decision at unpaginated 2; *see, e.g., Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 976-77 (9th Cir. 2006); *Chihuahuan Grasslands Alliance v. Norton*, 507 F. Supp.2d 1216, 1229-35 (D. N.M. 2007), *vacated and remanded on other grounds*, 545 F.3d 884 (10th Cir. 2008); *CEC*, 149 IBLA 154, 156-59 (1999). BLM recognized impacts to the Town’s residents and their health, safety, and quality of life as impacts that would be addressed during site-specific environmental review. *See* Decision at unpaginated 2-3.

In its recent decision in *State of New Mexico ex rel Richardson v. BLM (New Mexico)*, 565 F.3d 683 (10th Cir. 2009), the Tenth Circuit considered Federal cases concerning deferral of site-specific NEPA analysis of potential environmental impacts of oil and gas leasing and stated: “Taken together, these cases establish that there is no bright line rule that site-specific analysis may wait until the [Application for Permit to Drill] stage. Instead, the inquiry is necessarily contextual.” *New Mexico* at 717-18. The Court provided a two-part test: “[W]e first ask whether the lease

---

<sup>9</sup> Also, as BLM states, no “critical’ habitat, as that term is used in the Endangered Species Act, 16 U.S.C. § 1532(5), for the Canadian Lynx” is present on the Parcels, *citing* the U. S. Fish and Wildlife Service, which “has declined to designate any critical habitat under the Endangered Species Act, 16 U.S.C. § 1553(b)(6)(C), within the State of Colorado for the Canadian Lynx. 74 Fed. Reg. 8616, 8641, (Feb. 25, 2009).” *Id.* at 9-10.

constitutes an irretrievable commitment of resources,” and second “whether any environmental impacts were reasonably foreseeable at the leasing stage.” *Id.* at 718. In that case the Court answered the questions affirmatively because development was reasonably foreseeable at the leasing stage.<sup>10</sup> However, as BLM contends in the instant case, site-specific analysis is not required at this stage because none of the factors identified in *New Mexico* as showing that development was reasonably foreseeable existed here. “The record does not reveal any development plans concrete enough at the leasing stage to require a site-specific environmental analysis . . . . [D]evelopment of federal minerals in BLM’s management area is virtually non-existent.” BLM’s Notice of Supplemental Authority and Answer to SOR (Supplemental Answer) at 3. The Town has not responded to BLM’s filing to show fallacy in its argument applying *New Mexico* to the instant case. *See* Response (filed after BLM’s Supplemental Answer) at 1-11. Thus, appellant has not carried its burden to show that BLM was required to conduct site-specific environmental analysis for the Parcels because, unlike the circumstances in *New Mexico*, the potential impacts of oil and gas development were not reasonably foreseeable at the time the leases were issued.

[3] Here we conclude that BLM properly determined, in its DNA, that it had already adequately considered the likely environmental impacts of leasing and resulting exploration and development in the EIS prepared for the 1991 RMP, and thus it was not required to prepare a new EA or EIS. The Town has failed to carry its burden of demonstrating with objective proof that the decision was premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed actions, or that there is significant new information or circumstances sufficient to warrant supplementation of the EIS. For these reasons, we find no violation of section 102(2)(C) of NEPA.

We are also unpersuaded by the Town’s argument that BLM violated section 202(c) of FLPMA, 43 U.S.C. § 1712(c) (2006), by failing to assess whether leasing the Parcels, in accordance with the 1991 RMP, was consistent with State and local plans, specifically the June 2005 “Three Mile Plan,” adopted by the Town and Saguache County, for the purposes of guiding future land-use planning decisions in

---

<sup>10</sup> BLM refers to the Court’s conclusion that development was reasonably foreseeable because: 1) “[c]onsiderable exploration” had occurred on adjacent parcels, and 2) based on production levels from nearby wells and already issued permits for a pipeline to the lease at issue, the record revealed that the lessee had “concrete plans” to build a specific number of wells on the parcels at issue. . . . “Thus, NEPA required an analysis of the site-specific impact of the . . . lease prior to its issuance. . . .” Supplemental Answer at 2, citing 565 F.3d at 718-19.

the Town and surrounding County lands. SOR at 13. That section of FLPMA pertains to “the development and revision of land use plans[.]” 43 U.S.C. § 1712(c) (2006). FLPMA does not require leasing decisions to be consistent with State and local plans. Moreover, what is currently at issue here is not a land-use planning decision, but BLM’s decision to lease the Parcels.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Deputy State Director’s October 1, 2008, decision dismissing the Town’s protest is affirmed as to the inclusion of the two Parcels of public land in the May 8, 2008, Colorado Competitive Oil and Gas Lease Sale.

\_\_\_\_\_/s/\_\_\_\_\_  
R. Bryan McDaniel  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge