

The Wilderness Society

Phone: (303) 650-5935

Fax: (303) 395-0383

FAX

To: 17758616745

From: Barbara Young

Re:

Date: 08/06/2018

Enclosed please find The Wilderness Society's protest of BLM Nevada's September 2018 oil and gas lease sale.

Total pages (including cover): 15

Juli Slivka
Assistant Director, Agency Policy & Planning
The Wilderness Society
11050 Pioneer Trail, Suite 202
Truckee, CA 96161
(303) 650-1179
jslivka@twss.org

1660 Wynkoop St #850, Denver, CO 80202



August 6, 2018

Delivered by fax to (775) 861-6745

Bureau of Land Management
Nevada State Office
1340 Financial Boulevard
Reno, NV 89502-7147

Re: Protest of September 2018 Oil and Gas Lease Sale

To Whom It May Concern:

Please accept and fully consider this timely protest of BLM Nevada's September 2018 lease sale. This protest challenges BLM's Determinations of NEPA Adequacy, DOI-BLM-NV-L000-2018-0001-DNA and DOI-BLM-NV-E000-2018-0007-DNA, and the agency's decision to proceed with the sale of new leases located in the Ely and Elko Districts. We specifically protest all parcels being offered in the September lease sale, identified in the Competitive Notice of Oil and Gas Internet Lease Sale as parcels NV-18-09-001—NV-18-09-144.

Interests of the Protesting Parties

The Wilderness Society ("TWS") has a long-standing interest in the management of Bureau of Land Management lands in Nevada and engages frequently in the decision-making processes for land use planning and project proposals that could potentially affect wilderness-quality lands and other important natural resources managed by the BLM in Nevada. TWS has expended significant resources field inventorying public lands in Nevada for wilderness characteristics. TWS members and staff enjoy a myriad of recreation opportunities on BLM-managed public lands, including hiking, biking, nature-viewing, photography, and the quiet contemplation in the solitude offered by wild places. Founded in 1935, our mission is to protect wilderness and inspire Americans to care for our wild places.

Authorization to File This Protest

Nada Culver is authorized to file this protect on behalf of The Wilderness Society and its members and supporters as Senior Counsel and Director of The Wilderness Society's BLM Action Center.

Statement of Reasons

I. BLM failed to take the “hard look” required by NEPA.

BLM has not taken the required “hard look” at potential environmental impacts. Under the National Environmental Policy Act (NEPA), BLM must evaluate the “reasonably foreseeable” site-specific impacts of oil and gas leasing, prior to making an “irretrievable commitment of resources.” *New Mexico ex rel. Richardson, New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (agencies are to perform hard look NEPA analysis “before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values”); *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 ([o]n land leased without a No Surface Occupancy Stipulation the Department cannot deny the permit to drill; it can only impose 'reasonable' conditions which are designed to mitigate the environmental impacts of the drilling operations.). Courts have held that BLM makes such a commitment when it issues an oil and gas lease without reserving the right to later prohibit development. *New Mexico ex rel. Richardson*, 565 F.3d at 718.

For this proposed lease sale, BLM has not conducted any NEPA analysis to support offering these lease parcels for sale. Instead, BLM is attempting to rely on two Determinations of NEPA Adequacy (DNAs). DNAs, unlike Environmental Assessments and Environmental Impact Statements, are not NEPA documents. They do not analyze impacts, but rather determine the adequacy of existing NEPA documents. *See e.g., S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1261-62 (D. Utah 2006).

The use of DNAs is governed by provisions in the Department of the Interior Departmental Manual and the BLM’s NEPA Handbook. Under the Departmental Manual, a DNA can only be used when (1) the proposed action is adequately covered by existing NEPA analysis and (2) there are no new circumstances, information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis. Departmental Manual Part 516 Section 11.6. A DNA “does not itself provide NEPA analysis.” *Id.* Under the BLM NEPA Handbook, before a DNA can be used, there must be a determination made that the action is adequately analyzed in existing NEPA documents and the action is in conformance with the land use plan. BLM NEPA Handbook H-1790-1 at 22. Before a DNA can be used, BLM must confirm (based on a checklist of issues that need to be considered) that the existing NEPA analysis is sufficient. *Id.* at 23, 161 (Appendix 8).

BLM has not met these requirements. First, the DNAs do not provide sufficient information to assess whether the leases to be offered comply with the governing Resource Management Plans (RMPs). For example, the DNA for the Ely District has no discussion at all of Ely RMP requirements addressing any resources other than greater sage-grouse. *See Ely DNA* at 1-2. And with regard to sage-grouse, it is clear that this sale does not conform with the leasing prioritization requirements of the Nevada and Northeastern California ARMPA, as discussed below.

Nor do existing NEPA documents adequately analyze the reasonably foreseeable impacts of issuing these 144 leases. Oil and gas leasing involves an irreversible and irretrievable commitment of public resources that must be accompanied by site-specific NEPA analysis. A “suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid.” *Conner v. Burford*, 848 F.2d 1441, 1450-51 (9th Cir. 1988). Without preparation of at least an EA for a lease sale, “the government subverts NEPA’s goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values.” *Id.* at 1451.

The Ely DNA relies on two RMP analyses applicable to this area, and three earlier EAs for two entirely different lease sales. The Elko DNA similarly relies on RMP analysis and three previous leasing EAs. None of these documents provides the necessary analysis to support this specific lease sale. The Elko RMP dates to 1986, making this reliance exceptionally egregious.

For example, the 2008 Environmental Impact Statement (EIS) for the Ely Field Office RMP, and the 2015 greater sage-grouse RMP amendment, only considered whether areas should be available for leasing but did not consider actual leasing in specific areas, or the environmental impact of that leasing. The RMPs also did not make any irreversible and irretrievable commitment of resources by selling leases, which BLM is now proposing to do.

The 2008 and 2015 RMPs also did not consider the environmental impacts of leasing the specific parcels proposed for leasing here. The step of offering leases raises issues that were not considered in the RMPs. The EIS for the Ely RMP, for example, contains numerous statements committing to do additional site-specific analyses of different resources as the plan is implemented. *See, e.g.*, Ely RMP FEIS at 4.1-6, 4.1-8 to 9, 4.2-2. BLM has failed to follow through on that commitment in this sale.

The RMP-level analyses did not assess of a variety of impacts relevant to BLM’s decision whether to offer particular parcels for leasing or whether additional site-specific stipulations should be required. *See* 43 C.F.R. § 3131.3. These include, for example, the depth and quality of groundwater in specific locations, particular wetlands or riparian areas, information about topography, soil conditions and vegetation with a level of specificity that would allow BLM to prevent erosion or soil damage at the site-specific level, and the presence or absence of special status wildlife species in particular locations. The need for a site-specific NEPA analysis is especially apparent with regard to the prioritization objectives in the 2015 sage-grouse RMP amendment. That prioritization requirement expressly contemplates that BLM will conduct additional analysis at the leasing stage to decide which leases should be offered, and which should be deferred. Such an analysis has not been done for this lease sale, as discussed below.

New information, such as the issuance since January 2017 of numerous Executive Orders and Secretarial Orders related to energy development, and the resulting wave of new leasing that has followed, also have not been considered. Neither the 2008 or 2015 RMPs account for the large-scale leasing of sage-grouse habitat that has occurred recently in Nevada, Montana, Wyoming, and other states.

Nor can BLM rely on the EAs for other lease sales that occurred in 2013, 2014, 2017 and 2018. Those sales involved entirely different lands from those proposed for leasing in the September 2018 sale. This is especially important in the Ely District, where the proposed parcels cover vast acreages that were not analyzed in previous EAs. The Ely DNA incorrectly asserts that the proposed parcels are “adjacent” to those addressed in the earlier EAs. Ely DNA at 2-3. In fact, the map attached to the DNA shows that many of the proposed parcels lie 10-20 miles away from any lands covered in those earlier EAs. Ely DNA at 7.¹ In particular, the parcels in the Delamar Mountains and in northern Newark Valley/Huntington Valley are far removed from parcels in previous lease sales and cannot be assumed to contain the same resources as were analyzed in earlier EAs. The DNA also argues that the resource conditions are similar to areas previously analyzed because they are within the same valleys and ranges as previous lease sales. Ely DNA at 2-3. Given the immense size of the valleys and ranges in Nevada, and variabilities in species habitat, groundwater, vegetation, wild character and other resource conditions throughout those valleys and ranges, BLM must conduct site-specific environmental analysis for these particular lease parcels. Without any NEPA analysis, BLM has no basis to assume that the impacts from leasing and developing these parcels will be substantially the same as on other lands that are miles away.

The previous EAs on which BLM relies also fail to provide meaningful analysis of the reasonably foreseeable impacts to a variety of resources from drilling on the protested parcels. Instead, BLM takes the position in those EAs that: (a) the issuance of the leases is just a paper transaction with no direct impacts, and that (b) drilling on those leases is an “indirect” effect that is impossible to analyze at the leasing stage.² The EAs may identify the category of impact and what stipulations or legal requirements may apply, but take the position that assessment of impacts on these lease parcels will be deferred until applications for drilling permits are filed and approved. Such a generic discussion of types of impacts fails to provide many facts necessary for BLM to make an informed decision about leasing individual parcels. For example, the EAs fail to assess whether and to what extent stipulations will actually be effective in protecting resources on particular parcels, which resources on each parcel will suffer particular damage if an accident occurs, or where additional protective measures may be warranted on particular parcels. Most of the EAs’ discussion of impacts, in fact, could apply to any lease sale and therefore lack site-specific analysis.

This does not satisfy NEPA. Merely describing the “the *category* of impacts anticipated from oil and gas development” isn’t sufficient when it is reasonable for BLM to do more. *See New Mexico v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) (emphasis original). “NEPA does not permit

¹ The DNA also claims that the impacts from issuing these leases are “similar” or “unchanged” from the earlier sales because it will do additional NEPA analysis at the drilling permit stage. Ely DNA at 3-4. This “we’ll study it later” excuse just side-steps the relevant issue and provides no support for a DNA.

² See, for example, DOI-BLM-NV-L000-2013-0004-EA at 4.3.1 (“There would be no direct effects from issuing new oil and gas leases because leasing does not directly authorize oil and gas exploration and development activities.”); DOI-BLM-NV-L000-2014-0002-EA at 4.5.1 (“There would be no direct effects from issuing new oil and gas leases because leasing does not directly authorize oil and gas exploration and development activities. Direct impacts from these activities would be analyzed under a separate site-specific NEPA analysis.”); DOI-BLM-NV-L030-2017-0021-EA at 3.3.2 (“The sale of parcels and issuance of oil and gas leases is strictly an administrative action. The act of offering, selling, and issuing federal oil and gas leases does not produce impacts to water quality and surface water.”).

an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur. Such a state of affairs would be anathema to NEPA's 'twin aims' of informed agency decision-making and public access to information." *Id.* The impacts from development on lease parcels being sold are "reasonably foreseeable." An "effect is reasonably foreseeable if it is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Colo. Env. Coal. v. Salazar*, 877 F. Supp. 2d 1233, 1251 (D. Colo. 2013) (quotation omitted). The fact that no APDs have been filed yet does not excuse BLM from making reasonable predictions about where that development is likely to occur: "reasonable forecasting is implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Salazar*, 877 F. Supp. 2d at 1251 (quoting *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1286 (1st Cir.1996)). The test is whether an impact can or "cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker." *DuBois*, 102 F.3d at 1286.

It is clear the DNAs for the September 2018 oil and gas lease sale are invalid. The proposed action is not adequately covered in existing NEPA documents and there are new circumstances, information, and unanalyzed alternatives and environmental impacts that have not been considered that require additional NEPA analysis. BLM also has not shown that the proposed action is in conformance with the underlying RMPs.

Before proceeding with the proposed September 2018 lease sale, BLM must prepare a NEPA analysis that considers the environmental impacts of offering these 144 parcels for sale. At a minimum, an EA is required. BLM may likely find that given the large amount of acreage proposed for sale, an EIS is warranted. Even under IM 2018-034, an EIS or EA is still required when existing NEPA analysis has not adequately analyzed the impacts of the lease sale and is not in conformance with the resource management plan (RMP), as is the case here. *See* IM 2018-034 at section III.D (stating "state/field office[s] will determine the appropriate form of NEPA compliance for all lease sale parcels" and "If the authorized officer deems additional analyses to be necessary, then BLM can prepare an Environmental Assessment").

II. BLM failed to consider a range of alternatives.

NEPA generally requires the lead agency for a given project to conduct an alternatives analysis for "any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The regulations further specify that the agency must "rigorously explore and objectively evaluation all reasonable alternatives" including those "reasonable alternatives not within the jurisdiction of the lead agency," so as to "provid[e] a clear basis for choice among the option." 40 C.F.R. § 1502.14. This requirement applies equally to EAs and EISs. *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 122829 (9th Cir. 1988).

The range of alternatives is the heart of a NEPA document because "[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of [a NEPA analysis] to inform agency deliberation and facilitate public involvement

would be greatly degraded.” *New Mexico v. BLM*, 565 F.3d at 708. That analysis must cover a reasonable range of alternatives, so that an agency can make an informed choice from the spectrum of reasonable options. Here, in authorizing this lease sale through a DNA rather than conducting any NEPA, BLM has failed to evaluate any alternatives to the proposed action. Reasonable alternatives that should be evaluated include: (a) a no action alternative; (b) an alternative that defers most or all parcels that include priority and general sage-grouse habitat (see discussion of prioritization, below); (c) an alternative that defers parcels in inventoried lands with wilderness characteristics; and (d) one or more alternatives to apply additional stipulations to the lease in order to protect resources.

Agencies violate NEPA when they lease lands for oil and gas development without giving full consideration to a “no-leasing” alternative. See *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988). Issuing leases opens the door to potentially harmful post-leasing activity and creates unresolved conflicts concerning alternative uses of available resources. “NEPA therefore requires that alternatives – including the no-leasing option – be given full and meaningful consideration.” *Id.* Accordingly, BLM cannot rely on a DNA in situations where the agency has not considered alternatives to energy development, “such as not issuing leases at all.” *Pennaco Energy, Inc. v. U.S. Dep’t of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004).

The underlying RMPs never considered alternatives relevant to this lease sale, such as offering some but not all of the parcels considered here. Nor did the RMPs consider the alternative of deferring all of these particular leases. The RMPs only consider alternatives generally opening or closing to leasing large areas measured in the millions of acres. For example, the proposed action alternative for the 2008 Ely RMP opened six million acres for leasing under standard terms and conditions, while closing 1.46 million acres. 2008 Ely RMP FEIS at 2.9-33 to 34 (Table 2.9-1). None of the alternatives in the underlying RMPs addressed closing some or all of the particular parcel areas here to leasing—much less a temporary deferral of leasing those parcels.

Even if lands at issue here are open for leasing under the Ely and Elko RMPs, it would be entirely reasonable for BLM to consider deferring parcels that have lands with wilderness character or important sage-grouse habitat. Neither the Mineral Leasing Act (MLA), Federal Land Policy and Management Act (FLPMA) nor any other statutory mandate requires that BLM must offer public lands and minerals for oil and gas leasing that are nominated for such use, even if those lands are allocated as available to leasing in the governing land use plan. The 10th Circuit Court of Appeals confirmed this discretion in *New Mexico v. BLM*, when it stated, “[i]f the agency wishes to allow oil and gas leasing in the plan area it must undertake additional analysis...but it retains the option of ceasing such proceedings entirely”. 565 F.3d at 698. Moreover, to the extent certain parcels have only low potential for development, the alternative of deferring them appears even more reasonable. These options have never been analyzed.

Nor did the five leasing EAs on which BLM relies consider a range of alternatives regarding the parcels in this sale. Those EAs do not even address the parcels at issue here, and thus never considered the option of not leasing these particular parcels. Moreover, the EAs each only analyzed only two alternatives: a no action alternative, which would exclude all lease parcels from the sale; and an alternative offering all proposed parcels. An EA offering a choice between

leasing every proposed parcel, and leasing nothing at all, does not present a reasonable range of alternatives. *See TWS v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider “middle ground compromise between the absolutism of the outright leasing and no action alternatives”); *Muckleshoot Indian Tribe v. US Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (NEPA analysis failed to consider reasonable range of alternatives where it “considered only a no action alternative along with two virtually identical alternatives”).

Failing to consider alternatives that would protect other public lands resources from oil and gas development also violates FLPMA. Considering only one alternative in which BLM would offer all nominated oil and gas lease parcels for sale, regardless of other values present on these public lands that could be harmed by oil and gas development, would indicate a preference for oil and gas leasing and development over other multiple uses. Such an approach violates the agency’s multiple use and sustained yield mandate. *See* 43 U.S.C. § 1732(a).

In addition, none of the relied upon leasing EAs evaluate an alternative that would defer leasing in Priority Habitat Management Areas and/or General Habitat Management Areas for Greater Sage-grouse, despite a legal obligation to do so under the prioritization requirement of the 2015 RMP amendments (September 2015) and associated policy guidance. Because BLM has not evaluated these or any other “middle-ground” alternatives, it has violated NEPA.

III. BLM has failed to consider the cumulative impacts of leasing.

NEPA requires BLM to evaluate the cumulative impacts of this lease sale “resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.27(b)(7); *Kern v. Bureau of Land Management*, 282 F.3d 1062, 1075-77 (9th Cir. 2002). To satisfy this requirement, BLM must consider the cumulative impact of all the recent and currently-planned oil and gas auctions in which BLM has offered or may offer hundreds of leases affecting sage grouse habitat and other resources. These sales include, but are not limited to:

- Nevada June 2018 sale: 166 parcels totaling 313,000 acres offered;
- Wyoming September 2018 sale: more than 350 parcels totaling over 360,000 acres proposed;
- Utah September 2018 sale: 76 parcels totaling 158,944 acres;
- New Mexico September 2018 sale: 197 parcels;
- Colorado December 2018 sale: 227 parcels proposed totaling 236,000 acres; and
- Wyoming December 2018 sale: approximately 700,000 acres proposed, virtually all of which covers sage-grouse habitat.

These are only a few examples—other large BLM sales have already occurred in western states.³ Many of these sales, as discussed in more detail below, also violate the prioritization requirements of the 2015 grouse plans by leasing enormous acreage of sage-grouse habitat. BLM must analyze and disclose the cumulative impacts of this wave of leasing

³ Even for the September 2018 sale, BLM has issued two DNAs for lease parcels from the Ely and Elko Field Offices. Those two DNAs do not address each other or assess their combined effects.

Under NEPA, BLM cannot offer millions of acres of leases in Nevada, Wyoming, Montana and other states without considering the cumulative and trans-boundary impacts it will have. Properly analyzing those impacts will require a full EIS, not just an EA.

IV. BLM's FONSI for the Ely District is arbitrary and capricious.

Given the flaws in the DNA for the Ely District described throughout this protest, it would be arbitrary and capricious for BLM to make a finding of no significant impact (FONSI) for this lease sale. BLM has failed to analyze the reasonably foreseeable impacts of developing these lease parcels on sage-grouse, groundwater and other resources discussed herein. Having failed to prepare even an EA for this sale, BLM cannot also assert that impacts will not be significant. FONSI at 2. Moreover, as noted above, BLM's reliance on earlier EAs in the DNA is equally flawed and fails to support a conclusion that the sale of these particular leases will have no significant impacts.

In addition, the magnitude of this lease sale – covering approximately 295,000 acres (more than 460 square miles) – makes it highly implausible to conclude that it will not have a significant impact on the environment. BLM must prepare an EIS because leasing on this scale plainly may result in significant impacts.

An apparent error in the FONSI illustrates the lack of support for BLM's approach: after noting that 145 parcels have been nominated for leasing, the FONSI states incorrectly that an "Environmental Assessment encompassed the 145 parcels Lease stipulations (as required by Title 43 CFR 3131.3) would be added to any parcels offered for lease sale to address site-specific concerns or new information not identified in the land use planning process." Ely FONSI at 1 (emphasis added). BLM, however, has not prepared an EA for this lease sale. As a result, the agency has no way to know what "site-specific concerns or new information" exist for these parcels—and does not appear to have added any stipulations to address site-specific conditions. BLM's proposed FONSI is arbitrary and capricious, and only highlights the need for BLM to do more analysis before offering these parcels. *See Davis v. Mineta*, 302 F.3d 1104, 1123-25 (10th Cir. 2002) (reversing FONSI that was arbitrary and capricious).

Much of the rationale for the FONSI relies on the assumption that further NEPA analysis can be performed at the drilling permit stage. NEPA, however, does not allow BLM to defer the missing analysis until the APD stage. "All environmental analyses required by NEPA must be conducted at "the earliest possible time." *Id.*; 40 C.F.R. § 1501.2. This is especially important here, because issuance of the leases represents an irreversible commitment of resources that will limit BLM's ability to preclude drilling activities in the future. As the Tenth Circuit has held, "assessment of all reasonably foreseeable impacts must occur at the earliest practicable point, and must take place before an irretrievable commitment of resources is made." *New Mexico*, 565 F.3d at 718 (quotation omitted).

Similarly, the FONSI's statement that there will be no adverse impacts to ESA-listed species, and no violations of law, because consultation will occur at the drilling permit stage ignores the requirement to consult at the earlier possible point, as discussed later in this protest.

V. BLM has failed to analyze impacts to inventoried lands with wilderness characteristics.

Lands with wilderness characteristics (LWC) are one of the resources of the public lands that must be inventoried and considered under FLPMA. 43 U.S.C. § 1711(a); *Ore. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1122 (9th Cir. 2008) (holding that “wilderness characteristics are among the ‘resource and other values’ of the public lands to be inventoried under § 1711”). Instruction Memorandum 2011-154 directs BLM to consider lands with wilderness characteristics in land use plans and when analyzing projects under NEPA, consistent with FLPMA. The IM directs BLM to “conduct and maintain inventories regarding the presence or absence of wilderness characteristics, and to consider identified lands with wilderness characteristics in land use plans and when analyzing projects under [NEPA].”

BLM has not analyzed potential impacts from oil and gas leasing to the inventoried LWC in the Ely District in an existing NEPA document. The following lease parcels overlap with areas that BLM has inventoried and found to possess wilderness characteristics:

LWC Unit 060-504-1a (Diamond Mountains)

- NV-18-09-21—NV-18-09-33
- NV-18-090-39—NV-18-09-41

LWC Unit 034-2012 (Buck Mountain)

- NV-18-09-66
- NV-18-09-68
- NV-18-09-69
- NV-18-09-71
- NV-18-09-74
- NV-18-09-75
- NV-18-09-77
- NV-18-09-78

LWC Unit 0136-2a (Delamar Mountains)

- NV-18-09-107—NV-18-09-110
- NV-18-09-112
- NV-18-09-128—NV-18-09-133
- NV-18-09-135

LWC Unit 0145a-2012 (Delamar Mountains North)

- NV-18-09-108
- NV-18-09-109
- NV-18-09-121—NV-18-09-127
- NV-18-09-135—NV-18-09-144

These LWC units were inventoried since completion of the Ely RMP, and thus BLM has never analyzed potential impacts to these areas from oil and gas leasing and development in a NEPA

document. BLM cannot utilize a DNA to issue leases in these areas, and must defer all of these lease parcels until the agency completes NEPA analysis of potential impacts to wilderness resources from oil and gas leasing. BLM uses DNAs to document its conclusion that no substantial changes have occurred since the existing environmental document was prepared. Departmental Manual Part 516 Section 11.6. In this case, substantial new information has arisen, and changes have occurred, due to BLM identifying new wilderness resources that were not identified at the time the existing environmental document was prepared, and thus a DNA is not acceptable.

Notably, the Interior Board of Land Appeals (IBLA) has held that BLM cannot rely on a DNA when new resource information is available that has not been considered in an existing NEPA document. In *Center for Native Ecosystems*, BLM had prepared a DNA instead of a NEPA document to issue oil and gas leases in an area associated with two prairie dog subcomplexes. The subcomplexes at issue could be used to provide habitat for reintroduction efforts for the endangered black-footed ferret. The DNA relied on several existing environmental documents that analyzed the impact of oil and gas leasing on the parcels as well as other studies on the subcomplexes at issue. IBLA reversed BLM's decision to sell the parcels and remanded, holding that (1) information on the use of prairie dog subcomplexes for ferret reintroduction was new, and (2) BLM failed to take a "hard look" at the environmental impact of oil and gas leasing because the existing environmental documents never considered the impact of oil and gas leasing on subcomplexes used for ferret reintroduction. 170 IBLA 331 (2006).

Here, the existing NEPA document has not considered the impact of oil and gas leasing on the inventoried LWC because they were not analyzed in the Ely RMP. Therefore, BLM must conduct NEPA analysis to consider potential impacts to the LWC areas at stake in this lease sale. Further, BLM should defer leasing in inventoried lands with wilderness characteristics until the agency has considered protective management for those units in a land use planning process with public input.

VI. The proposed lease sale violates FLPMA because it is inconsistent with the governing RMPs.

BLM has not prioritized leasing outside of sage-grouse habitat, as required by the Record of Decision (ROD) and Approved Resource Management Plan Amendments for the Great Basin Region and Nevada and Northeastern California Approved Resource Management Plan Amendment (ARMPA). Under the Great Basin ROD, BLM must:

prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs. This is to further limit future surface disturbance and encourage new development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

ROD at 1-23.

The Nevada and Northeastern California ARMPA echoes this directive, including the following objective:

Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMA and GHMA, and subject to applicable stipulations for the conservation of GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG.

Nevada and Northeastern California ARMPA, p. 2-28 (emphasis added).

FLPMA requires that lease sale decisions comply with their governing land use plans. *See* FLPMA § 302(a), 43 U.S.C. § 1732(a) (“The Secretary shall manage public lands...in accordance with land use plans developed by him under section 1712 of this title...”); *see also* 43 C.F.R. § 1610.5-3(a) (48 Fed. Reg. 20,368 (May 5, 1983)) (“All future resource management authorizations and actions...shall conform to the approved plan.”). Commenting on these provisions, the Supreme Court said,

The statutory directive that BLM manage “in accordance with” land use plans, and the regulatory requirement that authorizations and actions “conform to” those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan.

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 68 (2004). Thus, it is clear that BLM must abide by the ROD and ARMPA in this lease sale. BLM’s leasing decisions, not just its development decisions, must comply with the ROD and ARMPA (“Priority will be given to leasing . . . of fluid mineral resources . . . outside of PHMA and GHMA.”).

In the DNAs, BLM has not even cited the “prioritization” requirement from the ROD and ARMPA, let alone made any attempt at complying with the requirement. We further note that while this lease sale is governed by the 2015 Nevada and Northeastern California ARMPA, which contains a clear and binding requirement to “prioritize” leasing outside of important grouse habitat, the draft amendment to the ARMPA proposed on May 4, 2018 retains and in no way modifies that requirement. *See* Nevada and Northeastern California Draft RMP Amendment and EIS at ES-6 (including “Prioritization of fluid mineral leases outside of PHMA and GHMA” in a list of “Issues and Resources Not Carried Forward for Additional Analysis”).

Further, the U.S. Fish & Wildlife Service (FWS) specifically identified the prioritization requirement as one of the new “regulatory mechanisms” that allowed it to determine that sage-grouse did not warrant an ESA listing. *See* Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858 59,981 (Oct. 2, 2015) (“The Federal Plans prioritize the future leasing and development of nonrenewable-energy resources outside of

sage-grouse habitats.”). By ignoring this requirement in the context of this and other oil and gas lease sales, BLM is undermining FWS’s determination and moving sage-grouse closer to a listing.

Leasing constitutes an irreversible and irretrievable commitment of resources, and in addition a lease gives a lessee the right to develop oil and gas. Form 3100-11 and 43 C.F.R. § 3101.1-2. Thus, it is clear that leasing has tangible impacts that cannot be ignored if BLM is to meet the commitment to prioritize leasing outside of sage-grouse habitats. BLM clearly must apply the prioritization objective from the ROD and ARMPA to this lease sale when parcels are proposed in or near PHMA and GHMA, and explain how its leasing decision complies with that mandate. BLM has failed to do so.

Furthermore, the DNAs do not provide sufficient information to assess whether the leases to be offered comply with the governing RMPs. For example, the Ely DNA has no discussion at all of Ely RMP requirements addressing any resources other than greater sage-grouse. *See* Ely DNA at 1-2. Thus, for virtually all resources that may be affected by these leases, BLM does not appear to have met its obligation under FLPMA to ensure that it manages public lands “in accordance with the [RMPs] developed” under that statute. 43 U.S.C. § 1732(a); *see also* 43 C.F.R. § 1610.5-3(a) (requiring that BLM resource management decisions “shall conform” to the governing plan).

VII. Consultation with the Fish & Wildlife Service is required.

The Endangered Species Act (ESA) provides that, “[e]ach federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 of the ESA establishes an interagency consultation process to assist federal agencies in complying with their duty to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. An agency must initiate consultation with FWS whenever it takes an action that “may affect” a listed species. *See* 50 C.F.R. § 402.14(a). Agencies also must consult with FWS “on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under [ESA Section 4] or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.” 16 U.S.C. § 1536(a)(4); *see also* 50 C.F.R. § 402.10.

Approvals of oil and gas leases are agency actions triggering the consultation obligation. Interior Department regulations implementing the ESA state that examples of triggering actions include, but are not limited to “the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid;” and “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02(c) & (d). “Actions” that courts have recognized “may affect” listed species include oil and gas leasing, along with “all post-leasing activities through production and abandonment.” *Connor v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988); *see also Wisely*, 524 F. Supp. 2d at 1302 (finding that decision by BLM to offer oil and gas leasing on certain parcels triggered BLM’s need to consult with FWS).

The Ely DNA acknowledges that a variety of species listed under the ESA may be present on the lease parcels, including the Mojave desert tortoise, southwestern willow flycatcher, yellow billed cuckoo, Railroad Valley springfish, White River spinedace, White River springfish, Hiko White River springfish and Pahrangat roundtail chub. Ely DNA at 3. The agency relies on the 2017 Programmatic Biological Opinion regarding the Ely RMP to satisfy its consultation requirements for those species. However, BLM appears to have done no analysis of which species covered by that PBO actually may be present on the lease parcels to be offered at the September sale. *See* DNA at 3 (citing 2013, 2014 and 2017 lease sale EAs, which addressed different lands, for list of species that may be present on the September 2018 parcels). BLM has not met its obligation to ensure the leases will not jeopardize the listed species that may be present or adversely modify their critical habitat.

VIII. IM 2018-034 is invalid.

In attempting to sell 144 leases covering nearly 300,000 acres with no public comment or scoping, no NEPA analysis, and only a grossly-inadequate ten-day protest period, BLM is following a process created by Instruction Memorandum (IM) 2018-034, which superseded and replaced the leasing reforms adopted in IM 2010-117. The new IM, however, was issued in violation of the notice-and-comment requirements of the Administrative Procedure Act (the APA) and is thus invalid. BLM may not rely on its invalid IM for this lease sale.

IM 2018-034 directs BLM to expedite its oil and gas lease sale process, and encourages the agency to minimize environmental review and public participation. Such an approach impedes informed decision-making, increases public controversy and prioritizes energy development above other resources and uses in violation of the multiple use mandate established in FLPMA. By allowing BLM to virtually eliminate the opportunity for public participation, and reducing the protest period to 10 days, IM 2018-034 effectively alters the substantive rights and interests of TWS and the public, and thus represents a substantive rule subject to the notice-and-comment requirements of the APA.

As implemented here, IM 2018-034 purports to allow the agency to provide no notice of which parcels would be offered at the September lease sale until a 10-day protest period, and without preparing any environmental analysis at all. BLM's implementation of the new IM has deprived the public of meaningful opportunities to comment, eliminated any updated or site-specific impacts analysis, and foreclosed our opportunity to prepare and file an adequate protest of the sale.⁴ With such a short review period for 295,000 acres of public land offered for lease, we are precluded from developing an effective protest that meets the required elements for making our case and exhausting the issues. For example, on this short timeline we are unable to complete a detailed review of the governing RMPs to identify any points of non-compliance. We also have large amounts of field data from inventory work we have completed in Nevada over several years, which we did not have adequate time to sort through and develop substantive comments informed by ground-truthed knowledge.

⁴ We further note that BLM did not provide GIS data for the proposed parcels until 3 days after the Notice of Competitive Lease Sale was posted, reducing the time to meaningfully review the parcels to 7 days.

Prior to issuance of IM 2018-034, BLM generally prepared environmental assessments of proposed lease sales and provided opportunities for meaningful public involvement and feedback.⁵ Public notice of parcels being considered for inclusion in BLM lease sales was provided months ahead of time. BLM was required to undertake an inter-disciplinary review, to visit proposed parcels, and to provide for public participation in the leasing process, all of which provided the opportunity for BLM to understand the values at stake and to understand and address public concerns. After an opportunity for public comment, BLM also provided the public with 30 days to evaluate, and if necessary file, a protest. BLM had 60 days prior to a lease sale to resolve protests. That process, which was set forth in IM 2010-117, did not impact our rights or impose significant new burdens on our ability to engage in the leasing of public lands and minerals. By contrast, IM 2018-034 imposes significant burdens on our participation in the leasing process, as described above. BLM's issuance of IM 2018-034 without notice-and-comment rulemaking violated the APA, and this lease sale cannot proceed under the procedures established by the invalid IM.

Perhaps even worse, IM 2018-034 creates a one-sided burden on requests that BLM defer lease parcels: it requires consultation with BLM's Washington, DC headquarters to defer parcels, but not to dismiss protests and proceed with a lease sale. These steps, outlined in IM 2018-034, effectively alter the substantive rights and interests of TWS and the public, and thus cannot be implemented without notice-and-comment rulemaking. BLM violated the APA by issuing the new IM without following notice and comment. BLM's abrupt issuance of new guidance did not provide a sufficient, reasoned explanation for the significant reversals in process and rights, which we and other stakeholders have relied upon since 2010. Because IM 2018-034 was promulgated in violation of law, BLM cannot undertake the sale of the protested parcels using the process established by the new IM.

Conclusion

We hope to see BLM complete needed analysis and fully comply with applicable law and guidance prior to proceeding with leasing the protested parcels.

Sincerely,



Nada Culver, Director and Senior Counsel
The Wilderness Society
1660 Wynkoop Street, #850
Denver, CO 80202
303-225-4635
nada_culver@tws.org

⁵ Instruction Memorandum 2010-117 at 12.