



POWDER RIVER BASIN RESOURCE COUNCIL
BIODIVERSITY CONSERVATION ALLIANCE

180 IBLA 1

Decided August 23, 2010



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

POWDER RIVER BASIN RESOURCE COUNCIL
BIODIVERSITY CONSERVATION ALLIANCE

IBLA 2010-25

Decided August 23, 2010

Appeal from decision of the Acting Deputy State Director, Wyoming State Office, Bureau of Land Management, affirming a Finding of No Significant Impact/Decision Record of the Field Manager, Buffalo Field Office, re-approving a plan of development for Federal oil and gas leases and applications for permits to drill coalbed natural gas wells in the Powder River Basin. WY-2008-16 (Part 2).

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Drilling

BLM's decision to re-approve a coalbed natural gas plan of development will be deemed to comply with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006), where BLM analyzed site-specific conditions on remand from a decision of the Board, as reflected in an environmental assessment tiered to the earlier environmental assessment and programmatic environmental impact statement, and the record demonstrates that BLM has taken a hard look at environmental consequences and reasonable alternatives, considered all relevant matters of environmental concern, and made a convincing case that either no significant impact beyond those already addressed in the environmental impact statement will result or any such impacts will be reduced to insignificance by the adoption of appropriate mitigation measures.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Drilling

Nothing in NEPA or the CEQ regulations requires BLM to postpone or deny a proposed action that is covered by the environmental impact statement for the current land use plan to preserve alternatives pending preparing a new land use plan and EIS. *See* 40 C.F.R. § 1506.1(c)(2).

APPEARANCES: Shannon R. Anderson, Esq., Powder River Basin Resource Council, Sheridan, Wyoming, for appellant; Jack D. Palma, II, Esq., Cheyenne, Wyoming, and Hadassah M. Reimer, Esq., Jackson, Wyoming, for the Williams Production RMT Co.; Philip C. Lowe, 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

The Powder River Basin Resource Council and Biodiversity Conservation Alliance (collectively, Powder River) have jointly appealed from and petitioned for a stay of the effect of an October 13, 2009, decision of the Deputy State Director, Minerals and Lands, Wyoming, Bureau of Land Management (BLM) on State Director Review (WY-2009-16) (SDR Decision).¹ The Deputy State Director affirmed in part and set aside and remanded in part the July 1, 2009, Finding of No Significant Impact/Decision Record (FONSI/DR) of the Field Manager, Buffalo (Wyoming) Field Office (BFO), BLM.

The FONSI/DR re-approved the Carr Draw III East (CD3-E) Coal Bed Natural Gas (CBNG) Plan of Development (POD) for Federal oil and gas leases, authorizing the drilling, production, abandonment, and reclamation of 82 CBNG wells by Williams Production RMT Company (Williams) in the Powder River Basin (PRB), located in northeastern Wyoming.² BLM based its decision to re-approve the POD in

¹ The Board docketed Powder River's Notice of Appeal, Petition for Stay, and Statement of Reasons (NA/Petition) as IBLA 2010-25. The Board denied Powder River's petition by Order dated Mar. 8, 2010 (Stay Order).

² The 5,477-acre CD3-E POD area is situated in T. 50 N., Rs. 75 and 76 W., Sixth Principal Meridian, Campbell County, Wyoming, near the town of Gillette, within the Barber Creek and South Prong Barber Creek drainages.

question on an environmental assessment (WY-070-09-078) (Remand EA),³ prepared under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), on remand from the Board's March 16, 2009, decision in *William P. Maycock*, 177 IBLA 1.

In *Maycock* we set aside the June 13, 2008, SDR decisions to the extent they affirmed the mitigation measures adopted for the protection of the Greater sage-grouse (*Centrocercus urophasianus*)⁴ and remanded the case to BLM for further consideration of the adequacy of its mitigation measures, and to take appropriate action. The Remand EA tiers to and incorporates by reference the original EA we reviewed in *Maycock*, and focuses on potential site-specific impacts to sage-grouse from the POD. Remand EA at 12; FONSI/DR at 3.

In its present challenge, Powder River principally contends that BLM violated section 102(2)(C) of NEPA, by allegedly failing to take a "hard look" at likely environmental impacts to sage-grouse, and by approving the POD during development of the RMP Amendment. For the reasons discussed below, we find that appellant has failed to carry its burden of demonstrating error in the FONSI/DR, as supported by the Remand EA.⁵

³ The FONSI/DR and Remand EA comprise a single, continuously paginated document. The EA is tiered to the Jan. 2003 Final Environmental Impact Statement and Proposed Plan Amendment for the PRB Oil and Gas Project (PRB FEIS) (WY-070-02-065). The PRB FEIS specifically addressed the proposed drilling of 39,367 CBNG wells and 3,200 conventional oil and gas wells in the Basin, over the course of 10 years.

⁴ Sage-grouse are a BLM-designated sensitive species. BLM's Sensitive Species Policy requires BLM to undertake actions in a manner that conserves the species and its habitat, promotes removal of the species from the list of sensitive species and avoids contributing to the need to list the species as a threatened and endangered (T&E) species under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (2006). See BLM 6840 Manual, Special Status Species Management (Rel. 6-125 (12/12/08)).

The Fish and Wildlife Service (FWS), U.S. Department of the Interior, at the direction of a Federal district court, recently considered sage-grouse for possible designation as a T&E species, under the ESA throughout all or a significant portion of its range. See *Western Watersheds Project v. Fish & Wildlife Service*, 535 F. Supp. 2d 1173 (D. Idaho 2007). In its 12-month finding on the petitions for listing, FWS determined that listing the Greater sage-grouse was warranted, but precluded by higher priority listings. See 75 Fed. Reg. 13910, 13988 (Mar. 23, 2010). Thus, it is a candidate species under the ESA and remains a BLM-designated sensitive species.

⁵ William P. Maycock, the surface estate owner, separately sought SDR of the July 1, (continued...)

I. Background

A. Original BFO Decision Approving the Carr Draw III East POD

The Board previously detailed background relevant to the subject matter of this appeal in *William P. Maycock*, 177 IBLA 1 (2009), and Orders dated March 8, 2010, (IBLA 2010-25), and September 18, 2008, (IBLA 2008-197 & 200). We decline to weave the full factual tapestry again, repeating selectively, and adding new developments as follows.

Oil and gas leasing and associated activity in the POD area is governed by the applicable land-use plan, the October 1985 Buffalo Resource Management Plan (Buffalo RMP), as revised in 2001, and as amended on July 30, 2003, by a Record of Decision (ROD), that was based on the FEIS for the 2003 RMP Amendment.

BFO originally approved the CD3-E POD in a March 4, 2008, FONSI/DR, authorizing drilling and development of 82 CBNG wells at 41 locations in the POD area.⁶ Drilling was to occur on split-estate lands that are virtually surrounded by existing or proposed oil and gas drilling. In approving the POD, BLM re-sited 10 of the well sites proposed by Williams, because of their proximity to sage grouse nesting habitat. See Original EA at 9-11, 48. To further avoid or mitigate adverse impacts arising from CBNG drilling and other development activities in the CD3-E POD area, BLM originally imposed the year-round, 0.25-mile buffer around active leks (breeding/strutting grounds), prohibiting occupancy and surface-disturbing activities, and the 2-mile seasonal buffer around active leks from March 1 to June 15, provided by the 1985 Buffalo RMP and 2003 PRB FEIS and ROD. See Original EA at 12, 16-17; Buffalo RMP ROD, dated Oct. 4, 1985, at 19. Although no active leks were situated *within* the POD area, because of their close proximity to the area, application of the 2-mile seasonal lek buffer would preclude

⁵ (...continued)

2009, FONSI/DR, and, in IBLA 2010-30, appealed the Oct. 13, 2009, SDR decision, without seeking a stay. Williams, the proponent and unit operator, moved to intervene in both pending appeals, filing an Opposition to Powder River's NA/Petition on Nov. 25, 2009, and an Answer to Maycock's Statement of Reasons (SOR) on Dec. 30, 2009. The Board granted Williams' motions to intervene and to consolidate the two appeals in the Stay Order. Having reviewed the record and decision pertaining to each appeal, we conclude it is in the best interest of Board administration to separately adjudicate each appeal. We begin with IBLA 2010-25.

⁶ The original FONSI/DR at issue in *Maycock* was based on a Mar. 4, 2008, EA (WY-070-08-029) (EA or Original EA), which, like the Remand EA at issue in the present appeal, was tiered to the Jan. 2003 PRB FEIS.

surface-disturbing activities at 26 of the 41 well sites during the critical time period.⁷ In addition, the March 2008 FONSI/DR required the siting of overhead power lines (potential raptor hunting perches), no less than 0.5 miles from any leks. *Id.*

B. William P. Maycock, 177 IBLA 1 (2009)

Powder River sought SDR of BLM's first approval of the POD, pursuant to 43 C.F.R. § 3165.3(b) and, on June 13, 2008, the Acting Deputy State Director, Minerals and Lands, Wyoming State Office, affirmed BFO's March 2008 FONSI/DR.⁸

Powder River challenged the SDR decision on the basis of the adequacy of BLM's analysis of the likely impacts to sage-grouse, elk, and their habitat in the original EA, and the validity of BLM's decision not to prepare an EIS. *See Maycock, 177 IBLA at 7, 11.* The Board's decision in *Maycock*, affirmed in part and set aside and remanded in part BLM's June 2008 SDR decision.⁹ In reviewing the adequacy of the EA supporting the agency's decision with respect to sage-grouse, we were unable to determine from the record that BLM's approval of the POD in reliance on the original EA, requiring application of the basic seasonal buffer prescribed in the 1985 Buffalo RMP and 2003 PRB FEIS and ROD, was predicated on a reasoned, fact-specific analysis. ("It appears," we stated, "that the *BFO did not undertake a [site-specific] analysis under the BLM Wyoming policy to adjust sage grouse protective areas when appropriate.*"¹⁰ *Maycock, 177 IBLA at 18, 19 (emphasis added.)* We contrasted BLM's decisionmaking, insofar as the record revealed, with its earlier

⁷ BLM reports that the POD area generally contains brood-rearing/nesting and other suitable habitat for sage-grouse, with, as of 2008, 7 active and 3 inactive leks situated from 0.33 to 3.57 miles of the POD area. *See Remand EA at 22-23 (Table 3.1).*

⁸ *Maycock* also sought SDR and, in a separate June 13, 2008, decision, the Acting Deputy State Director, Minerals and Lands, Wyoming State Office, affirmed BFO's March 2008 FONSI/DR.

⁹ The Board affirmed BLM's decision to approve the POD with respect to elk impacts. *See 177 IBLA at 21-26, 28.*

¹⁰ We noted that "Wyoming policy" is set forth in the Buffalo RMP, and that Wyoming BLM had also adopted IM No. WY-2004-057 (Aug. 16, 2004), which recognized that, after breeding, sage-grouse may nest even farther from leks than 2 miles. It provided for identification and mapping of nesting habitat, and adoption of appropriate site-specific stipulations to protect nesting habitat, regardless of whether it is situated within 2 miles of a lek or beyond. *See IM No. WY-2004-057 at 5; Biodiversity Conservation Alliance, 174 IBLA 1, 18 n,20 (2008).*

site-specific analysis, which the Board had reviewed in *Yates Petroleum Corp.*, 176 IBLA 144 (2008),¹¹ observing that, in the CD3-E EA, as in the EA in *Yates*, BLM had reported a consensus of scientific opinion casting doubt on the efficacy of 2-mile lek buffers in general. 177 IBLA at 15-16, 17, 19 (citing Original EA at 48-49). We further observed that, in *Yates*, following a site-specific impact analysis, BLM had decided to adopt the 3-mile buffer generally espoused in the amended recommendations of the Western Association of Fish and Wildlife Agencies (WAFWA).¹² 177 IBLA at 17 (citing 176 IBLA at 149, 151-53).

We set aside and remanded the decision for BLM to undertake a site-specific analysis of potential impacts to sage-grouse from the POD, taking into account the particular facts of this project and the then-current state of the science, in accordance with NEPA. We did not determine whether the project was likely to have a significant impact on sage-grouse and, therefore, did not address whether BLM had violated NEPA by failing either to adopt more stringent mitigation measures or to prepare an EIS.¹³

C. BLM's Ongoing Development of a Sage-Grouse Management Strategy

During the period of development and administrative review of BLM's March 2008 FONSI/DR, BLM was actively reassessing the adequacy of its sage-grouse mitigation measures throughout the West, including in connection with potential amendment or revision of the Buffalo RMP. See "Fact Sheet" for "Greater Sage-Grouse Buffalo Field Office RMP Amendment," dated May 28, 2008 (Fact Sheet) (Attachment M to Powder River's NA/Petition (IBLA 2008-200)); Letter to Oil and Gas Operators from the State Director, Wyoming, BLM, dated Aug. 10, 2007, (Document 14 attached to Powder River's Request for SDR); June 13, 2008, SDR Decision (Powder River) at 3-4; Remand EA at 8, 10-11. BLM recognized, "based on

¹¹ The Nemesis and Skyward PODs, were approved by BLM in Sept. 2005 FONSI/DRs, affirmed in May 2006 SDR decisions. We upheld the 3-mile seasonal lek buffer in *Yates*, finding BLM's condition of approval a proper exercise of its discretionary authority, based on an unrefuted site-specific EA, and consistent with statutory and regulatory authority, Departmental policy and the governing Buffalo RMP. See 177 IBLA at 17-18. The Buffalo RMP and PRB ROD are the land use planning documents governing the *Yates* PODS as well.

¹² WAFWA is composed of the Wyoming Game and Fish Department (WGFD) and other governmental wildlife agencies.

¹³ In setting aside and remanding the June 2008 SDR decisions, we observed that if BLM were to require a 3-mile buffer around active leks, as in *Yates*, all 41 well sites in the CD3-E POD area would be affected by the seasonal restriction on surface-disturbing activity. 177 IBLA at 20 n.23.

new information from recent sage-grouse inventories and scientific studies,” that current management practices might not adequately protect local sage-grouse populations in the Basin, and that large blocks of contiguous, undisturbed habitat might be necessary. Fact Sheet at unpaginated 1; *see* Remand EA at 10, 28; Declaration of Larry Gerard, dated July 28, 2009 (Document 4 attached to NA/Petition), ¶4, at 1-2.

BLM officially began amending the RMP in October 2008, and that undertaking continues to date.¹⁴ Pending promulgation of the RMP Amendment, which would adopt a long-term strategy for conserving sage grouse and its habitat in the PRB, BLM provided for delineating “biologically important areas,” consisting of “high quality sage-grouse habitat,” where, under an interim management strategy, greater protection would be afforded sage-grouse and its habitat. Fact Sheet at unpaginated 1; *see* Remand EA at 10-11. Wyoming BLM adopted a Focus Areas Approach, based on the State’s Core Area Population Strategy as an interim management strategy for the Basin.¹⁵ *See* Remand EA at 4, 8, 10-12; SDR Decision at 2; Letter to State from Field Supervisor, Wyoming Field Office, FWS, dated May 7, 2008 (FWS May 7 Letter) (Document 7 attached to Powder River’s Request for SDR at 1 (“The Service does indeed believe the ‘core population area strategy’ . . . is a sound framework for a policy by which to conserve greater sage-grouse in Wyoming. . . . The Service believes the ‘core population area strategy’ can achieve th[e] goal [of ensuring the necessary conservation to preclude the need to list the] . . . greater sage-grouse.”).¹⁶

¹⁴ *See* <http://www.blm.gov/wy/st/en/programs/Planning/rmps/buffalo.html>.

¹⁵ The State’s Core Population Area Strategy was adopted by the Governor, in Executive Order 2008-2, dated Aug. 1, 2008, to conserve sage-grouse in the State and avoid its listing. IM No. WY-2010-012 (Dec. 29, 2009), established a Greater Sage-Grouse Habitat Management Policy, to further guide proposed activities on all public lands in Wyoming, with the general aim of managing sage-grouse seasonal habitats and maintaining habitat connectivity, in support of population objectives of the WGFD. *See id.* at 1. It provides for case-by-case consideration of POD measures “to determine if impositions of these new conditions are consistent with the governing RMP and would not interfere with lease rights and allow for reasonable use and development of the leaseholds.” *Id.* at 12.

¹⁶ *See also*, FWS 12-Month Finding on Petition to List, 75 Fed. Reg. 13910, 13978 (Mar. 23, 2010), reporting, with approval on IM WY-2010-012 and BLM’s efforts to “incorporat[e] recommendations and information from new scientific studies into management direction.” (FWS noted that the IM is scheduled to expire on Sept. 30, 2011, and stated that “we are optimistic that this IM will result in short-term conservation benefits for sage-grouse in Wyoming.” *Id.*)

(continued...)

BLM provided specific guidance for CBNG drilling/development in specified focus areas under the jurisdiction of the BFO, within the PRB. These focus areas, which currently total approximately 1 million acres, “combined the originally proposed state core population areas [or Core Areas] with some mapped seasonal habitats to significantly enlarge the proposed areas of protection.”¹⁷ See Remand EA at 6, 11, 28. The POD area is not situated within a delineated focus area. Remand EA at 12, 22, 28; SDR Decision at 2; *Maycock*, 177 IBLA at 18 n.21. Moreover, IM WY-2010-012 does not apply to previously authorized activities, such as this POD, because it was approved in the July 2009 FONSI/DR. Nevertheless, BLM recognizes the value of non-focus areas in providing habitat connectivity between focus areas, and assisting in their maintenance. See Remand EA at 4-5, 11, 12, 21, 28.

D. Remand EA & New BFO Decision Approving the POD

Following our remand in *Maycock*, the BFO conducted seven days of onsite field inspections in the POD area. SDR Decision at 15. BLM issued a draft Remand EA on May 8, 2009, affording a public comment period, during which Powder River and Williams submitted comments. See Remand EA at 4, 11. The Remand EA analyzed, on a site-specific basis, the likely direct, indirect, and cumulative impacts of the proposed POD and alternatives thereto on sage-grouse, and incorporated, by reference, the original EA concerning such effects on all other aspects of the human environment. See Remand EA at 12. In designing project-specific, targeted mitigation, BLM recognized that the programmatic 2-mile lek buffer might not protect all of the nesting sage-grouse, noting scientific evidence that, after breeding, less than 50 percent of sage-grouse nest within 2 miles of a lek. See Remand EA at 9-10, 27.¹⁸ The agency considered current scientific information regarding sage-grouse, including “more stringent sage-grouse mitigation measures” developed since its March 2008 FONSI/DR. See SDR Decision at 7; Remand EA at 9-10.

The original FONSI/DR for the CD3-E POD, like the decision at issue in *Yates*, focused its sage-grouse mitigation on restricting activities *relative to active leks* in or

¹⁶ (...continued)

Also, as indicated by Powder River in a Mar. 11, 2010, Notice of Suppl. Information, BLM recently issued 2010-071, *Greater Sage-grouse Management Considerations for Energy Development* (Mar. 5, 2010), also described in the 12-Month Finding as an exceptional example of BLM’s application of authorities to meet the conservation needs of the species in Wyoming. 75 Fed. Reg. At 13979.

¹⁷ BLM states that the core areas, designated by the State, “support 82 percent of Wyoming’s sage-grouse populations.” SDR Decision at 2.

¹⁸ BLM also noted that IM No. WY-2004-057, applied in *Yates*, had expired on Sept. 30, 2005.

near the POD area. Here, by contrast, BLM used a habitat model, site visits, and field notes to determine and map all nesting and other high-quality sage grouse habitat in the POD area and then analyzed site-specific mitigation measures, regardless of whether the high-quality habitat fell within 2 miles of an active lek or beyond. See Remand EA at 4-5, 9-10, 12, 17, 20-22; Gerard Declaration, ¶6, at 3; SDR Decision at 4.

In doing so, it also analyzed four alternatives: Alternative A - a no action alternative; Alternative B - the proposed action; Alternative C (incorporating the results of sage-grouse habitat mapping efforts in the project area and on-site verification of habitat suitability designed to reduce project-specific impacts to sage-grouse habitat); and Alternative D (including the measures in Alternative C and others designed to accelerate the return of habitat effectiveness upon reclamation). Remand EA at 13-21.

Following additional review and consideration, the Field Manager issued his July 2009 FONSI/DR, deciding to re-approve the Carr Draw III East POD, comprised of 82 applications for permits to drill (APDs), subject to more stringent measures to avoid or minimize adverse impacts to sage-grouse. BLM's re-approval is a combination of the Remand EA Alternatives C and D,¹⁹ and imposes a variety of Conditions of Approval (COAs) for the protection of sage-grouse. See Remand EA at 1, 3-4, 7; FONSI/DR at 4. The FONSI/DR explains how the selected alternative "incorporates appropriate local sage-grouse research and the best available science from across the species' range," including components of the Wyoming Governor's Sage Grouse Implementation Team's Core Population Area Strategy and executive order and local research to provide appropriate protections for sage-grouse, while meeting the purpose and need for the [CD3-E] project." FONSI/DR at 7.

To begin, BLM recognized that POD activities are likely "to adversely impact sage-grouse through direct loss, reduced effectiveness, and disturbance to brood-rearing, nesting, and winter habitat." Remand EA at 23. Since almost all of the POD area has nesting and other high quality habitat, it precluded all surface-disturbing activities from March 1 to June 15 (the critical breeding/nesting season) at 39 of the 41 well sites.²⁰ See Remand EA at 17. BLM considered this restriction "a more

¹⁹ Powder River asserts that BLM failed, in the FONSI/DR, to "identify which components of Alternative D were included in the selected alternative." NA/Petition at 28-29. The FONSI/DR identifies that information at 1, 3-4, 20-21.

²⁰ BLM explained that it did not apply the seasonal ban on surface-disturbing activities to the 21-26 and 34-30 well sites because they are located within existing disturbances and not within nesting or other high quality habitat. Remand EA

(continued...)

accurate application of protection than the 2-mile timing restriction from the BFO RMP and the 2003 PRB Oil & Gas Project [F]EIS.” *Id.* at 25. Taking into consideration the best available science, BLM decided to implement a site-specific, habitat-based mitigation measure. Interestingly, imposition of this measure effects essentially the same on-the-ground result we forecasted, if BLM were to adopt the 3-mile lek buffer applied to the *Yates* PODs. *Maycock*, 177 IBLA at 20 n.23 (“all the wells within the POD area would come under the timing mitigation restrictions now applicable to those within the 2-mile timing buffer”). *See* BLM Opp. at 5.

The decision to re-approve the POD included several additional, site-specific measures designed to avoid or minimize sage-grouse disturbance and habitat fragmentation, some of which are modifications to the proposed action agreed to by Williams after on-site visits with BLM. Among others, those measures include: elimination or modification of 16 well locations/facilities, clearance surveys within 0.5 miles of any surface-disturbing activity during the breeding season (March 1 to May 15); location of all facilities to ensure that the noise at any nearby sage-grouse display grounds does not exceed 49 dBA (10 dBA above background noise); locating all overhead power lines at least 0.5 miles from any active lek; monitoring, reporting and review of data to determine the necessity and disruptiveness of site visits; and, “out of an abundance of caution” to protect a potential lek identified by Powder River and *Maycock* during the Remand EA comment period (SDR Decision at 10), the burial of the a proposed power line near well site 22-20, and restricting all surface-disturbing and disruptive activity at the well site between 6:00 p.m. and 8:00 a.m., from March 1 to May 15. *See* Remand EA at 4, 17- 20, 24-25; SDR Decision at 8, 22; Surface Use Conditions of Approval (attached to Letter to Williams from Field Manager, dated July 1, 2009), at 3, 8.²¹ The re-approval also retained the year-round prohibition on occupancy and surface-disturbing activity within 0.25 miles of any active lek. *See* Remand EA at 4; SDR Decision at 8 n.12.

BLM determined that the modified, re-approved action conformed to the existing RMP, best met the stated purpose and need for the proposed action, and provided appropriate protection for sage-grouse, despite expected adverse impacts to

²⁰ (...continued)
at 4, 7, 25.

²¹ *See* discussion of Alternatives C and D in Remand EA at 17-21. Alternative D also included measures predicted to further minimize habitat fragmentation and accelerate the return to habitat effectiveness, during reclamation of POD activity. In selecting a combination of mitigating measures, BLM took into consideration the fact that “the majority of project components have already been constructed,” and recognized that some components of Alternative D “may not meet the purpose and need of the proposed action.” *Id.* at 7, 25.

its habitat in the POD area. *See* Remand EA at 1, 3-4, 7-8, 12. Finding that the POD as approved was not likely to significantly impact the human environment in a manner not already addressed in the Remand EA, original EA, and FEIS, the Field Manager concluded that BLM was not required to prepare an EIS. *Id.* at 8.

E. Deputy State Director's SDR Decision on Review

On October 13, 2009, the Deputy State Director identified and extensively discussed each issue presented. He affirmed the July 2009 FONSI/DR, thereby approving further implementation of the POD, with respect to the issues before us.²² *See* SDR Decision at 22-23. Powder River timely appealed, and on March 8, 2010, the Board denied its request for a stay of the effect of SDR Decision.

F. Status of the POD

Williams reports that, to date, it has completed drilling almost all of the wells that it currently intends to drill in the POD area, completed all well heads and meter runs, improved/constructed almost all of the new and existing roads, installed all of the gas pipelines and other infrastructure necessary for POD development, and has begun producing natural gas. Williams Opp. at 5, 25 (citing Affidavit of Joe Olson,²³ dated Nov. 23, 2009 (Ex. 3 attached to Williams Opp)), ¶¶3-6). It states that “[c]urrent activity in the POD is limited to a few trucks and occasional equipment in the POD each day necessary to operate the wells and perform ongoing reclamation activities,”²⁴ and that “[t]he only surface-disturbing work that remains is related to reclamation of well pads and shaping and resurfacing the road along Barber Creek.” *Id.* at 5 (citing Olson Affidavit, ¶6).

²² The Deputy State Director set aside and remanded the FONSI/DR to the extent that it restricted site visits to well pads. As stated in our Mar. 10, 2010, Order at 4 n.5, that matter is not before us.

²³ Olson is Williams' Development Manager, responsible for all permitting, drilling, and construction activities associated with CBNG development in the Powder River Basin, including the CD3-E POD. *See* Olson Affidavit, ¶¶1, 2, at 1.

²⁴ Williams asserts that its current intention is to drill only 57 of the 82 wells, specifically to complete all 41 wells in the Gates/Wall and Werner formations and 16 out of 25 wells in the Big George formation. *See* Williams Opp. at 4. It notes that drilling of 55 of the 57 wells is complete, while completion of 2 wells is delayed, pending access through condemnation.

II. Discussion

Powder River makes myriad arguments, many of which merely repeat their concerns raised in comments to the draft Remand EA and on SDR, without meaningfully acknowledging or responding to the measures, explanations and rationales provided in BLM's decisions. *See, e.g.*, SDR Decision at 5-14. Although we need not recount all of those arguments here, *see In re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 362 (1991),²⁵ we address its averments under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), that an EIS was required and that BLM prejudiced the selection of alternative courses of action with respect to its pending NEPA review and decisionmaking concerning the RMP Amendment.

[1] BLM's decision to re-approve a coalbed natural gas plan of development will be deemed to comply with section 102(2)(C) of NEPA, where BLM analyzed site-specific conditions on remand from a decision of the Board, as reflected in an environmental assessment tiered to the earlier environmental assessment and programmatic environmental impact statement, and the record demonstrates that BLM has taken a hard look at environmental consequences and reasonable alternatives, considered all relevant matters of environmental concern, and made a convincing case that either no significant impact will result beyond those already addressed in the environmental impact statement or any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *See Biodiversity Conservation Alliance*, 174 IBLA at 18 n.20; *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007). In assessing the adequacy of an EA, we generally will be guided by the "rule of reason," such that the EA need only briefly discuss the likely impacts of a proposed action: "By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises." *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (*quoting Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)). An appellant seeking to overcome such a decision carries the ultimate burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance

²⁵ In *Mill Creek*, 121 IBLA at 362, we stated,

The right of review provided by this Board is not intended to be a circular promenade in which the parties simply repeat their steps. We have repeatedly stated that an appellant is required to point out affirmatively why the decision under appeal is in error. [Citations omitted]. In *Shell Offshore, Inc.*, 116 IBLA 246, 250 (1990), we held that this requirement is not satisfied if the appellant 'has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision . . . addressing those points.'

to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Bales Ranch, Inc.*, 151 IBLA at 357.

Where BLM's decision to issue a FONSI, and not prepare an EIS after environmental review "implicates agency expertise" (*Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004)) such as here, BLM properly relies on the professional opinion of its technical experts, concerning matters within the realm of their expertise when their opinion is reasonable and supported by record evidence. *Wyoming Outdoor Council*, 173 IBLA at 235 (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)). In challenging such reliance, Powder River must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the agency experts. A mere difference of opinion, even its witness' expert opinion, will not suffice to show that BLM failed to fully comprehend the nature, magnitude, or scope of the likely impacts. *Id.*

In reviewing the re-approval of the CD3-E POD we also are mindful, as we have stated frequently, that while compliance with NEPA is "designed to 'insure a fully informed and well-considered decision,'" BLM "is not constrained by NEPA from deciding that other values outweigh the environmental costs," and going forward with the action. *Biodiversity Conservation Alliance*, 174 IBLA at 13 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)); *Wyoming Audubon*, 151 IBLA 42, 50 (1999) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). The fact that the appellant has a differing opinion about likely environmental impacts or prefers that BLM take another course of action does not show that BLM violated the procedural requirements of NEPA. *San Juan Citizens Alliance*, 129 IBLA 1, 14 (1994).

A. NEPA Did Not Require BLM to Prepare an EIS

Powder River generally contends BLM violated NEPA by failing to prepare an EIS, asserting that evidence in the record and offered on appeal establishes that the POD is likely to significantly impact sage-grouse. *See* NA/Petition at 14. Powder River essentially asserts that the potential adverse impacts to habitat that BLM identified in the Remand EA amount to significant impacts to sage-grouse, and, therefore, required BLM to prepare an EIS.²⁶

Powder River relies largely on the July 28, 2009, Declaration of Larry Gerard, a former BLM wildlife biologist who recently reviewed proposed CBNG

²⁶ Powder River notes, as acknowledged by BLM in the Remand EA, that the POD will impact brood-rearing, nesting and winter habitat, and, as a consequence, "will most likely contribute to the abandonment of the ten leks within 4 miles of the project area." NA/Petition at 15 (quoting Remand EA at 23).

drilling/development. Gerard asserts that the impact to local habitat will cause significant (deadly) impacts to local sage-grouse, absent certain general mitigation measures that BLM did not adopt in its decision. *See* Gerard Declaration, ¶6, at 2-3; *id.*, ¶9, at 4 (“Given habitat fragmentation, increased noise, and other effects of the POD, sage-grouse will most likely leave the area and they are unlikely to return, thus causing local extirpation.”) He avers that such predicted disruption will threaten the connectivity between core areas and non-core areas, vital to the interim management strategy.²⁷ *See id.*, ¶11, at 4-5. Gerard advocates adoption of the following mitigation actions:

burying all power lines, implementing larger (over 3 mile) buffers around leks during breeding and nesting seasons and larger buffers around leks and high quality winter habitat throughout the year, avoiding the placement of wells and infrastructure within high quality habitat, requiring phased development and stronger reclamation standards, and reducing sources of noise, such as diesel generators and compressor stations.

Id., ¶8, at 3-4.

BLM has long been aware that large-scale CBNG drilling/development across the Powder River Basin will, by virtue of mortality owing to vehicle and power line collisions, habitat loss, degradation, and fragmentation, and other adverse effects, significantly impact sage-grouse, even with adoption of the measures analyzed and required under the 2003 PRB FEIS, *i.e.*, a 0.25-mile year-round NSO buffer for active leks, a 2-mile prohibition on surface-disturbing activities during the critical breeding/nesting season (March 1 to June 15), and a 0.5-mile prohibition for power lines in the vicinity of active leks. *See* 177 IBLA at 14-15 (citing FEIS at 4-257, 4-266 through 4-273); Remand EA at 26-27; *Maycock*, 177 IBLA at 15 (*quoting* FEIS at 4-270). The question now is not whether drilling/development across the PRB is likely to significantly impact sage-grouse, as that question has already been answered in the FEIS. Rather, the question is whether the drilling/development of 82 CBNG wells at 41 sites under the approved POD is likely, individually or cumulatively, to significantly impact sage-grouse.

The Remand EA reveals that BLM considered recent scientific studies that examine impacts to sage-grouse and habitat from CBNG-related activities (involving construction of facilities, traffic, noise, etc.) as well as potential mitigation measures, such as those identified above. *See, e.g.*, Remand EA at 6-8, 10-11, 22-29. It documents BLM’s consideration of those impacts and the effectiveness of the various

²⁷ Gerard also indicates that he disagrees with WGFD’s identification of core areas in the area under the jurisdiction of BFO. *See* Gerard Declaration, ¶¶10, 12, at 5.

measures incorporated into the approved project, consistent with NEPA and implementing regulations.²⁸ The Remand EA, FONSI/DR, and SDR Decision each reflect BLM's methodical consideration of concerns raised throughout the decisionmaking process on remand, leading to the imposition of substantial mitigation measures.

While few sage-grouse were actually observed during field visits, BLM acknowledged that approximately 88 percent of the POD area contains seasonal habitat, with 61 percent considered high quality nesting habitat and 57 percent considered high quality winter habitat.²⁹ See Remand EA at 22. It also recognized the likely adverse impacts to sage-grouse in and around the POD area (*i.e.*, the loss or degradation of the entire 8.6 square miles of habitat in the POD area) and the fact that the POD will, by reason of such effects, most likely contribute to the abandonment of the 10 leks in the vicinity of the POD area.³⁰ See *id.* at 23-28.

The Remand EA explains that the POD would only "contribute" to abandonment because, as of April 2009, there already were a total of 1,194 existing and 2,432 proposed wells, and associated infrastructure, within 4 miles of the 10 leks, which raises the "high probability" that such abandonment would occur *regardless of the POD*. *Id.* at 25-26. BLM concluded that the adverse impacts from the POD, as approved, would not be significant and were not likely to exceed those previously disclosed and analyzed in the PRB FEIS. Remand EA at 8; SDR Decision at 4, citing PRB FEIS at 4-257, 4-266, 4-270, 4-273. Powder River disagrees with this assessment, but offers no evidence to demonstrate that the mitigation measures BLM considered in the Remand EA and adopted in the FONSI/DR would fall short of

²⁸ The Deputy State Director stated that wildlife experts at WGFD concluded that "the BLM decision incorporates all the appropriate and available mitigation practices possible to maintain or improve the current lek viability." SDR Decision at 5-6. Williams likewise notes that BLM's new suite of measures comports with the current recommendations of WGFD and other State wildlife agencies to move away from arbitrary buffers to "[m]apping of habitat[, which] would allow for more accurate application of th[e] [nesting/early brood-rearing] stipulation." Opposition at 12 (*quoting* Multi-State Wildlife Report at 7). The Multi-State Wildlife Report, attached to a Jan. 29, 2008, WGFD Memorandum, is identified as Document 3 attached to Powder River's SDR Request.

²⁹ Neither BLM nor WGFD considered any of the winter habitat as a winter concentration area, absent the presence of large numbers of sage-grouse, and Powder River offers no contrary evidence. See SDR Decision at 9-10.

³⁰ BLM based its prediction of habitat loss or degradation on scientific evidence that sage-grouse will typically avoid suitable habitat located within 0.6 miles of roads, wells, and other facilities. See Remand EA at 23, 26.

reducing any significant impacts to insignificance. Although it would prefer that BLM adopt different measures, Powder River has not preponderated in showing that “BLM’s failure to adopt any of their proposed mitigation measures is likely to result in a significant impact, thus undermining the FONSI.”³¹ *Biodiversity Conservation Alliance*, 171 IBLA at 235.

Nothing in the record or offered by Powder River on appeal demonstrates that BLM erred in finding no significant impacts to sage-grouse from approval of the CD3-E POD. Appellant has shown no error in the data, methodology, analysis, or conclusion of the agency’s experts.³² On remand, BLM undertook the appropriate, site-specific analyses of sage-grouse impacts and of mitigation measures to protect those resources that were not evident in our review of BLM’s original POD approval in *Maycock*. See 177 IBLA at 18, 19. The record here clearly demonstrates that BLM engaged in an appropriate site-specific analysis, considered the particular facts of this project and the then-current state of the science, and took a “hard look” at potential environmental impacts. Relying on the professional opinion of its technical experts, BLM applied reasonable mitigation measures and made a convincing case that no significant impact to sage-grouse will result that was not already addressed in the Remand EA as tiered to the original CD3-E POD EA and PRB FEIS. *Wyoming Outdoor Council*, 173 IBLA at 235; *Biodiversity Conservation Alliance*, 171 IBLA at 226. Appellant has provided no significant information, not considered in the Remand EA, original EA or FEIS, bearing on the impacts of this action. It has failed to meet its burden on appeal.

³¹ For instance, Powder River has not shown that the fact that a total of 10 diesel generators will be employed pending the construction of power lines, each of which emits 68 dBA at the source, translating to 49 dBA 210 feet from the source, is likely to significantly impact sage-grouse or its habitat in a manner not considered in the FEIS or not mitigated by resiting and other required modifications and measures. See Olson Affidavit, ¶12, at 4, and Attachment A (Generator Location to Grouse Lek Relation Map). Similarly, it does not acknowledge or assess as ineffective project components including pipeline burial, buffers, and well placements.

³² Powder River also criticizes BLM’s use of a “Focus Areas Approach.” NA/Petition at 17-18. Here we are concerned only with whether BLM properly approved the POD. As we do not believe that it was necessary for BLM to decide how best to ensure the viability of the sage-grouse population throughout the Basin in order to decide whether to approve the CD3-E POD, we need not consider whether the Focus Areas Approach is likely to succeed in ensuring the viability of the species in the PRB.

B. BLM Was Not Required to Defer its Decision Pending Amendment of the RMP

[2] Powder River contends that BLM “will be setting in motion de facto decisions for the Plan Amendment and eliminating management options prior to the analysis.” NA/Petition at 31-32.³³ (Emphasis added). The regulations that Powder River cites—40 C.F.R. §§ 1502.2(f) and 1506.1(a)—prohibit BLM from authorizing any aspect of a proposed action where the agency remains engaged in its NEPA review of that action, when doing so would limit its choice of reasonable alternatives, and thereby prejudice its decision whether to approve that action. See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998), cert. denied, 527 U.S. 1003 (1999) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)); *State of Idaho v. Interstate Commerce Commission*, 35 F.3d 585, 595-96 (D.C. Cir. 1994); *Wyoming Outdoor Council*, 159 IBLA 388, 416 (2003).

The context of the case at hand, however, makes clear that Powder River’s reliance on 40 C.F.R. §§ 1502.2(f) and 1506.1(a)) is misplaced. The proposed action here is the POD, not the RMP amendment to which Powder River refers. See NA/Petition at 32. BLM had completed its NEPA review by the time it issued the FONSI/DR, consistent with the purposes of 40 C.F.R. §§ 1502.2(f) and 1506.1(a). See *Wilderness Watch*, 142 IBLA 302, 305 (1998); *Southern Utah Wilderness Alliance*, 141 IBLA 85, 88-89 (1997); *In Re Bryant Eagle Timber Sale*, 133 IBLA 25, 27-29 (1995). Under such circumstances, BLM is not required to await a further decision regarding the amendment or revision of an existing land use plan, before taking an action that comports with the existing land use plan.

Nothing in NEPA or its implementing regulations requires BLM to postpone or deny a proposed action *that is covered by the EIS for the current land use plan*, in order to preserve alternatives during the course of preparing a new land use plan and EIS. See 40 C.F.R. § 1506.1(c)(2); *Colorado Environmental Coalition*, 169 IBLA 137, 144 (2006).

Montana Trout Unlimited, 178 IBLA 159, 172 (2009) (emphasis added).

³³ 40 C.F.R. § 1502.2(f) provides that, in connection with preparing an EIS concerning a proposed action and alternatives thereto, a Federal agency “shall not commit resources prejudicing selection of alternatives before making a final decision[.]” It cites 40 C.F.R. § 1506.1, which confirms, in relevant part, in subsection (a), that, until an ROD is issued in connection with an EIS, “no action concerning the proposal shall be taken which would . . . [l]imit the choice of reasonable alternatives.” (Emphasis added.) See *Oregon Chapter of the Sierra Club*, 172 IBLA 27, 48 (2007).

The record shows that the POD accords with the current RMP Amendment, as required by section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2006), and 43 C.F.R. § 1610.5-3(a).³⁴ See, e.g., *Dona Jeanette Ong*, 165 IBLA 274, 278 (2005) (citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004)). Powder River has not shown otherwise. Indeed, “[a]cceptance of appellant[’s] position that, once BLM has decided to prepare a new land use plan for an area, it must suspend action in conformance with the prevailing plan would seriously impair BLM’s ability to perform its management responsibilities.” *Sierra Club Legal Defense Fund, Inc.*, 124 IBLA 130, 140 (1992). BLM’s approval of the POD at issue in this appeal is consistent with the Buffalo RMP and PRB Amendment. We are not persuaded by Powder River’s argument that BLM must defer action on the CD3-E POD until the new RMP Amendment is finalized.

III. Conclusion

Powder River has not carried its burden of demonstrating by a preponderance of the evidence and with objective proof that BLM failed to take a “hard look” at the proposed action. *Biodiversity Conservation Alliance*, 169 IBLA 321, 331 (2006). It generally repeats assertions of alleged NEPA violations made on SDR Decision review without convincing evidence of error in BLM’s decision. Its mere differences of opinion can not overcome the well-informed, amply supported, site-specific BLM management decision to re-approve the CD3-E POD.

The record and pleadings in this case bear witness to the ever-developing science pertaining to sage-grouse and to BLM’s dynamic, agency-wide efforts to analyze and apply that science in managing the public lands. Generalized, unsubstantiated disagreements with BLM’s policy and actions are not enough to invalidate an EA, and the sheer fact of active land use planning is insufficient to prohibit BLM from authorizing activities covered by an RMP.³⁵

³⁴ FLPMA mandates that “the Secretary shall manage the public lands . . . in accordance with the land use plans” 43 U.S.C. § 1732(a). Departmental regulations provide that once BLM has approved an RMP, “all future resource management authorizations and actions . . . shall conform to the approved plan.” 43 C.F.R. § 1610.5-3(a).

³⁵ All other errors of fact or law alleged by appellants to have been committed by BLM have been considered and found to provide no basis for reversing the decision under appeal. See *National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F.2d 645, 652 (6th Cir. 1954); *IMC Kalium Carlsbad, Inc.*, 170 IBLA 25, 54 (2006).

We, therefore, conclude that the Deputy State Director, in his October 13, 2009, SDR Decision, properly affirmed that part of the Field Manager's July 1, 2009, FONSI/DR, re-approving, on remand, the CD3-E POD for Federal oil and gas leases at issue in this appeal.

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/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge