WYOMING OUTDOOR COUNCIL, ET AL.

IBLA 2003-358, 2004-52 Decided September 21, 2006

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, dismissing protests to competitive oil and gas lease sales. WY-0204-065 through WY-0204-067, WY-0204-079, and WY-0204-085; WY-0208-065.

Decisions affirmed.

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

A BLM decision dismissing a protest challenging the approval of a competitive oil and gas lease sale will be affirmed as to the sale parcels for which the appellant has established standing, when the record shows that existing environmental documentation provided BLM with a hard look at the environmental consequences of leasing, supporting the conclusion that the impacts from exploration and development of coalbed methane would not be significantly different from those associated with conventional oil and gas exploration and development.

APPEARANCES: Keith G. Baurle, Esq., Earthjustice, Denver, Colorado, and Bruce Pendery, Esq., Wyoming Outdoor Council, Logan, Utah, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Wyoming Outdoor Council (WOC) has appealed the August 18, 2003, decision of the Deputy State Director, Wyoming State Office, Bureau of Land Management (BLM), upholding dismissal of WOC's protests of a proposed sale of oil and gas leases on lands administered by the Rawlins Field Office (RFO). WOC filed a protest dated April 1, 2002, challenging the April 9, 2002, offering of 95 parcels for competitive oil and gas lease sale in various BLM Field Offices on the basis that the subject leases overlie subsurface coal seams that are projected to be developed for the extraction of coalbed methane (CBM). WOC also filed a protest dated September 26, 2002, challenging on the same basis the October 1, 2002, offering of 31 parcels for lease sale in various Field Offices. Of the 126 parcels offered in the two sales, 30 are in the RFO. [1/] The Board docketed this appeal as IBLA 2003-358.

WOC, Natural Resources Defense Council (Wyoming), Wyoming Wildlife Federation, Sierra Club, and Defenders of Wildlife (collectively referred to as WOC), have appealed the October 7, 2003, decision of the Acting Deputy State Director, BLM, dismissing in part and deferring in part protests of the offering of 79 parcels on public lands administered by various BLM Field Offices at the competitive lease sale held on August 6, 2002. [2/] The Board docketed this appeal as IBLA 2004-52.

Factual and Legal Background

These appeals concern whether the environmental analyses underlying the Great Divide Resource Management Plan (RMP) and Environmental Impact Statement (EIS), formerly known as the Medicine Bow RMP, as reviewed by the RFO in a series of "Interim Determination of Land Use Plan Conformance and NEPA Adequacy" worksheets (DNAs), are adequate to support the proposed sales. Specifically, WOC argued that the predominant use for the proposed leases would

[1/] The RFO parcels offered at the April 2002 sale are WY-0204-063, WY-0204-065 through WY-0204-075, WY-0204-079 through WY-0204-082, WY-0204-085 through WY-0204-087, WY-0204-093 through WY-0204-096, and WY-0204-103 through WY-0204-107. The two RFO parcels offered at the October 2002 sale are WY-0210-058 and WY-0210-059.

[2/] The competitive oil and gas lease sale was held on Aug. 6, 2002. Although BLM received WOC's protests on Aug. 5, 2002, the State Director elected to include the protested parcels in the sale while the merits of the protests were being considered, as authorized by 43 CFR 3120.1-3. WOC's appeal initially pertained to 12 parcels located in the RFO that were sold.

be CBM development, and that, although the EIS underlying the Great Divide RMP had addressed the environmental effects of oil and gas leasing in general, those documents either completely failed to mention CBM development or inadequately addressed the unique and significant impacts associated with that development.

The Board addressed the subject of whether the Great Divide RMP/EIS and related environmental analyses were adequate to support oil and gas lease sales in the RFO in Wyoming Outdoor Council (WOC III), 158 IBLA 384 (2004), in which WOC appealed a BLM decision to offer parcels on lands administered by various BLM Field Offices, including the RFO, at BLM's April 4, 2000, competitive oil and gas lease sale. That appeal, docketed by the Board as IBLA 2000-309, also concerned whether the lease sale conformed to the Great Divide RMP/EIS, and whether existing documents prepared to comply with section 102(2) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2) (2000), supported BLM's proposal. [3/]

In WOC III, the Board reversed BLM's decision as it related to certain parcels of land administered by the RFO and remanded the matter to BLM, stating:

> Because the Great Divide RMP/EIS does not constitute the requisite hard look at the environmental consequences of offering the parcels for leasing, BLM was required to perform further NEPA analysis before deciding whether to approve the sale of the parcels at issue. The DNAs, which depended totally on the Great Divide RMP/EIS, failed to identify any of the relevant areas of environmental concern or

[3/] In its Jan. 7, 2004, order granting WOC's petition for stay in IBLA 2004-52, the Board also denied WOC's motion that IBLA 2003-358, IBLA 2004-52, and IBLA 2000-309 be consolidated. In this motion, WOC explained that the decisions in all three appeals were based upon the revised DNA prepared by the RFO in response to the Board's remand in WOC III. In requesting that these appeals be consolidated, WOC observed that the issuance of the leases raise identical legal and factual questions, and that the Board's resolution "in all three cases will turn on whether the new DNA can refute" the Board's holding in WOC III, and "prove that CBM extraction is no different from conventional gas extraction in the RFO." (Motion to Consolidate, IBLA 2003-358, at 4; Motion to Consolidate, IBLA 2004-52, at 4.)

> reasonable alternatives to the proposed action and thus do not satisfy BLM's NEPA obligations in this case. See WOC [I], 156 IBLA [347,] 359 [(2002)].

158 IBLA at 394.

In response to the Board's remand, the RFO undertook a review of its existing environmental documentation related to the Great Divide RMP and related environmental analyses, resulting in the preparation of a revised DNA dated July 29, 2003 (revised or New DNA). This New DNA, challenged by WOC in an appeal docketed as IBLA 2000-398, was reviewed by the Board in Wyoming Outdoor Council (WOC IV), 160 IBLA 387 (2004). The Board held in WOC IV that BLM had met its NEPA requirements, in that the RFO had analyzed the Great Divide RMP/EIS, as well as "all the other NEPA documents listed therein in reaching its conclusion that the existing NEPA documentation 'fully covers the proposed action and constitutes compliance with the requirements of NEPA.'" 160 IBLA at 402, quoting New DNA at 15, Ex. 2 to WOC's Motion to Consolidate. The Board ruled that BLM had "taken a hard look at the environmental impacts of leasing the two parcels at issue in this appeal and is fully informed of the consequences of leasing those parcels." 160 IBLA at 403. WOC challenges this holding on the basis, as discussed infra, that it "is no longer good law." (Notice of Supplemental Authority (NSA) at 6.) For the reasons that follow, we reject WOC's challenge to WOC IV and uphold the RFO's assessment, as documented by the New DNA, that the inclusion of the parcels in the subject lease sales conforms to the Great Divide RMP/EIS constitutes an adequate analysis of the impacts of leasing these parcels for CBM .

IBLA 2003-358

In its Supplemental Statement of Reasons (SSOR), WOC stated that while its appeal in IBLA 2003-358 originally covered protests of BLM's decisions to offer certain lease parcels in its April and October 2002 lease sales, it "ha[d] conducted, in the interim, a refined analysis allowing it to limit" IBLA 2003-358 to parcels that have "very good potential" for CBM development within the area administered by the RFO. (SSOR at 1.) Thus, WOC voluntarily dismissed its appeal in IBLA 2003-358 with respect to all parcels except WY-0204-065 through WY-0204-067, WY-0204-079, WY-0204-085, WY-0204-106, and WY-0204-107. The Board issued an order dated August 31, 2004, that WOC show cause why IBLA 2003-358 should not be dismissed in its entirety for lack of standing, given that WOC had not provided evidence "showing use of each particular parcel to which the appeal relates." On September 21, 2004, WOC filed a response attaching a declaration showing that a member of WOC had visited and used parcels

WY-0204-065 through WY-0204-067, WY-0204-079, and WY-0204-085, but stating that it had "not been able to find a member who has used or visited parcels WY-0204-106 or -107." Thus, WOC established standing with regard to parcels WY-0204-065 through WY-0204-067, WY-0204-079, and WY-0204-085.

By decision dated May 21, 2003, the Deputy State Director dismissed in part and affirmed in part WOC's protests to the offering at its April 9, 2002, competitive oil and gas lease sale of 105 parcels administered by various BLM Field Offices, including the RFO. (Stay Petition, IBLA 2003-358, Ex. 3.) Citing this Board's decisions in WOC I, 156 IBLA 347 (2002), Wyoming Outdoor Council (On Reconsideration) (WOC II), 157 IBLA 259 (2002), and the appeal therefrom then pending in Pennaco Energy, Inc. v. U.S. Department of the Interior (Pennaco I), 266 F.Supp. 1323 (D.Wyo. 2003), BLM determined to (1) defer further action on parcels in the Buffalo Field Office until a decision in Pennaco I was issued; (2) defer further action on parcels in the Pinedale Field Office until consultation regarding the Canada lynx was completed pursuant to section 7(a) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a) (2000); and (3) defer issuance of 28 oil and gas leases in the RFO pending action in response to the Board's remand in WOC III. (May 21, 2003, Decision at 2.) He responded to WOC's protest allegations in detail, stating that there

> is not a high potential for CBM on many of the parcels that were protested. In most areas of Wyoming, we do not know what the impacts of CBM exploration and development will be, because CBM exploration is either non-existent or relatively rare. As explained throughout this response, to date, in areas where CBM exploration and development have occurred (outside the PRB [Powder River Basin]), the impacts associated with CBM are the same as the impacts addressed and identified in the applicable RMP/EIS. Where the pre-leasing hard-look analysis has already occurred, it is unnecessary to perform any additional pre-leasing NEPA analysis.

Id. at 6. Leases for all other parcels protested by WOC were to be issued.

By decision dated June 24, 2003, the Deputy State Director similarly dismissed in part and affirmed in part WOC's protest of the competitive sale held on October 1, 2002, at which 32 parcels in various Field Offices, including the RFO, were offered. (Stay Petition, IBLA 2003-358, Ex. 4.) Again citing the remand in WOC III, BLM

determined to defer issuance of two oil and gas leases in the RFO. [4/] Leases for all other parcels protested by WOC were to be issued. (June 24, 2003, Decision at 2.) The Deputy State Director's responses to WOC's protest allegations were otherwise virtually identical to the responses contained in his May 21, 2003, protest decision.

Meanwhile, on May 30, 2003, the U.S. District Court for the District of Wyoming issued its decision in Pennaco I, 266 F. Supp. 2d 1323 (D.Wyo. 2003). As noted, to fulfill the Board's direction on the remand in WOC III, BLM prepared its New DNA dated July 29, 2003. (Stay Petition, IBLA 2003-358, Ex. 5.)

On August 18, 2003, the Deputy State Director issued the subject decision dismissing WOC's protests, as identified above, as they pertain to the lease parcels remaining at issue IBLA 2003-358. In that decision, he explained that the New DNA complied with WOC III, and found that the environmental impacts of CBM development are similar to the environmental impacts associated with other natural gas development in the RFO area. "Based in large part on the analysis of 11 previously performed CBM environmental documents and CBM drilling and production that has occurred to date in the RFO area," he concluded that those "impacts have been identified and analyzed in the Great Divide RMP[/EIS]," as documented by the New DNA. Thus, perceiving no further reason to defer leasing, the Deputy State Director dismissed the protests. (Stay Petition, IBLA 2003-358, Ex. 7 at 2.)

In its Petition for Stay of the August 18, 2003, decision, WOC argued that it was likely to succeed on the merits [5/] of its appeal because, in its view, BLM's updated DNA worksheet "squarely contradicts the explicit findings of this Board that the Great Divide RMP/EIS 'analyzed only the impacts of conventional oil and gas development and neither alluded to nor evaluated CBM-related effects.'" (Petition for Stay, IBLA 2003-358, at 3, quoting WOC III, 158 IBLA at 392.) In his July 29, 2003, memorandum to the Acting State Director accompanying the New DNA, the Field Manager, RFO, explained that the RFO had prepared the "new DNA to determine if

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[4/] Lease issuance was deferred for WY-0210-058 and WY-0210-059. (June 24, 2003, Decision at 1.)

[5/] Under 43 CFR 4.21(b)(1), a party must demonstrate that a stay is justified based on the relative harm to the parties, the likelihood of success on the merits, the likelihood of immediate and irreparable harm to the moving party if the stay is not granted, and whether granting the stay is in the public interest. The burden of showing that issuance of a stay is justified under the rule rests with the appellant. 43 CFR 4.21(b)(2); The Wilderness Society, 151 IBLA 346, 348 (2000).

the exploration and development of methane gas from coal reservoirs is within the broad impacts predicted from the development of oil and gas resources described in the current land use plan." He stated that the "updated DNA worksheet * * * confirms [that] the exploration and development of methane gas from coal reservoirs is in conformance with the GDRMP [Great Divide RMP]." WOC challenged BLM's having "gone back and conglomerated '11 previously performed CBM environmental documents and CBM drilling and production that has occurred to date in the RFO area' in an attempt to justify its earlier reliance on the RMP/EIS." (Petition for Stay, IBLA 2003-358, at 6, quoting the Deputy State Director's Aug. 18, 2003, Decision.) WOC characterized BLM's updated DNA as a "post-hoc examination of project-level and site-specific NEPA documents to support its leasing decision." (Petition for Stay, IBLA 2003-358, at 6.)

The Board determined that WOC had failed to demonstrate, under 43 CFR 4.21, a likelihood of success on the merits concerning whether BLM's pre-leasing NEPA analysis adequately supported its conclusion that CBM exploration and development conformed with the Great Divide RMP and related environmental documents. In our order, we noted that BLM stated that two of the parcels did not overlie coal and that the other three parcels are in a township and range where applications for permit to drill (APDs) in coal reservoirs have been filed. We stated therein:

> We have scrutinized the Great Divide RMP/EIS and conclude that its analysis of oil and gas impacts adequately analyzed impacts associated with potential CBM exploration and development in the RFO area, which is located outside the Powder River Basin. Although BLM did not flag CBM as a discrete topic in the draft and final EIS's, those documents did address the issues typically associated with natural gas production in general and CBM production in particular (e.g., water volume, quality, discharge/disposal, contamination of surface and groundwater, sodium adsorption ratio (SAR), and the uses to which produced water can be put). Thus, in Table 8, the draft EIS enumerated applicable water quality parameters, including SAR, for fish and aquatic life, and for underground water for domestic, agricultural, and livestock uses. (Draft EIS at 140-41.) The Draft EIS acknowledged that the energy industry uses groundwater for extraction and processing, and that the "petroleum industry is the largest user." (Draft EIS at 149.) Moreover, citing data from the Wyoming Department of Environmental Quality (WDEQ), the Draft EIS noted that "[t]he energy industry is creating potential sources of aquifer contamination at a very rapid pace," and named "[p]etroleum-related

injection wells" and oil field holding ponds, among others, as potential sources of aquifer contamination. (Draft EIS at 152.) In the chapter on Environmental Consequences, the final EIS described the portions of the planning area that were to be subject to surface disturbance restrictions, and these included riparian areas and perennial surface water, among others. (FEIS at 107.)

The Oil and Gas Appendix (O&G Appendix) to the FEIS noted that a water supply is required and that a permit issued by the State Engineer is also required, whether the source is a well, stream, or pond. (O&G Appendix at 460.) The Critical Watersheds section of the Soils, Water and Air Appendix (SWA Appendix) states that new oil and gas leasing would continue subject to standard stipulations, and that special practices to control erosion and protect water quality will be prescribed on a case-by-case basis in the context of processing an APD, and that any watershed problem or improvement not addressed in an oil and gas reclamation plan, activity management plan or habitat management plan "will be addressed and mitigated through watershed activity plans." (SWA Appendix at 465.) Central water disposal sites, "[p]roduced water and mud pit design, including liners, proper compaction, and location away from major ephemeral drainages," and "irrigation/watering to establish vegetation" are listed among the general practices designed to control erosion and improve water quality. (SWA Appendix at 465.) Moreover, it is clear that WDEQ's air and water quality standards are to be applied to oil and gas operations as the standards in the planning area. (SWA Appendix at 466.)

We reviewed the comments on the draft EIS and BLM's responses thereto as well. Although no one, not even WOC, specifically raised CBM-produced water as a topic of concern, issues relating to the handling and disposition of produced water were raised. BLM's responses to individual comments, coupled with its general responses, confirm that it did indeed consider the questions typically relevant to CBM, at least as they might arise in south-central Wyoming outside the Powder River Basin. See, e.g., Response 2 to Letter 18; Response 6 to Letter 112; Response 4 to Letter 114; Responses 2, 8 to Letter 115; and Response 6 to Letter 154.

Given these facts and circumstances, WOC has not persuaded us that, in this case, it is likely to prevail on the merits of the question of the adequacy of the pre-leasing NEPA analysis; as a consequence, we

> find that WOC's showing regarding the remaining elements necessary to justify issuance of a stay also fails. [Footnotes omitted.]

(Order, IBLA 2003-358 (Nov. 19, 2003), at 6-7.)

In its order denying WOC's request for stay, the Board afforded WOC the opportunity to file a further pleading. On December 15, 2003, WOC filed an SSOR, arguing that with the leasing decisions at issue, the RFO "took a blind leap when it issued leases authorizing exploration, production, and full-field development of CBM without ever taking the requisite 'hard look' at the environmental impacts of CBM development." (SSOR at 7.) However, WOC has presented no additional evidence which changes the Board's evaluation of the Great Divide RMP/EIS and related environmental documentation, as reflected in the RFO's New DNA, and as upheld in WOC IV.

IBLA 2004-52

On December 19, 2003, WOC filed a pleading styled Statement of Reasons and Response to Government's Opposition to Petition for Stay (SOR/Response) in which WOC stated that it "has conducted a refined analysis of the RFO lease parcels sold in the August 2002 lease sale that has allowed it to limit this appeal to the parcel, WY-0208-065, that has a very good potential for coalbed methane ('CBM') development." WOC requested dismissal of its appeal as to all other parcels offered in the August 2002 sale. (SOR/Response at 2.) By order dated January 7, 2004, [6/] the Board granted WOC's request.

Also in its January 7, 2004, order, the Board granted WOC's request for a stay of the October 7, 2003, decision of the Acting Deputy State Director at issue in IBLA 2004-52. Citing the decision and remand in WOC III, the Acting Deputy State Director determined that the July 29, 2003, DNA prepared by the RFO supported the conclusion that "the environmental impacts associated with CBM development are similar to the environmental impacts associated with other natural gas development in the RFO area." (Decision, IBLA 2004-52, at 23.) As in the August 18, 2003, decision at issue in IBLA 2003-358, he stated that the New DNA is "[b]ased in large part on the analysis of 11 previously performed CBM environmental documents and CBM drilling and production that has occurred to date." Id. He agreed with the RFO Manager's conclusion that the impacts of CBM drilling and production have been

[6/] When it issued this order, the Board inadvertently dated it Jan. 7, 2003, rather than Jan. 7, 2004. However, the return-receipt cards correctly referred to the Board's order of Jan. 7, 2004, so that possible confusion should have been minimal.

identified and analyzed in the Great Divide RMP. He further determined that the 12 protested parcels should not be withheld from leasing, and that it was not necessary to "reconfigure BLM's oil and gas leasing program in the RFO area." Id.

In its petition for stay, WOC referred to and relied upon the factual and legal bases advanced in the appeal docketed as IBLA 2003-358. In addition, WOC cites a map prepared by Douglas C. Pflugh (SOR/Response, Ex. 1) which shows that "parcel WY-0208-65 is located in the middle of an area delineated by the Rawlins Field Office as having high potential for CBM development," and that the parcel is located "within the boundaries of the Atlantic Rim CBM Project, which is forecast by the BLM to contain upwards of 3,880 CBM wells." (SOR/Response at 2.) WOC argues that these facts demonstrate that the parcel shows "very good potential for CBM exploration and/or development," which it characterizes as a "probability that WY-0208-65 will experience CBM extraction." Id.

Pertinent to our current review, the Board summarized WOC's arguments showing its likelihood of success on the merits as follows:

> WOC argues that it is likely to succeed on the merits, because the new DNA does not cure BLM's failure to perform an adequate NEPA analysis before issuing leases, and in any event, the new DNA does not support the conclusion that the GDRMP considered the environmental impacts of CBM development. (Petition at 7-12.) In support, WOC enumerates the ways in which CBM impacts on ground and surface water associated with disposal of produced water volumes (Petition at 8-9), the quality of produced water (Petition at 9), and methane migration to the surface (Petition at 10). WOC challenges BLM's representation of produced water volumes from conventional gas projects compared to CBM projects, arguing that BLM has failed to identify the number of wells in each project and hence the true volumes of produced water at issue. (Petition at 11.) WOC further contends that none of the NEPA documents identified in the new DNA constitutes an adequate pre-leasing environmental analysis, because "[n]either the Great Divide RMP/EIS nor any of the project level EA's [Environmental Assessments] listed by the BLM in its new DNA analyzed whether stipulations, including those preventing surface occupancy, should have been included in the disputed leases to address the unique impacts of CBM development." (Petition at 13.)

(Order, IBLA 2004-52 (Jan. 7, 2004), at 3.)

BLM opposed WOC's petition for stay by attaching and incorporating by reference the opposition it filed in IBLA 2003-358, the relevant portions of which were summarized above in the Board's November 19, 2003, order. In its January 7, 2004, order, the Board acknowledged that WOC's appeal in IBLA 2004-52 "presents some similarities to IBLA 2003-358." Id. at 5. BLM argued that only three of the 12 parcels overlie subsurface coal seams (WY-0208-050, WY-0208-065, and WY-0208-068), and only one (WY-0208-065) "has any CBM development around it." (Opposition at 2.) BLM argued that "even though there are surrounding sections containing some CBM wells, neither section 11 [n]or section 12, which are part of parcel 65, have CBM wells within them." Id. BLM characterized the potential for CBM exploration in sections 11 and 12 as a mere possibility. Id. at 2-3.

In ruling that WOC had demonstrated a likelihood of success on the merits regarding WY-0208-065, the Board provided the following examination of evidence submitted by WOC:

> [BLM's] stance fails to acknowledge or respond to the evidence submitted by WOC. WOC has provided a color-coded map of the protested lease parcels (Ex. 1 to SOR/Response), which appears to be consistent with the map BLM included in the September 2001 EA prepared for the Sun Dog Pod of the Atlantic Rim Coalbed Methane Project (Sun Dog EA). Compare Sun Dog EA, Figures 1-1 and 1-2, with Ex. 1 to SOR/Response. BLM has determined that the impacts associated with CBM exploration and development in the Atlantic Rim project area are significant, and accordingly, has determined to prepare an environmental impact statement (EIS) to analyze those impacts. The Atlantic Rim CBM EIS was scheduled to begin in late summer 2001 and was to require two years to complete. (Sun Dog EA at 2-1.) In the meantime, BLM has determined to proceed with CBM exploration pursuant to the Interim Drilling Policy, utilizing EA's to fulfill NEPA's requirements, under which the drilling of up to 200 exploratory wells will be permitted. (Sun Dog EA at 2-1 and Appendix A thereto.) The Sun Dog Pod is one of nine areas or "pods" where exploratory wells will be located.
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> Exhibit 1 to the SSOR places parcel WYO-0208-065 inside the Atlantic Rim Project area, apparently in or very near pod nine. In addition, WOC has provided an excerpt from the Mineral Occurrence and Development Potential Report for the Rawlins Resource Management Plan Planning Area (RMPPA) prepared by ENSR Corporation for BLM in February 2003 (MODP Report). (Ex. 2

to SSOR.) That Report looks at development potential during the period 2001 through 2020. Figure 4-28 from that Report characterizes the Atlantic Rim area as one possessing "high potential" for CBM development. The MODP Report recognizes that CBM development is not as important as conventional oil and gas development (MODP Report at 4-1), and that it is "very early in the life of the CBM play in the RMPPA" and that "[v]ery little information is presently available about its viability as an economic play" (MODP Report at 4-46.) However, the MODP Report also acknowledges that, although

> there is very little development history, the BLM anticipates that as many as 4,850 wells may be drilled between 2001 and 2020. Eleven wells were drilled in 2002 (Figure 4-27) and approximately 90 wells were drilled in 2002. For the rest of the 20-year period, new wells are expected to be drilled at an average rate of 264 per year. The actual drilling rate in any year could vary widely from this average.

(MODP Report at 4-46.) Thus, although it is too early to predict whether the CBM potential in the RFO will result in a large play, "[i]f pilot projects prove that a viable CBM resource over a large area exists and gas prices are favorable, drilling and production could increase at a rapid rate." (MODP Report at 4-49.)

In denying the stay in IBLA 2003-358, we were persuaded that the GDRMP's analysis of oil and gas impacts adequately analyzed impacts associated with potential CBM exploration and development in the portions of the RFO area there at issue, in large part because those parcels were outside the Powder River Basin and in areas exhibiting little potential for CBM exploration and development. Absent some objective indicia of the potential for CBM development comparable to that found in the Powder River Basin, we concluded that WOC had not carried its burden of demonstrating that a stay was appropriate. Here, in contrast, parcel WYO-0208-065 is outside the Powder River Basin, but it is also in the very promising Atlantic Rim project area, which BLM believes possesses high potential for CBM development, and for which 200 to 279 exploratory wells are presently envisioned on an interim basis. Moreover, notwithstanding the uncertainty that necessarily inheres in exploration activity, BLM has initiated an EIS to analyze the impacts of CBM exploration and development in the Atlantic Rim

> project area, demonstrating its conviction that potential environmental impacts are significant. [Footnotes omitted.]

(Order, IBLA 2004-52, at 5-7.)

The Board concluded that "it appears WOC is likely to prevail on the merits of the question of the adequacy of the pre-leasing analysis." Id. at 7. However, as discussed infra, we now conclude, in the context of this proceeding, that WOC has not discharged its burden of showing that BLM failed to take a hard look at the environmental consequences of leasing the parcels at issue in IBLA 2004-52.

Analysis

We have previously noted the importance of the remand ordered by the Board in WOC III to BLM's disposition of WOC's protests in IBLA 2003-358 and IBLA 2004-52. Our review of the Board's decision in WOC III begins with the fact that BLM therein considered lease parcels covered by two separate RMPs: Parcels WY-0004-045 and WY-0004-046 were covered by the 1985 Buffalo RMP/EIS and the Wyodak Draft EIS, which comprised the relevant NEPA documentation in WOC I and WOC II; and Parcels WY-0004-072, WY-0004-074, WY-0004-077, WY-0004-080, and WY-0004-099 were covered by the 1990 Great Divide RMP, the 1987 Medicine Bow-Divide Draft EIS, and the 1990 Final EIS for the Great Divide RMP. The Board stated that its resolution of the appeal as it related to Parcels WY-0004-045 and WY-0004-046 was controlled by WOC I and WOC II, given that those matters also involved the Buffalo RMP and EIS, and the Wyodak Draft EIS, and reversed BLM's decision dismissing the WOC's protest as to those parcels and remanded the matter to BLM for further action. With regard to the five parcels subject to the Great Divide RMP/EIS, the Board stated: "That RMP/EIS however, like the Buffalo RMP/EIS, analyzed only the impacts of conventional oil and gas development and neither alluded to nor evaluated CBM-related effects. Therefore, like the Buffalo RMP/EIS discussed above, the Great Divide RMP/EIS does not satisfy BLM's obligation under NEPA to take a hard look at the impacts associated with CBM extraction and development." 158 IBLA at 392. Accordingly, the Board reversed BLM's decision dismissing the WOC's protest as to those parcels and remanded the matter to BLM for further appropriate action.

In WOC IV, the Board stated, with reference to its previous decision in WOC III: "That decision would appear to control our disposition of this case. However, since the issuance of that decision, two events have taken place." 160 IBLA at 392. The first such event was the issuance of the District Court's decision in Pennaco I, which reversed WOC I and WOC II. The District Court stated:

"The extensive and current analysis of the environmental effects of CBM development in the Wyodak EIS reasonably supplemented the pre-leasing alternatives in the Buffalo RMP/EIS so as to provide sufficient information to enable the BLM to take a hard look in this general fashion." 160 IBLA at 393-94, quoting 277 F. Supp. 2d at 1330.

According to the Board, "[t]he second event occurred when, following our remand in 158 IBLA 384, noted above, BLM undertook a new review of its existing environmental documentation resulting in the preparation of a revised DNA." 160 IBLA at 394. In its immediate criticism of the New DNA, WOC asserted that BLM had failed to utilize the "supplementation" theory adopted by the District Court in Pennaco I. According to WOC, BLM "uses the NEPA analyses completed to date in the RFO for small-scale exploratory CBM projects referenced in the DNA solely to confirm that the 'exploration and development of [CBM] is in conformance with GDRMP,' * * * and that the GDRMP/EIS therefore provides, on its own, the requisite NEPA analysis." 160 IBLA at 395, quoting WOC's Response at 9.) Further, WOC asserted that the New DNA offers no document that can "provide the 'extensive and current analysis of the environmental effects of CBM development' that the Pennaco court relied on in concluding that BLM had taken a hard look at the impacts of CBM development, citing Pennaco, 266 F. Supp. 2d at 1330." 160 IBLA at 396. WOC asserted that "BLM's position may only be upheld if CBM exploration and development is no different from conventional gas exploration and development, a proposition, it claims, is wrong based on 'the overwhelming weight of evidence from industry officials, independent scientists, professional consultants, and indeed the agency's own experts.'" 160 IBLA at 396, quoting WOC Response at 11.

In Pennaco Energy, Inc. (Pennaco II) v. U.S. Dep't of the Interior, 377 F.3d 1147 (10th Cir. 2004), the Tenth Circuit Court of Appeals reversed the U.S. District Court's decision in Pennaco I and ordered the reinstatement of this Board's decisions in WOC I and WOC II. In its Notice of Supplemental Authority (NSA), WOC argues that the Tenth Circuit decision, in combination with this Board's decision in WOC III, controls the result in these appeals. (NSA at 1.) WOC emphasizes the Tenth Circuit's conclusion that the "record contain[ed] substantial evidence to support the IBLA's conclusion that CBM development poses unique environmental concerns related to water discharge." (NSA at 3, quoting 377 F.3d at 1159.) Similarly, argues WOC, in WOC III, the Board reached the "same conclusion" with respect to CBM methane development in the RFO, "holding that 'some of the unique effects of CBM extraction' in this area 'includ[e] discharge water with moderately high total-dissolved-solids concentrations and a relatively high sodium-adsorption ratio, surface and ground water quality changes, and drawdown of ground water levels." (NSA at 3, quoting WOC III, 158 IBLA at 393.) Further, WOC points out that the Board has "determined

that the Great Divide RMP/EIS 'only analyzed the impacts of conventional oil and gas development that neither alluded to nor evaluated CBM-related effects.'" (NSA at 4, quoting WOC III, 158 IBLA at 392.) WOC concludes that the Great Divide RMP/EIS, like the Buffalo RMP/EIS in WOC I and WOC II, "does not satisfy BLM's obligation under NEPA to take a hard look at the impacts associated with CBM extraction and development." (NSA at 4, quoting WOC III, 158 IBLA at 392.)

WOC contends that in reversing the District Court decision in Pennaco I, the Tenth Circuit "rejected the District Court's novel interpretation of BLM's NEPA duties that provides the basis for this Board's later decision in [WOC IV]." (NSA at 5.) WOC claims that the Board considered itself bound in WOC IV to follow the District Court's decision in Pennaco I, which the Board found had

> adopted a "supplementation" theory, such that even though a planning-level EIS may not specifically address the effects of CBM exploration and development in its consideration of oil and gas development, BLM may rely on its and other environmental documentation, whether or not the other documentation involves pre-leasing analysis, to fully inform it about a decision to lease for oil and gas, when the exploration and development of CBM is possible.

(NSA at 5-6, quoting WOC IV, 160 IBLA at 393-94.) WOC objects to the Board's holding that "[t]he case record, as supplemented, meets the requirements of NEPA by showing that BLM has taken a hard look at the environmental impacts of leasing the two parcels at issue in this appeal and is fully informed of the consequences of leasing those parcels." (NSA at 6, quoting WOC IV, 160 IBLA at 403.) "That holding," declares WOC, "is no longer good law." (NSA at 6.)

We disagree with WOC's reading of WOC IV and Pennaco II. The following statement of the Board's de novo review authority appears in WOC IV:

> Thus, we are not limited by the record before BLM at the time it denied appellant's protest in this case in determining the correctness of that decision. While we have said many times that BLM must ensure that its decision is supported by a rational basis, which must be stated in the decision as well as being demonstrated in the administrative record accompanying the decision, e.g., Larry Brown & Associates, 133 IBLA 202, 205 (1995); Eddleman Community Property Trust, 106 IBLA 376, 377 (1989), we have also, as a matter of practice, allowed parties to supplement the record on

> appeal. Silverado Nevada, Inc., 152 IBLA 313, 322 (2000). We have accepted data submitted by BLM on appeal in support of its decision, emphasizing that it is our duty to have before us as complete a record as possible. In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983); see B. K. Killion, 90 IBLA 378, 381 (1986).

160 IBLA at 398. See also National Wildlife Federation, 145 IBLA 348, 362 (1998), discussed at length in WOC IV. Nothing in Pennaco II changes the accuracy of the following analysis:

> To the extent the record now shows that impacts for CBM exploration and development for those parcels would generally not be different from the impacts from conventional gas exploration and development of the same parcels, that conclusion results from a review of BLM's examination of the impacts of CBM exploration and development in its New DNA. Such an analysis did not exist in the original record in this case. However, BLM did not change its conclusion and WOC, the organization that had protested the June 2000 sale and sought review of the denial of its protest, received the supplementary information and had an opportunity to respond. Under such circumstances, we believe it was appropriate for this Board to consider this case with the New DNA and the other supplementary information and without the necessity for further public comment.

160 IBLA at 399. This analysis is correct and should not be disturbed.

WOC has given us no reason to retreat from the following discussion in WOC IV, which appears sound throughout:

> WOC insists that we would be required to reverse our decision in Wyoming Outdoor Council, 158 IBLA 384, in order to rule in BLM's favor in this case because we held in that case that the Great Divide RMP/EIS did not constitute the requisite hard look at the environmental consequences of offering the parcels in question for leasing and that BLM was required to perform further NEPA analysis before deciding whether to approve the sale of those parcels. Therein, however, we did not instruct BLM on what analysis was necessary. We did state that "[t]he DNAs, which depended totally on the Great Divide RMP/EIS, failed to identify any of the relevant areas of environmental concern or reasonable alternatives to the proposed action and thus do

> not satisfy BLM's NEPA obligations in this case." 158 IBLA at 392. The fact that BLM continues to rely on the Great Divide RMP/EIS is not dispositive, because on remand BLM undertook an examination of all existing environmental documentation concerning both conventional and CBM gas operations in the RFO management area and prepared the New DNA. It is that new examination that differentiates this case from 158 IBLA 384, and justifies a different result. Thus, we disagree that 158 IBLA 384 must be reversed in order to affirm BLM's determination to lease the two parcels in question in this case.

160 IBLA at 402-03.

Our holding in WOC IV is consistent with recent Board decisions in which we have "recognized that BLM may properly rely on existing land use documents and their associated environmental statements where there is no foreseeable likelihood of CBM development or where the impacts of CBM development do not differ significantly from the effects of oil and gas development already described in existing NEPA documents." Southern Utah Wilderness Alliance (SUWA), 166 IBLA 270, 288-89 (2005). For example, in Western Slope Environmental Resource Council (WSERC), 163 IBLA 262 (2004), which was decided after the Tenth Circuit's decision in Pennaco II, we stated:

> On the present record, appellants have not shown that BLM failed to consider impacts which it contends will be associated with CBM production on the North Fork Valley parcels, principally because they have not shown that the impacts associated with CBM production in other basins, such as Powder River and San Juan, will result from such development and production. Absent an objective showing that the reported impacts on which appellants predicate their case are reasonably likely to occur on the North Fork Valley parcels, we decline to find that appellants have shown error in BLM's decision.
>
> We conclude that the NEPA documentation at issue demonstrates that BLM took the requisite hard look at the environmental consequences of oil and gas development on the North Fork Valley parcels in the Piceance Basin. Given that the effects of CBM production in the Piceance Basin will not significantly differ from conventional oil and gas production, we do not fault BLM for not specifically analyzing the environmental impacts of CBM production in the Piceance Basin per se. As in WOC, 158 IBLA 384 (2003), appellants have not convinced us that BLM erred in including the subject parcels in the

> competitive oil and gas lease sale, "especially since the impacts associated with CBM development will be analyzed in greater detail in site-specific environmental documents prepared for any proposed development on the lease issued for that parcel." Id. at 395. [7/]

163 IBLA at 289-90; see SUWA, 166 IBLA at 289-90; WSERC, 164 IBLA at 340-41, and cases cited.

Also instructive is WOC, 164 IBLA 84 (2004), in which the Board considered consolidated appeals involving two competitive oil and gas lease sales offered by the Pinedale Field Office in Wyoming. As in the present appeal, oil and gas leasing was authorized, but the Pinedale RMP/EIS did contain an analysis of CBM extraction and development. WOC argued that CBM extraction and development did not conform to the Pinedale RMP/EIS "either because current projections of oil and gas development have exceeded that projected in the RMP/EIS's RFD [reasonably foreseeable development] scenario, or because CBM extraction and development generates unique impacts beyond those associated with conventional oil and gas exploration and development." 164 IBLA at 96. Regarding the latter argument, the Board acknowledged the kinds of significant environmental consequences that can be associated with CBM extraction and development (164 IBLA at 103 n.25), but rejecting purely abstract arguments about such potential consequences, the Board stated: "More than a general recitation of possible CBM-related impacts is necessary to discharge the burden of proof on appeal. The Board will look for objective indications of the potential for CBM on the specific parcels at issue." Id. at 104. The Board stated that if it appears a parcel may contain CBM, it would not simply assume that any such potential would result in development or that development would necessarily occur in circumstances comparable to those found in the Powder River Basin. Id.; see also, e.g., SUWA, 166 IBLA at 289.

WOC, 164 IBLA 84, shows how we applied this logic as between two scenarios. In IBLA 2002-126, we held that WOC failed to come forward with "objective, countering evidence to show, as to each parcel, that BLM erroneously relied on the RMP/EIS's environmental analyses to support the decision to offer these parcels for sale." 164 IBLA at 104. We decided that in such circumstances, BLM properly could rely on the pre-leasing analysis contained in the Pinedale

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7/ This portion of WOC III pertained to parcel WY-0004-116, for which the Rock Springs Field Office relied solely on the 1997 Green River RMP/EIS to satisfy its NEPA obligations. The Board stated: "In contrast with both the Buffalo RMP/EIS and the Great Divide RMP/EIS, the Green River RMP/EIS considered CBM before designating lands, as open to oil and gas development." 158 IBLA at 395.

RMP/EIS, because, in the absence of any real and present indications of potential CBM extraction and development, what remained was conventional oil and gas leasing. Id. at 104-05. On the other hand, in IBLA 2002-303, we reached the opposite result. We concluded that "WOC's contention therefore stands unrefuted, circumstantially buttressed by the fact that the RMP is presently being revised to address, among other things, CBM development in the Pinedale Resource Area, and by BLM's admissions and actions in other contexts." Id. at 106 (footnote omitted). Accordingly, we held that the Pinedale RMP/EIS did not constitute the pre-leasing analysis that NEPA requires and reversed and remanded the case for further action as to the parcels involved in IBLA 2002-303.

Our reading of the Tenth Circuit's decision in Pennaco II is not as expansive as that urged by WOC. As noted in SUWA, "the Board's holding sustained in Pennaco [I] may not be properly extended to require further NEPA analysis in cases where there is no foreseeable likelihood of CBM development or where the impacts of CBM development do not significantly differ from those that arise from conventional oil or gas drilling." 166 IBLA at 288. The Tenth Circuit stated that its application of the "arbitrary and capricious standard" is "very limited in its sweep," with the "narrow question before [it as] whether the IBLA acted arbitrarily and capriciously in deciding that the leases at issue should not have been issued before additional NEPA documentation was prepared." Pennaco II, 377 F.3d at 1156. Noting that the record "contains some evidence arguably contrary to the IBLA's findings," the Tenth Circuit stated that "such evidence does not render the IBLA's decision arbitrary and capricious." Id. at 1158. The Tenth Circuit then stated that the Board "did not act arbitrarily and capriciously in deciding that the Wyodak EIS did not adequately supplement the Buffalo RMP/EIS." Pennaco II, 377 F.3d at 1160. The Tenth Circuit did not say that the Board would have acted "arbitrarily and capriciously" had it decided that the Wyokak EIS adequately supplemented the Buffalo RMP/EIS, or, as WOC implies, that BLM could not supplement its NEPA documentation, when including parcels in a competitive lease sale, to address possible, but by no means certain, impacts from CBM exploration and development. WOC IV underscores in emphatic terms the Board's authority to "review[] the record, as supplemented, under our de novo review authority, to reach our conclusion that the record supports the sale and leasing of the parcels in question for oil and gas exploration and development, including for CBM exploration and development." 160 IBLA at 399. The Tenth Circuit's analysis in Pennaco II is consistent with this reasoning.

[1] We must now determine whether, in the present cases, WOC has met its burden of demonstrating with objective proof that the Great Divide RMP/EIS failed to consider a substantial environmental question of material significance to the proposed lease sales. WOC's contention that the parcels are likely to be developed

for CBM, the impacts of which significantly differ from those associated with conventional oil and gas development, does not stand unrefuted. See WOC, 164 IBLA at 105-06. On balance, we conclude that WOC has failed to carry its burden of demonstrating with objective proof that BLM failed to consider a substantial environmental question of material significance to the proposed actions. See, e.g., SUWA, 166 IBLA at 289. In both IBLA 2003-358 and IBLA 2004-52, what WOC describes are impacts commonly associated with conventional oil and gas leasing. WOC presently says little more, in an objective way, than that CBM development is bound to happen, and that the pre-leasing NEPA documentation fails to address CBM development impacts.

WOC emphasizes that the parcels at issue in IBLA 2003-358 and IBLA 2004-52 are within the Atlantic Rim CBM project area, and thus "are likely to be explored and developed to extract coalbed methane." (NSA at 3.) As noted, although WOC filed an SSOR following issuance of the Board's November 19, 2003, order denying WOC's motion for stay in IBLA 2003-358, WOC has presented no evidence which changes the Board's evaluation of the Great Divide RMP/EIS and related environmental documentation, as reflected in the RFO's New DNA. The Board concluded in its November 19, 2003, order, as we now conclude, that the RFO's "analysis of oil and gas impacts adequately analyzed impacts associated with potential CBM exploration and development in the RFO area, which is located outside the Powder River Basin," and that "[a]lthough BLM did not flag CBM as a discrete topic in the draft and final EIS's, those documents did address the issues typically associated with natural gas production in general and CBM production in particular." The Board proceeds to provide a detailed analysis of the evidence in support of its conclusion that "WOC has not persuaded us that, in this case, it is likely to prevail on the merits of the question of the adequacy of the pre-leasing analysis * * *." Id. at 7. This analysis applies as well to the Board's disposition of IBLA 2003-358 on the merits, consistent with SUWA, WSERC and WOC IV.

In turning to IBLA 2004-52, we are met with the fact that in granting the petition for stay therein, the Board distinguished the facts from IBLA 2003-358. However, our present review, in light of WOC IV, leads us to conclude otherwise. In its response to WOC's SOR, BLM states that WOC "provides no additional legal basis for its appeal of this parcel [WY-0208-065], but merely reiterates the arguments made in its Petition for Stay and incorporates the same arguments made in its earlier appeal of the April and October 2002 lease sales (IBLA 2003-358). (Response at 1-2.) BLM stated that "[b]ecause Appellants have not submitted any new or original arguments in regard to this appeal of parcel WY-0208-65, there is nothing additional for BLM to offer in rebuttal." Id. at 2.

The full extent of CBM development in both these cases is speculative, notwithstanding that the parcels are located within the Atlantic Rim area. As BLM points out, "one cannot simply look at the thickness and depth of coal in comparing geologic basins. There are other factors to consider, e.g., reservoir pressure, depositional environments, structural complexity and a host of other factors that make each and every basin geologically unique." Id. at 8. Thus, whether full-field CBM development is foreseeable, or even likely, is only one factor in evaluating the adequacy of BLM's environmental analyses. [8/] As important is the question whether the anticipated impacts of CBM development are sufficiently different from the impacts evaluated in BLM's environmental analysis regarding conventional oil and gas development. See WSERC, 163 IBLA at 298-90. In the present cases, the record shows the validity of BLM's position that "[e]nvironmental impacts, including impacts from produced water have been shown to be extremely unlikely." (Government's Supplemental Answer at 10; see Affidavit of Lloyd Chism, Government's Supplemental Answer, Ex. 5.)

That the Tenth Circuit reversed the District Court in the Pennaco litigation does not mean that the Board's analysis in WOC IV was flawed, and is "no longer

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[8/] The February 2003 MODP Report (SSOR, Ex. 2) acknowledges that, although

"there is very little development history, the BLM anticipates that as many as 4,850 wells may be drilled between 2001 and 2020. Eleven wells were drilled in 2001 (Figure 4-27) and approximately 90 wells were drilled in 2002. For the rest of the 20-year period, new wells are expected to be drilled at an average rate of 264 per year. The actual drilling rate in any year could vary widely from this average." (MODP Report at 4-46.)

In its Jan. 7, 2004, order at 6, quoting the MODP Report at 4-49, the Board stated: "Thus, although it is too early to predict whether the CBM potential in the RFO will result in a large play, '[i]f pilot projects prove that a viable CBM resource over a large area exists and gas prices are favorable, drilling and production could increase at a rapid rate.'"

BLM emphasizes that the MODP Report "is a twenty year projection of RFO resources and is very speculative in nature." (MODP Report at 4-46.) In addition, the MODP Report states that "[i]t is very early in the life of the CBM play in the Rawlins RMPPA. Very little information is presently available about its viability as an economic play." Id. While the MODP Report does state that "[i]nitial pilot programs indicate that CBM resources are present and will be developed at least in local areas" (MODP Report at 4-49), BLM counters that "this does not mean that the resources will be developed throughout the Atlantic Rim project area" (Government's Supplemental Answer at 7).

good law," as contended by WOC. We are struck by the irony of WOC's argument, offered in its SSOR, that this Board should honor its conclusion in WOC III that "the Great Divide RMP/EIS does not satisfy BLM's obligation under NEPA to take a hard look at the impacts associated with CBM extraction and development." (SSOR at 12, quoting WOC III, 158 IBLA at 392.) WOC states:

> "Under the principle of stare decisis, rules of law established by prior Departmental decisions are binding precedent" and may only be overruled when found to be erroneous. (SSOR at 12, quoting United States v. Vernard E. Jones, 106 IBLA 230, 246 (1988), citing United States v. Union Carbide Corp., 31 IBLA 72 (1977); United States v. Winegar, 16 IBLA 112, 166-80, 81 I.D. 370, 392-98 (1974). Put another way, "[i]f [this Board is] to pay more than lip service to the doctrine of stare decisis [it] must adhere to [its prior decisions], unless there is some compelling reason to the contrary." Robert L. Beer, et al., 25 IBLA 287-292 (1976).

(SSOR at 12.) WOC now asks us to overrule WOC IV, seeing a "compelling reason" in the Tenth Circuit's decision in Pennaco II.

In viewing WOC III and WOC IV as entirely consistent, we do more than pay lip service to the doctrine of stare decisis; we emphasize that the Board decided both decisions correctly: "It is [BLM's] new examination that differentiates this case from 158 IBLA 384, and justifies a different result." WOC IV, 160 IBLA at 401-02. Thus, in WOC III, the Board found that BLM's exclusive reliance on the Great Divide RMP/EIS was deficient under NEPA, while in WOC IV the Board found that BLM had established through its review of existing environmental documentation that the impacts from potential CBM exploration and development would not be different from conventional oil and gas exploration and development and that such documents supported the sale and leasing of the parcels in question. The Tenth Circuit's ruling in Pennaco II does not require differently, as argued by WOC. In these cases, BLM's New DNA identifies other supplemental NEPA documentation which adequately supported BLM's decisions to approve the sale of the subject parcels.

Thus, we affirm BLM's decisions herein based upon the fact that WOC has not shown with objective proof that BLM failed to consider a substantial environmental question of material significance to the proposed action, i.e., that the impacts of CBM exploration and development differ significantly from the effects of oil and gas development as described in existing NEPA documents. See SUWA, 166 IBLA at 288-89, citing WOC, 164 IBLA at 103-05, and WSERC, 163 IBLA at 289-90.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions are affirmed.

James F. Roberts
Administrative Judge

ADMINISTRATIVE JUDGE PRICE CONCURRING SPECIALLY:

The dispute in this case is about whether the EIS for the 1988 Great Divide RMP analyzed the impacts of CBM exploration and development as part of the decision to open lands in the resource area to oil and gas leasing. The Great Divide RMP/EIS contained no mention of CBM. That fact, coupled with the knowledge that CBM extraction can result in extraordinary impacts, as experience has shown, is the backbone of WOC's assertion that BLM was compelled to undertake further environmental analysis before BLM properly could authorize leasing for CBM. In Wyoming Outdoor Council, 158 IBLA 384 (2003), decided before the District Court decision in Pennaco Energy, Inc., 266 F. Supp. 2d 1323 (D. Wyo. 2003), this Board determined that the Great Divide RMP/EIS, standing alone, had not analyzed those impacts, and remanded the case for further action. On remand, BLM prepared a new "Documentation of Land Use Plan Conformance and NEPA Adequacy" (DNA) in which BLM unmistakably signaled its reliance on the District Court's decision in Pennaco Energy to support its conclusion that no further action was required by section 102(2)(C) of the National Environmental Policy Act, as amended, 42 U.S.C. § 4332(2)(C) (2000), to proceed with the lease sales. (DNA at 6.) [1/] It undertook the new DNA review and documentation to satisfy the Board's remand order, listing all the NEPA documents which supported the decision to offer these parcels for sale. (DNA at 1.) In February 2004, in Wyoming Outdoor Council, 160 IBLA 387 (2004), this Board concluded that the NEPA documents identified in the newly expanded DNA discharged BLM's obligations under NEPA. In August 2004, the District Court was reversed in Pennaco Energy, Inc., 377 F.3d 1147. The DNA considered in Wyoming Outdoor Council, 160 IBLA 387, is again before us and, because these

[1/] This Board and the courts have repeatedly cautioned that a DNA is not a NEPA document. It is nothing more than a worksheet that BLM uses to ascertain the status of its compliance with the NEPA obligation triggered by the proposed action, an oil and gas lease sale. See Southern Utah Wilderness Alliance, 166 IBLA 270, 282-83 (2005), citing Pennaco Energy, Inc., 377 F.3d 1147, 1162 (10th Cir. 2004). It is BLM's responsibility, in a protest decision, in the DNA, or in its appeal briefing, to provide specific citations to each NEPA document to support the assertion that such analyses are relevant to a decision to lease the particular parcels at issue. Manifestly, BLM cannot simply assert that a NEPA document "covers" the proposed action, and it cannot rely on NEPA documents prepared after the date of the leasing decision on appeal. For the latter reason, BLM cannot rely on the Desolation Flats Natural Gas Field Development Project Draft EIS issued in April 2003 to support the April and October 2002 lease sales now before us.

appeals relate to 2002 lease sales, the parties' arguments have momentarily revived the reasoning expressed in 160 IBLA 387 to embrace what the Board described as the Pennaco District Court's "supplementation theory." See SSOR at 13-17.

While I generally agree with my colleague, I write separately to emphasize that, whatever may be urged regarding the proper import and impact of the 10th Circuit's reversal on this Board's precedents, the decision in Wyoming Outdoor Council, 160 IBLA 387, marks an important point in the Board's approach to the question of whether existing pre-leasing environmental analyses, often silent on the topic of CBM, nevertheless may be adequate for CBM exploration and extraction. Although these appeals arose in the wake of the District Court's decision in Pennaco Energy, it is clear that today, post-Pennaco Energy, the task of ascertaining the adequacy of pre-existing environmental analyses for CBM-related impacts is no longer properly described in terms of a "supplementation theory" or at all grounded in any idea that the RMP/EIS is supplemented merely by identifying other NEPA documents in a DNA.

When BLM asserts that no further NEPA analysis is required for a proposed action, the Board has, like the courts, accepted the idea that a DNA is appropriately used to identify the NEPA documents that furnish support for that conclusion. Southern Utah Wilderness Alliance, No. 2:04CV574 DAK, 2006 U.S. Dist. LEXIS 53621, at *35-36 (D. Utah Aug. 1, 2006); Pennaco Energy, Inc., 377 F.3d at 1162; Southern Utah Wilderness Alliance, 164 IBLA 1, 30 n.12 (2004), and cases cited. In finding that idea acceptable, we have necessarily concluded that a NEPA document is not the only or a necessary vehicle to demonstrate that an existing analysis is adequate as a pre-leasing analysis for the sale of parcels likely to be explored or developed for CBM. When the parcels at issue are likely to be explored and developed for CBM, the real question is whether, when the NEPA documents listed in the DNA are examined, the Board can conclude that an earlier RMP/EIS environmental analysis of the impacts of oil and gas leasing constitutes an adequate pre-leasing analysis. The issue clearly is not whether the other NEPA documents identified in a DNA "supplement" the environmental analysis that undergirds the RMP/EIS, because that question plainly implicates *tiering* from one NEPA document to another. See 40 CFR 1508.28. The crux of the matter is the quality and completeness of the oil and gas leasing impacts analysis contained in the RMP/EIS for CBM activities, fundamentally a product of BLM's assumptions about what is likely to occur in the planning area as a result of that activity, and therefore the essential query is whether the additional environmental analyses identified in a DNA either confirm the continuing validity of the assumptions relied upon in the RMP/EIS

for its impact analyses, or, in the alternative, demonstrate the existence of new facts and circumstances that negate or limit those assumptions so that further analysis is required before the proposed action can go forward.

BLM has responded to WOC's challenge with five arguments why the Great Divide RMP/EIS is adequate as a pre-leasing NEPA analysis for these parcels: (1) CBM is a fluid gas mineral covered by the decision to open the resource area to oil and gas leasing; (2) the impacts of CBM exploration and development are not different from other gas extraction activities; (3) there is little chance that conditions in southwestern Wyoming will rival those found in the Powder River Basin; (4) exploratory efforts have not yet proven that extraction of CBM can be produced economically in southwestern Wyoming; and (5) the NEPA documents identified in the DNA confirm the foregoing, so that the RMP/EIS oil and gas leasing analysis is adequate for these lease sales.

The first argument is in reality a land use conformance question that arises under the Federal Land Policy and Management Act, 43 U.S.C. § 1712 (2000). CBM exploration and development is in general a conforming use, but it is possible that the impacts of an action can be so far beyond those anticipated in the land use planning decision as to render the use non-conforming and raise a NEPA issue. WOC so argues. (SSOR at 37-39.) We have acknowledged as much. See, e.g., Wyoming Outdoor Council, 164 IBLA 84, 103 n.25 (2004). BLM's remaining arguments are therefore designed to show that, contrary to WOC's assertions, there is no such issue in these appeals. Therein lies the substantive basis on which Judge Roberts and I have agreed these appeals should be decided.

This Board has stated that an allegation that CBM extraction and development will result in impacts that exceed those analyzed in the relevant pre-leasing environmental analysis must be supported by some objective indication that a lease parcel potentially contains CBM. That standard informs our decisionmaking at two junctures. Initially, it serves as a threshold standard to forestall either arguments that assume that any and all CBM extraction and development must result in impacts of the kind and magnitude that occur in, for example, the Powder River Basin, the most obvious instance in which CBM-related impacts required further NEPA review, or arguments that are reduced to mere abstractions because the geophysical facts wholly negate CBM potential. Here, the parcels at issue are within the Atlantic Rim CBM project area. The record shows that BLM and the industry have committed to exploration for and development of the CBM resource in that project area, so that WOC has satisfied the initial threshold showing.

Once that threshold is crossed, we properly proceed to the second point when the standard is applied, that is, on the merits of whether WOC has demonstrated with objective evidence that the nature and extent of CBM-related impacts are different from or in magnitude exceed the impacts of conventional oil and gas leasing projected for, and analyzed in, the RMP/EIS. I agree with Judge Roberts that, in these cases, WOC has not carried its burden on the merits. The decisions in IBLA 2003-358 and IBLA 2004-52 therefore should be affirmed because the NEPA documents identified in the DNA, considered for the purpose just articulated above, lead to the conclusion that the impacts of CBM exploration and extraction in the Rawlins planning area do not exceed those assumed for all oil and gas leasing activity.

The DNA cites those portions of the RMP/EIS that discuss topics that can become particularly acute in CBM extraction, such as produced water volumes and water disposal methods. See DNA at 5. These topics were identified and addressed in the Board's November 19, 2003, and January 7, 2004, orders acting on the stay petitions in both appeals. The RMP/EIS was premised on a Reasonably Foreseeable Development (RFD) scenario for all oil and gas leasing activity that is a function of well numbers and surface disturbance, as well as assumptions about the methods, techniques, equipment, and facilities that would be employed in exploration and development, and resulting impacts, projected over a 20-year period. See Oil and Gas Appendix to RMP/EIS. The RMP/EIS assumed 34,355 acres (1,717.75 acres per year) would be disturbed by oil and gas development over the 20-year period (RMP/EIS at 97), representing approximately 1,440 wells (RMP/Draft EIS at 220).

In the section of the DNA that considers whether the RMP/EIS analysis remains valid in view of any new information or circumstances, the DNA identifies 11 "applicable NEPA document(s) and other related documents that cover the proposed action." In reality, those 11 documents represent six projects: the Draft and Final EIS and ROD for the MetFuel Hanna Basin CBM project; the Draft and Final EIS and ROD for the Continental Divide/Wamsutter II (CD/WII) Natural Gas project; the Draft EIS for the Desolation Flats Natural Gas Project; three environmental assessments (EAs) for the Atlantic Rim CBM project; and the EAs for the Seminoe Road and Hanna Draw CBM projects. The Desolation Flats Draft EIS is not relevant for the reason noted above. The explanation of why the remaining documents pertain to the proposed action consists of the following:

> None of the aforementioned documents amended decisions made in the GDRMP. However, all discuss the process for extracting natural gas, including gas from coal reservoirs. These documents contain predicted impacts that could occur from recently-proposed exploratory activities

> in the planning area. The assumptions and methodologies in the above document[s] were compared to those employed in the GDRMP to predict resource impacts from natural gas development. Based on these analyses, methods used to explore the potential for natural gas development from coal reservoirs are found to be the same as those used to drill for natural gas from other reservoirs. Furthermore, the same general type of ancillary facilities are needed (i.e., access roads, compressors, water and product pipelines, water disposal facilities, re-injection wells, etc.) to support natural gas production, regardless of the gas reservoir. Therefore, based on the complementary methods of exploration and development, the GDRMP is adequate to support oil and gas leasing where potential exists for exploration and development of natural gas from coal reservoirs.

(DNA at 4.)

The MetFuel Hanna Basin CBM Project proposed 123 wells in 1992 using "primarily standard drilling and production procedures, as currently employed in natural gas field developments throughout Wyoming and the surrounding region." (MetFuel Draft EIS at 2-1.) Assuming initial disturbance of 1,018 acres for all well pads and facilities and a total life-of-project disturbance of 430 acres, that project EIS was tiered to the RMP/EIS and was deemed consistent with the decisions made therein. (MetFuel Final EIS at 1-5.)

The 1999 CD/WII Draft EIS proposed 930 wells at a point when 1,145 wells had been drilled in the Resource Area since 1985, leaving 295 wells that could be drilled as part of the CD/WII project. Noting that the RMP/EIS assumed long-term surface disturbance of 11.2 acres per well, the CD/WII Draft EIS stated that experience had shown that the long-term disturbance is 9 acres per well, but even that revised figure was deemed to be an "overestimation." (CD/WII Draft EIS at 1-8.) Nonetheless, using the 9-acre figure, the CD/WII Draft EIS recalculated BLM's estimate of acreage remaining under the RMP/EIS that could be disturbed at 4,587 acres and concluded that the CD/WII project would exceed the RFD projected under the RMP/EIS:

> Monitoring and tracking of well development since the completion of the RMP will continue. BLM initiation of a RFO land use plan review and possible amendment will occur prior to reaching the reasonably foreseeable disturbance estimates made in the current RMP, and the BLM will not authorize oil and gas actions (APDs, ROWs) that exceed current reasonably foreseeable disturbance estimates prior to the [Great

> Divide] plan review and possible amendment. Based on the long-term disturbance acreage required per well for the [CD/WII] project (2.77 acres) approximately 1,655 wells could be authorized in the RFO area under the existing reasonably foreseeable disturbance acreage estimate (i.e., 1,655 wells = 4,587 acres of available long-term disturbance divided by 2.77 acres per well).
>
> The 20-year planning period for the RFO extends until approximately year 2005 and, if authorized, the [CD/WII] Project is estimated to be less than 30% developed by this date (i.e., <621 well locations; <1,718 acres long-term disturbance within the RFO area.

(CD/WII Draft EIS at 1-9.)

The January 2001 Seminoe Road CBM EA proposed 19 CBM wells, 6 of which would be on Federal land, and total initial disturbance of 46.1 acres and 21.8 acres for the life of the project. (Seminoe Road EA at 14.) The Decision Record and Finding of No Significant Impact (DR/FONSI) at 2 concluded that the project is within the assumptions of the RMP/EIS, presumably including the RFD.

The January 2002 Hanna Draw CBM project EA analyzed the impacts of drilling 16 new wells, to be added to 9 wells that had been drilled on private property. The project is within the MetFuel Hanna Basin CBM project area and was tiered to that EIS. Like the MetFuel CBM project, it states that it is also within the assumptions on which the RMP/EIS was premised. (Hanna Draw EA at 5.)

As for the three Atlantic Rim CBM Pod EAs prepared in December 2001 (Sun Dog Pod), June (Cow Creek Pod) and July (Blue Sky Pod) 2002, they are part of a 200-well Interim Drilling Policy (IDP) designed to acquire information and data to be used in the Atlantic Rim CBM Project EIS. The IDP's 200-well limit is within the RFD analyzed in the RMP/EIS. See, e.g., IDP at A-1, Appendix A to Sun Dog Pod EA; Appendix A to Cow Creek and Blue Sky EAs. [2/] The majority of WOC's factual allegations in support of the unique impacts of CBM extraction is based on its view of the impacts associated with the Atlantic Rim exploratory pods. However, this Board has determined that BLM's FONSIs for the Blue Sky and Cow Creek Pods were well-supported and properly issued and, at least by implication, that those analyses demonstrated that CBM exploration would not result in impacts that exceed those

[2/] WOC's appeal of the Sun Dog EA and FONSI, docketed as IBLA 2004-11, was dismissed on WOC's motion by order dated Dec. 18, 2003.

addressed in the RMP/EIS. National Wildlife Federation, 169 IBLA 146 (2006). In that decision, we also held that, because CBM is a fluid gas mineral, a land use planning decision that opens a planning area to oil and gas leasing opens it to CBM exploration and development as well. 169 IBLA at 152-53 and cases cited. Therefore, the appeal turned not on whether CBM activity conforms to the Great Divide RMP land use decision authorizing oil and gas activity, but whether there are any environmental impacts associated with CBM activity beyond those resulting from conventional oil and gas activity, rendering them "unique" impacts or impacts never addressed in the EIS and, if so, whether the EA adequately analyzed them. See National Wildlife Federation, 169 IBLA at 153.

At the point when these appeals arose, the RFD for the planning area had not been exceeded. It appears that there is merit to BLM's statement that methods and techniques have actually improved over time beyond those contemplated in the RMP/EIS, resulting in less surface disturbance than anticipated. That development, coupled with WOC's failure to acknowledge the impact of mandatory compliance with applicable statutory and regulatory requirements, particularly those governing air and water quality, and water discharges, or the mitigation measures imposed at both the planning area and project levels, provides an adequate basis for concluding that WOC has not persuasively demonstrated that CBM-related impacts will exceed those assumed for all oil and gas activity in the planning area under the RMP/EIS. Therefore, the hard look at the environmental consequences of oil and gas leasing reflected in the RMP/EIS suffices for CBM activity on these parcels.

One other circumstance influences the outcome here. According to the DNA, "[t]wo amendments and eight maintenance actions have been completed since the ROD was signed." (DNA at 4.) No further information is provided about the details of those RMP review actions, apart from a statement that the last plan evaluation occurred in July 2001. However, the Board is aware that revision of the Great Divide RMP was a priority for the RFO. See BLM Instruction Memorandum 2002-81. The Board's library includes a copy of the December 2004 Draft EIS for what will be known as the Rawlins RMP, which will replace the Great Divide RMP. That plan revision or amendment was initiated to address a number of deficiencies in the Great Divide RMP, including the fact that fluid mineral development was approaching the RFD contained in the existing RMP/EIS. (Rawlins RMP/Draft EIS at 1-7.) Therefore, even if it is assumed that CBM development in the planning area eventually will result in impacts rivaling those of the Powder River Basin as WOC contends, so that further NEPA analysis is required, it is clear that, in the pending Rawlins RMP revision or amendment and in the forthcoming cumulative impacts analysis

supporting the Atlantic Rim Project EIS, BLM is moving forward to do that which WOC demands in consequence of its FLPMA and NEPA arguments. [3/] See Wyoming Outdoor Council, 164 IBLA at 103.

Therefore, for the foregoing reasons and those set forth in Judge Roberts' opinion, I concur.

_____
T. Britt Price
Administrative Judge

[3/] The fact that the RMP revision or amendment process has not been completed furnishes no independent basis for challenging these decisions. Nothing in 43 CFR Part 1610 or in Council of Environmental Quality regulations requires BLM to suspend leasing until a plan revision is concluded. In Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140 (1992), the Board rejected the argument that BLM must suspend action that conforms with an existing land use plan when it decides to prepare a new plan. The Board has also held that 40 CFR 1506.1(c) does not apply where the proposed action is covered by an existing environmental statement, thus repudiating the contention that ongoing environmental studies bar BLM from acting until such studies have been completed. In Re Bryant Eagle Timber Sale, 133 IBLA 25, 29 (1995); see also ONRC Action v. BLM, 150 F.3d 1132, 1140 (9th Cir. 1998) ("ONRC asserts that because the RMPs are outdated, they cannot be existing program plans as stated in NEPA. This argument is unfounded."). See also Wyoming Outdoor Council, 156 IBLA 377, 384-85 (2002).