Director's Protest Resolution Report

Amendments for Allocation of Oil Shale & Tar Sands Resources

March 19, 2013

BLM

Contents

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Reader's Guide

How do I read the Report?

The Director's Protest Resolution Report is divided into sections, each with a topic heading, excerpts from individual protest letters, a summary statement (as necessary), and the Bureau of Land Management's (BLM) response to the summary statement.

Report Snapshot

Issue Topics and Responses
NEPA

Issue Number: PP-CA-Rew-13-0020-10
Organization: The Forest Organization
Protester: John Smith

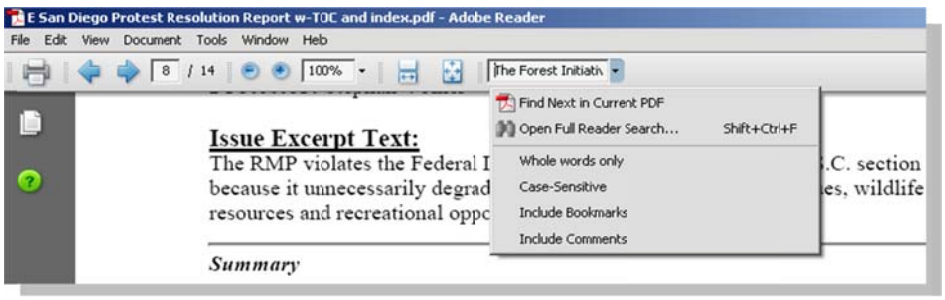
Issue Excerpt Text:
Rather than analyze these potential impacts, as required by NEPA, BLM postpones analysis of renewable energy development projects to a future case-by-case analysis.

Summary
There is inadequate NEPA analysis in the PRMP/FEIS for renewable energy projects.

Response
Specific renewable energy projects are implementation-level decisions rather than RMP-level decisions. Upon receipt of an application for a renewable energy project, the BLM would require ….

How do I find my Protest Issues and Responses?

1. Find your submission number on the protesting party index which is organized alphabetically by protester's last name.
2. In Adobe Reader search the report for your name, organization or submission number (do not include the protest issue number). Key word or topic searches may also be useful.



List of Commonly Used Acronyms

ACEC	Area of Critical Environmental Concern
ACHP	Advisory Council on Historic Preservation
APA	Administrative Procedures Act
APD	Application for Permit to Drill
BA	Biological Assessment
BLM	Bureau of Land Management
BMP	Best Management Practice
BO	Biological Opinion
CAA	Clean Air Act
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
COA	Condition of Approval
CSU	Controlled Surface Use
CWA	Clean Water Act
DM	Departmental Manual (Department of the Interior)
DOI	Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
EO	Executive Order
EPA	Environmental Protection Agency
ERMA	Extensive Recreation Management Area
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act of 1976
FO	Field Office (BLM)
FR	Federal Register
FWS	U.S. Fish and Wildlife Service
GAO	Government Accountability Office
GIS	Geographic Information Systems
GSG	Greater Sage-Grouse
IB	Information Bulletin
IM	Instruction Memorandum
IQA	Information Quality Act
LWC	Lands with Wilderness Characteristics
MOU	Memorandum of Understanding
MW	Mega Watt
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act of 1969
NHPA	National Historic Preservation Act of 1966, as amended
NOA	Notice of Availability
NOI	Notice of Intent
NRHP	National Register of Historic Places
NSO	No Surface Occupancy
NTT	National Technical team
OHV	Off-Highway Vehicle
OMB	Office of Management and Budget
OSTS	Oil Shale and Tar Sands
PEIS	Programmatic Environmental Impact Statement
PGH	Preliminary General Habitat
PPH	Preliminary Priority Habitat
RD&D	Research, Development, and Demonstration
RFDS	Reasonably Foreseeable Development Scenario
RMP	Resource Management Plan
RMPA	Resource Management Plan Amendment
ROD	Record of Decision
ROW	Right-of-Way
SHPO	State Historic Preservation Officer
SO	State Office
SRMA	Special Recreation Management Area
T&E	Threatened and Endangered
USC	United States Code
USGS	U.S. Geological Survey
VRM	Visual Resource Management
WA	Wilderness Area
WO	Washington Office
WSA	Wilderness Study Area
WSR	Wild and Scenic River(s)

Protesting Party Index

Protester	Organization	Submission Number	Determination
Jim Tozzi	Center for Regulatory Effectiveness	PP-WO-OilTar-13-01	Denied—Issues & Comments
Craig Meis, Janet Rowland, and Steve Acquafresca	Mesa County, Colorado Board of County Commissioners	PP-WO-OilTar-13-02	Dismissed – Comments Only
Kirk Wood, Ronald Winterton, and Kent Peatross	Duchesne County Commission	PP-WO-OilTar-13-03	Denied – Issues & Comments
John Martin	Garfield County Board of County Commissioners	PP-WO-OilTar-13-04	Denied – Issues & Comments
Raymond Ridge	Excalibur Industries, Inc.	PP-WO-OilTar-13-05	Denied – Issues, Comments
Rikki Lauren Hrenko	Enefit American Oil	PP-WO-OilTar-13-06	Granted in Part – Issues & Comments
Emily Kennedy	American Petroleum Institute	PP-WO-OilTar-13-07	Denied – Issues & Comments
Kathleen Clarke	State of Utah Public Lands Policy Coordination Office	PP-WO-OilTar-13-08	Denied – Issues & Comments
Mike McKee, Brent Gardner, and Kent Connelly	Uintah County Board of Commissioners, Utah Association of Counties, Lincoln County Board of Commissioners, Coalition of Local Governments, Sweetwater County Board of Commissioners, Sweetwater County Conservation District, Lincoln Conservation District	PP-WO-OilTar-13-09	Granted in Part – Issues & Comments
Taylor McKinnon, Ethan Aumack, Eric Huber, and John Weisheit	Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club	PP-WO-OilTar-13-10	Denied – Issues & Comments
Brad McCloud	Environmentally Conscious Consumers for Oil Shale	PP-WO-OilTar-13-11	Denied –Issues & Comments
Bruce Schlanger	American Oil Shale, LLC	PP-WO-OilTar-13-12	Denied – Issues & Comments
Erik Molvar,	Biodiversity Conservation	PP-WO-OilTar-13-13	Granted in Part –

Protester	Organization	Submission Number	Determination
Jonathan Ratner, and Michael Painter	Alliance, Western Watersheds Project, and Californians for Western Wilderness		Issues & Comments
Bruce Pendery and Warren Murphy	Wyoming Outdoor Council and Wyoming Association of Churches	PP-WO-OilTar-13-14	Granted in Part – Issues & Comments
Kathleen Zimmerman	National Wildlife Federation	PP-WO-OilTar-13-15	Denied – Issues & Comments
Joro Walker, Mike Chiropolos, Bobby McEnaney, and Stephen Bloch	Western Resource Advocates, Natural Resources Defense Council, Southern Utah Wilderness Alliance	PP-WO-OilTar-13-16	Denied – Issues & Comments
Kai Turner, Shawn Bolton, and Ken Parsons	Rio County Board of County Commissioners	PP-WO-OilTar-13-17	Denied – Issues & Comments
Lionel Trepanier		PP-WO-OilTar-13-18	Dismissed – Submitted Late

Issue Topics and Responses

Federal Land Policy and Management Act

Issue Number: PP-WO-OilTar-13-09-66
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Consequently, when BLM decides to close more than 5,000 acres of public land to mineral leasing, BLM must comply with the procedures in Section 204 of FLPMA. BLM has failed to do so in violation of FLPMA. Prior to issuance of the OSTS PFEIS and corresponding land use plan amendments, therefore, BLM must identify and publish notice of a withdrawal as it affects the approximately 1,323,000 acres of oil shale lands and 301,000 acres of tar sands lands classified as closed to mineral leasing, seek public comment and prepare a report to Congress that conforms to the issues set out in Section 204(c), 43 U.S.C. § l7l4(c)(1)-(12).

Summary

The Proposed Resource Management Plan Amendments (RMPA) close public lands to mineral leasing. The BLM did not comply with the procedures for mineral withdrawal in Section 204 of Federal Land Policy and Management Act of 1976 (FLPMA).

Response

As defined by FLPMA §103(j), the term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry under some or all of the general land laws for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land . . . from one department, bureau or agency to another department, bureau or agency (43 U.S.C. §1702(j)).

Withdrawals are one method of excluding public lands from one or more uses. While withdrawals are discretionary on the part of the Secretary, as explained in Section 202(e) of FLPMA, the Section 204 withdrawal process is only required when the Secretary of the Department of the Interior (Secretary) decides to exclude lands from hard rock mining under the

General Mining Law of 1872, or to transfer lands to the jurisdiction of another department, bureau or agency. Besides these two circumstances, however, the Secretary may employ the land use planning process described in section 202, to exclude lands from one or more particular uses, such, as, for instance, oil and gas leasing, or, as relevant here, leasing of oil shale or tar sands resources.

National Environmental Policy Act (NEPA)

NEPA - Public Involvement

Issue Number: PP-WO-OilTar-13-06-24
Organization: Enefit American Oil

Issue Excerpt Text:

BLM has arbitrarily finalized its proposed 2012 RMP Amendments under a schedule that prevents stakeholders from reviewing and commenting on the impact of any proposed changes to BLM's related commercial oil shale leasing regulations.

BLM scheduled the public comment period on the proposed changes to the RMP Amendments to end before BLM issued revised regulations for oil shale leasing, thereby preventing stakeholders from considering closely related information as they prepared comments in response to the 2012 PEIS. Enefit Comment letter, at 21-22. In response, BLM claims that the proposed amendment to the 2008 oil shale regulation is not "closely related" to the RMP amendments. BLM Response, at 157-58.

However, for current RD&D lessees such as Enefit, the proposed rule amendment directly affects the interpretation of BLM's 2012 RMP revisions. Enefit concern about the impact of the rule change on the RMP amendments is well founded in light of commitments BLM made in its settlement agreement to propose amendments to the 2008 OS Regulation that address the royalty rate and environmental protection requirements for oil shale leasing.

Issue Number: PP-WO-OilTar-13-07-13
Organization: American Petroleum Institute

Issue Excerpt Text:

BLM also violated the APA by precluding the opportunity to provide informed comments given that proposed and closely-related rules for amending existing oil shale regulations were not available during the public comment period.

Summary

The BLM violated the Administrative Procedures Act (APA) by scheduling the public comment period on the Draft RMPA and Programmatic Environmental Impact Statement (PEIS) to end before issuing revised regulations for oil shale leasing, thereby preventing stakeholders from considering closely related information.

Response

As addressed in the Comment Response Document of the Final PEIS, the Proposed RMPA allocations and any proposed amendment to the oil shale rule are distinct proposed actions, and not "closely related" so as to warrant discussion as a "connected action" under 40 CFR 1508.25, or to necessitate coordination of the public comment period for either process. Any proposal to lease oil shale or tar sands, with or without a rule, must be consistent with the applicable land use plan. The PEIS reassesses the appropriate mix of allowable uses with respect to opening lands for future oil shale and tar sands leasing and potential development. Therefore, any proposed amendment to the oil shale rule is not discussed as a "connected action" in the Final PEIS, nor did the BLM extend the 90-day public comment period for the Draft PEIS (Final PEIS, Comment Response Document, p. 164).

NEPA - Cumulative Impacts

Issue Number: PP-WO-OilTar-13-10-10
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

In Utah, oil shale and tar sands are found on BLM lands as well as on are both State and Tribal lands; in Utah's Uintah Basin, the State has authorized development of both tar sands and oil shale. BLM is required but in this case failed to evaluate the impacts of the present and future development activities of oil shale and tar sands of all lands in Utah as a NEPA cumulative impact analysis.

Issue Number: PP-WO-OilTar-13-16-12
Organizations: Western Resource Advocates, Natural Resources Defense Council, and Southern Utah Wilderness Alliance

Issue Excerpt Text:

Even given the limited scope of BLM's cumulative impact analysis, the PEIS fails to address the cumulative environmental consequences of its decision to open 750 square miles of federal lands to industrial development. That BLM undertake adequate cumulative analysis is particularly warranted because oil shale and tar sands development in Utah will likely entail strip mining and 100% surface disturbance. This development will also occur in the Uinta Basin, an area already subject to intense oil and gas development and the adverse environmental impacts associated with fossil fuel extraction. In addition, the 140,000 acres of existing oil shale and tar sands leases on non-federal lands, coupled with the 486,000 acres of federal lands open to possible development, put at significant risk Utah's communities, ecological resources, and air and water quality.

Most fundamentally, BLM failed to address together the impacts of both reasonably foreseeable tar sands and reasonably foreseeable oil shale development in Utah. Such analysis is mandated because, on the whole, these open parcels are concentrated in a single area of the state and because this region is already beset by environmental harms stemming from oil and gas development.

Issue Number: PP-WO-OilTar-13-16-14
Organizations: Western Resource Advocates, Natural Resources Defense Council, and Southern Utah Wilderness Alliance

Issue Excerpt Text:

The same can be said for the Green River and its tributaries. Existing oil and gas development is already adversely impacting this river system - both in terms of reduced water quality and quantity. Similarly, the reasonably foreseeable impacts on the Green River from development on lands already leased for oil shale and tar sands, some of which are already subject to industrial activity, will be substantial. BLM's decision to add to these harms by opening almost one half a million additional acres for development could send this area into an environmental free fall. Yet, these potential impacts are not adequately addressed in the

PEIS. Extending this analysis indicates that cumulative impacts on air quality, ground water and ecosystem health will be profound, yet the PEIS does not tackle these collective harms.

Summary

The cumulative impacts analysis within the Final PEIS failed to evaluate present and future oil shale and tar sands development activities on state and tribal lands in Utah; to consider existing oil and gas development and lands already leased for oil shale and tar sands; and to address together the impacts of both reasonably foreseeable tar sands and reasonably foreseeable oil shale development in Utah.

Response

Section 6.1.6 of the Final PEIS states that cumulative impacts presented in the Final PEIS are "in the context of other major activities in the study areas on both BLM-administered and non-Federal lands that could also affect environmental resources and the socioeconomic setting." Section 6.1.6.2 further articulates that "past, current, and planned future activities on BLM-administered lands and also on non-federal lands were obtained mainly from various BLM RMPs and EISs available through the field offices to obtain their best current estimates for projected activities in the areas of oil and gas development (both on public and private lands), coal development, other minerals development, energy development, and other activities." According to Table 6.1.6-4 and 6.2.6-4: "Projected Levels of Major Activities for Seven Planning Areas Considered in the Cumulative Impacts Assessment for Oil Shale Development and Tar Sand Development in Utah," the potential of oil shale and tar sands on non-Federal lands in Utah is currently unknown. At this time, reasonable foreseeable development scenarios and affected environment information from existing RMPs/EISs are the best information available to the agency for developing cumulative impacts for this PEIS.

The protestor also suggests that existing oil and gas development and lands already leased for oil shale and tar sands were not considered in the cumulative effects portions of the Final PEIS (related to collective effects on existing resources). However, effects from other energy development in oil shale and tar sands areas have been considered in the cumulative impacts analysis sections of the PEIS, as depicted by the projected levels of major activities provided in Final PEIS Table 6.1.6-4 for oil shale and Table 6.2.6-4 for tar sands. The cumulative effects analysis summarizes the current and planned activities (e.g., oil and gas development, coal mining, minerals development) for the study area and offers a preliminary qualitative assessment of the impacts of those activities, combined with possible future oil shale and tar sands development, including but not limited to air, water, wildlife, and communities in the study area.

The cumulative impact analysis, however, is limited by the broad nature of the planning level allocation decisions under analysis as well as the level of uncertainty and speculation regarding the locations and magnitude of future oil shale and tar sands development. Prior to leasing (when site-specific and technology-specific data will be available) or approval of a plan of development (when accurate information on water use, air emissions, employment, and the like will be available), additional environmental analysis will be performed, including a cumulative analysis, as appropriate.

Finally, the protestor claims that the Final PEIS failed to jointly address the impacts of both reasonably foreseeable tar sands and reasonably foreseeable oil shale development in Utah. While the discussion of impacts in Chapter 4 is split between the oil shale and tar sand alternatives, the final decision will be based on the collective analysis of all of the impacts. The BLM will ensure that any commercial oil shale and tar sand program meets the intent of Congress, is consistent with the requirements of the National Environmental Policy Act (NEPA) and FLPMA, takes advantage of the best available information and practices to minimize impacts, and offers opportunities for states, tribes, local communities, and the public to be involved at each decision point.

NEPA - New Technology

Issue Number: PP-WO-OilTar-13-03-6
Organization: Duchesne County Commission

Issue Excerpt Text:

The proposed action is in violation of40 CFR 15.02.24, 40 CFR 1502.24. Methodology and scientific accuracy. "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix."

Findings: In this case, the BLM has failed to ensure the professional integrity and scientific integrity of the discussion and analysis in the PEIS by repeatedly ignoring information on new technologies associated with oil shale and tar sands production. Duchesne County and Uintah County, Utah have repeatedly in our earlier comments asked the BLM to recognize such technologies; however; the BLM, in an attempt to justify its actions in the settlement agreement, has failed to do so. Uintah County devoted extensive time and effort in this respect (see their letter and exhibits dated November 16, 2012 and a November 28, 2012 letter from the Utah Association of Counties attached hereto and incorporated herein).

Issue Number: PP-WO-OilTar-13-04-28
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

1. OSTS PFEIS Fails to Resolve Significant Scientific Controversies: Garfield County commented on the OSTS PDEIS as to BLM's failure to locate and consider information that has been generated since the 2008 ROD and to take the requisite "hard look" as required by NEPA. It commented further on this failure in its Request for IQA Review. See Ex. A Garfield County's IQA Request (Dec. 4, 2012). BLM did add data from companies RD&D projects to the OSTS PFEIS in Appendices A and B, but failed to incorporate this data into its analysis of the available technologies and corresponding environmental impacts throughout the rest of the OSTS PFEIS. In response to comments on its NEPA shortcomings, BLM stated that it has done adequate review as required by NEPA and more specific analysis of environmental impacts from new technologies would be addressed in project-specific NEPA analysis. See BLM Comment Response Doc. at 39, 64-66, 129-130, 133, 137-138, 153, 160-161. NEPA requires that an agency take a "hard look" at the environmental effects of the proposed action, even after a proposal has received its initial approval. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 374 (1989). BLM must insure professional integrity, including scientific integrity, of the discussions and analyses in the EIS. 40 C.F.R. §§1500.1(b), 1502.24. It must also address scientific controversies that have an effect on the human environment and support its position. 40 C.F.R. §1508.27(b)(4); Middle Rio Grand Conservation Dist. v. Norton, 294 FJd 1220, 1229 (loth Cir. 2002) (setting aside critical habitat designation EIS on the basis that "[t]he

wide disparity in the estimates of water required for the designation, and the associated loss of farmland acreage, indicates that a substantial dispute exists as to the effect of the designation.").

The OSTS PFEIS fails to address the scientific controversies, as discussed in the attached IQA letter, in regards to new technological advances in oil shale and tar sands development and the corresponding environmental impacts. See Ex. A Garfield County IQA Request (Dec. 4, 2012). This information changes the assumed environmental impacts of Alternatives 1, the No Action Alternatives, and also the premise upon which the Preferred Alternatives rest. The new scientific information and technology show that oil shale development will have fewer environmental impacts, including less water, electrical power, and surface disturbance. Thus, the oil shale development is economically feasible contrary to the conclusions in the OSTS PFEIS.

Issue Number: PP-WO-OilTar-13-04-29
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

The new, quality information on oil shale technologies requires BLM to prepare a supplement to the OSTS PFEIS. An agency must prepare a supplement to a draft or final EIS if "(I) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns or (2) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(I). A supplement may also be prepared if the agency determines that the purposes of NEPA would be furthered by doing so or when a new alternative is added that is outside the spectrum of alternatives already analyzed. Id. at §1502.9(c)(2); BLM NEPA Handbook H-17901, at 29 (Jan. 30, 2008).

BLM did include a discussion of the new technological advances made and current RD&D projects in Appendices A and B of the OSTS PFEIS. BLM, however, did not incorporate this new and quality information into the analysis of the direct, indirect, and cumulative impacts.

See BLM Comment Response Doc. at 39, 41, 45, 125, 128, 130, 139, 142-143, 147-148, 153, 156, 159-160, 162-163 (BLM refers to the new technology and resulting impacts as nascent and speculative). BLM's responses omit the fact that the Colorado School of Mines has sponsored an annual symposium on oil shale development and documented this same information in a peer reviewed context. This omission is a perfect illustration of how BLM failed to address the underlying controversy, perhaps because it could not explain away the science. Past oil shale development information and their corresponding impacts are still carried throughout the analysis of the direct and indirect impacts in Chapter 2, and the cumulative effects analysis in Chapters 46.

See 2012 OSTS PFEIS at 4-1 ("Some of the information on the environmental consequences of oil shale development in this chapter is based on past oil shale development efforts . . . information derived from other types of mineral development (oil and gas, underground and surface mining of coal) was used in preparing this chapter."). Therefore, supplementation of the OSTS PFEIS is appropriate to provide further discussion and analysis of the new technologies and corresponding environmental

impacts.

Supplementation is also appropriate because portions of the OSTS PFEIS, such as Chapter 3 and the Appendices, are outdated. The assumptions from these sections (Chapter 3 and the Appendices) are carried throughout the analysis of the direct and indirect impacts in Chapter 2, and the cumulative effects analysis in Chapters 4-6. This outdated information and analysis dates from the 2008 OSTS PFEIS and was probably developed more than five years ago.

BLM has a continuing duty to evaluate new information especially when it is relying on information from an EIS that is four to seven years old. See Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983) ("In general, an EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed."). This is especially true when the accuracy of the scientific assumptions is contested.

While it is beneficial to look at the technology used in the past for oil shale development, it is just as important, if not more, to include analysis of the new technologies. These new technologies will help resolve some of the environmental concerns raised by the use of past technologies. Further, BLM's failure to analyze the new oil shale technologies and their corresponding impacts violates NEPA. See 40 C.F.R. §§1500.1(b), 1502.24, 1508.27(b)(4).

Issue Number: PP-WO-OilTar-13-05-7
Organization: Excalibur Industries Inc.

Issue Excerpt Text:

Mr. Black's position [and that of Sec. Salazar] is nonsensical. On the one hand they assert that the proposed withdrawal of BLM lands is to protect the environment at the same time that they include environmentally unfriendly technologies as "state of the art" assumptions. They continue to include most existing aboveground retorts in the "same breath" on page 4-5 of the 2012 PEIS, assuming that above-ground retorts would be patterned after: Paraho Direct Bum Retort; TOSCO IT Indirect Mode Retort; ATP; and Red Leaf In-Capsule Technology.

For example, the Paraho Direct Bum Retort emits more carbon dioxide in the Direct Bum mode than does the Paraho Indirect Retort, which has been in continuous operation in Brazil since 1972. And the ATP as a rotary kiln is approximately 40% less efficient in transferring heat from gas to oil shale particles than the vertical kiln configurations, which causes even greater emissions of carbon dioxide than the Paraho Direct Bum Retort.

Issue Number: PP-WO-OilTar-13-08-18
Organization: State of Utah

Issue Excerpt Text:

The BLM qualifies its analysis of oil shale and tar sands technologies by stating that the information on these technologies is presented for the purposes of general understanding and doesn't define the range of possible technologies that might emerge in the coming years. This reflects a lack of due diligence on the part of the BLM. There is information available on newer, cutting-edge technologies that have moved from the RD&D phase into commercial scale

development. BLM's reliance on outdated or general descriptions of the technology and its environmental impacts when there is ample information available on the newest developments in the industry contravenes NEPA's implementation requirements for EISs. While past experience may be useful for the analysis of the impacts of oil shale technologies, it is also important to include analysis of the innovative technologies currently in use that seek to resolve some of the environmental concerns raised by these earlier projects. Relying on technological examples in any industry (e.g. computing for example) from years back, simply does not meet the requirement of NEPA to consider the best information available. This is true especially in the oil and tar sands industries present in Utah today.

The companies referenced in Utah's comments report that their new technologies use less water and result in fewer environmental impacts than the process technologies of the 1980s. For example, the EcoShale technology utilizes low temperatures for heating and does not require process water. The Enefit140 retort process, currently in use in its Estonian facilities and the predecessor to the Enefit280, uses no water, runs on organic waste, and emits significantly lower C02 emissions. While the BLM acknowledges that these two companies are planning commercial production in the Uintah Basin in the near future, BLM fails to examine these technologies in any detail or evaluate their assertions of reduced environmental impacts. The agency instead relies on assumptions based on old data and tired ideas.

This omission is serious. According to regulations for the implementation of NEPA: "If a draft Statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion." 40 CFR § 1502.9 (a) BLM's failure to include any kind of meaningful consideration of current oil shale and tar sand technologies and their environmental impacts is a serious breach of its responsibility to provide thorough, unbiased in its EISs. CEQ regulations are very clear that EISs shall serve as the means for assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

Issue Number: PP-WO-OilTar-13-09-15
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

As discussed infra Section V.C, BLM also fails to address the more recent technological advances in oil shale and tar sands extraction and the resulting decrease in environmental impacts relating to development of oil shale and tar sands. See Ex.7, Uintah County IQA Request (Nov. 16, 2012). BLM also admits that it is too early to analyze exact environmental impacts from oil shale and tar sands development, because such an analysis should be completed at the project level. BLM Comment Response Doc. at 57, 63-64, 66, 68, 73, 78, 80, 89-90, 94-5,105-106,107, 119,153. BLM is, nevertheless, prematurely excluding lands from oil shale and tar sands leasing without first obtaining site-specific information regarding the potential impacts of development. See 2008 OSTS ROD at 22.

Issue Number: PP-WO-OilTar-13-09-38
Organizations: Uintah County, Utah Association of Counties, and the Coalition of

Local Governments

Issue Excerpt Text:

OSTS PFEIS Fails to Resolve Significant Scientific Controversies: Uintah County, UAC, and the Coalition commented on the OSTS PDEIS as to BLM's failure to locate and consider information that has been generated since the 2008 ROD, and to take the requisite "hard look" as required by NEPA. BLM did add data from companies RD&D projects to the OSTS PFEIS in Appendices A and B, but failed to incorporate this data into its analysis of the available technologies and corresponding environmental impacts throughout the rest of the OSTS PFEIS. BLM continues to rely on the out-of-date assumptions of the 2008 PFEIS environmental impacts as to amount of surface disturbance, water and power used. In response to comments on its NEPA shortcomings, BLM stated that it has done an adequate review as required by NEPA and more specific analysis of environmental impacts from new technologies would be addressed in project specific NEPA analysis. See BLM Comment Response Doc. at 39, 64-66,129-130,133,137-138, 153, 160-161. Merely dismissing the new technology as "nascent" or "speculative" is not a scientific o dispassionate analysis of data required by NEPA. By admitting there was new data, BLM must analyze the changes to the assumptions of environmental impacts of developing oil shale and tar sands in the OSTS PFEIS. Its failure to do so violates NEPA.

Issue Number: PP-WO-OilTar-13-09-40
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

The OSTS PFEIS fails to address the scientific controversies, as discussed in the attached IQA letter, in regards to new technological advances in oil shale and tar sands development and the corresponding environmental impacts. See Ex.7, Uintah County IQA Request (Nov. 16, 2012). This information changes the assumed environmental impacts of Alternatives I, the No Action Alternatives, and also the premise upon which the Preferred Alternatives rest. The new scientific information and technology show that oil shale and tar sands development will have fewer environmental impacts, including less impacts on water, use of less electrical power, and less surface disturbance. Thus, the oil shale and tar sands development does not have the significant environmental impacts assumed.

Issue Number: PP-WO-OilTar-13-09-42
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM discusses the new technological advances made and current RD&D projects in Appendices A and B of the OSTS PFEIS. BLM, however, did not incorporate this new and quality information into the analysis of the direct, indirect, and cumulative impacts and did not change either the assumptions or conclusions. See BLM Comment Response Doc. at 39, 41, 45, 125, 128, 130, 139, 142-143, 147-148, 153, 156, 159-160,162-163 (BLM refers to the new technology and resulting impacts as nascent and speculative). BLM's responses omit the fact that Enefit has been producing oil from oil shale for

more than 30 years. The response also ignores the peer-reviewed and scholarly documentation of oil shale and tar sands development by the Colorado School of Mines, which has sponsored an annual symposium on oil shale development. The following papers were presented in the last decade. See e.g. Mark Looney, et al, Chevron USA, Status Report & Direction of Chevron's RD&D Pilot Oil Shale Project, Piceance Basin, CO, 31st Oil Shale Symposium (Oct. 18, 2011); Rikki Hrenko, Enefit American Oil, 31st Oil Shale Symposium (Oct. 18, 2011); Roger L. Day, et al, Pilot Test of AMSO's CCR In-Situ Oil Shale Process, 31st Oil Shale Symposium (Oct. 18, 2011); Justin Birdwel1 & Michael Lewan, U.S. Geological Survey, Laboratory Simulation of In Situ Oil Shale Retorting Conditions to Assess Product Yield and Composition, 30th Oil Shale Symposium (Oct. 19, 2010); Sepehr Arbahi, et al, Shell Oil Company, Simulation Model for Ground Freezing Process: Application to Shell's Freeze Wall Containment System, 30t'h Oil Shale Symposium (Oct. 19, 2010); Indrek Aama & Andreas Orth, Easti Energia AS & Outotec GmbH, A New Improved Solid Heat Carrier Technology (Enefit 280) for Processing of Oil Shale with Different Grades, 29th Oil Shale Symposium (Oct. 19, 2009); James Patten, Red Leaf Resources, Field Test Results: Ecoshale In-Capsule Technology, 29th Oil Shale Symposium (Oct. 19, 2009).

This omission is a perfect illustration of how BLM failed to address the underlying controversy, perhaps because it could not explain away the facts or the science. Stale and outdated oil shale development information and their corresponding impacts are still carried throughout the analysis of the direct and indirect impacts in Chapter 2, and the cumulative effects analysis in Chapters 4-6. See 2012 OSTS PFEIS at 4-1, 5-1 ("Some of the information on the environmental consequences of [oil shale and tar sands] development in this chapter is based on past [oil shale and tar sands] development efforts.... information derived from other types of mineral development (oil and gas, underground and surface mining of coal) was used in preparing this chapter."). Therefore, supplementation of the OSTS PFEIS is appropriate to provide further discussion and analysis of the new technologies and corresponding reduction in environmental impacts.

Supplementation is also appropriate because portions of the OSTS PFEIS, such as Chapter 3 and the Appendices (excluding Appendices A and B), are outdated. The assumptions from these sections (Chapter 3 and the Appendices) are carried throughout the analysis of the direct and indirect impacts in Chapter 2, and the cumulative effects analysis in Chapters 4-6. This outdated information and analysis dates from the 2008 PFEIS and was probably developed several years before that. BLM has a continuing duty to evaluate new information especially when it is relying on information from an EIS that is four to seven years old. See Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475,1480 (9th Cir. 1983) ("In general, an EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed."). This is especially true when the accuracy of the scientific assumptions is contested.

Issue Number: PP-WO-OilTar-13-11-5
Organization: Environmentally Conscious Consumers for Oil Shale (ECCOS)

Issue Excerpt Text:

Though data from the 2008 OSTS PEIS was considered the Final 2012 PEIS is lacking due to the fact that it is void of new technologies, or the consideration of their analyses and information in the process of decision.

Summary

The Proposed RMPA is in violation of NEPA because:

1. The Final PEIS does not include information generated since the 2008 Record of Decision (ROD) on new technologies associated with oil shale and tar sands production into its analysis. New information is included in Appendices A and B, but not incorporated into the analysis of the direct, indirect and cumulative impacts.
2. The Final PEIS does not address scientific controversy regarding the technological advances in oil shale and tar sands development and the corresponding environmental impacts.
3. The BLM ignores the peer-reviewed and scholarly documentation of oil shale and tar sands development by the Colorado School of Mines.
4. New scientific information shows that oil shale and tar sands development will have fewer environmental impacts, including less impacts on water, use of less electrical power, and less surface disturbance; thus the conclusions in the Final PEIS on environmental impacts are incorrect
5. The BLM needs to prepare a supplement to the Final PEIS to incorporate new information on oil shale technologies and corresponding environmental impacts.
6. The BLM is prematurely excluding lands from oil shale and tar sands leasing without first obtaining site-specific information regarding the potential impacts of development.

Response

While the Council on Environmental Quality's (CEQ) regulations implementing NEPA require that agencies use "high quality information" (40 CFR 1500.1(b)), under the BLM's guidelines for implementing the Information Quality Act, Section 515 of Public Law 106-554, (IQA), the BLM applies the principle of using the "best available" data in making its decisions (BLM IQA Guidelines, February 9, 2012, at 2 c.). In applying this principle, "best available" refers to the availability of the information at the time an assessment was made weighed against the needed resources and the potential delay associated with gathering additional information in comparison to the value of the new information in terms of its potential to improve the substance of the

assessment. The BLM will rely on older information where the conditions of the land and/or resources have not substantially changed or where collection of more recent information would not be cost-justified. Where appropriate, the BLM will seek input from appropriate stakeholders and the scientific community.

Several counties have alleged, through either protests filed on the Final PEIS and/or IQA Information Correction Requests, that the BLM has failed to consider and analyze new information documenting 2012 technological advances for the extraction of oil from oil shale and tar sands, and addressing the previously identified scientific controversies relating to the claimed environmental impacts of oil shale and tar sands development. The Draft PEIS was published February 3, 2012 and the 90-day comment period on the Draft PEIS closed on May 4, 2012. In light of the comments the BLM received from cooperating agencies regarding the preliminary Draft PEIS, as well as other comments the BLM received on the Draft PEIS, suggesting there was information showing new technologies that were ready to be applied now that would result in commercially viable operations, the BLM followed up with several of the companies and requested additional information; however, the companies declined to respond or were unable to provide this information.

Many of the cooperating agency counties passed Resolutions opposing the BLM's 2012 Oil Shale and Tar Sands (OSTS) PEIS, stating, "Whereas, even prior to 2008, the development and production from oil shale has been proven beyond a doubt to be technologically and economically feasible; and Whereas, even prior to 2008, this same technology to extract oil from the rock is not only economically feasible, but it requires no consumption of water, contrary to myths which falsely claim that oil shale requires large consumption of water resources…". However, other than these conclusory representations, the BLM has not received further data from these cooperating agencies, or any other source, that would change our analysis. Demonstration that a technology is capable of extracting kerogen from oil shale is not the same as demonstration that such extraction can be done commercially, using oil shale from the Uintah Basin. Lab and field tests so far performed by many of these companies may demonstrate capacity, but they do not demonstrate the commercial viability of such technology. Further, as noted in the BLM's response to comments received on the Draft PEIS, references to development of these resources carried out in Estonia as demonstrating the current viability of a commercial oil shale industry in the United States fail to acknowledge the distinct political and economic structures operative in that country.

Several counties assert that some companies have completed testing which confirms the economic feasibility of oil shale development. Many of these companies' tests have been reported on company websites, presented at the Colorado School of Mines Oil Shale Symposiums, and/or were Exhibits attached to IQA Information Correction Requests. The BLM

disagrees that this testing demonstrates that oil shale development in the Piceance, Green River, Washakie and Uintah Basins is economic on a commercial scale using these technologies. The information provided by the commenters for the various companies represents that tests have been performed, but does not show specific test results or how these test results demonstrate the ability to produce a profit at a commercial scale producing oil shale or tar sands resources in the Green River Formation Basins. For the most part, the asserted information provided appears to be representations intended for presentation to investors and not as evidence of a commercial operation. The asserted information provides overviews of the technology and extraction processes, but little more. Therefore, the BLM does not believe that the representations provided constitute "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" so as to warrant supplementation under CEQ's regulations implementing NEPA at 40 CFR 1502.9.

While these technologies appear to hold promise, and many have been lab and/or field tested, most of the technology descriptions fail to provide detail in their depiction of results and technical data that would support our revision of the analytical assumptions underlying this planning process. The information is included in Appendices A and B, which provide an overview of the current oil shale and tar sands development technologies that may be employed in future developments on BLM-administered lands. Assumptions regarding these technologies were developed to support analyses in the PEIS and are also presented in these Appendices. Where information was not available or provided, the "best available data" was used. As explained in the Final PEIS, the "best available data" the BLM has relied on in developing its analytical assumptions continue to be predicated on the assumed similarities of oil shale/tar sands development technologies to development of conventional energy sources such as oil and gas, and coal (Final PEIS, pp. 1-14 and 4-1).

The scope of the decision-making to be supported by the development of this PEIS is limited to an allocation decision. The analysis of potential impacts associated with oil shale and tar sands development in Chapters 4, 5, and 6 is programmatic in character and designed to disclose the potential impacts from future leasing and development, in order to provide the decision maker the available, essential information for making the allocation decision. This land use allocation does not authorize any future lease or development proposal. The current experimental state of the oil shale and tar sands industries does not allow this PEIS to include sufficient specific information or cumulative impact analyses to support future leasing decisions within these lands.

The BLM is not prematurely excluding lands from oil shale and tar sands leasing without first obtaining site-specific information regarding the potential impacts to development. Under FLPMA, the Secretary has the authority and the discretion to engage in land use planning, including the establishment, revision, or amendment of land use plans. While leasing oil shale

and permitting development of this resource on the public lands is authorized under the 1920 Mineral Leasing Act, management of oil shale resources is also conducted pursuant to FLPMA. Under Section 302 of FLPMA, the Secretary can establish the conditions under which uses of the public land can take place. Because the technologies required to develop oil shale resources are in their infancy, the Secretary is proposing to require research, development and demonstration (RD&D) in order that the kinds of technologies and their impacts may be known before broad-scale commercial development takes place. While there is no formal RD&D process of tar sands, the technology required to develop this resource for energy use is in its infancy, as well. Land use planning decisions may be amended, and nothing in the decision based on this PEIS precludes the option to amend plans in the future.

The commenters appear to have mischaracterized the Colorado School of Mines annual Oil Shale symposium. This is an academic conference that provides an opportunity for companies and individuals to present research in progress (see http://csmspace.com/events/oilshale2012). The BLM attends this conference and is fully aware of the information presented. Information from these presentations has been incorporated into Appendices A and B, although again, the BLM has not received data that would change the programmatic analysis of potential impacts presented in Chapters 4, 5, and 6 of the PEIS.

The BLM disagrees that there is scientific controversy. There is a lack of detailed information and data upon which to base decisions, but there is not disagreement about the science or the technology and the corresponding environmental impacts.

State and Local Government

Issue Number: PP-WO-OilTar-13-04-36
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

IM 2011-154 and later the manuals were adopted without proper comment procedures and without coordination with local governments. Under Section 202(a), BLM has no choice but to coordinate with local governments and to resolve conflicts in land use plans. 43 U.S.C. §1712(a). So far BLM has failed to do so on this very important issue. Garfield County does not support proposed or identified LWCs. BLM has clearly violated Section 202 by not coordinating both its inventory and LWC determination with the state and local governments.

Issue Number: PP-WO-OilTar-13-04-39
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

BLM did publish the notice of intent within 120 days and appears intent on issuing the final decision by December 31, 2012, assuming that BLM treats this protest with the same disregard as it did the cooperating agency comments. BLM is rushing to issue a final decision without regard to the facts or competing legal obligations and constraints. Even when multiple cooperating agencies requested more time to comment on the OSTS PDEIS, BLM refused to grant the additional time because it needed to meet the deadline set in the Settlement Agreement. See BLM Comment Response Doc. at 1119-20. BLM gave cooperating agencies less than two weeks to review several thousand pages of text in the OSTS PDEIS.

Issue Number: PP-WO-OilTar-13-08-6
Organization: State of Utah
Protestor: Kathleen Clark

Issue Excerpt Text:

B. The BLM Failed to Consult with Utah As Required by the Energy Policy Act of 2005: Not only does the PRMP/FEIS fail to adhere to the commercial leasing directives of the EP 2005, BLM failed to consult with Utah to determine the level of Utah's support and interest in a commercial leasing program. The EP 2005 requires that the Secretary, "consult with Governors of the States with significant oil shale and tar sands resources on public lands.... In an effort to determine the level of support and interest in the States in the development of tar sands and oil shale resources." 42 USC 15927 (e). This directive goes on to State: "If the Secretary finds sufficient support and interest exists in a State, the Secretary may conduct a lease sale in the State under the commercial leasing program regulations." The "may conduct" language goes not to the discretion of the Secretary to refrain from commercial leasing if the requisite level of interest is there, but rather to the requirement that State support and interest exist before commercial leasing commences. The statute requires commercial leasing if the State supports it.

As pointed out in Utah's comments, and in

contradistinction to the extensive consultation that occurred during the 2008 ROD process, "no such meetings have taken place with the Governor of Utah or his representative during the current PEIS effort." Comments p. 6. It was further pointed out that, "Utah advised BLM [during the 2008 process] that the level of interest in Utah was high, and that if necessary, the BLM should proceed with a commercial leasing program in Utah even if the other States were not interested." Id The comments concluded by requesting the required consultations before issuance of the FEIS:

"The State of Utah urgently requests meeting with the BLM which meet the letter and the spirit of the requirement of EPACT 2005 to consult with the Governors, and local government, to determine the level of support for a commercial program for the leasing of oil shale and tar sands. Only then will the BLM be able to fully analyze the social and economic impacts to the State as well as work with the State on decisions affecting a critical component of the State's economy. These meetings must include through discussion of all information and issues pertaining to a commercial leasing program, including royalty rates, the structure of the leasing program, and the availability of lands for leasing. " Id. (Emphasis on original).

BLM's failure to consult with the Governor of Utah in violation of EPAct 2005 renders the PRMP/FEIS insufficient to support any subsequent ROD.

Since the issuance of the 2008 ROD, Utah has taken significant steps to foster the commercial development of its oil shale and tar sands resources. In March 2011, Utah Governor Herbert unveiled his "Energy Initiatives and Imperatives: Utah's 10-Year Strategic Energy Plan, "with the goal of facilitating the expansion of responsible development of Utah's energy resources, including oil shale and tar sands." In 2012, the Utah Legislature enacted the "State of Utah Resource Management Plan for Federal Lands," UCA 63J-8-101 et. seq. that created the Uintah Basin Energy Zone in both Uintah and Duchesne Counties. This legislation States that the State supports, "efficient and responsible full development of all existing energy and mineral resources located within the Uintah Basin Energy Zone, including oil, oil shale, natural gas, etc." It calls upon the federal agencies who administer lands within the Uintah Basin Energy Zone to fully cooperate with the State in the adoption of land and resource management plans which employ the State's land, and to expedite the processing, granting and streamlining of mineral and energy leases. Yet, due to the BLM's failure to consult with Utah, neither of these State initiatives were considered or even mentioned in the PRMP/FEIS.

Issue Number: PP-WO-OilTar-13-09-46
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM did publish the notice of intent within 120 days and appears intent on issuing the final decision by December 31, 2012, assuming that BLM treats this protest with the same disregard as it did the cooperating agency comments. BLM is rushing to issue a final decision without regard to the facts or competing legal obligations and constraints. Even when multiple cooperating agencies requested more time to comment on the OSTS PDEIS, BLM refused to grant the additional time because it needed to meet the deadline set in the Settlement

Agreement.

See BLM Comment Response Doc. at 1119-20. BLM gave cooperating agencies less than two weeks to review several thousand pages of text and write comments on the preliminary OSTS PDEIS.

Issue Number: PP-WO-OilTar-13-09-49
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

The OSTS PFEIS Preferred Alternatives continue to be inconsistent with all three Counties' local plans, policies, and resolutions. These alternatives do not support the full development of oil shale and tar sands but instead greatly decrease the amount of lands available for leasing and development.

Issue Number: PP-WO-OilTar-13-09-53
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM made no attempt to reconcile the differences with Uintah, Lincoln, and Sweetwater Counties' plans and policies. Instead, BLM asserts that a RD&D focus is necessary in order to obtain more information about the technologies and associated environmental consequences before committing to broad-scale development. id. BLM is not only failing to consider quality, new information on oil shale and tar sands development, but it is also violating federal law by supporting alternatives that are contrary to state and local plans and policies, and failing to make any attempt to reconcile these differences. No federal law contradicts the County and Conservation Districts local plans, so BLM's failure to reconcile does not conform to FLPMA.

Issue Number: PP-WO-OilTar-13-09-60
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

IM 2011-154 and later the manuals, BLM Manuals 6310 and 6320 (March 15, 2012), were adopted without proper comment procedures and without coordination with local governments. Under Section 202(a), BLM has no choice but to coordinate with local governments and to resolve conflicts in land use plans. So far BLM has failed to do so on this very important issue. Uintah County does not support proposed or identified LWCs. The State of Utah statutorily opposes the management of public lands for wilderness characteristics as it circumvents the statutory wilderness process and is inconsistent with the multiple use management standard. BLM has clearly violated Section 202 by not coordinating both its inventory and LWC determination with the state and local governments.

Summary

The BLM has not fulfilled its obligations to state and local governments:

1. The BLM failed to consult with Utah to determine the level of Utah's support and interest in a commercial leasing program, as required by the Energy Policy Act of 2005. As a consequence, neither of Utah's State initiatives regarding oil shale and tar resources were considered or even mentioned in the Final PEIS.
2. The Final PEIS violates FLPMA because the preferred alternative is inconsistent with Uintah, Lincoln, and Sweetwater counties local plans, policies, and resolutions.
3. Under Section 202(a) of FLPMA, the BLM is required to coordinate with local governments and to resolve conflicts in land use plans. The BLM has violated Section 202 by not coordinating both its inventory and the decisions regarding lands with wilderness characteristics with the state and local governments.
4. The BLM did not provide sufficient time for cooperating agencies to comment on the Final PEIS.

Response

As previously stated in the Comment Response Document, Section 369 of the Energy Policy Act of 2005 requires the Secretary, no later than 180 days after the publication of the oil shale regulations whose development is required under this section, to consult with the governors of states with significant oil shale and tar sands resources on public lands, as well as with representatives of local governments, interested Indian tribes, and other interested persons, to determine the level of support and interest in the states in the development of oil shale and tar sands resources. The Secretary conducted this consultation in 2008, when the commercial oil shale and tar sands leasing programs were established. It was anticipated that further consultation would occur in the future, in preparation for any Secretarial decision to conduct a lease sale in one or more of these states. At this time, however, no commercial lease sale is under consideration or anticipated. Rather, the BLM is engaged in a land use planning action pursuant to its authority under FLPMA. As part of the land use planning action, which involves targeted plan amendments addressing land use allocation for future oil shale and tar sands leasing and development, as well as the associated NEPA analysis, the BLM has invited the state and local governments and interested tribes to participate in the NEPA process as cooperating agencies, and has provided a governors' consistency review regarding the Proposed RMPA, in accordance with the BLM's planning regulations at 43 CFR 1610.3-2 (Final PEIS, Comment Response Document, p.147).

Section 202 (c)(9) of FLPMA requires that "Land use plans of the Secretary under this section shall be consistent with state and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." In accordance with this requirement, the BLM has given consideration to those state, local, and tribal plans that are germane in the development of land use plans for public lands. To the extent the Final PEIS/Proposed RMPA is inconsistent with state and county plans, policies, or programs, the BLM believes that because of the nascent character of the oil shale and tar sands technologies, a measured approach should be taken to oil shale and tar sands resources leasing and development. This approach ensures that any commercial oil shale program meets the intent of Congress; is consistent with the requirements of NEPA and FLPMA; takes advantage of the best available information and practices to minimize impacts; and offers opportunities for states, tribes, local communities, and the public to be involved at each decision point.

In regards to BLM's wilderness characteristics inventory, Section 201 of FLPMA requires the BLM to maintain on a continuing basis an inventory of all public lands and their resources and other values, which includes wilderness characteristics. The BLM will consider whether to update or conduct a wilderness characteristics inventory when: (1) The public or the BLM identifies wilderness characteristics as an issue during the NEPA process; (2) the BLM is undertaking a land use planning process; (3) the BLM has new information concerning resource conditions; (4) a project that may impact wilderness characteristics is undergoing NEPA analysis; or (5) the BLM acquires additional lands (BLM Manual 6310, p. 2). Although the inventory process may occur in concurrence with a land use planning effort, it is a distinct and separate process. The BLM is not required to coordinate with state or local governments in its inventory process. As stated above, requirements for coordination with state and local governments under Section 202(c)(9) apply to the "development and revision of land use plans." These requirements do not apply to BLM inventories.

In regards to the request for a cooperating agency review extension, the BLM has explained why it was unable to grant this request (Final PEIS, pp. 1119 to 1120). "The preferences of cooperating agencies regarding the pace … of collaborative efforts [including document reviews] do not supersede the need to adhere to established schedules." See BLM "Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners" (2012), p. 26.

Alternatives

Range of Alternatives

Issue Number: PP-WO-OilTar-13-03-3
Organization: Duchesne County Commission (Utah)

Issue Excerpt Text:

Findings: In this case, the BLM, in violation of 40 CFR 1502.14 (a), failed to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. During review of the draft PEIS, several cooperating agencies, as stated on Page 2-76 of the DPEIS, suggested an alternative that would allow for larger scale leasing in Utah and Wyoming, where more support lies, while limiting leasing in Colorado. The draft PEIS stated that "The BLM seeks comments on this approach as well as other approaches that combine elements of the various alternatives." Unfortunately, the final PEIS failed to explore and evaluate this alternative and failed to discuss the reasons for it having been eliminated.

Issue Number: PP-WO-OilTar-13-10-16
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

In addition to each of the substantive violations outlined above, the PRMP Amendments and FEIS also violate the procedural requirements of NEPA that all significant environmental impacts be analyzed and alternatives that minimize such impacts be considered. In each case, the inadequate and inaccurate analysis leading to the substantive violation of FLPMA, ESA, and/or CAA described above also give rise to a corresponding violation of NEPA. Moreover, because BLM relied exclusively on oil shale and tar sands development scenarios in all alternatives and failed to analyze an alternative that allocated no land to future oil shale and tar sands development to mitigate climate change impacts and other risks to the environment, BLM failed to consider a reasonable range of alternatives, rendering the FEIS woefully deficient.

Issue Number: PP-WO-OilTar-13-13-22
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

BLM considered but eliminated from detailed analysis an alternative that would have applied the more permissive Wyoming standards for oil shale leasing in Colorado and Utah, but the BLM determined that it would not make economic sense to open larger areas in Colorado and Utah to potential oil shale leasing where the resource is of low grade and unlikely to be developed at this time, because interest in future leasing would be directed at higher grade deposits.

FEIS at 2-83. This rationale makes perfect sense and is in accord with EPAct directives to focus attention on the most prospective deposits. BLM added that if technology improved to allow low-grade deposits to be feasibly developed, "additional planning and NEPA analysis could be conducted to open these areas to leasing and development, where warranted." Id. Not listed as an alternative considered at any point during the NEPA process is the alternative sought by BCA et al. to apply the 25-foot-thickness and 25 gallon per ton threshold to Wyoming as well as Colorado. See FEIS at 2-82 through 2-88. The fact that this is a reasonable alternative in Wyoming is demonstrated by the fact that it is a reasonable alternative (indeed, proposed under all alternative) in Colorado and Utah. The BLM's failure to consider this reasonable alternative is a violation of NEPA's 'range of reasonable alternatives' requirement.

Issue Number: PP-WO-OilTar-13-13-23
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

BLM considered by rejected an alternative that would allow oil shale leasing at the 15 GPT/15-foot threshold in all three states. FEIS at 2-83. However, BLM never even considered an alternative that only lands exceeding 25 GPT/ 25-feet thickness (the "25-25 threshold") would be considered for leasing in all three states. BCA specifically asked BLM to consider such an alternative in our DEIS comments. Not only did BLM fail to consider such and alternative, but the agency also failed to provide a rationale for why it considered such an alternative unreasonable.

Summary

The BLM did not provide a rationale for eliminating the following proposed alternatives:

1. An alternative that would allow for larger scale leasing in Utah and Wyoming.
2. An alternative that allocated no land to future oil shale and tar sands development.
3. An alternative that applied the 25-foot-thickness and 25 gallon per ton threshold to Wyoming.

Response

The purpose and need for the proposed action defines the range of alternatives to be considered. The BLM must analyze a range of reasonable alternatives, but is not required to analyze in detail every possible alternative or variation. An agency may eliminate alternatives from detailed study with a brief discussion of the reasons for having been eliminated (40 CFR 1502.14(a)). For example, an alternative may be eliminated from detailed study if it is determined not to meet the

proposed action's purpose and need; determined to be unreasonable given the BLM mandates, policies, and programs; it is substantially similar in design to an alternative that is analyzed; its implementation is speculative or remote; or it is technically or economically infeasible (BLM NEPA Handbook, H-1790-1, 6.6.3).

The BLM did not consider an alternative that allocated no land to future oil shale and tar sands development because it would be inconsistent with Section 369 of the Energy Policy Act, which directed the Secretary to "complete a programmatic environmental impact statement for a commercial leasing program for oil shale and tar sands resources on public lands, with an emphasis on the most geologically prospective lands within each of the States of Colorado, Utah, and Wyoming." In response to internal scoping, however, the BLM developed and analyzed Alternative 3 for both oil shale and tar sands, in order to present for public and policy-maker consideration an allocation where very few lands would be available for leasing and development of these resources.

The BLM did not consider an alternative that applied the 25-foot-thickness and 25 gallon per ton threshold to Wyoming because this alternative would also be inconsistent with the Energy Policy Act's directive to focus on the most geologically prospective lands within each of the States of Colorado, Utah, and Wyoming. In Wyoming, where the oil shale resource quality is not as high as it is in Colorado and Utah, the most geologically prospective oil shale resources have been determined to be those deposits that yield 15 gallon/ton or more of oil shale and are 15 feet thick or greater.

The BLM did not consider an alternative that applied the 15-foot-thickness and 15 gallon per ton threshold to all three states because this alternative would also be inconsistent with the Energy Policy Act's directive to focus on the most geologically prospective lands within each of the States of Colorado, Utah, and Wyoming. In Colorado and Utah, where the oil shale resource quality is excellent to good, the most geologically prospective resources have been determined to be those deposits that yield 25 gallon/ton or more of oil shale and are 25 feet thick or greater. This is not to say that at some time, in the future, the deposits that fall outside this boundary would not be developed; in this circumstance, a land use plan amendment would determine whether these additional lands should be opened.

Please see the response regarding leasing standards below ("Policy - Leasing Standards"), or page 124 of the Comment Response Document in the Final PEIS, for a more detailed explanation of leasing standards used in the Final PEIS.

"The Preferred Alternative Was Predetermined"

Issue Number: PP-WO-OilTar-13-04-31
Organization: Garfield County Board of County Commissioners (CO)

Issue Excerpt Text:

BLM's settlement agreement with environmental groups has been the primary reason for reconsidering the 2008 PFEIS and for choosing the Preferred Alternatives. See Settlement Agreement in Colorado Environmental Coalition et al. v. Salazar, 09-00085 (Feb. 15, 2011). Through the agreement, BLM restricted its administrative discretion under the EIS process. BLM committed itself to proposing amendments to the RMPs for Colorado, Utah, and Wyoming and to initiate scoping under NEPA for such revisions. Settlement Agreement at ¶¶1-2. As part of the NEPA analysis, BLM is required to include an alternative that excludes from commercial oil shale or tar sands leasing (1) all areas identified as lands with wilderness characteristics (LWCs), (2) the whole Adobe Town Very Rare or Uncommon area, (3) core or priority sagegrouse habitat, (4) all areas of critical environmental concern (ACEC), and (5) all areas identified as excluded in Alternative C of the 2008 PFEIS. Id at '¶1.

The Settlement Agreement limits the alternatives BLM can consider in the NEPA analysis to a no action alternative, an alternative that removes all the lands just described, and an alternative that removes some of the lands just described. Id at ¶2. BLM then limited the purpose and need statement by agreeing to define it so that it can be met by the two alternatives chosen by the environmental groups in the settlement agreement. Id BLM effectively precluded otherwise reasonable alternatives from being considered by agreeing to this type of statement. See Colorado Envtl. Coal. v. Dombeck, 185 FJd 1162, 1174-76 (l0th Cir. 1999) (an agency may reject alternatives that do not satisfy a reasonable purpose and need.). The purpose and need in the OSTS PFEIS is to "reassess the appropriate mix of allowable uses with respect to oil shale and tars sands leasing and potential development." 2012 OSTS PFEIS at 1-4. BLM will consider amending the applicable RMPs to specify whether any areas currently open for application for leasing and development should not be available for such application. Id.

BLM was committed to a predetermined outcome in the OSTS PFEIS to reduce the potential for oil shale and tar sands development. Large sections and whole chapters of the OSTS PFEIS are largely the same as the 2008 PFEIS. BLM only added discussions about the new technology for oil shale and tar sands development to Appendices A and B after receiving extensive comments from cooperating agencies and others concerning this new and quality data. BLM, however, still refused to incorporate and consider this information in its analysis of the alternatives and environmental impacts. Commenters also proposed an alternative that would increase the amount of lands made available for commercial oil shale and tar sands leasing as compared to the other proposed alternatives, but BLM refused to consider it. BLM chose Alternatives 2 and 2(b) as its Preferred Alternatives, which effectively exclude all the lands from commercial oil shale

and tar sands leasing as set forth in the settlement agreement. 2012 OSTS PFEIS at 2-36 - 2-37, 2-69; Settlement Agreement at ¶1.

The Preferred Alternatives also require RD&D leasing requirements be met prior to any commercial lease applications being accepted. 2012 OSTS PFEIS at 2-37 - 2-38. This decision was also predetermined as BLM agreed to not issue any commercial oil shale or tar sands leases until the publication of the RMP amendments, but was allowed to nominate parcels to be leased for RD&D and in the Asphalt Ridge Special Tar Sands Area. Settlement Agreement at ¶¶7-8. BLM had already agreed to only issue RD&D leases and discontinued the issuance of commercial leases before the EIS process had even started. See Metcalf, 214 F.3d at 1143-44 (the court invalidated an agency's decision because it had predetermined the outcome when it made a contractual commitment to support the Makah whaling proposal before preparing an environmental assessment.).

Lastly, the set time frames proposed in the settlement agreement provide additional evidence of the predetermined outcome for the OSTS PFEIS. BLM agreed to publish a notice of intent for the RMP amendments within 120 days of the settlement agreement. Settlement Agreement. at ¶1. Then it agreed to issue a final decision on the RMP amendments by December 31, 2012. Id. at ¶5.

Issue Number: PP-WO-OilTar-13-07-7
Organization: American Petroleum Institute

Issue Excerpt Text:

Importantly, in stating that it would only consider the removal of lands from application for potential future leasing and then choosing restrictive options as its preferred alternatives, BLM's Draft PEIS reveals a biased and predetermined outcome that also runs counter to the intent of the National Environmental Policy Act (NEPA). Congress's intent in promulgating NEPA included the desire to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," and to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.'" By considering only the narrowing of available lands for oil shale development, BLM failed to consider the range of beneficial uses and the potential to promote human standards of living that could result from more availability of lands for oil shale and oil sands development.

Issue Number: PP-WO-OilTar-13-08-16
Organization: State of Utah

Issue Excerpt Text:

43 CFR § 1502.2 provides that: "Environmental impact Statements shall serve as the means of assessing the environmental impact of a proposed action, rather than justifying decisions already made." Certainly with regard to the conversion from a commercial leasing program to an RD&D program (as discussed herein in subpart A), and perhaps with respect to many of the other proposed changes from the 2008 ROD, the PRMP/FEIS is a rather thinly-veiled effort on BLM's part to justify decisions already made to more accurately reflect the policies of the new administration. NEPA review is not the vehicle for such political shifts in po1icy. Rather, NEPA review must be objective and based upon empirical evidence of environmental impacts of

proposed federal actions. To the extent that the PRMP/FEIS is the justification of decisions already made, it is in violation of 43 CFR § 1502.2.

Issue Number: PP-WO-OilTar-13-09-45
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM's settlement agreement with environmental groups was the only reason to reconsider the 2008 PFEIS and to select the Preferred Alternatives. See CEC v. Salazar, 09-00085 Dkt. No. 63-1 (D.C. Colo. 2011). Through the agreement, BLM restricted its administrative discretion under the EIS process. BLM committed itself to proposing amendments to the RMPs for Colorado, Utah, and Wyoming and to initiate scoping under NEPA for such revisions. Id. at ¶¶I-2. As part of the NEPA analysis, BLM is required to include an alternative that excludes from commercial oil shale or tar sands leasing (1) all areas identified as lands with wilderness characteristics (LWCs), (2) the whole Adobe Town Very Rare or Uncommon area, (3) core or priority sage-grouse habitat, (4) all areas of critical environmental concern (ACEC), and (5) all areas identified as excluded in Alternative C of the 2008 PFEIS. Id. at ¶1.

The Settlement Agreement limits the alternatives BLM can consider in the NEPA analysis to a no action alternative, an alternative that removes all the lands just described, and an alternative that removes some of the lands just described. Id. at ¶2. BLM then limited the purpose and need statement by agreeing to define it so that it can be met by the two alternatives chosen by the environmental groups in the settlement agreement. id. BLM effectively precluded otherwise reasonable alternatives from being considered by agreeing to this type of statement. See Colorado Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1174-76 (l0th Cir. I999)(an agency may reject alternatives that do not satisfy a reasonable purpose and need.). The purpose and need in the OSTS PFEIS is to "reassess the appropriate mix of allowable uses with respect to oil shale and tar sands leasing and potential development." 2012 OSTS PFEIS at 1-4. BLM will consider amending the applicable RMPs to specify whether any areas currently open for application for leasing and development should not be available for such application. id.

BLM committed to a predetermined outcome in the OSTS PFEIS to reduce the potential for oil shale and tar sands development. As noted above, the OSTS PFEIS does not use new information nor take a fresh look. Large sections and whole chapters of the OSTS PFEIS are largely the same as the 2008 PFEIS. BLM only added discussions about the new technology for oil shale and tar sands development to Appendices A and B after receiving extensive comments from cooperating agencies and the affected companies concerning this new and quality data. BLM, however, still refused to incorporate and consider this information in its analysis of the alternatives and environmental impacts. Uintah County and other cooperating agencies proposed an alternative that would increase the amount of lands made available for commercial oil shale and tar sands leasing as compared to the other proposed alternatives, but BLM refused to consider it. See BLM Comment Response Doc. at 40-42. BLM chose Alternatives 2 and 2(b) as its Preferred Alternatives, which effectively exclude all the lands from commercial oil shale and tar sands leasing as set forth in the settlement agreement. 2012 OSTS PFEIS at 2-36

- 2-37, 2-69; CEC v. Salazar, 09-00085, Dkt. No. 63-1, ¶1 (D.C. Colo. 2011).

The Preferred Alternatives also require RD&D leasing requirements be met prior to any commercial lease applications being accepted. 2012 OSTS PFEIS at 2-37 - 2-38. This decision was also predetermined as BLM agreed to not issue any commercial oil shale or tar sands leases until the publication of the RMP amendments, but was allowed to nominate parcels to be leased for RD&D and in the Asphalt Ridge Special Tar Sands Area. CEC v. Salazar, 09-00085, Dkt. No. 63-1, ¶¶ 7-8 (D.C. Colo. 2011). BLM had already agreed to only issue RD&D leases and discontinued the issuance of commercial leases before the EIS process had even started. See Metcalf, 2I4 F.3d at I 143-44 (the court invalidated an agency's decision because it had predeteffi1ined the outcome when it made a contractual commitment to support the Makah whaling proposal before preparing an environmental assessment).

Lastly, the set time frames proposed in the settlement agreement provide additional evidence of the predetem1ined outcome for the OSTS PFEIS. BLM agreed to publish a notice of intent for the RMP amendments within 120 days of the settlement agreement CEC v. Salazar, 09-00085, Dkt No. 63-1, ¶1 (D.C. Colo. 2011). Then it agreed to issue a final decision on the RMP amendments by December 31, 2012.

Summary

The BLM is in violation of NEPA because the purpose and need statement, range of alternatives, and preferred alternative were all predetermined based on the settlement agreement with environmental groups. This is demonstrated by the narrow purpose and need statement; the exclusion of information on new technologies from the analysis; the refusal to consider an alternative that would increase the amount of land available; the selection of a more restrictive option as the preferred alternative; the fact that the BLM agreed to not issue any commercial leases until the publication of the RMP amendments but was allowed to nominate parcels to be leased for RD&D before the EIS process had started; and the adherence to a time-frame determined in the settlement agreement.

Response

As previously stated in the Comment Response Document of the Final PEIS, although the BLM agreed in settlement to consider certain alternatives in the NEPA and planning processes, the Proposed Plan presented with this Final PEIS was not "predetermined." The measures agreed to

by the United States in settlement are not inconsistent with its NEPA obligations under BLM's planning regulations. In addition, the settlement of pending litigation challenging the 2008 OSTS ROD is an element of the background information for the purpose and need, not an element of the purpose and need itself.

The Secretary has long expressed an interest in reassessment of the allocation decisions made in 2008 and a focus on a robust RD&D program; the terms of the settlement agreement are consistent with this policy direction (Final PEIS, Comment Response Document, p.143). Under the purpose and need—reassessing the appropriate mix of allowable uses, in light of the still nascent character of the oil shale and tar sands industries—any of the four alternatives (or combination of elements thereof) presented for analysis could be selected for implementation. Nor did the settlement agreement limit the number or character of alternatives that the BLM could consider; it only represented the minimum number and character of alternatives the BLM agreed to consider. As required by NEPA, the BLM considered a range of alternatives and explained its identification of Alternative 2(b) as the Proposed Plan in the Final PEIS.

The BLM did not develop an alternative that would increase the amount of land available for leasing because such an alternative would consist of elements already analyzed and presented for public comment, and therefore this approach is not necessary (see section 10.1 from this Protest Resolution Report). Contrary to the allegation made by the protester, the BLM did not "exclude information on new technologies from the analysis." The BLM used the best available information in all analyses presented in the Final PEIS (please see section 8.8 of this Protest Resolution for a detailed discussion on this topic). Under the terms of the settlement agreement, the BLM agreed not to issue any call for expression of leasing interest for commercial oil shale leases until the publication of the RMP amendments. The settlement agreement, however, did not address or predetermine final leasing decisions under this Proposed RMPA. Further, nothing in the settlement agreement prohibited the BLM from nomination of parcels to be leased for RD&D, and the BLM has accordingly moved forward with RD&D leases in the interim. With respect to leases of tar sands resources for development, the BLM agreed to a similar waiting period, pending completion of the new planning effort. Finally, adherence to the timeframe determined in the settlement agreement is not associated in any way with the BLM's alternative selection, nor did it prevent the BLM from adhering to required time periods for public participation and review. For example, the BLM is required to provide: a 30-day scoping comment period; a 90-day public comment period on the draft PEIS; a 30-day protest period; and a 60-day Governor's Consistency Review period (43 CFR Part 1610; Land Use Planning Handbook, p. 17). The BLM has adhered to all of these time period requirements.

Treatment of Alternatives

Issue Number: PP-WO-OilTar-13-03-5
Organization: Duchesne County Commission (Utah)

Issue Excerpt Text:

In this case, the BLM, in violation of 40 CFR 1502.14 (b), failed to devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. On Page 2-35, Line 37 of the DPEIS, the BLM admitted that the preferred alternative, Alternative 2 (b), was "not noted elsewhere in the document but will be developed further in preparation of the Final PEIS." Duchesne County requested that the DPEIS be re-written and provided to us for at least a 30-day comment period after this alternative is more fully developed. We noted that it is impossible for cooperators and the general public to adequately comment on an alternative until it is fully developed in the draft PEIS. Unfortunately, the BLM ignored this request.

Response

The Draft PEIS clearly explained that the under alternative 2(b), “the lands open for future leasing consideration would be the same as those in Alternative 2(a), but only for RD&D leases…. The environmental impacts of Alternative 2(b) would be analytically indistinguishable from those of Alternative 2(a). Only the method of obtaining a lease would be different. Accordingly, the analysis in this PEIS of Alternative 2 applies fully and equally to both alternatives. To the extent there may be differences in environmental consequences between Alternative 2(a) and 2(b), these would be related to the timing of the commencement of impacts, as well as, possibly, length of disturbance. However, these issues are best addressed in the lease and/or project-specific analysis” (Draft PEIS, p. 2-35, lines 9 to 22). Thus, because alternative 2(a) and 2(b) are analytically indistinguishable, it is not necessary to revise the Draft PEIS or to provide an additional comment period.

As explained below (“Policy – Energy Policy Act” response), however, the Final PEIS did develop additional description of how the Secretary would exercise his discretion with respect to the RD&D first Alternative, as it appears in the Proposed RMPA. This further description was developed in response to comments and suggestions made by several commenters that the RD&D work done on lands other than Federal lands in the formations at issue should not have to be duplicated.

Policy Considerations

Policy – Reconsideration of the 2008 PEIS Allocations

Issue Number: PP-WO-OilTar-13-01-11
Organization: Center for Regulatory Effectiveness

Issue Excerpt Text:

The 2008 PEIS was a measured approach taken to balance environmental considerations with the congressional mandate to devise a commercial leasing program. BLM specifically chose the 2008 PEIS (no-action alternative) on the basis that there would be two additional stages of environmental analysis before any commercial development of oil shale could occur. Accordingly, the 2012 no-action alternative does not commit BLM to "broad scale commercial development" nor does it preclude BLM from fully understanding all of the environmental implications of oil shale development. As such, the unjustified shift by BLM in the 2012 PEIS is arbitrary and capricious.

Issue Number: PP-WO-OilTar-13-01-22
Organization: Center for Regulatory Effectiveness

Issue Excerpt Text:

Ironically, BLM need only look to its own findings to conclude that the 2012 Alternative "is not fully consistent with the mandate of the Energy Policy Act of2005." In the 2008 ROD, BLM argued against the alternative it selected in the 2012 PEIS. Specifically, BLM argued: "Alternative C [Alternative selected in the 2012 Final PEIS] was not selected as the Proposed Plan Amendment because the alternative would not make the -most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing. Titus it is not fully consistent with the mandate of the Energy Policy Act of 2005. Much of the most geologically prospective acreage would be excluded under Alternative C.24"

Thus, BLM admittedly, is in agreement that the 2012 Final PEIS violates the Energy Policy Act of 2005.

Issue Number: PP-WO-OilTar-13-01-7
Organization: Center for Regulatory Effectiveness

Issue Excerpt Text:

BLM found in 2008 that the Alternative selected for the 2012 Final PEIS "unreasonably fragments the area that would be available for application, resulting in parcels that are unlikely to be explored lease or developed. In addition, "Alternative C [the Alternative selected in 2012] was not selected as the Proposed Plan Amendment because the alternative would not make the -most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing. Thus it is not fully consistent with the mandate of the Energy Policy Act of2005. Much of the most geologically prospective acreage would be excluded under Alternative C. In addition, this unreasonably fragments the area that would be available for

application, resulting in parcels that are unlikely to be explored, leased, or developed.,,19

The 2008 land allocations for oil shale do nothing more than lay the foundation for future commercial oil shale development. It is not the final policy statement, nor is it the final statement of the environmental impacts of oil shale development. Thus, it is disingenuous to conclude that the 2008 PEIS "is deficient" where BLM has prescribed subsequent NEPA analyses to be conducted when reasonably foreseeable issues become "ripe."

The analyses for the 2008 and 2012 PEIS are notably consistent. The major difference between NEPA documents are the outcomes, which is a direct result of the lawsuit filed by the Environmental NGO Coalition.

Issue Number: PP-WO-OilTar-13-04-15
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Thus, BLM cannot exploit the Settlement Agreement to ignore the EP Act's mandate to develop oil shale and tar sands resources. The NEPA process itself is purely procedural and does not require agencies to elevate environmental concerns over other appropriate considerations. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983); Stryckers' Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980).

This is precisely why the Settlement Agreement only requires BLM to "consider" amending the 2008 OSTS ROD to protect the identified resources. Settlement Agreement 'Ill. As previously demonstrated, supra at Section V.B.2, BLM has failed to provide any reasoned analysis or explanation for revoking the administrative findings made in the 2008 OSTS ROD. Indeed, as already determined by BLM in 2008, the only alternative that conforms to the EP Act is the No Action Alternative.

Issue Number: PP-WO-OilTar-13-04-24
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

In a complete about-face, BLM now proposes to significantly scale back its commercial leasing program. BLM's Preferred Alternative for oil shale would only allocate about 677,000 acres for oil shale leasing, with only 26,259 acres (2012 OSTS PFEIS at ES-9 - ES-IO, 2-28, 247) or 35,309 acres (BLM oral communication with Garfield County) located in Colorado. Remarkably, the Preferred Alternative reduces the lands previously classified as suitable, available and open for oil shale leasing in Colorado by approximately 90%.

BLM now adopts the 2008 PFEIS conservation alternative allocation: "All areas identified as excluded from commercial oil shale and tar sands leasing in Alternative C of the September 2008 OSTS PFEIS (Alternative C made 830,296 acres available for potential commercial oil shale leasing and 229,038 acres available for potential commercial tar sands leasing)." 2012 OSTS PFEIS at 2-37. Alternative C in the 2008 PFEIS had excluded from application for leasing all lands where surface-disturbance restrictions and/or seasonal limitations were in place to protect known sensitive resources. 2008 OSTS ROD at 17; 2012 OSTS PFEIS at 2-42, 6-79.

Again, however, BLM expressly determined that the selection of Alternative C would not be consistent with the purposes of the EP Act. 2008 OSTS ROD at 8, 22. Thus, BLM chose Alternative B in the 2008 PFEIS, which allocated a vastly larger acreage for oil shale and tar sands leasing. Id. at 13, 29, 38-39.

Issue Number: PP-WO-OilTar-13-04-41
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

BLM's most egregious violation of the EP ACT is the fact that the agency actually adopts the 2008 PFEIS conservation alternative allocation: "All areas identified as excluded from commercial oil shale and tar sands leasing in Alternative C of the September 2008 OSTS PFEIS (Alternative C made 830,296 acres available for potential commercial oil shale leasing and 229,038 acres available for potential commercial tar sands leasing)." 2012 OSTS PFEIS at 2-37.

Alternative C had excluded from application for leasing all lands where surface disturbance restrictions and/or seasonal limitations were in place to protect known sensitive resources. 2008 OSTS ROD at 17; 2012 OSTS PFEIS at 2-42. Again, however, BLM expressly determined that the selection of Alternative C would not be consistent with the purposes of the EP Act. 2008 OSTS ROD at 8, 22. Thus, BLM chose Alternative B, which allocated a vastly larger acreage for oil shale and tar sands leasing. Id at 13, 29, 38-39.

Issue Number: PP-WO-OilTar-13-04-45
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Another compelling example of BLM's failure to reasonably explain the proposed mineral leasing exclusions is with respect to Areas of Critical Environmental Concern (ACECs). The 2008 OSTS ROD logically excluded ACECs that were closed to mineral leasing. 2008 OSTS ROD at 17. BLM now identifies ACECs in the study area not closed to mineral leasing that would also be excluded from oil shale/tar sands leasing under the Oil Shale Preferred Alternative. 2012 OSTS PFEIS at 6-6. BLM provides no explanation for doing so, and ostensibly, this is because the agency can offer none.

Issue Number: PP-WO-OilTar-13-04-9
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Without any explanation, BLM now incorporates the rejected scaled back leasing allocations into its Preferred Alternative. One of the tenets of reasoned decision-making is that "an agency changing its course ... is obligated to supply a reasoned analysis for the change." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). Thus, reasoned decision making necessarily requires the agency to acknowledge and provide an adequate explanation for its departure, and an agency that neglects to do so acts arbitrarily and capriciously under the APA, 5 U.S.C. §706. Jicarilla Apache Nation v. U.S. Dept. of the Interior, 613 FJd 1112, 1119 (D.C. Cir. 2010).2

In this context, BLM completely fails to provide a reasoned analysis for its 180-degree change in position. BLM may not lawfully make a statutory conformance determination where more restrictive leasing alternatives identified in the OSTS PFEI8 were rejected in 2008 as being inconsistent with the EP Act?

Issue Number: PP-WO-OilTar-13-06-16
Organization: Enefit American Oil

Issue Excerpt Text:

D. BLM fails to explain why it has selected an 08T8 management plan (Alternative 2) that the agency has recently rejected as inconsistent with BLM's multiple use obligations and congressional directives.

In the 2008 PEIS, BLM rejected essentially the same plan it has now selected as its preferred alternative. Enefit Comment letter, at 15-17. However, although the BLM is changing an administrative decision made through notice and comment rulemaking, it provides no explanation about why BLM's 2008 decision rejecting what is now termed Alternative 2 was incorrect. See, e.g., BLM Response to Comments, at 41-48. Because the BLM is making a resource management decision that drastically alters a recently-implemented resource management decision, BLM must offer a reasonable explanation for its change. See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983) ("An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.")

Issue Number: PP-WO-OilTar-13-06-18
Organization: Enefit American Oil

Issue Excerpt Text:

BLM now suggests that the "nascent character of the oil shale and tar sands industries" justifies BLM's decision to drastically revise its 2008 RMPs by limiting the acreage available for commercial oil shale leasing. See, e.g., BLM's Response at 45, 143, 162. But the "nascent character" of much of the oil shale technology was one of the very reasons provided by the BLM in 2008 for rejecting the overly restrictive resource management alternative. As described above, BLM recognized in its 2008 planning effort that it would be "premature" to eliminate areas at the planning stage, when much more information about both the affected resources, and the "timing and type of oil shale technology," may show that sensitive resources "could be adequately protected through mitigation." 208 OSTS ROD, at22.

Issue Number: PP-WO-OilTar-13-06-5
Organization: Enefit American Oil

Issue Excerpt Text:

BLM has failed to present stakeholders, or the general public, with a credible justification for altering its 2008 RMP Amendments, but instead offered an unsupportable "purpose and need" statement for restarting yet another comprehensive NEPA analysis to revise land use plans that have never been fully implemented. Id., at 3-5.

Issue Number: PP-WO-OilTar-13-06-8
Organization: Enefit American Oil

Issue Excerpt Text:

What BLM fails to explain, however, is why it would contractually commit itself to design a purpose and need statement that was so broad as to provide no guidance for the land use planning effort the statement was supposed to direct. The fact that BLM had committed itself to consider an alternative that the BLM had just three years before concluded was inconsistent with the agency's directives under the Federal Land Policy and Management Act ("FLPMA") and the 2005 Energy Policy Act, undermines BLM's claim that it was implementing planning revisions that were consistent with "the congressionally established policy of encouraging the development of [oil shale and tar sands) on public lands." BLM Response, at 41.

Issue Number: PP-WO-OilTar-13-08-8
Organization: State of Utah

Issue Excerpt Text:

Notwithstanding the findings of the 2008 FEIS and the substantiation of the 2008 ROD, BLM now attempts to justify its complete about-face by simply opining that it a "fresh look" is required of the allocation of lands made available for commercial leasing, and makes reference to a Settlement Agreement that was entered into outside of the NEPA process. As noted in Utah's comments on the Draft PEIS: "Despite the adequacy and sufficiency of the previous Record of Decision and supporting documentation proposed under the provisions of the National Environmental Policy Act, the BLM has reversed the sound decision it made in the 2008 ROD." Comments at p. 2. BLM makes no attempt to explain the reversal of its 2008 conclusions that the 2008 ROD was consistent with the EP 2005, and that the more restrictive Alternative C was not. The law requires that "an agency changing its course is obligated to supply a reasoned analysis for the change." Sec Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Ins. Co. supra. BLM's failure to adequately explain this change in course constitutes an arbitrary and capricious action in violation of the APA.

Issue Number: PP-WO-OilTar-13-09-12
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

In this regard, BLM's most egregious violation of the EP ACT is the fact that the agency actually adopts the previously-rejected 2008 PFEIS conservation alternative: "All areas identified as excluded from commercial oil shale and tar sands leasing in Alternative C of the September 2008 OSTS PFEIS (Alternative C made 830,296 acres available for potential commercial oil shale leasing and 229,038 acres available for potential commercial tar sands leasing)." 20 12 OSTS PFEIS at 2-37.

Alternative C had excluded from application for leasing all lands where surface-disturbance restrictions and/or seasonal limitations were in place to protect known sensitive resources. 2008 OSTS ROD at 17; 2012 OSTS PFEIS at 2-42. Again, however, BLM expressly determined that the selection of Alternative C would not be consistent with the purposes of the EP Act. 2008 OSTS ROD at 8, 22. Thus, BLM chose Alternative B, which allocated a vastly larger

acreage for oil shale and tar sands leasing. ld. at 13,29,38-39.

Issue Number: PP-WO-OilTar-13-09-13
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Without any credible explanation, BLM now incorporates the rejected scaled back leasing allocations into its Preferred Alternatives. One of the tenets of reasoned decision-making is that "an agency changing its course ... is obligated to supply a reasoned analysis for the change." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). Thus, reasoned decision making necessarily requires the agency to acknowledge and provide an adequate explanation for its departure, and an agency that neglects to do so acts arbitrarily and capriciously under the APA, 5 U.S.C. §706. Jicarilla Apache Nation v. U.S. Dept. of the Interior, 613 F.3d 1112, 1119 (D.C. Cir. 20 I0). BLM does so without identifying new information and preparing an EIS that is remarkably similar to the 2008 document. The only change is who is the Interior Secretary.

In this context, BLM completely fails to provide a reasoned analysis for its 180-degree change in position. BLM may not lawfully make a statutory conformance determination where more restrictive leasing alternatives identified in the OSTS PFEIS were rejected in 2008 as being inconsistent with the EP Act' BLM's only explanation is completely contrary to its conclusions in 2008.

Issue Number: PP-WO-OilTar-13-09-17
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Treatment of the ACECs provides another compelling example of BLM's failure to reasonably explain the proposed mineral leasing exclusions. The 2008 ROD logically precluded oil shale and tar sands leasing in ACECs that were also closed to mineral leasing. 2008 OSTS ROD at 17. BLM now identifies ACECs in the study area not closed to mineral leasing that will also be excluded from oil shale/tar sands leasing under the Preferred Alternatives. 2012 OSTS PFEIS at 6-6. Again, BLM provides no explanation for this significant change other than deciding to take a "fresh look" at leasing allocations. BLM Comment Response Doc. at 59.

Issue Number: PP-WO-OilTar-13-09-30
Organization: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM, however, may not rely on the Settlement Agreement to violate its congressional mandate under the EP Act. Land use plan amendments must be consistent with the principles of multiple use set forth in FLPMA and other "applicable law." 43 U.S.C. §17l2(c)(I). It is axiomatic that the leaders of "every administration are required to adhere to the dictates of statutes that are also products of democratic decisionmaking." ILGWU v.

Donovan, 722 F.2d 795, 828 (D.C. Cir. 1983). See also Atchinson, Topeka & Santa Fe Ry. Co. v. Wichita Bd. Of Trade, 412 U.S. 800,806 (1973) (agency's course must be "consistent with its mandate from Congress").

Thus, BLM cannot exploit the Settlement Agreement to ignore the EP Act's mandate to develop oil shale and tar sands resources. The NEPA process itself is purely procedural and does not require agencies to elevate environmental concerns over other appropriate considerations. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87,97 (1983); Stryckers' Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980).

This is precisely why the Settlement Agreement only requires BLM to "consider" amending the 2008 OSTS ROD to protect the identified resources. CEC v. Salazar, 09-00085, Dkt. No. 63-1, 1 (D.C. Colo. 20 II). As previously demonstrated, supra Section E.2.b, BLM has failed to provide any reasoned analysis or explanation for revoking the administrative findings made in the 2008 OSTS ROD. Indeed, as already determined by BLM in 2008, the only alternative that conforms to the EP Act are the No Action Alternatives. To find otherwise would unlawfully elevate the Obama Administration's anti-oil shale/tar sands policies over statutory dictates.

Summary

The BLM has failed to provide any reasoned analysis or explanation for superseding the administrative findings made in the 2008 OSTS ROD, and has failed to explain why the Proposed RMPA is essentially the same as an alternative the agency rejected in 2008 (Alternative C) for being inconsistent with the BLM's multiple-use obligations and congressional directives under the Energy Policy Act. The BLM's failure to adequately explain these changes constitutes an arbitrary and capricious action in violation of the APA.

In 2008, the BLM stated that it would be premature to eliminate areas at the planning stage, when more information may show that sensitive resources could be adequately protected through mitigation. The BLM now contradicts itself by using this same rationale (i.e., the nascent character of the OSTS industries) to justify reducing the acreage available to commercial oil shale leasing.

The 2008 OSTS ROD only excluded Areas of Critical Environmental Concern (ACEC) from OSTS leasing that were closed to mineral leasing. The Proposed RMPA now excludes ACECs in the study area not closed to mineral leasing, but the BLM provides no explanation for this change.

The major difference between the 2008 and 2012 Final PEIS documents is the outcome, not the analyses. This is a direct result of the lawsuit filed by the environmental groups. The BLM may

not rely on the settlement agreement to violate its congressional mandate under the Energy Policy Act to develop oil shale and tar sands resources.

Response

As explained in the Comment Response Document of the Final PEIS, pages 162 to 164, the Secretary may engage in land use planning on the basis of changed circumstances, new policy considerations, or any combination of the two, as long as the correct procedures are followed. In this instance, a combination of factors contributed to the Secretary's decision to initiate this land use planning process, including the nascent character of the oil shale and tar sands industries, new U.S. Geological Survey (USGS) information relating to resource potential, the U.S. Fish and Wildlife Service (FWS) determination regarding sage-grouse, the identification of additional lands with wilderness characteristics in the study area, and other policy considerations. The interest in engaging in this land use planning initiative also served to assist the United States in resolving pending litigation brought by a coalition of environmental interests in January 2009 contesting the land allocation decisions analyzed in 2008 OSTS PEIS (Draft PEIS, p. 2-7 and Final PEIS, p. 2-8).

Although these considerations, including the new information, prompted the initiation of this planning effort, in fact, as described in Section 1.1.1 of the Draft PEIS, upon consideration of the USGS studies, which focused on the potential resource, and after analysis of the issue, the BLM determined that the USGS studies did not provide a basis for revising the boundaries of the study area or the definition of the most geologically prospective area for oil shale. Still, through the planning process itself, including the analysis of alternative allocations under NEPA, and consideration of other resource issues, the BLM developed the Proposed RMPA presented in the Final PEIS.

During this planning initiative, the BLM has been able to refine its inventories of resources it manages in the study area. Some lands previously identified as having wilderness characteristics were and are no longer considered to have these characteristics. In other instances, areas were reviewed and identified as having wilderness characteristics.

Similarly, other information new since 2008, as noted in the BLM's Notice of Intent (NOI), was the FWS determination regarding the status of the sage-grouse. The FWS determination that listing the species was warranted but precluded, nevertheless demonstrates that there is a vital need and an important opportunity to manage the habitat of the species on public lands to prevent the listing of the species as threatened or endangered. If the species were to be listed, there could

be significant adverse impacts on several types of land uses, including oil shale and tar sands development. The BLM has considered this information, and although the BLM agrees with the protester that there are several methods, including but not limited to land use allocation decisions, to address reducing impacts on this species' habitat, the BLM elected to consider the use of exclusions in order to address the anticipated resource conflicts. As in many similar public land use and development decisions, even where lands remain open for leasing and development, the BLM may impose mitigation measures in lease stipulations or in conditions of approval in plans of development that would be consistent with law, regulation, and BLM policy, and that would be indicated by environmental review conducted at the time of the decision.

In addition, as stated in the Final PEIS' Comment Response Document, nothing in the Energy Policy Act specified how the Secretary must establish a commercial oil shale leasing program, apart from requiring the Secretary to consider the most geologically prospective areas in Colorado, Utah, and Wyoming. The Energy Policy Act did not specify the acreage that must be available for such programs or how the requirements of such program should be balanced with other resource uses. Under FLPMA, the Secretary must manage the public lands in accordance with land use plans and retains the discretion to establish, revise, and amend those land use plans, as appropriate, to address resource management issues. This means that no leasing or development of oil shale and tar sands resources may occur on the public lands unless such activity is consistent with the applicable land use plan. In view of the nascent character of the oil shale and tar sands industries, as well as in light of other resource management concerns, the Secretary, acting though the BLM, has reconsidered the appropriate Federal lands to be available for leasing and development of these resources, as well as whether commercial leasing should be preceded by additional, vigorous RD&D. There may be different views on whether the nascent character of the technologies argues for more land to be open, so that more lands may be available for RD&D, or whether fewer lands should be open, in order that such RD&D and eventual commercial development as does occur may be targeted in areas with few resource use conflicts, while leaving open some areas where the oil shale and tar sands resources have been identified as particularly rich. While the Energy Policy Act encourages commercial development of oil shale and tar sands resources, these kinds of land management policy questions (how much land, where, with what restrictions, and so on) are left, under FLPMA, to the Secretary, acting through the BLM. (Final PEIS, Comment Response Document, pp. 39, 45, 142, 160, and 163).

Further, the Energy Policy Act does not prevent the Secretary from proposing an amendment or amending land use plans. In 2008, the BLM made a land use allocation decision based on the available information, emphasizing the potential of oil shale to provide a domestic source of liquid fuels. Although that consideration remains important, the BLM revisited that allocation decision more squarely in the context of other resource management and policy considerations.

Each of the alternatives considered keeps lands available for RD&D and commercial development of oil shale. Under any of the alternatives analyzed, a viable commercial program would be possible. None of the alternatives is inconsistent with the policies expressed in Section 369 of the Energy Policy Act, including the alternative with the least amount of land allocated, which would provide for more than 30,000 acres of the richest oil shale resource being open for consideration for future leasing.

Each of the alternatives presented provides for lands to be available for development of these important resources. Under the purpose and need, any of the four alternatives (or combination of elements thereof) presented for analysis could be selected for implementation. Although the BLM agreed in settlement to consider certain alternatives in the NEPA and planning processes, the Proposed RMPA presented with in the Final PEIS was not "predetermined." (See Final PEIS, Comment Response Document, pp. 146-148 and 156-157).

The measures agreed to by the United States in settlement are not inconsistent with its NEPA obligations under BLM's planning regulations. In addition, the settlement of pending litigation challenging the 2008 OSTS ROD is an element of the background information for the purpose and need, not an element of the purpose and need itself. The Secretary has long expressed an interest in reassessment of the allocation decisions made in 2008 and a focus on a robust RD&D program; the terms of the settlement agreement are consistent with this policy direction.

The analysis between the 2008 PEIS and the 2012 PEIS is comparable because the scope of the proposal is limited to an allocation decision. As discussed in Section 1.2.2 of the Final PEIS, the analysis of environmental effects in the PEIS is made up of two main components. The first is an analysis of general, hypothetical, commercial facilities for each of the major types of oil shale and tar sand technologies resulting in the development of impacting factors for affected environmental resources. In cases in which information on impacting factors was not available for commercial oil shale or tar sands technologies, such factors were developed from analogous experience in the oil and gas industry.

The second main component of the environmental impacts analysis draws on the expected environmental effects of oil shale RD&D projects, as analyzed in the Environmental Assessments prepared for those projects. The analysis does not vary greatly, because the available information has not significantly changed since 2008. In the absence of more specific information on the oil shale and tar sands technologies to be implemented in the future and the environmental consequences of implementing those technologies, information on the effects of oil shale and tar sands technologies was derived from other types of mineral development. The BLM has taken this approach because it anticipates, to the best of its knowledge, that the surface disturbing activities involved with these other types of mineral development are comparable to

those that may result from oil shale and tar sands development.

Under the land use plan, oil shale and tar sands leasing is precluded in all ACECs and in areas that are currently under consideration for designation as ACECs. The protester correctly points out that this is different than the 2008 ROD, which only excluded ACECs from oil shale and tar sands potential leasing that were closed to mineral leasing. As stated in the Executive Summary of the Draft PEIS, the BLM determined there was reason to take a fresh look at the allocation of lands made in the 2008 ROD, including consideration of an increase in the amount of land excluded from application for development in one or more alternatives. The ACECs that were not withdrawn from mineral development were a reasonable choice for exclusion from potential development as were lands with wilderness characteristics, and lands identified in RMPs as having surface disturbance restrictions or seasonal limitations to protect known sensitive resources. Public lands determined to be not suitable for application for oil shale or tar sands leasing will not receive any additional designation in this PEIS; the land use decisions for these public lands in existing RMPs will remain in effect.

Policy – "New Information"

Issue Number: PP-WO-OilTar-13-01-3
Organization: Center for Regulatory Effectiveness

Issue Excerpt Text:

i. USGS In-Place Assessment Or Oil Shale Resources In Colorado. Utah, And Wyoming

Although USGS has completed its in-place assessment of oil shale since the 2008 PEIS, the findings in the report do not justify amending the 2008 land use plans. In fact, the USGS report does just the opposite and actually justifies devoting additional resources to developing oil shale resources. Specifically, in the report, USGS concluded that there are 1.525 trillion barrels of oil alone in just the Piceance Basin of western Colorado--an upward increase of nearly 50% from the 1989 USGS assessment of 1 trillion barrels of oil. Interestingly, despite this substantial increase of in-place oil shale, BLM specifically chose not to incorporate the USGS findings into the 2012 PEIS by failing to update and expand the study area based on USGS' report.

ii. 2010 U.S. Fish and Wildlife and Plants, 12 month Findings to List the Greater-Sage Grouse as Threatened or Endangered

The USFWS did release a finding in 2010 on the Greater-Sage Grouse, but importantly USFWS decided not to list the Greater Sage-Grouse as a threatened or endangered species, because there were "higher priority listings, and "because the threats have a moderate to low magnitude." Moreover, the 2008 EIS thoroughly analyzed the impact of oil shale development on the Greater Sage-Grouse, for which the analysis is nearly identical as that listed in the 2012 Draft PEIS. 12 Thus, absent any new findings or analyses concerning the impact of oil shale development on the Greater Sage-Grouse, BLM is not justified in amending the 2008 land use plans based on the Greater Sage-Grouse nor using it as a reason to "take a hard look" at the RMPs. As was the case with the 2008 PEIS, the additional levels of NEPA analysis at the leasing and site development stage are more than sufficient to avoid unnecessary harm to the habitat of the Greater Sage-Grouse.

iii. BLM's updated inventory of lands having wilderness characteristics (LWC) and Areas of Critical Environmental Concern (ACECs).

ACECs only account for a small proportion of land coincident with land that is designated for oil shale development. Specifically, ACECs comprised only 76,666 acres of the 2,017,714 acres of land available for oil shale leasing. Just as the ACECs and LWCs were accounted for in the 2008 PEIS, the environmental integrity of the ACECs can be preserved with the additional required NEPA analysis for the leasing and project development phases.

Accordingly, not one of the pieces of "new information" justify the decision to revisit the 2008 PEIS nor justify amending the RMPs. Especially, because all of the "new information" can be accommodated during the environmental analyses required during leasing and site development stages. What is driving BLM's decision to modify the RMPs is the lawsuit and settlement agreement with the Environmental NGO Coalition. A lawsuit representing a

special interest group's narrow perspective is clearly not a legal justification for an abrupt change in a policy, which was developed lawfully through the regulatory process and required by Congress.

Issue Number: PP-WO-OilTar-13-04-11
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Despite such a prohibition under FLPMA and the 2011 congressional moratorium, BLM proposes to close approximately 66,000 alleged LWC acres to oil shale and tar sands leasing. 2012 OSTS PFEIS at 6-5. Id. at 6-7 (excluded LWC acreage may be much as 88,000 acres). The only rational offered by BLM is that it recently "completed updating its inventory of lands having wilderness characteristics." Id at 1-5.

BLM, however, already conducted similar LWC inventories prior to its 2008 PFEIS allocation decisions. BLM did not explicitly exclude leasing within lands it believed may have one or more characteristics of wilderness under any of the alternatives. Instead, it acknowledged that processes were underway in the respective field offices where such lands have been identified to determine appropriate management requirements for these areas. The 2008 PFEIS identified the location of such lands in Chapter 3 and, in general terms, assessed the impacts of development on these lands in Chapters 4 and 5. 2008 OSTS PFEIS at 2-57. In Garfield County, the Glenwood Springs RMP, the Grand Junction RMP, and White Rive RMP reviewed all lands proposed for wilderness in citizen proposals and made decisions on how they should be managed. The PFEIS contradicts those planning decisions without regard to the facts and findings made by the respective Field Offices.

BLM concluded: "When future site-specific NEPA analyses are conducted on the issuance of commercial leases, the presence of any lands with wilderness characteristics will be considered at that time. The presence of wilderness characteristics on lands otherwise available for multiple use, however, does not necessarily preclude mineral development." Id. Nothing has changed since 2008, and BLM cannot rely on LWC inventories as "new information" warranting a reduction in leasing allocations. As correctly explained by BLM in 2008, any consideration of LWC should occur during future site-specific NEPA analyses conducted on the issuance of commercial leases. BLM's abrupt change in course, therefore, was not accompanied by the reasoned analysis required by law.

Issue Number: PP-WO-OilTar-13-04-23
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

BLM purportedly decided to "reconsider" and take a "fresh look" at the 2008 leasing allocations in light of "new information" that has emerged since issuance of the 2008 PFEIS, and as a result of a 2011 Settlement Agreement entered into by the United States with environmental groups. Id. at ES-I, 1-4. The PFEIS does not provide any new information that would support the changes.

Issue Number: PP-WO-OilTar-13-06-14
Organization: Enefit American Oil

Issue Excerpt Text:

There is no new information that Justifies BLM's proposal to dramatically revise its 2008 RMPs and unnecessarily restrict allowable acreage for OSTS leasing.

As Enefit noted in its Comment letter, there is no new information that justifies BLM's proposal to dramatically revise its 2008 RMPs and unnecessarily restrict allowable acreage for commercial oil shale leasing. Enefit Comment Letter, at 8-13. BLM asserts that the nascent character of the industry, new USGS information regarding resource potential, the USFWS sage grouse determination (addressed above in Section II-B), BLM's LWC determinations, and "other [unidentified] policy considerations" justify revising the 2008 RMP Amendments so soon after those land use plans went into effect. BLM Response, at 162. However, the 2008 RMP Amendments were designed to accommodate the very concerns now cited by the BLM for revising those RMPs. As such, none of these "justifications" can form the basis for revising the existing 2008 RMPs as useful guides for resource management.

In fact, BLM's 2012 RMP revision efforts thwart BLM's own guidelines that describe the circumstances under which it is appropriate to revise or amend an existing RMP: "RMP revisions are necessary if monitoring and evaluation findings, new data, new or revised policy, or changes in circumstances indicate that decisions for an entire plan or a major portion of the plan no longer serve as a useful guide for resource management." BLM, Land Use Planning Handbook, H-1601-1, VII(C), p. 46.

Issue Number: PP-WO-OilTar-13-08-12
Organization: State of Utah

Issue Excerpt Text:

The PRMP/FEIS does not contain any such analysis of its authority to manage for wilderness characteristics. In addition, the PRMP/FEIS does not contain any new information on inventories for lands contained within inventories for wilderness characteristics. All inventories in the areas of concern in the PRMP/FEIS were completed prior to 2008. Because the BLM presents no new information regarding new inventories that would indicate the reasons for an increase, decrease or adjustment, related to the management of lands with wilderness characteristics, the BLM must carry forward the decisions made in the 2008 oil shale EIS and the 2008 RMP's for lands managed for wilderness characteristics. A decision containing new management prescriptions for lands with wilderness characteristics would be contrary to the decisions in the 2008 ROD and would, therefore, be arbitrary and capricious, as it would not be supported by any significant new information.

Issue Number: PP-WO-OilTar-13-09-6
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM purportedly decided to "take a fresh look" and to "reassess" the 2008 leasing allocations "in light of new information that has emerged since the 2008 PEIS was prepared." 2012 OSTS PFEIS at 1-4; Notice of Intent, 76 Fed. Reg. 21 003 (2011). Instead of promoting oil shale and

tar sands development in light of recent technological advances and consistent with the EP Act and the 2008 OSTS ROD, BLM reversed its position and now proposes to substantially reduce the lands available for leasing to a point where it may no longer be economical to develop the resources pursuant to the EP Act, 42 U.S.C. §§ I5927(c), (d). BLM is not basing this decision on a "fresh look" or "reassessment" of new information, but on a recent Settlement Agreement in 2011 and a change in administration since the original evaluation was conducted. See Colorado Environmental Coalition (CEC) v. Salazar, 09-00085, Dkt. No. 63- I (D.C. Colo. 2011).

Issue Number: PP-WO-OilTar-13-09-68
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM concluded in the 2008 OSTS PFEIS: "When future site-specific NEPA analyses are conducted on the issuance of commercial leases, the presence of any lands with wilderness characteristics will be considered at that time. The presence of wilderness characteristics on lands otherwise available for multiple use, however, does not necessarily preclude mineral development." id.

Nothing has changed since 2008 and BLM cannot rely on LWC inventories as "new information" warranting a reduction in leasing allocations. As correctly explained by BLM in 2008, any consideration of LWC should occur during future site-specific NEPA analyses conducted on the issuance of commercial leases. BLM's abrupt change in course, therefore, was not accompanied by the reasoned analysis required by law.

Issue Number: PP-WO-OilTar-13-12-6
Organization: American Shale Oil LLC

Issue Excerpt Text:

Since 2008, the BLM has received no new data about possible impacts of oil shale development because no such development has occurred. The PEIS incorporates and relies upon outdated scientific and technical information and conclusions that have no credible support. The BLM's decision to dramatically reduce the amount of acreage available for commercial oil shale leasing without any reliable factual, legal, or policy justifications, is not reasoned decision making and violates the BLM's statutory mandate.

Summary

The BLM is not justified in amending the 2008 land use plan decisions based on new information for the following reasons:

1. The BLM decided to take a "fresh look" at the 2008 leasing allocations in light of "new information" that has emerged since issuance of the 2008 PEIS, but the 2012 Final PEIS does not provide any new information that would support the changes.

2. The decision to reduce lands available for leasing is not based on a fresh look or reassessment of new information, as the BLM claims, but on a recent Settlement Agreement in 2011 and a change in administration since the original evaluation was conducted.
3. The BLM has violated its guidelines that describe the circumstances under which it is appropriate to revise or amend an existing RMP (BLM Land Use Planning Handbook, p. 46).
4. The USGS in-place assessment of oil shale concluded that there is significantly more oil in the Piceance Basin of western Colorado than previously believed. The BLM did not, however, incorporate these new findings into the 2012 PEIS by updating and expanding the study area.
5. The sage-grouse analysis in the 2008 PEIS is nearly identical to the 2012 Draft PEIS, indicating that there are no new findings or analyses concerning the impact of oil shale development on the Greater Sage-Grouse.
6. The ACECs and lands with wilderness characteristics were already accounted for in the 2008 PEIS, and any new information can be addressed in the additional required NEPA analysis for the leasing and project development phases. The BLM cannot rely on wilderness characteristics inventories as "new information" warranting a reduction in leasing allocations.

Response

As explained in the previous response, the Secretary may engage in land use planning on the basis of changed circumstances, new policy considerations, or a combination of the two, as long as the correct procedures are followed. In this instance, a combination of factors contributed to the decision to initiate this planning effort, including the need to examine new information. As suggested by protesting parties, and as disclosed in the Draft and Final PEIS, the interest in engaging this land use planning initiative also served to assist the United States in resolving pending litigation brought by a coalition of environmental interests in January 2009 contesting the land allocation decisions analyzed in the 2008 OSTS PEIS (Draft PEIS, p. 2-7 and Final PEIS, p. 2-8).

The decision to engage in this planning process is entirely consistent with the BLM's planning regulations as well as with guidance found in BLM Land Use Planning Handbook (H-1601-1). Under BLM planning regulations at 43 CFR 1610.5-5 and 1610.5-6, a plan may be revised or amended in order to consider monitoring and evaluation findings, new data, new or revised policy, a change in circumstances. In the Handbook, the BLM provides guidance on determining if new decisions are needed and lists numerous examples of the types of new data or information

that may initiate a planning process (BLM Land Use Planning Handbook, pp. 37-38). The description of new data or information in the Handbook includes the type of information initially identified by the BLM to be important reasons for initiating this planning process: new USGS information regarding resource potential; the determination by FWS that listing of the sage-grouse as threatened or endangered under the ESA was warranted but precluded by the need to focus on other species; and the BLM's identification of additional lands with wilderness characteristics in the study area (Final PEIS, Comment Response Document, pp. 1-5 and 162). New data or information may include policy considerations (BLM Land Use Planning Handbook, p. 38) and the Handbook makes clear that the consideration of new or revised policies may by itself be an appropriate reason for initiating a planning process (p. 45). Note that the initiation of this planning effort does not conflict with the guidance in the Handbook cited by a protesting party, which relates to determining when it is appropriate to comprehensively revise an RMP; this planning effort is limited in scope to amending RMPs rather than the replacement of one or more RMPs.

As previously noted, this planning process has allowed the BLM to consider the new information initially identified by the BLM in its April 2011 Notice of Intent. Protesting parties question the BLM's treatment of a USGS assessment of oil shale resources in the Piceance Basin of western Colorado. Upon consideration of the USGS studies, and after analysis of the issue, the BLM determined that the USGS studies did not provide a basis for revising the boundaries of the study area or the definition of the most geologically prospective area for oil shale. While the USGS comprehensive assessment of in-place oil estimated about 50 percent more total in-place oil than the previous assessment USGS presented for the Piceance Basin in Colorado, USGS stated, "Almost all of this increase is due to (1) new areas being assessed that had too little data to assess in the previous assessment, and (2) new intervals being assessed that were not assessed previously. Much of this previously un-assessed resource is of low grade and is unlikely to be developed" (Final PEIS, page 1-8, footnote 4). In the PEIS, the "most geologically prospective" boundaries were determined using grade and thickness of the deposits under the premise that these were the most likely areas to be developed.

In addition, as a result of this planning initiative, the BLM refined its inventories of resources it manages in the study area. For instance, some lands previously identified as having wilderness characteristics were determined not to have these characteristics. In other instances, areas were reviewed and identified as having wilderness characteristics (note, the identification of lands with wilderness characteristics is addressed below).

The BLM's consideration of sage grouse information and the potential listing of the species by FWS are further discussed in the responses regarding "Policy – Sage-Grouse" below. As explained on page 162 of the Comment Response Document, the BLM has considered this new information, and although the BLM agrees that there are several ways to address reducing

impacts on this species' habitat, the BLM elected to consider changes to land allocations of oil shale or tar sand resources in order to address the anticipated resource conflicts.

Policy – Water Resources and Quantity

Issue Number: PP-WO-OilTar-13-01-18
Organization: Center for Regulatory Effectiveness

Issue Excerpt Text:

Of great importance, in the 2012 Draft PEIS, BLM has not identified the water usage required for the development of oil shale as a justification to revisit the 2008 land use plans. Moreover, there has been no developments or research between the 2008 and 2012 PEIS that justify altering the 2008 land allocations based on water availability. Both the 2008 Final PEIS and the 2012 Final PEIS use the same assumptions and analyses regarding water usage for oil shale development. For example, both the 2008 PEIS and 2012 Final PEIS assume (based on a 2005 study by the Rand Corporation) that the in-situ process would require 1-3 bbl of water per barrel of oil shale produced; and that 2.6-4.0 bbl of water per barrel of oil shale produced would be required for a surface mine and surface retort. Likewise, both the 2008 PEIS and 2012 Final PEIS find that production levels of 50,000 bbl of oil per day would require 7,050 acre-ft/year of water. 31

Nevertheless, none of these assumptions factor in current and future technological advancements. For instance, Red Leaf Resources has recently stated that the company uses less than half barrel of water to produce a barrel of oil. Red Leaf further explains that the amount of water required for oil shale production is unrelated to the technology used to produce the oil shale, but is instead required for dust control and to meet on-site worker demand. While the water requirements for oil shale production should not be overlooked it is also necessary to have some perspective, especially with the competing uses for water. In particular, a 23,800 bbl oil/day production facility would require the same amount of water daily as a golf course in a desert region, such as Palm Springs Palms Springs has fifty seven (57) golf courses. Fifty-seven (57) oil shale production facilities could produce 1,356,600 bbl oil/day. Thus, the same amount of water consumed for Palm Springs golf courses could produce 1.35 million barrels of oil per day.

Accordingly, BLM's statement that it "looks forward to gaining a clearer understanding of the implications of development oil shale for water quality and quantity," does not serve as a justification for the Amended RMPs in the 2012 PEIS where neither the data or analysis has changed since 2008.

Summary

The 2008 OSTS Final PEIS and the 2012 OSTS Final PEIS use the same assumptions and analyses regarding water usage for oil shale development. None of these assumptions factor in current and future technological advancements. Accordingly, the BLM's statement that it "looks

forward to gaining a clearer understanding of the implications of development oil shale for water quality and quantity," does not serve as a justification for the Proposed RMPA presented in the 2012 Final PEIS where neither the data nor analysis has changed since 2008.

Response

As noted by the protesting party, water use estimates within the 2008 Final PEIS are the same as those presented in the 2012 Final PEIS. These estimates are based on RAND, AMEC Earth and Environmental, and U.S. Government Accountability Office (GAO) reviews (see the 2012 Final PEIS, Sections 4.1.2 and 4.1.3) and incorporate all estimated water requirements for scaled-up operations. As stated in Section 4.5.1.2 of the 2012 PEIS, there is still lingering uncertainty surrounding process water requirements, which is why the BLM utilized the same assumptions. At the time the PEIS was being prepared, this was the best available science available. Aside from the programmatic level analysis that exists within the PEIS, any future potential project would still need to undergo additional NEPA analyses (lease stage and project design phase). The BLM will have the opportunity at such a future point in the NEPA process to review project specific water use.

The BLM's statement that it "looks forward to gaining a clearer understanding of the implications of development oil shale for water quality and quantity" was removed from the EIS between draft and final. The protestor points out that certain environmental groups view water availability for oil shale development as the primary basis for not pursuing oil shale development in the United States and that this was the primary justification for the lawsuit against the BLM's 2008 OSTS ROD. While this may be a primary reason for the environmental groups' lawsuit against the 2008 Oil Shale Tar Sands ROD, it is not a primary reason for the BLM's reconsideration of the 2008 PEIS. As stated in Section ES.1 of the Final PEIS, "the purpose and need for this proposed planning action is to reassess the appropriate mix of allowable uses with respect to oil shale and tar sands leasing and potential development in light of Congress's policy emphasis on these resources."

Policy – Lands with Wilderness Characteristics and Secretarial Order 3310

Issue Number: PP-WO-OilTar-13-03-8
Organization: Duchesne County Commission (Utah)

Issue Excerpt Text:

The proposed action is in violation of the Congressional Spending Moratorium (Continuing Resolution) that prohibits the use of federal funds to implement, administer or enforce DOI Secretarial Order No. 3310 issued on December 22, 2010.

Findings: On April 14, 2011, the BLM caused to be published in the Federal Register, Volume 76, Thursday, April 14, 2011, pages 21003-21005, a Notice of Intent to prepare the 2012 OSTS DPEIS.

The preliminary purpose and need statement in the Notice of Intent, states the PEIS will analyze removing from oil shale and tar sands leasing "All areas that the BLM has identified or may identify as a result of inventories conducted during this planning process, as lands containing wilderness characteristics.)" The notice of intent further states at page 21004:

"Lands that the BLM identifies as having wilderness characteristics will be considered during this planning initiative, as described above, and consistent with Secretarial Order No. 3310, dated Dec. 22, 2010, and BLM Manuals 6301 and 6302. Future leasing of lands determined by the BLM to have wilderness characteristics, if compatible with the allocation decisions stemming from this initiative, will subsequently be assessed in accordance with BLM Manual 6303, as appropriate (i.e., where the BLM has not determined, consistent with BLM Manual 6302, whether the lands with wilderness characteristics at issue should receive a wild lands designation, BLM Manual 6303 will apply)."

This language above documents the BLM's intent to implement, administer and/or enforce Secretarial Order 3310 and one or more of the BLM guidance manuals promulgated under Order 3310. Any attempt by the BLM to implement, administer and/or enforce Secretarial Order 3310, including any effort by the BLM to proceed further on the above-referenced Programmatic EIS violates the spending moratorium of Section 1769 of the April 21, 2011 Congressional Continuing Resolution to Fund Fiscal Year 2011 through September 30, 2011, which states:

"For the fiscal year ending September 30, 2011, none of the funds made available by this division or any other Act may be used to implement, administer, or enforce Secretarial Order No. 3310 issued by the Secretary of the Interior on December 22, 2010." This spending moratorium has been carried forward in all subsequent Congressional spending resolutions up to and including the current spending resolution.

Thus, the 2012 OSTS DPEIS, is an admitted attempt by the BLM to implement, administer and/or enforce Secretarial Order 3310 and its policies and objectives, all in violation of the Spending Moratorium of the 2011 Continuing Resolution and subsequent resolutions.

Issue Number: PP-WO-OilTar-13-04-10
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Notably, the same lack of reasoned analysis is true with respect to the Preferred Alternative's exclusion of lands identified by BLM as having wilderness characteristics (LWC). 2012 OSTS PFEIS at 1-5, 2-26. As argued infra at Section E, and in Garfield County's comments, BLM may not lawfully close these lands to oil shale development based on alleged wilderness characteristics. BLM's action in developing the PFEIS based on lands with wilderness character violates Congress' prohibition. Just changing the label does not relieve BLM of honoring the funding restriction, and BLM has admitted the funds allocated to implement Secretarial Order 3310 (S.0. 3310) were applied to the PFEIS.

Issue Number: PP-WO-OilTar-13-04-34
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

BLM has long contended that a mere inventory of wilderness character falls within its authority, citing 43 U.S.C. §1711(a). But FLPMA is equally clear that BLM cannot change land management based on an inventory unless and until the land use plan is amended. Id. The OSTS PFEIS uses an undisclosed wilderness inventory and then proposes to change the management of these areas to protect the alleged wilderness character without disclosure of the basis for BLM's 'The Wild Lands Policy, 1M 2011-154 and the LWC and wildlands manuals (MS 6310 and 6320) contradict the commitments made to the State of Utah, the U.S. Congress and the public when the Secretary stated that he would honor the Settlement Agreement between Utah and DOI (Answering yes to the question from Senator Bennett "Do you agree that currently the Department has no authority to establish new WSAs (Post-603 WSAs) under any provision of law, such as the Wilderness Act of [sic] Section 202 of FLPMA?") The Secretary also stated BLM had no authority to impose nonimpairment management on non-WSA lands determination. This is exactly what S.0. 3310 directed BLM to do and what Congress prohibited.

When Congress froze all funding for S.O 3310, two months after the Colorado Environmental Coalition v. Salazar (09-0085, 09-0091) settlement, BLM's hands were tied. The apparent decision to proceed regardless of the funding freeze is in contempt of Congress and unlawful. U.S.C. §1341.10 DOI and BLM officials who authorized the expenditure of these funds face employment actions and even criminal penalties. Id. at §§1341, 1350.

Calling these areas LWCs or claiming that BLM is only using its separate inventory authority does not change the result. BLM proposes to manage the areas in the same manner as it would have had Congress not shut down all funding related to S.O. 3310. Changing the name from "Wildlands" to "LWCs" does not make the action any more lawful.

Issue Number: PP-WO-OilTar-13-06-20
Organization: Enefit American Oil

Issue Excerpt Text:

E. BLM's use of LWCs to designate lands as unsuitable for OSTS leasing violates the congressional prohibition on the implementation of the Department of Interior's "Wild Lands" policy.

By effectively implementing Secretarial Order No. 3310 to exclude LWCs from prospective oil shale development, BLM is violating federal law. Enefit Comments, at 7-8, BLM does not deny using LWCs to make determinations, although it purports to arrive at LWC determinations using alternative regulations and guidance. See, e.g., BLM Response. at 145, 163. As Enefit previously explained, Public law 112-10 became law on April 15, 2011. This law prohibited the use of any funds to "implement, administer, or enforce" LWCs, However, notwithstanding this clear congressional moratorium, the Final 2012 PEIS recommends a preferred alternative that excludes from future commercial oil shale leasing "[a]ll areas that the BLM has identified or may identify as a result of inventories conducted during this planning process as LWC: PEIS, at ES-6 (Vol. 2). The resulting resource management proposal is unmistakable: BLM is attempting to preclude from future commercial oil shale leasing a broad category of lands based on a management directive (Secretarial Order No. 3310) that BLM is legally barred from implementing, administering, or enforcing.

Issue Number: PP-WO-OilTar-13-08-14
Organization: State of Utah

Issue Excerpt Text:

In addition, because the BLM does not possess any new information about lands with wilderness characteristics from that available in 2008, a change in any type of management for the lands, from that finalized in the 2008 RMP's and the 2008 Oil Shale EIS as is proposed in the PRMP/FEIS, would constitute an improper use of Secretarial Order 3310, issued December 23, 2012. Secretarial Order 3310 was defunded by Congressional action, which required that no funds may be used to implement or enforce the Order. In this case, the BLM is proposing to restrict the availability of these lands for the commercial leasing of oil shale and tar sands based solely upon the existing, older inventory for the presence of wilderness characteristics. This clear expression of intent to manage for wilderness is the functional equivalent of the creation of wild lands as proposed within the Secretarial Order, Because the Congressional action clearly stated that the BLM may not implement or enforce Secretarial Order 3310, the PRMP/FEIS is contrary to law.

Issue Number: PP-WO-OilTar-13-09-16
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Notably, the same lack of reasoned analysis is true with respect to the Preferred Alternatives' exclusion of lands identified by BLM as having wilderness characteristics (LWC). 2012 OSTS PFEIS at 1-5, 2-26. As argued infra Section V.E - G, and in Uintah County, UAC, and the Coalition's comments, BLM may not lawfully close these lands to oil shale and tar sands development based on alleged wilderness characteristics. BLM's actions in developing the OSTS PFEIS based on lands with wilderness character violates Congress's prohibition. Just changing the label from S.O. 3310 to LWCs

does not relieve BLM of honoring the funding restriction, and BLM has admitted the funds allocated to implement S.O. 3310 were applied to the OSTS PFEIS.

Despite such a prohibition under FLPMA and the 2011 congressional moratorium, which has been extended, BLM proposes to close at least 66,000 acres to oil shale and tar sands leasing based on their alleged LWCs. 2012 OSTS PFEIS at 6-5; cf id. at 6-7 (excluded LWC acreage may be as much as 88,000 acres). The only rationale offered by BLM is that it recently "completed updating its inventory of lands having wilderness characteristics." Id. at 1-5.

The LWC inventory is not new information, because BLM already conducted similar LWC inventories prior to its 2008 PFEIS allocation decisions. See e.g. Alternative E, Vernal Resource Management Plan (RMP) and Final Environmental Impact Statement (FEIS). BLM did not explicitly exclude leasing within lands it believed may have one or more characteristics of wilderness under any of the alternatives. Instead, it acknowledged that processes were underway in the respective field offices where such lands have been identified to determine appropriate management requirements for these areas. The 2008 PFEIS identified the location of such lands in Chapter 3 and, in general terms, assessed the impacts of development on these lands in Chapters 4 and 5. 2008 OSTS PFEIS at 2-57. In Uintah County, the 2008 Vernal RMP reviewed all lands proposed for wilderness in citizen proposals and made decisions on how they should be managed. The PFEIS contradicts those planning decisions without regard to the facts and findings made by the Vernal Field Office in a concurrent and still valid land use planning process.

Issue Number: PP-WO-OilTar-13-09-55
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

On April 14, 2011, the BLM caused to be published in the Federal Register, Volume 76, No 72/Thursday, April 14, 2011, pages 21 003-21 005, a notice of intent to prepare the 2012 OSTS PEIS. The preliminary purpose and need statement in the Notice of Intent states the PEIS will analyze removing from oil shale and tar sands leasing "All areas that the BLM has identified or may identify as a result of inventories conducted during this planning process, as lands containing wilderness characteristics[.]" id. at 21004. The Notice of Intent further states:

“Lands that the BLM identifies as having wilderness characteristics will be considered during this planning initiative, as described above, and consistent with Secretarial Order No. 3310, dated Dec. 22, 2010, and BLM Manuals 6301 and 6302. Future leasing of lands determined by the BLM to have wilderness characteristics, if compatible with the allocation decisions stemming from this initiative, will subsequently be assessed in accordance with BLM Manual 6303, as appropriate (i.e., where the BLM has not determined, consistent with BLM Manual 6302, whether the lands with wilderness characteristics at issue should be receive a wild lands designation, BLM Manual 6303 will apply)[.]” Id. at 21004 (emphasis added).

The Notice of Intent reveals BLM's true intent to use the OSTS PFEIS as a vehicle to implement, administer, and/or enforce S.O. 3310 and one or

more of the BLM guidance manuals promulgated under S.O. 3310. That Notice of Intent still controls the 2012 OSTS/PEIS effort. This constitutes a continuing violation of the Congressional Moratoria against the enforcement of S.O. 3310, which has been extended until March 27, 2013, supra. On April 21, 2011, for example, seven days after issuance of the Notice of Intent, Congress enacted the Congressional Resolution to Fund Fiscal Year 2011 through September 30, 2011. Section 1769 of that measure states:

"For the fiscal year ending September 30, 2011, none of the funds made available by this division or any other Act may be used to implement, administer, or enforce Secretarial Order No. 3310 issued by the Secretary of the Interior on December 22, 2010[.]"

Continuing Appropriations Act, 2011 (Pub. Law 112-10. Sec. 1769). The BLM has never rescinded the April 14th Notice of Intent for the subject OSTS PFEIS The OSTS PFEIS stands as a continuing effort by the BLM to implement S.O. 3310, something that was barred and continues to be barred by the previously-referenced Congressional Moratoria. The undersigned protest the OSTS PFEIS as a continuing direct violation of the April 21, 2012 Congressional Moratorium.

BLM has long contended that a mere inventory of wilderness character falls within its authority, citing 43 U.S.C. §1711(a). But FLPMA is equally clear that BLM cannot change land management based on an inventory unless and until the land use plan is amended. id. The funding ban prohibits management changes in the name of wilderness. The OSTS PFEIS uses an undisclosed wilderness inventory and then proposes to change the management of these areas to protect the alleged wilderness character without disclosure of the basis for BLM's determination. This is exactly what S.O. 3310 directed BLM to do and what Congress prohibited. When Congress froze all funding for S.O. 3310, two months after the CEC v. Salazar (09-00085, 09-00091) settlement, BLM's hands were tied. The apparent decision to proceed regardless of the funding freeze is in contempt of Congress and unlawful. 31 U.S.C. § 1341." DOI and BLM officials who authorized the expenditure of these funds face employment actions and even criminal penalties. id. at §§ 1341, 1350.

Calling these areas LWCs or claiming that BLM is only using its separate inventory authority does not change the result. BLM proposes to manage the areas in the same manner as it would have had Congress not shut down all funding related to S.O. 3310. Changing the name from "Wildlands" to "LWCs" does not make the action any more lawful.

Issue Number: PP-WO-OilTar-13-09-70
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

The OSTS PFEIS contradicts Congress' clear direction that BLM cease and desist from implementing the provisions of S.O. 3310. The fact that BLM put the implementing manuals in abeyance but issued Instruction Memorandum (IM) 2011-154 and more recent manuals, BLM Manuals 6310, 6320 (March 15,2012), that implement the S.O. 3310, does not excuse BLM from the clear violation of Congress' edict. 31 U.S.C. §§ 1349, 1340.

Summary

The BLM's consideration of lands with wilderness characteristics in allocating lands as unsuitable for OSTS leasing violates the congressional prohibition on the implementation of Secretarial Order (SO) 3310. In section 1769 of Public Law 112-10, and subsequent enactments, Congress has prohibited the use of any funds to "implement, administer, or enforce" SO 3310. The 2011 Federal Register Notice of Intent documents the BLM's intent to implement, administer and/or enforce SO 3310 and one or more of the BLM guidance manuals promulgated under SO 3310. Further, the BLM has admitted that the funds allocated to implement SO 3310 were applied to the Final PEIS.

Response

As stated on page 145 of the Comment Response Document of the Final PEIS, the BLM has not violated the April 21, 2011, Continuing Resolution and other congressional prohibitions on "implementing, administering, or enforcing SO 3310" (the "Wild Lands" order).

Lands that the BLM identifies as having wilderness characteristics have been considered during this planning initiative as part of the planning process consistent with FLPMA and BLM Manuals 6310 (Conducting Wilderness Characteristics Inventory on BLM Lands) and 6320 (Considering Lands with Wilderness Characteristics in the BLM Land Use Planning Process). In accordance with congressional direction, this planning initiative will not consider designating "Wild Lands." This current planning initiative does not rely upon the SO as legal authority and does not implement, administer, or enforce it.

Nothing in any of the congressional actions addressing SO 3310, however, prohibits the Secretary from considering the wilderness value of lands in establishing, revising, or amending land use plans, pursuant to FLPMA. The Secretary has the authority and obligation, under Section 201 of FLPMA to "prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern" (Title 43, Section 1711[a] of the United States Code [43 USC 1711[a]]).

As required under Section 202 of FLPMA, the BLM relies on its resource inventory information, such as the inventories of lands with wilderness characteristics compiled for this OSTS planning initiative, in developing land use plans. There is ample authority in FLPMA for the BLM to identify wilderness characteristics as a resource and, if it chooses, to manage lands to protect

such characteristics as part of its multiple use mandate in developing, revising, and amending land use plans. In this instance, the BLM is proposing and has analyzed the potential effects of protecting lands it identifies as having wilderness characteristics from the possible impacts of a technology still in its infancy. The IM-2011-154 simply provides direction for land use planning for identified lands with wilderness characteristics.

Policy – Wilderness Characteristics Inventory and Analysis

Issue Number: PP-WO-OilTar-13-04-37
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

The OSTS PFEIS also fails to identify which, if any, inventory it has used to identify the LWCs. The single map in the OSTS PFEIS identifies these areas but does not disclose the factual basis for the LWC classification. 2012 OSTS PFEIS Fig. 2.3.3-2. Thus, it is impossible to divine the resource values that prompted the classification being used in the OSTS PFEIS. If Garfield County had access to this information, it could provide site specific documentation of the errors in the premise that these are LWCs.

Issue Number: PP-WO-OilTar-13-04-43
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Chapter 6 of the OSTS PFEIS lists the areas and acreage without providing maps or a description.

Issue Number: PP-WO-OilTar-13-04-44
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

The OSTS PFEIS uses a limited and incorrect definition of wilderness. Footnotes to Tables 6.1.1-2 and 6.2.1-3 state: "The key characteristics of wilderness that may be considered in land use planning include an area's appearance of naturalness and the existence of outstanding opportunities for solitude or primitive and unconfined types of recreation." This statement is materially incorrect, because the definition of wilderness requires that an area be road less and that it be greater than 5,000 acres. 16 U.S.C. §1131(a). The OSTS PFEIS conveniently drops the first two criteria. It appears that the OSTS PFEIS adopts this unofficial and inaccurate information and excluded significantly high potential public lands from oil shale and tar sands leasing.

Issue Number: PP-WO-OilTar-13-09-61
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

The OSTS PFEIS also fails to identify which, if any, inventory it has used to identify the LWCs. The single map in the OSTS PFEIS identifies these areas but does not disclose the factual basis for the LWC classification. See 2012 OSTS PFEIS Fig. 2.3.3-2. Thus, it is impossible to divine the resource values that prompted the classification being used in the OSTS PFEIS. If Uintah County had access to this information, it could provide site specific documentation of the errors in the premise that these are LWCs.

Issue Number: PP-WO-OilTar-13-09-63

Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Chapter 6 of the OSTS PFEIS lists the areas and acreage without providing maps or a description.

Issue Number: PP-WO-OilTar-13-09-64
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

The OSTS PFEIS uses a limited and incorrect definition of wilderness. Footnotes to Tables 6.1.1-2 and 6.2.1-3 state: 'The key characteristics of wilderness that may be considered in land use planning include an area's appearance of naturalness and the existence of outstanding opportunities for solitude or primitive and unconfined types of recreation." This statement is materially incorrect, because the definition of wilderness requires that an area be roadless and that it be greater than 5,000 acres. 16 U.S.C. §1131(a). The OSTS PFEIS conveniently drops the first two criteria. It appears that the OSTS PFEIS adopts this unofficial and inaccurate information and excluded significantly high potential public lands from oil shale and tar sands leasing.

Issue Number: PP-WO-OilTar-13-13-35
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

BLM should remove from leasing potential wilderness in the Kinney Rim and Devils Playground units. In the Proposed Plan Amendment, the BLM removes all lands that the agency has identified or may identify as Lands with Wilderness Characteristics ("LWCs") from oil shale leasing. FEIS at 2-79. BLM has recently undertaken a new round of inventories for Lands with Wilderness Characteristics. FEIS at 1-5. The agency notes that acreage adjustments have been made between Draft and Final OSTS EISs to account for "errors" in the original document. Id. BLM further explains, "The Kinney Rim South Unit west of the WSA was mistakenly identified in the Draft PEIS as an area with wilderness characteristics." FEIS at 3-36. However, BLM provides no evidence to support the contention that lands identified definitively as LWCs in the Kinney Rim units in the Draft EIS (as well as the previously released 2008 OSTS EIS) actually lack wilderness characteristics. Nor does BLM explain the changed circumstances that led the agency to change its official determination. These failures are symptomatic of a broader failure to disclose baseline information regarding the presence and/or degree of wilderness characteristics in the Kinney Rim units and the concomitant failure to take the legally required 'hard look' at impacts to these resources pursuant to NEPA.

Issue Number: PP-WO-OilTar-13-13-38
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

The Manual specifically states, "Human impacts outside the area will not normally be considered in assessing naturalness of an area." BLM Manual MS-6310.06.C.2.b.iii. Furthermore, "Developed rights-of-way (ROW) are treated like other impacts, and the boundary should be drawn to exclude those ROWs." BLM Manual

MS-6310.06.C.3.c. Yet BLM has used the presence of County Road 19, which is outside (and serves as a boundary of) both the Kinney Rim North and South units, as a factor detracting from naturalness inside the units. BLM has consistently mentioned the presence of wellsites, and even a dead-end County Road, as being within these units and detracting from naturalness. But BLM guidance states that these intrusions should be excluded from candidate units, and serve instead as boundaries, because every active wellpad is accessed by a 'wilderness inventory road:' "The boundary is generally based on the presence of wilderness inventory roads…." BLM Manual MS-6310.06.C.1. Further, "Dead-end roads (i.e., "cherry stem roads") may extend into the unit and are excluded from the unit, which will modify the unit boundary." BLM Manual MS-6310.07, "Boundaries," emphasis added.

Issue Number: PP-WO-OilTar-13-13-42
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

The issue of protecting the Devils Playground citizens' proposed wilderness from oil shale leasing was also raised at the Draft EIS stage. See FEIS Response to Comment document at 315, 1178, 1205, and Attachment F. We are unable to find any evidence that BLM has done an Inventory Area Evaluation for these lands, made a determination that they do or do not possess wilderness characteristics, any assessment of the size, naturalness, solitude, or primitive and unconfined recreation opportunities for these lands, or analysis of impacts. BCA began an intensive on-the-ground wilderness inventory of this area in fall of 2012, and have identified areas exceeding 5,000 acres which possess both solitude and naturalness. See Attachments F, G. Under the Preferred Alternative, BLM intends to offer a significant portion of these lands for commercial oil shale leasing. See FEIS at Figure 2.3.3-6. BLM's failure to respond to comments seeking withdrawal of these lands from oil shale leasing as Lands with Wilderness Character appears to violate NEPA's baseline information and 'hard look' requirements.

Issue Number: PP-WO-OilTar-13-13-46
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

It is also notable that Adobe Town Area H, North Cow Creek, has been designated by BLM to possess Lands with Wilderness Characteristics. See FEIS at 6-115; Attachments H, I, J. This area is denoted in the FEIS as possessing lands available for oil shale leasing. In addition, portions of Adobe Town Area F determined to be Lands with Wilderness Characteristics by BLM also are offered for oil shale leasing. See FEIS at 6-115, Attachment J. As BLM has already determined these areas to possess wilderness characteristics, they should be withdrawn from oil shale leasing under the PEIS.

Issue Number: PP-WO-OilTar-13-14-43
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

a. BLM's Decision Eliminating LWC in the Adobe Town Area is Arbitrary and Capricious. In the draft EIS the BLM recognized a large area of LWC in the Adobe Town area. DEIS at Fig. 2.3.3-3. Therefore, those lands were not

available for leasing application because LWC were excluded from leasing. But in the final EIS the BLM has completely eliminated many of these LWC and no longer recognizes them. FEIS at Fig. 2.3.3-3. Therefore, a much larger area is now available for application for oil shale leasing. Compare DEIS Fig. 2.3.3-6 with FEIS Fig. 2.3.3-6.

In the final EIS BLM states the following areas are excluded from availability from applications for oil shale leasing, All areas that the BLM has identified or may identify as a result of inventories conducted during this planning process, as containing wilderness characteristics (acreage figures for LWC have been corrected from the erroneous figures included in the Draft RMP Amendments/Draft PEIS; no supplementation is required, as these lands were analyzed as open under Alternative 1). FEIS at ES-9. As can be seen, the reason so much less acreage is now recognized as LWC in the Adobe Town area is that BLM claims to have corrected "erroneous figures" that were presented in the draft EIS. BLM also had this to say: "BLM has recently completed updating its inventory of lands having wilderness characteristics (LWC) (please note that acreage errors in the Draft PEIS have been corrected in this document) in each of the three states for the planning area." FEIS at 1-5.

So we are left with this picture: BLM claims to have made mistakes in the draft EIS relative to its portrayal of LWC and now claims to have corrected those mistakes in the final EIS, the result of which is to eliminate vast acreages from being excluded from oil shale leasing, most particularly in the Adobe Town area. This modification is wrong because there is no rational basis to support it, making it an arbitrary and capricious decision.

Issue Number: PP-WO-OilTar-13-14-45
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

The only reasons BLM has put forth to justify its dramatic turnabout on the acreage of LWC in Adobe Town is that the acreage figures in the draft EIS were deemed to be "erroneous" and that "errors" had been made in the draft EIS. There is no explanation for these dramatic changes, no rationale, no justification—BLM just invokes supposed mistakes that it made and that is the end of the matter. Yet there are far-reaching changes being made as a result of this decision. The implications of it are not trivial or de minimis. Therefore this decision is arbitrary and capricious because it has no support. BLM has entirely failed to consider important aspects of the problem—it has provided no real consideration of the problem at all—and its decision runs counter to the evidence that was before the agency, which, as recognized in the draft EIS, was that these areas are LWC.

Issue Number: PP-WO-OilTar-13-14-47
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

To support this decision to eliminate LWC BLM was required to consider and analyze the factors it must evaluate in determining if lands have wilderness characteristics—sufficient size (5000 acres or more), naturalness, outstanding opportunities for solitude, outstanding opportunities for primitive and unconfined recreation, and supplemental values (such as ecological, geological, or other features that have scientific, scenic, or historical value). Yet so far as we can determine nowhere in the final EIS is there any analysis of these factors. BLM just states that errors were made in the draft EIS

and then proceeds to make wholesale changes in the acreages available for oil shale leasing. BLM does state that, "[t]he BLM had previously reviewed this Area [the Kinney Rim South area] and had determined that wilderness characteristics were not present." FEIS at 2-36. But this still does not represent an analysis, it is a conclusory end to the argument.

Issue Number: PP-WO-OilTar-13-14-51
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

But even if at the Field Office level there have been inventories finding these areas are not LWC, that does not change the fact that the BLM (and the Department of the Interior) national offices initially reached a different finding and recognized wilderness qualities in the Adobe Town area.

So even if BLM now wants to rely on the Field Office level inventories, it must provide an explanation for why the national level assessment was wrong, and it cannot do that in a summary fashion as is currently the case. At a minimum BLM must explain why its naturalness finding for Adobe Town lands at the national level was wrong and the naturalness finding at the local level is right, and provide a rational explanation for this different interpretation.

Summary

The Final PEIS did not disclose the inventory used to identify lands with wilderness characteristics, and Chapter 6 of the Final PEIS lists the areas and acreages of these lands but does not provide maps or a description.

The Final PEIS uses an incorrect definition of wilderness. The definition of wilderness requires that an area be road less and that it be greater than 5,000 acres (16 U.S.C. §1131) but these criteria are not used in the Final PEIS.

The Final PEIS states that the Kinney Rim South Unit west of the Wilderness Study Area (WSA) was mistakenly identified in the Draft PEIS as an area with wilderness characteristics, but provides no evidence to support this change, and the BLM did not disclose baseline information regarding the presence and/or degree of wilderness characteristics in the Kinney Rim units. Further, the BLM used the presence of County Road 19, which is outside both the Kinney Rim North and South units, as a factor detracting from naturalness inside the units. The BLM also mentioned the presence of wellsites and a dead-end County Road as being within these units and detracting from naturalness. The BLM guidance, however, states that these intrusions should be excluded from candidate units, and serve instead as boundaries.

There is no evidence that the BLM completed an Inventory Area Evaluation for the Devil's Playground citizens' proposed wilderness. Further, the BLM failed to respond to comments seeking withdrawal of these lands from oil shale leasing based on wilderness character.

Adobe Town Area H and portions of Adobe Town Area F have been determined by the BLM to possess lands with wilderness characteristics and are still available for oil shale leasing in the PEIS. The BLM did not provide analysis regarding its decision to eliminate lands with wilderness characteristics in the Adobe Town Area in the Final PEIS. The BLM claims this was because it corrected "erroneous figures" that were presented in the Draft EIS, but the BLM still needs to present analysis to support this. It is unclear if the BLM is now relying on the Field Office level wilderness characteristics inventories; if so, the BLM must provide an explanation for why the national level assessment of Adobe Town area used in the Draft PEIS was incorrect.

Response

- The Final PEIS did not disclose the inventory used to identify lands with wilderness characteristics. Chapter 6 of the PEIS lists the areas and acreages of lands with wilderness characteristics but does not provide maps or a description.

As disclosed in the Final PEIS, lands with wilderness characteristics were identified by the affected Field Offices in field surveys that were updated as recently as 2011 following program guidelines for identifying such lands and have been compiled for this PEIS review (Final PEIS, Comment Response Document, p. 123; see also p. 2-12). These inventories were conducted as part of the BLM's obligation to maintain resource inventories and were updated, as necessary specifically for this planning effort. These inventories and documentation are generally available at each affected Field Office. Since the OSTS PEIS is a targeted plan amendment addressing only the management of oil shale and tar sands resources, it is not making any decisions regarding the management of lands with wilderness characteristics with respect to resources other than oil shale and tar sands. Detailed description of the inventory process for any resource value, including but not limited to lands with wilderness characteristics is not usually contained in an EIS, but is kept in the administrative files for a particular project. As noted below, some Field Offices also post their inventory information on their website. The BLM's proposed planning decision is that lands with wilderness characteristics are not available for oil shale or tar sands leasing.

Regarding areas within Uintah County, Utah, the lands with wilderness characteristics identified in the 2012 OSTS PEIS are those areas that were considered in the BLM Vernal Field Office

RMP process and were identified in the 2005 Draft Vernal RMP/EIS (available on the Field Office webpage). Uintah County and the State of Utah provided input and comments on these inventories during that planning effort. The Lands With Wilderness Characteristics Inventory process for the White River FO in Colorado is also documented on the FO website at: http://www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/white_river_field/LWC.Par.48278.File.dat/Lands%20with%20Wilderness%20Characteristics%20Inventory%20update%20for%20web%202012_08_29.pdf. The five polygons identified as having wilderness characteristics in the White River FO that overlap the oil shale area are described under the section "Current Conditions, Inventoried Units" on page 4 of the document online. The methodology and the findings of the inventory for each of the five polygons are included.

It is correct that no map of the lands with wilderness characteristics for Colorado is provided in Chapter 6 of the Final PEIS. It was intended that the map published in Chapter 2 of the Final PEIS (Figs. 2.3.3-1) would show the location of the lands with wilderness characteristics along with other sensitive lands. There was an error in publishing this map and the Colorado lands were inadvertently excluded. The BLM regrets the error. No area-specific descriptions were included in the document; rather, the areas proposed for closure for a variety of reasons should have been identified on that map. A revised Figure 2.3.3-1 was published at the Oil Shale and Tar Sands Programmatic EIS website (http://ostseis.anl.gov/index.cfm), on December 20, 2012, as an addition to the Errata Sheet for the Final PEIS. An email was sent to stakeholders at the time to notify parties of the correction.

- The OSTS PEIS uses a limited and incorrect definition of wilderness, which requires that an area be road less and greater than 5,000 acres in size. 16 U.S.C. §I 131(a). The OSTS PFEIS conveniently drops these two criteria.

Tables 6.1.1-2 and 6.2.1-3 list areas that BLM Field Offices had previously determined possess wilderness characteristics using the BLM's established wilderness inventory process. Footnotes A of these tables (pages 6-7 and 6-332) were intended to summarize the criteria the BLM considers when inventorying lands for wilderness characteristics. The protester is correct in pointing out that the footnotes did not include the size and roadless criteria. The complete list of criteria, though, is listed elsewhere in the Final PEIS (p. 2-12, e.g.). The BLM regrets the oversight. In compliance with BLM policy and Manual 6310, all criteria and standards were considered by the BLM when conducting field inventories.

-The PEIS states that the Kinney Rim South Unit west of the WSA was mistakenly identified in the Draft PEIS as an area with wilderness characteristics, but provides no evidence to support this change. Further, BLM didn't disclose baseline information regarding the presence and/or degree of wilderness characteristics in the Kinney Rim units.

-BLM's Decision Eliminating Lands with Wilderness Characteristics in the Adobe Town Area in the final PEIS is Arbitrary and Capricious because there is no rational basis to support it. In the final EIS the BLM has eliminated many lands with wilderness characteristics that were recognized in the draft PEIS. BLM claims this was because it corrected "erroneous figures" that were presented in the draft EIS.

-BLM does not present any analysis, explanation, rationale or justification regarding its decision to change the status of lands for the Adobe Town area.

-Even if BLM now wants to rely on the Field Office level inventories, it must provide an explanation for why the national level assessment was wrong, and it cannot do that in a summary fashion as is currently the case.

-Adobe Town Area H, North Cow Creek, and portions of Adobe Town Area F have been designated by BLM to possess Lands with Wilderness Characteristics and are also available for oil shale leasing. As BLM has already determined these areas to possess wilderness characteristics, they should be withdrawn from oil shale leasing under the PEIS.

Under the Proposed RMPA, all areas that the BLM has identified as a result of inventories conducted during this planning process or previous to the process as lands with wilderness characteristics are excluded from commercial oil shale and tar sands leasing and development. Portions of the Adobe Town/Kinney Rim area were determined by the BLM to contain wilderness characteristics. These areas are located on the western and eastern borders of the Adobe Town WSA. All but one of the areas is also located within the Wyoming Environmental Quality Council-designated Adobe Town "Very Rare or Uncommon Area," another exclusion area for oil shale leasing and development in the PEIS. Based on the presence of oil and gas leases within the areas with wilderness characteristics outside the WSA, it was determined in the Rawlins RMP that all of these areas within the Rawlins Field Office would be managed as multiple-use lands and not for protection of wilderness. In the Final PEIS, the BLM stated that these lands would not be exclusion areas for oil shale leasing and development since they were not being managed that way for other resources (Final PEIS, p. 3-36).

Upon review of this protest issue, the BLM has determined that it is appropriate to grant this protest because under the Proposed RMPA, all lands determined to possess wilderness characteristics will be closed to oil shale leasing and development. This includes, then, the Adobe Town/Kinney Rim areas of the Rawlins and Rock Springs Field Offices. The ROD for the PEIS will make clear that oil shale leasing and development will be excluded from these areas. For all other resources, these areas will be managed in accordance with the decisions in the Rawlins and Rock Springs Field Office RMPs.

-BLM has used the presence of County Road 19, which is outside both the Kinney Rim North and South units, as a factor detracting from naturalness inside the units. BLM has also mentioned the presence of wellsites, and even a dead-end County Road, as being within these units and detracting from naturalness. But BLM guidance states that these intrusions should be excluded from candidate units, and serve instead as boundaries.

-BLM has not provided evidence that it has done an Inventory Area Evaluation for the Devil's Playground citizens' proposed wilderness. BLM's failure to respond to comments seeking withdrawal of these lands from oil shale leasing as Lands with Wilderness Character violates NEPA's baseline information and 'hard look' requirements.

The BLM's inventory of the Kinney Rim North and South units and the manner in which boundaries of the areas comply with BLM policy in Manual 6310. The BLM made a reasonable determination that the units either do not meet the size criteria or are impacted by the presence of noticeable human-made features. In determining the naturalness of an area, BLM guidance states that "any work of human beings must be substantially unnoticeable" (Manual 1610.c.2.b). While the BLM guidance further states that, in certain cases, human-made features may be determined to be substantially unnoticeable, the BLM determined that the presence of these features in the Kinney Rim South units detract from naturalness.

The inventories for areas within the Rawlins Field Office were conducted as part of the Rawlins RMP revision; those determinations were reviewed by the public before being finalized as part of the Rawlins RMP ROD in 2008. In mid-2011, as part of OSTS PEIS process, the Rock Springs Field Office conducted an inventory of lands with potential wilderness characteristics within the proposed oil shale lease area (which includes the Devil's Playground area) to determine if wilderness characteristics exist or not. The Field Office determined that lands in the Devil's Playground area identified by the protesting party did not meet the wilderness characteristics criteria. The BLM is currently undergoing an RMP revision in the Rock Springs Field Office which is subject to public review and input.

Because the BLM has an ongoing requirement to maintain an accurate inventory of the public lands and to periodically update its land use plan decisions, changes to the BLM's inventories could be made in the future. As previously stated, additional NEPA analysis will be required prior to any leasing of oil shale in any particular area, and prior to approval of any project-specific development proposals. Identification of areas with wilderness characteristics and the consideration of the potential impacts to lands with wilderness characteristics that could arise during consideration of any leasing/development decision will be analyzed, as required by NEPA and BLM Manuals 6310 and 6320. During the course of these subsequent NEPA reviews, as is the case with any NEPA review, should there be additional information or a change in

circumstances or inventories, the BLM may consider an amendment to its planning decisions to address that information or change in circumstances (BLM Land Use Planning Handbook, pp. 45-46).

The Comment Response Document of the Final PEIS documents how the BLM considered the comments raised at the Draft EIS stage regarding the citizens' proposed wilderness in the Devil's Playground area. As explained on page 1 of the Comment Response Document all comments submitted during the review period were categorized by the BLM. Comments submitted regarding the citizens' proposed wilderness in the Devil's Playground area displayed on pages 315 and 1178 of the document were categorized under issue 3.1.1 "Support of Additional Resource Protection" (the comment cited by the protesting party on page 1205 relates to visual resource management, not to wilderness characteristics inventory). As noted on pages 2 and 3 of the response document, the BLM received voluminous comments on the Draft PEIS and thus, a summary of comments expressing support of additional resource protection was appropriate (40 CFR 1503.4(b)). The summary and response to issue 3.1.1 is found on pages 54-56 of the Comment Response Document.

Policy – Energy Policy Act

Issue Number: PP-WO-OilTar-13-01-13
Organization: Center for Regulatory Effectiveness

Issue Excerpt Text:

The proposed land use plan amendments violate the 2005 Energy Policy Act: In the 2012 Final PEIS, BLM states that it "would like to maintain focus on RD&D projects, so as to obtain more information about the technological requirements for development of oil shale, as well as the environmental implications, before committing to broad-scale commercial development. However, the Energy Policy Act of 2005 requires that "the Secretary shall complete a programmatic environmental impact statement for a commercial leasing program for oil shale and tar sands resources on public lands, with an emphasis on the most geologically prospective lands within each of the States of Colorado, Utah, and Wyoming. The 2012 Final PEIS is not a PEIS for commercial oil shale development as required by the Energy Policy Act of 2005. It is instead a PEIS to develop a RD&D leasing program. This is a clear violation of a mandatory obligation set forth by Congress.

Moreover, the Energy Policy Act of 2005 requires the Secretary to consult with state and local governments to determine if there is sufficient support for a lease sale under the commercial leasing program. If there is sufficient support, then the Secretary may then conduct a commercial lease sale. Under the 2012 PEIS, state and local governments will never be afforded the opportunity to consult with the Department of Interior regarding commercial lease sales, because there is no commercial leasing program created by the 2012 PEIS. Thus, this is also a violation of the Energy Policy Act of 2005.

Furthermore, the Energy Policy Act of 2005 mandates the Department of the Interior to develop a commercial leasing program "with an emphasis on the most geologically prospective lands." Even if the RD&D first requirement does marginally constitute developing a commercial leasing program, BLM still ignores the statutory requirement that the commercial leasing program is based upon the "most geologically prospective lands." The 75% reduction in land available under the 2012 PEIS is a clear disregard for statutory requirement that a leasing program be focused on the most geologically prospective lands."

Issue Number: PP-WO-OilTar-13-03-10
Organization: Duchesne County Commission (Utah)

Issue Excerpt Text:

Programmatic Environmental Impact Statement and commercial leasing program for oil shale and tar sands: Not later than 18 months after the date of enactment of this Act, in accordance with section 102(2) (C) of the National Environmental Policy Act of 1969 (42 USC. 4332(2) (C)), the Secretary shall complete a programmatic environmental impact statement for a commercial leasing program for oil shale and tar sands resources on public lands, with an emphasis on the most geologically prospective lands within each of the States of Colorado,

Utah, and Wyoming.

Findings: This required PEIS was completed in 2008 in accordance with the Act. However, the so-called "fresh look" undertaken by the current Secretary guts the required commercial leasing program called for in the section above. The associated plan amendments abandon the commercial leasing program in favor of RD&D leases, in violation of the Act.

Issue Number: PP-WO-OilTar-13-04-7
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

In a complete about-face from 2008, BLM now proposes to drastically scale back its commercial leasing program. BLM's Preferred Alternative for oil shale would only allocate about 677,000 acres for oil shale leasing. 2012 OSTS PFEIS at ES-9-10. Remarkably, the Preferred Alternative only leaves about 33% 'of the lands previously classified as suitable and available open for oil shale and tar sands leasing.

In doing so, BLM violates the EP Act by cutting off the "most geologically prospective" public lands that are otherwise suitable and available for mineral leasing under the 2008 PFEIS program.

Issue Number: PP-WO-OilTar-13-05-18
Organization: Excalibur Industries Inc.

Issue Excerpt Text:

While Congress' intent under Section 369 of the Energy Policy Act of 2005 enacted on August 8, 2005 was to have the BLM proceed to granting commercial leases not later than January 15, 2008! Oil shale companies, including ours, have been denied Procedural Due Process every day since January 15, 2008....

Issue Number: PP-WO-OilTar-13-07-5
Organization: American Petroleum Institute

Issue Excerpt Text:

In removing 66% of the acreage made available for oil shale leasing application and nearly 70% of the acreage made available for oil sands leasing application in the land use allocations that resulted from the 2008 Oil Shale and Tar Sands PEIS and Record of Decision, BLM's action is misguided and runs counter to EPAct OS's directive to promote commercial oil shale development in Colorado, Utah, and Wyoming, including by issuing regulations to establish a commercial oil shale leasing program. Rather than being guided by the Act's intent and express requirements, BLM has foreclosed even the possibility of oil shale and oil sands leasing and development on more than 1.6 million acres of land by prematurely and inappropriately deciding not to allow site-specific issues to be resolved later at the lease sale and development stages.

Issue Number: PP-WO-OilTar-13-08-5
Organization: State of Utah

Issue Excerpt Text:

Citing a Settlement Agreement in a 2009 lawsuit and some alleged "new information," BLM determined that it needed to take a new "hard look" at the leasing program created by the 2008

ROD. This review has resulted in the pending PRMP/FEIS. The Preferred Alternatives Proposed Plan Amendments of the PRMP/FEIS dramatically modify the conclusions of the 2008 ROD. Most significantly, the PRMP/FEIS drastically reduces the total acreage available for leasing, and converts the commercial programs for both oil shale and tar sands to research, development and demonstration (RD&D) programs. These changes directly violate the aforementioned provisions of the EP 2005.

In its DPEIS comments at p. 4, Utah made this very point stating that, "Congress did not ask BLM to determine if commercial leasing was appropriate or not, or to wait on a commercial leasing process in favor of some other proposal. ..The recent proposal does not meet those requirements and directly ignores both the mandate and timeline given to it by Congress under [EP 2005]." In response to these and similar comments, the BLM cynically States that: "Nothing in the Energy Policy Act of 2005 specified how the Secretary must establish a commercial oil shale leasing policy," but recognizes that commercial leases under the preferred alternatives could occur, "only through conversion of an RD&D lease." Comment Response Document ("CRD") p. 45. Such conflation of directives does not cure the fact that the PRMP/FEIS directly violates the commercial leasing provisions of the EP 2005.

Issue Number: PP-WO-OilTar-13-09-10
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

In a complete about-face from its 2008 decision, BLM now proposes to drastically scale back its commercial leasing program to what is basically the RD&D program. BLM's Preferred Alternatives (for Oil Shale and Tar Sands) would only allocate about 677,000 acres for oil shale leasing and about 130,000 acres for tar sands leasing. 2012 OSTS PFEIS at ES-9 - ES-10. Remarkably, the Preferred Alternatives only leave about 33% of the lands previously classified as suitable and available open for oil shale and tar sands leasing.

In doing so, BLM violates the EP Act by cutting off the "most geologically prospective" public lands that are otherwise suitable and available for mineral leasing under the 2008 PFEIS program.

Issue Number: PP-WO-OilTar-13-09-14
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM states that the EP Act does not state how a commercial leasing program must be established or amount of acreage that must be available for leasing. BLM Comment Response Doc. at 38-39, 41, 45, 124, 142-143, 146-148, 160-161, 163. BLM then concludes that the EP Act only requires it to consider the most geological prospective areas for leasing, and under FPLMA BLM has the discretion to amend land use plans based on the potential impacts on the environment. id. BLM's rationale omits the fact that mineral development is one of five principal uses, 43 U.S.C. §1702(1), and that FLPMA adopts the policies in the Mining and Materials Policy Act. id. at §1701 (a)(12). These mineral development policies must also guide BLM's decisionmaking, affects BLM's response

ignores. BLM's reliance on FLPMA is misplaced because the EP Act imposes mandates that supersede the generic policies upon which BLM relies.

Issue Number: PP-WO-OilTar-13-09-51
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

By limiting the size of parcels and the acres available, DOI is imposing unnecessary restraints for potential commercial development in violation of the EP Act and FLPMA. BLM responds that this is necessary to protect resources, which are already protected by other federal statutes and regulations, such as lands with wilderness characteristics, the Adobe Town VRUA, core sage-grouse habitat, ACECs, and other areas excluded by Alternatives C in 2008. 76 Fed. Reg. at 21004; see also 2008 OSTS ROD at 22, 35-36. Such restrictions on available land "unnecessarily speculates upon the nature and degree of impacts" prior to site-specific analyses which will include factors not now known. 2008 OSTS ROD at 22, 35-36. The OSTS PFEIS treatment of the Adobe Town Rare and Uncommon Area illustrates the error of BLM's analysis. The Wyoming designation that BLM relies on allows leasing development and only prohibits mining.

Companies have purchased RD&D leases from BLM for parcels of 160 acres, knowing that commercial development would allow the companies to expand operations to 640 acres. BLM, BLM Advances Oil Shale Research Process (Dec. 7, 2012), available at http://www.BLM.gov/ut/st/en/info/newsroom/2010/october_/BLM_advances_oil_shale.html. Many of the parcels available for potential commercial leasing under the Preferred Alternatives are 640 acres or smaller, many of which are much smaller, and isolated from other parcels available for potential commercial development. 2012 OSTS PFEIS at 2-44 - 2-46, 2-71. In 2008, when analyzing a similar proposal, the 2008 OSTS ROD concluded that the proposal "unreasonably fragments the area that would be available for application, resulting in parcels that are unlikely to be explored, leased or developed," potentially impeding "sound and rational development of the resource" contrary to the EP Act and FLPMA. 2008 OSTS ROD at 22, 35-36.

Issue Number: PP-WO-OilTar-13-10-13
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

The PRMP amendments and FPEIS are not consistent with the EPAct, which requires that oil shale or tar sands development on public lands may proceed only in an “environmentally sound manner.” NEPA standing alone does not necessarily mandate an environmentally sound outcome as a substantive matter, such result is required here. See, e.g., Wyo. Outdoor Council v. U.S. Army Corps of Eng’rs, 351 F. Supp. 2d 1232, 1240 (D. Wyo. 2005) (“NEPA mandates that federal agencies take into consideration the impacts of their actions on the environment in the hopes that such consideration will lead to environmentally sound decisions that balance the needs of humans and the environment in which they live”). The FPEIS and other studies demonstrate, however, that oil shale and tar

sands development, as would be allowed by the proposed PRMP Amendments, would not proceed in an "environmentally sound" way, but would destroy habitat; alter topography; displace and kill birds and animals; destroy plants including oil shale endemic species; require vast energy inputs that may emit up to four times more greenhouse gas pollution than conventional oil production; exacerbate to global warming and regional drying; and deplete and pollute water. The development would literally transform hundreds of thousands of acres of public lands into an industrial zone. Because the PRMP amendments allocate land to oil shale and tar sands development that would not and cannot proceed in an "environmentally sound manner," BLM cannot proceed with the proposed action.

Issue Number: PP-WO-OilTar-13-11-4
Organization: Environmentally Conscious Consumers for Oil Shale (ECCOS)

Issue Excerpt Text:

Further removal of the over 90% of potential acres in CO is in opposition of the EP Act of 2005 emphasis on "…most geologically prospective lands…" CO has the richest deposits and is the most commercially attractive as is proof when considering that 5 of the 6 1st Round RD&D leases and ALL 3 of the 2nd Round RD&D leases are in CO.

Issue Number: PP-WO-OilTar-13-13-51
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

Having a different set of standards for leasing oil shale deposits across state lines violates the intent of the Energy Policy Act in a manner that is arbitrary and capricious and an abuse of discretion.

Issue Number: PP-WO-OilTar-13-16-11
Organizations: Western Resource Advocates, Natural Resources Defense Council, and Southern Utah Wilderness Alliance

Issue Excerpt Text:

The Final PEIS fails to explain why an additional 475,518 acres of public land are needed for research and potential development of the "experimental" oil shale and tar sands industries.

Issue Number: PP-WO-OilTar-13-16-9
Organizations: Western Resource Advocates, Natural Resources Defense Council, and Southern Utah Wilderness Alliance

Issue Excerpt Text:

Specifically, the plan to allow leasing and development on almost one half million acres of federal lands in Utah is not in keeping with the Energy Policy Act of 2005. This statute sets as its goal to develop the Nation's energy supply, while protecting the environment and ensuring sustainability. In adopting this aim, BLM recognized the "experimental state" of the oil shale and tar sands industries, acknowledged that research and development on smaller parcels should precede commercial development and determined that the more appropriate response to the Energy Policy Act was to offer

significantly fewer public lands for leasing. To now increase that number, without the adequate analysis to make a well-informed decision and in light of the almost certain significant adverse impacts, is contrary to the Act and BLM's obligation to analyze the impacts of its actions on the environment.

Summary

The Final PEIS violates the Energy Policy Act of 2005 directive to develop "a commercial leasing program for oil shale and tar sands resources on public lands, with an emphasis on the most geologically prospective lands" because the Final PEIS:

1. Reduces the total acreage available for leasing.
2. Excludes geologically prospective public lands from potential leasing.
3. Converts the commercial programs for both oil shale and tar sands to RD&D programs.
4. Limits the size of parcels available for leasing, resulting in parcels that are unlikely to be explored, leased or developed.
5. Does not allow site-specific issues to be resolved at the lease sale and development stages.

The Final PEIS is not consistent with the Energy Policy Act's directive to protect the environment and ensure sustainability because oil shale and tar sands development will have substantial environmental impacts and cannot be accomplished in an environmentally sound manner.

Congress' intent under Section 369 of the Energy Policy Act was to have the BLM proceed to granting commercial leases not later than January 15, 2008. Oil shale companies have been denied Procedural Due Process every day since January 15, 2008.

The BLM's rationale for reconsidering the allocation decisions of the 2008 PEIS omits the fact that mineral development is one of five principal uses outlined in FLPMA, and that FLPMA adopts the policies in the Mining and Materials Policy Act. The BLM's reliance on FLPMA is misplaced because the Energy Policy Act imposes mandates that supersede the generic policies upon which BLM relies.

Response

As stated above (response to "Reconsideration of the 2008 PEIS Allocation Decision"), the BLM has complied with the Energy Policy Act (Act). Section 369 of the Act included three provisions relevant here. First, the Energy Policy Act required the Secretary of the Interior to complete a PEIS for a commercial leasing program for oil shale and tar sands resources on the public lands, with an emphasis on the most geologically prospective lands in Colorado, Utah, and Wyoming. The BLM published such a PEIS in November, 2008. Second, the Energy Policy Act required the Secretary of the Interior to publish a final regulation establishing such a program. The BLM's final tar sands regulations were published May 18, 2006, and the final oil shale regulation was published in November 2008. Third, the Secretary of the Interior is to consult with the governors of those respective states, as well as representatives of local governments, interested Indian tribes, and other interested persons, to determine the level of support and interest in the States in the development of tar sands and oil shale, and, if the level of interest is sufficient, the Secretary may conduct a lease sale in that State under the applicable commercial program regulations. The BLM anticipates consultation will occur at such time as the Secretary considers conducting a lease sale.

Separately, the Secretary, acting through the BLM, manages the public lands under FLPMA. As noted above (response to "Reconsideration of 2008 PEIS Allocations"), under FLPMA, the Secretary must manage the public lands in accordance with land use plans, and retains the discretion to establish, revise, and amend those land use plans, as appropriate, to address resource management issues. This means that no leasing or development of oil shale or tar sands resources may occur on the public lands unless such activity is consistent with the applicable land use plan. Although FLPMA requires the BLM to manage public lands for multiple use and sustained yield FLPMA does not require all uses to take place on all lands and does not specify particular acreages that must be allocated to particular uses. Rather, the Secretary has wide latitude to allocate the public lands to particular uses, and to employ the mechanism of land use allocation to protect for certain resource values, or, conversely, develop some resource values to the detriment of others, short of unnecessary and undue degradation.

It is important to recognize that the Energy Policy Act does not speak to allocations of public lands for commercial oil shale or tar sands leasing, nor does the Act provide any standard by which the reasonableness of any particular acreage figure might be determined. The Act does not prevent the Secretary from proposing an amendment or amending land use plans. In fact, nothing in the Act specified how the Secretary must establish a commercial oil shale leasing program, apart from requiring the Secretary to consider the most geologically prospective areas in Colorado, Utah, and Wyoming. The Act did not specify the acreage that must be available for such program, or how the requirements of such program should be balanced with other resource

uses. Rather, while the Act encourages commercial development of oil shale and tar sands resources, the question of where such development is most appropriate and under what restrictions it may be conducted is left, under FLPMA, to the Secretary, acting through the BLM.

In 2008, the BLM's land use allocation decision was based on the available information and emphasized the potential of oil shale to provide a domestic source of liquid fuels. Although that consideration remains important, the BLM has in this planning process revisited that allocation decision, more squarely in the context of other resource management considerations. The BLM believes the purpose and need statement to be appropriate to this land use allocation planning action and consistent with the fostering of a robust RD&D oil shale program, and tar sands industry, leading to viable commercial development of both of these resources. Each of the alternatives analyzed would keep lands available for RD&D and commercial development of oil shale, and none of the alternatives is inconsistent with the policies expressed in Section 369 of the Energy Policy Act. None of the alternatives presented in the Draft PEIS or in the Proposed RMPA precludes the Secretary's or the BLM's exercise of discretion in managing the public lands for multiple use or the appropriate use of an adaptive management approach. In the Proposed RMPA, the Secretary, acting through the BLM, has proposed a policy decision that in view of the nascent character of the oil shale and tar sands industries, less land than allocated in 2008 should remain open for development of these resources.

Section 369 of the Act expresses congressional policy that the development of these resources should be conducted in an environmentally sound manner, using practices that minimize impacts. One practice available to the BLM under FLPMA for minimizing impacts is making land use allocations that reduce conflicts among resource uses in the first place. As noted in the response above, each of the alternatives presented provides for lands to be available for development of these important resources. While several of the alternatives do result in small or irregular tracts being available for consideration for oil shale/tar sands leasing, even the alternative with the least amount of land allocated would provide for more than 30,000 acres of the richest oil shale resource being open for consideration for future leasing. Further, nothing in the Act precludes the BLM from offering leases of less than 5,760 acres for oil shale, and the BLM has not been presented with a basis for estimating the optimal size of an oil shale operation. Under the oil shale regulations, potential lessees may obtain exploration licenses to investigate potential lease tracts, in order to anticipate how such tracts might be developed most efficiently, prior to leasing them. In fact, in the last round of RD&D, the BLM offered 640 acres and received 3 nominations. Further, as the experience of at least one of the current RD&D lessees demonstrates, in many locations there are opportunities for potential developers to plan operations across federal and nonfederal lands. In its allocation alternatives, the BLM did not want to preclude these opportunities by closing off smaller tracts. In employing its FLPMA-based land allocations with discretion, taking into account multiple uses, the BLM believes it has

fulfilled its mandate under the Act, to develop a leasing program for unconventional fuels, while accomplishing its mission to sustain the health, diversity, and productivity of America's public lands for the use and enjoyment of present and future generations.

Besides taking into account multiple uses in its land use allocation decisions under FLPMA, the BLM needs to ensure that technological and environmental impacts are well understood prior to commercial development. Another practice available to the BLM under FLPMA is to require that potential commercial developers pursue RD&D first, in order that more is known about the technologies for development, and their impacts, before broader scale development is undertaken (Final PEIS, Comment Response Document, pp. 156-157). It would be irresponsible for the BLM to encourage speculative commercial leasing. The BLM is not proposing to eliminate commercial leasing but to require that the commercial viability of a technology is proven and the environmental impacts are evaluated prior to issuing such leases. Any entity that believes it has a commercially viable technology could seek an RD&D lease at the next call for nominations, consistent with the Proposed PRMPA, if adopted.

As explained in the Final PEIS, the Proposed RMPA (Alternative 2(b), the "RD&D-First" alternative) adds only the procedural requirement that companies must first obtain an RD&D lease prior to obtaining a commercial lease. From the standpoint of environmental consequences, then, there is no difference between Alternative 2 and the Proposed RMPA (Alternative 2(b)). The BLM does not disagree that from a business management standpoint, there may be differences for potential lessees contained within this procedural distinction, and the Final PEIS addresses the several questions about this plan element raised by commenters. With respect to the RD&D-First provision of the Preferred Alternative, as presented in the Draft PEIS, Alternative 2(b) has been revised in the Proposed RMPA, Section 2.5 of the Final PEIS, as follows: "In the areas open for oil shale leasing and development under Alternative 2(b), the Secretary may issue a commercial lease to an entity that has succeeded in converting an RD&D lease to commercial lease (or who holds the license to a technology that has converted from RD&D to commercial lease) for a tract on other lands open under Alternative 2(b). In these circumstances, such commercial lessee would not have to begin with another RD&D lease on the new leasehold."

Similarly, for those instances where a potential lessee intends to employ a technology that has proved commercially viable either on non-federal lands within the study area, or outside the study area, Alternative 2(b) has also been revised in the Proposed RMPA, Section 2.5 as follows: "The Secretary may issue a commercial oil shale lease on the lands open under the Proposed RMPA, where the potential commercial lessee intends to employ technology which has proved commercially viable on non-federal lands in the study area[, or outside the study area,] and which the Secretary determines to be environmentally acceptable." Finally, in response to

comments received on the Draft PEIS, Alternative 2(b) has been revised in the Proposed RMPA, Section 2.5 of the Final PEIS, to incorporate that element of Alternative 3 whereby the lands subject to the three potential RD&D leases currently undergoing NEPA analysis (two in Colorado and one in Utah) would be available for potential oil shale leasing. However, like the other areas that are available for potential oil shale leasing under this alternative, these areas are also open to RD&D first only. See also page 158 of the Comment Response Document.

As was the case with the 2008 OSTS PEIS, the scope of the decision making to be supported by the development of this PEIS is limited to an allocation decision. This land use allocation does not authorize any future lease or development proposal. The BLM has conducted sufficient analysis pursuant to NEPA to support this land use allocation decision making. The BLM will similarly determine the appropriate NEPA analysis required to support decision making regarding any future proposed actions, including, but not limited to, additional planning, leasing, or development. The BLM managers retain authority to approve, modify or deny future lease and development proposals based on consideration of factors, including, but not limited to, impacts on natural and cultural resources, economic viability, community concerns, and any other pertinent factors. Site-specific issues must be resolved at the lease sale and development stages of the process as the current experimental state of the oil shale and tar sands industries does not allow this PEIS to include sufficient specific information or cumulative impact analyses to support future leasing decisions within these allocated lands. The scope of any future environmental analysis would depend upon the specific technology proposed for use, as well as the resources specific to the area proposed for leasing and/or development. The regulations governing oil shale and tar sands development provide specifics on the information that would be required from applicants to inform this analysis.

As noted above, in Section 369 of the Energy Policy Act, Congress required the Secretary of the Interior to establish a commercial oil shale leasing program that focused on the most geologically prospective regions. This mandate included requiring the Secretary to determine the meaning of "most geologically prospective" for the purpose of identifying the oil shale resources on the public lands in Colorado, Utah, and Wyoming.

The Secretary, through the BLM, determined the meaning of this phrase in 2008, and has carried it forward into this planning initiative for the reasons explained in Section 1.2 of the Final PEIS. As stated above, the standards developed by the USGS Conservation Division, and subsequently adopted by the BLM, use 15 gallon/ton and 15 feet thick as the prospectively valuable classification standard for oil shale resources. The USGS further defined oil shale leasing area criteria on a regional basis as 25 gallon/ton and 25 feet thick.

For this PEIS, as previously discussed, the most geologically prospective resources in Colorado and Utah are defined as those deposits that yield 25 gallon/ton or more and are 25 feet thick or greater. In Wyoming, where the oil shale resource is not of as high a quality as it is in Colorado and Utah, the most geologically prospective resources are defined as those deposits that yield 15 gallon/ton or more and are 15 feet thick or greater. The intent of using these definitions in the PEIS is to establish an area inside of which applications for leases can be accepted. Industry can make its own determinations on what target it may want to pursue within that area. An alternative that would apply the Wyoming criteria to Colorado and Utah was considered but eliminated from detailed analysis in the PEIS, as discussed in Section 2.5.2 of the Final PEIS. In that discussion, it is reasoned that it would not make economic sense to open larger areas in Colorado and Utah to potential oil shale leasing where the resource is of low grade and unlikely to be developed at this time, because interest in future leasing would be directed at higher grade deposits. It is further noted that, in the future, additional planning and NEPA analysis could be conducted to open areas with lower grade deposits if economically warranted.

Policy – Leasing Standards

Issue Number: PP-WO-OilTar-13-13-21
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

The Energy Policy Act ("EPAct") directs the BLM to "Complete an environmental impact statement for a commercial leasing program for oil shale and tar sands resources on public lands, with an emphasis on the most geologically prospective lands in Colorado, Utah and Wyoming." FEIS at 1-3, emphasis added, and see Section 369(d)(1) of the Energy Policy Act. The BLM states:

"As discussed in Section 1.2, the analyses in this PEIS focus on the most geologically prospective oil shale resources in these basins (i.e., the oil shale study area) shown in Figure 2.3-1. In Colorado and Utah, these are defined as those deposits that are expected to yield 25 gal/ton or more of shale oil and that are 25 ft thick or greater. In Wyoming, where the oil shale resource quality is not as high as it is in Colorado and Utah, the most geologically prospective oil shale resources are those that yield 15 gal/ton and that are 15 ft thick or greater." FEIS at 2-14.

But oil shale deposits of 15 feet thickness and 15 gallons per ton are not "most geologically prospective," and there is strong evidence that they are not even economically viable at this time for oil shale production. BLM should therefore apply the same 25-foot-thickness and 25 gallon per ton threshold in Wyoming as has been done in other states.

Issue Number: PP-WO-OilTar-13-13-25
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:
In the original Oil Shale/Tar Sands PEIS, the BLM approved minimum criteria for leasing oil shale in Colorado and Utah at 25 feet in thickness and 25 gallons per ton, in order to ensure economic feasibility. However, the agency approved a different standard for Wyoming, 15 feet of thickness and 15 gallons per ton, and repeated this difference in thresholds in the 2012 FEIS. In its original Final EIS on oil shale, BLM stated, "Of course, the most geologically prospective deposits in Wyoming are those exceeding 25 gallons per ton and 25 feet in thickness." 2008 FPEIS at 4-281. We agree. These deposits are by definition more geologically prospective than deposits averaging 15 feet thick and 15 gallons per ton. It is illogical for the BLM to assign a different standard for Wyoming oil shales as the geologic properties or the techniques available to extract them do not change when one crosses the state line. Wyoming shows a much greater "geologically prospective" oil shale area than either Utah or Colorado precisely because the standards have been lowered for Wyoming.

Issue Number: PP-WO-OilTar-13-13-27
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:
BLM has failed to provide a rational connection between the facts found and the decisions made supporting the use of the 15 gpt/15-ft threshold in Wyoming while a different standard was applied in Colorado and Utah. BLM's response to this issue from the original 2008 FEIS is as follows:

"In Section 369 of the Energy Policy Act of 2005, Congress directed the Secretary of the Interior to complete a PEIS for commercial leasing on public lands with an emphasis on the most geologically prospective lands in the States of Colorado, Utah, and Wyoming. There are differences in the quality of the oil shale resource between the three States, so to meet Congress' direction to look at all three States, a different standard was used for Wyoming." FPEIS at 4-480. But requiring a 25-25 threshold in Wyoming would also meet this Congressional mandate; in fact, it would meet the mandate more exactly by constraining leasing to those lands that are "most geologically prospective." In the instant case, the 2012 FEIS does not appear even to address this difference. BLM's past response implies that the different standard for Wyoming was necessary to permit oil shale leasing in Wyoming due to the absence of oil shale deposits of 25 feet in thickness averaging 25 gallons per ton. This, however, is not the case, as evidenced by a Wyoming State Geological Survey Analysis while delineates oil shale deposits in Wyoming which exceed 25 feet in thickness and 25 gallons per ton, and which are quite extensive across the prospective oil shale region in the state. See Attachment C.

Issue Number: PP-WO-OilTar-13-13-30
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

The WSGS analysis shows a substantial acreage of Wyoming lands which meet the threshold of 25 gallons per ton over 25 feet of thickness, the threshold set for oil shale leasing in Utah and Colorado under the OSTS PEIS. Thus, it is arbitrary and capricious to lower the threshold for oil shale leasing in Wyoming below 25 gallons per ton over a 25-foot stratigraphic interval. In order to prevent unnecessary degradation of sensitive public resources in a quest for technically and economically infeasible oil shale deposits, BLM needs to apply the same standard for Wyoming as in Utah and Colorado to meet the directives of the Energy Policy Act.

Issue Number: PP-WO-OilTar-13-13-32
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

FEIS at 2-83, emphasis added. BLM does not (indeed, cannot) explain why oil shale companies would be any likelier to direct interest in oil shale development at "resources of low grade" in Wyoming than they would in Colorado or Utah. Tables A-1 and A-2 analyze the comparative acreages available for leasing in the Uinta Basin under 25-foot thickness and 15-foot thickness thresholds. FEIS at A-9, A-10. The FEIS only discloses yields under the 15-15 threshold for the Washakie and Green River Basins of Wyoming. FEIS at A-12, A-13. The

lack of this analysis for Wyoming points to a failure to gather necessary baseline information in Wyoming, and a concomitant failure to take the legally necessary 'hard look' at oil shale leasing under a 25-25 threshold scenario in Wyoming. It also indicates a failure to respond to public comments submitted on this topic pursuant to NEPA. See FEIS Comment Document at 1205.

Summary

The decision to apply a lower threshold for oil shale leasing in Wyoming is arbitrary and capricious and an abuse of agency discretion.

The BLM has defined the "most geologically prospective lands" in Wyoming as oil shale deposits of 15 feet thickness and 15 gallon/ton. These are not the "most geologically prospective," and there is strong evidence that they are not even economically viable at this time for oil shale production.

The BLM could have met the Energy Policy Act mandate using the same definition in Wyoming as in Colorado and Utah. This is evidenced by a Wyoming State Geological Survey Analysis which delineates oil shale deposits in Wyoming exceeding 25 feet in thickness and 25 gallon/ton and which are extensive across the prospective oil shale region in the state.

The Final PEIS provided inadequate baseline information and analysis in Wyoming in regards to the 15 feet oil leasing standard and failed to take a hard look at oil shale leasing under a 25 feet thickness and 25 gallon/ton threshold scenario. The BLM failed to respond to public comments submitted on this topic.

It is illogical for the BLM to assign a different standard for Wyoming oil shale as the geologic properties or the techniques available to extract them do not change when one crosses the state line.

Response

The BLM did not consider an alternative that would apply the 25-foot-thickness and 25 gallon per ton threshold to Wyoming because it would be inconsistent with the Energy Policy Act's directive to focus on the most geologically prospective lands within each of the States of Colorado, Utah, and Wyoming (see response to "Range of Alternatives"). As previously stated

in the Comment Response Document, in Section 369 of the Energy Policy Act, Congress required the Secretary of the Interior to establish a commercial oil shale leasing program that focused on the most geologically prospective regions. Ingredient in this mandate is the necessity for the Secretary to determine the meaning of "most geologically prospective" for the purpose of identifying the oil shale resources on the public lands in Colorado, Utah, and Wyoming. The Secretary, through the BLM, determined the meaning of this phrase in 2008, and has carried it forward into this planning initiative, for the reasons explained in Section 1.2. Further, the BLM has interpreted Congress' mandate to focus on the "most geologically prospective lands within each state," to mean that the standard should be determined independently in each state so that the most geologically prospective lands within each state be identified.

As explained in the previous response, the standards developed by the USGS Conservation Division, and subsequently adopted by the BLM, use 15 gallon/ton and 15 feet thickness as the prospectively valuable classification standard for oil shale resources. The USGS further defined oil shale leasing area criteria regionally for the Southeastern Uinta Basin Oil Shale Leasing Area as 25 gallon/ton and 25 feet thick. For this PEIS planning process, the most geologically prospective resources in Colorado and Utah are defined as those deposits that yield 25 gallon/ton or more and are 25 feet thick or greater. The oil shale resource in Wyoming is widely recognized to be of lower quality than in Colorado and Utah. For this reason, the BLM defined the most geologically prospective resources in Wyoming as those deposits that yield 15 gallon/ton or more and are 15 feet thick or greater. The intent of using these definitions in the Final PEIS is to establish an area inside of which applications for leases can be accepted. Industry can make its own determinations on what target it may want to pursue within that area (Final PEIS, Comment Response Document, p. 124).

As noted by the protester, Wyoming does contain areas that would meet the 25 gallon/ton and 25 feet thick standard, as applied in Colorado and Wyoming. The BLM is aware of the Wyoming Geological Survey oil shale map, dated October 16, 2008. While not available during our determination of most geologically prospective areas, the BLM conducted its own study of oil shale resources in southwest Wyoming and made a similar finding to that of Wyoming Geological Survey. Although this data was considered, it does not add to the information the BLM already had in identifying the most geologically prospective resources. Most of these areas, however, underlie the mechanically mineable trona area, and are currently being mined for trona. These areas are excluded from oil shale leasing because it is unsafe to allow both trona mining and oil shale mining at the same location. Some of the remaining areas are small enough in size that it would be difficult to develop an economically viable project. Both the 1960 and the updated 1983 USGS Classification standards for the Green River and Washakie Basins used

a 15 gallon/ton, 15 feet thick criteria for determining whether the oil shale was a “valuable” deposit. Based on these limitations, and the directive provided in the Energy Policy Act to focus on the most geologically prospective lands *within* each state, the BLM decided in 2008 to apply a different leasing standard in Wyoming than in Colorado and Utah, and this decision was carried forward into this planning process.

Policy – Sage Grouse Policy

Issue Number: PP-WO-OilTar-13-07-9
Organization: American Petroleum Institute

Issue Excerpt Text:

Furthermore, the preferred alternative excludes from commercial oil shale leasing lands identified as having "wilderness characteristics" and/or "core or priority sage-grouse habitat." API believes that withdrawing lands due to potential wilderness characteristics and sage-grouse habitat protection is premature given that no concrete regulatory action has yet occurred with respect to wilderness or sage-grouse habitat protections. BLM should not foreclose commercial oil shale leasing based on resource protection assumptions that may change.

Response

Although the Greater Sage-Grouse (GSG) is not federally-listed as a threatened or endangered species under the Endangered Species act (ESA), the FWS determined that listing of the species was warranted but precluded by higher priority listing actions (75 Federal Register 13910). Considering the potential for future listing under the ESA, the BLM proposes a conservation alternative (Alternative 2) to exclude all currently defined sage-grouse core and priority habitats from consideration for oil shale and tar sands lease applications in Colorado and Utah and to make oil shale and tar sands development activities consistent with the Wyoming Greater Sage-Grouse Core Area Protection Strategy in Wyoming (WY Executive Order 2011-5) (Final PEIS, Comment Response Document, p. 90). The BLM does not believe that protection of sage-grouse habitat is premature given the possibility of future listing. Further, the Secretary retains discretion to manage the public lands for protection of resource values, including wildlife habitat, whether or not listed.

With respect to lands with wilderness characteristics, the Secretary has the authority and obligation, under Section 201 of FLPMA to “prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern” (Title 43, Section 1711[a] of the United States Code [43 USC 1711[a]]). As required under Section 202 of FLPMA, the BLM relies on its inventory information, such as the inventory of wilderness characteristics assembled for this OSTS planning initiative, in developing land use plans. There is ample authority in FLPMA for the BLM to identify wilderness characteristics

and, if it chooses, to manage lands to protect such characteristics, when found (Final PEIS, Comment Response Document, p. 145).

Finally, the Secretary retains the discretion, under FLPMA, to revise and/or amend land use plans, as information regarding resource values and/or policy direction regarding management of those resources warrants.

Issue Number: PP-WO-OilTar-13-06-10
Organization: Enefit American Oil

Issue Excerpt Text:

BLM's 2012 RMP Amendments related to sage grouse habitat are premature, overly restrictive, and fail to incorporate the best available scientific evidence.

BLM's attempt to manage sage grouse in the 2012 RMP Amendments is not supportable. As Enefit explained in great detail in its comment letter, BLM's RMP revisions represent a "rush to judgment" in which large swaths of federal land are excluded from future commercial oil shale leasing before the underlying sage grouse conservation efforts have even been completed. Enefit Comment letter, at 914. The most glaring deficiency in BLM's land management approach is the adoption of protected sage grouse habitat before the State of Utah has even completed its state sage grouse conservation planning effort. Enefit Comment Letter, at 10-12. It is simply impossible at this time to designate sage grouse "core areas," or similar types of protected habitat in Utah, before the State of Utah, in coordination with all the affected stakeholders, completes its own state planning effort.

In response to the charge that the 2012 RMP Amendments short-circuit Utah's planning effort, BLM simply states: "Unfortunately, the State of Utah's process for designation of core or priority sagegrouse habitat has not been completed as of the date this Final PEIS. Therefore, the BLM is relying upon the existing maps showing the location of occupied habitat to represent core or priority sage-grouse habitat in Utah in order to make its allocation decisions." BLM's Response, at 149.

BLM is effectively admitting that it is making a long-term land use planning decision based on incomplete scientific and management information. And yet, BLM is willing to bypass the State of Utah, and the many state and local stakeholders involved in Utah's sage grouse planning effort, in order to satisfy an arbitrary December 31, 2012, deadline that BLM committed to in its 2012 RMP settlement agreement with oil shale development opponents. See RMP Settlement at 115, attached as Exhibit A to Enefit's Comment letter. Indeed, BLM offers no tenable justification for why it is rushing to complete its RMP amendments (especially for the Utah RMPs) before the Utah sage grouse management plan has been finalized.

Issue Number: PP-WO-OilTar-13-06-11
Organization: Enefit American Oil

Issue Excerpt Text:

Issue Number: PP-WO-OilTar-13-06-12
Organization: Enefit American Oil

Issue Excerpt Text:

The revisions to the Utah RMPs are also premature in light of the fact that the BLM has not even completed its own nationwide programmatic environmental impact statement for sage grouse ("Sage Grouse PEIS"). Enefit Comment letter, at 11. BLM's nationwide sage grouse planning effort is not scheduled to be completed until 2014. Id. By designating sage grouse habitat areas in Utah before either the Utah State program, or BLM's own comprehensive sage grouse land use planning effort, has been completed, the 2012 RMP Amendments arbitrarily and prematurely exclude lands from commercial oil shale leasing that may otherwise be available once these planning efforts are completed.

Issue Number: PP-WO-OilTar-13-08-10
Organization: State of Utah

Issue Excerpt Text:

Governor Herbert has created a Sage-Grouse Working Group "to provide recommendations for the protection of sage-grouse, while continuing to provide for a healthy economy and protecting private property rights. This Working Group includes representatives of BLM, USFS, FWS and the National Resource Conservation Service, along with representatives of State and local government, industry and environmental organizations. This Working Group has been meeting regularly since January 2012, and has issued its final recommendations to the Governor. These recommendations are now being translated into a Conservation Plan for Sagegrouse in Utah. BLM is fully aware of the provisions of this Plan, and is moving to incorporate its provisions into the RMP amendment effort now underway in all the western states with sagegrouse habitat. The Plan sets forth conservation goal and objectives, identifies Sage-grouse Management Areas, portrays pertinent scientific information and studies, provides maps of existing habitat and land ownership, and sets forth management protocols and mitigation that will ensure protection of sage-grouse habitat and populations. The State has made the request to the BLM to adopt its Sage-grouse Management Areas as the "priority" habitat used in the BLM RMP amendment effort, and to consider other sage-grouse habitat to be identified general habitat. This delineation is directly related to the exclusions under discussion in the current oil shale FEIS. This directly violates the provisions of BLM Instructional Memoranda and planning instructions.

BLM, through its active participation on the Working Group, is intimately aware of the information, evidence, conclusions and sage-grouse grouse protections that are under discussion and consideration. Yet the PRMP/FEIS fails to consider the fruits of this substantial and ongoing effort, and is, therefore, arbitrary and capricious.

Recognizing this deficiency, and acknowledging that, "the 2012 OSTS ROD is likely to be inconsistent with the results of the State process in Utah,"(PRMP/FEIS p. 2-81), BLM suggests that the matter can be cured down the road by subsequent RMP amendments. This is wholly insufficient, and violates the BLM planning criteria. NEPA requires that all pertinent and available information be considered in the FEIS, including subsequently prepared or identified information. Accordingly, the PRMP/FEIS needs to be amended to reflect the imminent Utah Conservation Plan and supporting information, and the allocation of lands available for lease need to be adjusted accordingly.

Issue Number: PP-WO-OilTar-13-13-19
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

BLM has ignored the recommendations of its own experts in the National Technical Team Report and has proposed to approve OSTS Plan Amendments that are (for Wyoming, at least) contrary to their own expert recommendations by permitting leasing for a land-use that is fundamentally incompatible with the maximum levels of impact prescribed in the NTT Report. They have also failed to require mitigation measures that ensure that protections outlined in the state and federal Core Area policies will apply for oil shale leasing and development. This deficiency is easily remedied by reinstating the withdrawal of sage grouse Core Areas in Wyoming from eligibility for oil shale leasing under the OSTS Plan Amendments.

Summary

The proposed oil shale leasing exclusions in Utah based on sage-grouse habitat are premature for the following reasons:

1. Sage-grouse planning efforts have not been completed yet for the State of Utah or the National GSG Planning Strategy; thus the BLM is making long-term land use planning decisions based on incomplete scientific and management information.
2. The NEPA requires that all pertinent and available information be considered in the FEIS, including subsequently prepared or identified information; thus the BLM is not in compliance with NEPA by not waiting for the State of Utah and the National Planning efforts to be completed.
3. The proposed exclusions may not conform to future sage-grouse initiatives.
4. Sage-grouse have not been listed yet.

Response

Section 2.3.3.1 of the Final PEIS was been revised to note that unlike the states of Colorado and Wyoming, the State of Utah has not yet completed the process of identifying core or priority sage-grouse habitat. The information available from Utah is the map of occupied habitat, and this map was used in the development of the alternatives in the Draft PEIS, specifically the Preferred Alternative, Alternative 2(b), under which all such lands are excluded from oil shale/tar sands leasing and development. This map was updated by the State of Utah in

September 2012, but still shows occupied habitat. For Utah, the state's occupied habitat map represents the best source of information regarding sage-grouse habitat. Therefore, although the occupied habitat map almost certainly represents a larger area than will eventually be designated by the State of Utah as core or priority habitat, the ROD for the Proposed RMPA will continue to rely on the 2012 map as a proxy for core or priority sage-grouse habitat.

In March 2010, the FWS found that the GSG warranted protection under the ESA, but listing at that time was precluded by the need to take action on other species. One of the primary reasons behind this FWS decision was due to the fact that there was a lack of regulatory mechanisms in place within land use/management plans for assuring the long term conservation of the GSG. As a result, the BLM developed a National Greater Sage-Grouse Planning Strategy in December 2011 (BLM Washington Office (WO) IM-2012-044). This planning strategy will evaluate various GSG conservation measures through land plan amendments and ongoing planning revisions, so that regulatory mechanisms are in place before the FWS will make a listing decision in 2015. The BLM Wyoming, Colorado, and Utah State Offices have identified the GSG as a sensitive species.

The BLM policy is to conserve the species and take no action that will contribute toward the need to list the species under ESA. On December 22, 2011, the BLM issued Washington Office (WO) IM- 2012-043, Greater Sage-Grouse Interim Management Policies and Procedures. This IM provides interim conservation policies and procedures to be applied to ongoing and proposed authorizations and activities while the BLM develops and decides how to best incorporate long-term conservation measures for GSG into applicable land use plans.

The policies and procedures identified in BLM WO IM-2012-043 are designed to minimize habitat loss in Preliminary Priority Habitat (PPH) and Preliminary General Habitat (PGH) and will advance the BLM's objectives to maintain or restore habitat to desired conditions by ensuring that field offices analyze and document impacts to PPH and PGH and coordinate with states and the Fish and Wildlife Service. The direction in this IM is time-limited: for each planning area where GSG occur, the conservation policies and procedures described in this IM will be applied until the BLM makes sage-grouse focused decisions through the land use planning process. All such land use planning decisions are expected to be completed by the end of 2014. The IM states, "BLM field offices do not need to apply the conservation policies and procedures described in this IM in areas in which (1) a state and/or local regulatory mechanism has been developed for the conservation of the GSG in coordination and concurrence with the FWS (including the Wyoming Governor's Executive Order (EO) 2011-5, Greater Sage-Grouse Core Area Protection); and (2) the state sage-grouse plan has subsequently been adopted by the BLM through the issuance of a state-level BLM IM." The Proposed RMPA is consistent with interim policy guidance to protect the GSG.

While the State of Utah is in the process of developing a state-wide sage-grouse planning strategy, efforts have not yet been completed and the BLM need not delay its decision-making. The BLM recognizes that the Proposed RMPA is likely to be inconsistent with the results of the State process in Utah regarding sage-grouse habitat protection. As explained in the PEIS, there will be ample opportunity for plans to be amended in the future, to make changes in allocation decisions, if appropriate.

The NEPA regulations at 40 CFR 1502.22 require that, "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear the information is lacking." The BLM has complied with requirement in Section 2.5 of the Final PEIS. The NEPA does not require that information prepared after the completion of an EIS be considered in that document. Such information will be considered after the fact and if appropriate, changes will be made in the future through the appropriate planning and decision-making process.

Issue Number: PP-WO-OilTar-13-09-19
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Moreover, BLM is currently engaged in a National Greater Sage-Grouse Planning Strategy to identify necessary conservation measures and management restrictions for the maintenance and recovery of sage-grouse populations. id. at 2-22. BLM's reason for excluding lands within core and priority sage grouse habitats is because of this current planning strategy and the possibility the sagegrouse will be listed under the ESA. BLM Comment Response Doc. at 90-91, 94. However, BLM is still working on conservation measures and management restrictions and sage grouse have not been listed, so any exclusion of land to protect sage grouse and their habitat is entirely premature.

Issue Number: PP-WO-OilTar-13-13-17
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

A number of mitigation measures are recommended by BLM to protect sage grouse and their habitats, based on available science. FEIS at 4-129. Mitigation measures include "Avoid leasing and/or development in sage-grouse habitats." FEIS at 4-137. This mitigation is not applied for Core Areas in Wyoming, a failure that is arbitrary and capricious and an abuse of agency discretion.

In the FEIS, the BLM mentions a number of policy recommendations with which BLM management will likely be consistent. FEIS at 4-130. The agency's own National Technical Team ("NTT") Report is not among them, despite the fact that BCA et al. attached this report to our comments at the Draft EIS stage and the BLM appended this Report to its Final EIS.

Issue Number: PP-WO-OilTar-13-13-5
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

Endangered Species listing for sage grouse in Wyoming hangs in the balance, and if BLM fails to accord sufficiently strong protections for sage grouse Core Areas in the context of oil shale leasing and development, ESA listing will be the most likely outcome. If the Preferred Alternative is approved, BLM will meet these requirements in Utah and Colorado by precluding leasing in Core Areas but will have failed to meet these requirements in Wyoming, and as such, will have failed to meet the protective requirements of FLPMA.

Issue Number: PP-WO-OilTar-13-13-6

Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

The greater sage grouse is currently listed as a Candidate Species under the Endangered Species Act. FEIS at 3-202. BLM is currently undertaking a National Sage-Grouse Planning Strategy. FEIS at 1-5. The State of Wyoming has identified Core Areas designated for the protection and recovery of sage grouse. FEIS at 3-203, 204. Some 120,690 acres of Core Area sage grouse habitat in Wyoming intersects lands available for oil shale leasing. FEIS at 6-98. Oil shale leasing will create valid existing rights which may impair the BLM's ability to protect sage grouse habitat as oil shale projects move forward on leased lands, therefore it is imperative that adequate protections be applied at or before the leasing stage. In sage grouse Core Areas, there is no package of mitigation measures available to the BLM that will render oil shale development compatible with maintaining sage grouse habitats and population viability, and therefore the agency must impose a moratorium on oil shale leasing of any kind within designated Core Areas and Priority Habitats in Wyoming as it has in Colorado and Utah.

Issue Number: PP-WO-OilTar-13-13-8
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

The sage grouse is a Candidate Species under the Endangered Species Act, with a listing decision decreed by settlement agreement in 2015. The State of Wyoming has established a state Core Area protection policy through Executive Order 2011-5 in hopes of averting Endangered Species listing. See FEIS at Appendix K-93. This policy states, "New development or land uses within Core Population Areas should be authorized or conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse populations. FEIS at Appendix K-95. Stipulations in Appendix B on Executive Order 2011-5 are prescribed to avoid such declines (FEIS at K-95, K-99); oil shale leasing and development as approved under the OSTS EIS is not consistent with these stipulations, and does not apply the protective measures contained in Executive Order 2011-5.

Issue Number: PP-WO-OilTar-13-13-9
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

A lack of sufficient mitigation measures is one way a project will cause unnecessary or undue degradation pursuant to FLPMA. "Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. An impact that can be mitigated, but is not, is clearly unnecessary." 65 Fed. Reg. 69998, 70052 (Nov. 21, 2000). Here, BLM fails to prevent unnecessary or undue degradation by applying the mitigation measures in its oil shale leasing program that would prevent unnecessary and undue destruction of occupied habitats in sage grouse Core Areas and Priority Habitats, as outlined in state and federal policies.

Issue Number: PP-WO-OilTar-13-14-11
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

Therefore, if the lease screening criteria are met, under the terms of IM-2012-019 it would be required for BLM to not make the sage-grouse core areas in the Adobe Town area available for application for oil shale leasing, as had been provided for in the draft EIS. The BLM should consider the lease screening criteria specified by IM WY-2012-019 and modify its preferred alternative as needed and required by the IM.

Issue Number: PP-WO-OilTar-13-14-15
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

The State of Wyoming's sage-grouse conservation Executive Order (EO 2011-5) makes a number of specific provisions for how sage-grouse will be conserved. Yet nowhere in the final EIS is adherence to these specified mitigation measures required or even mentioned. This is not permissible.

Under the terms of EO 2011-5, there is a requirement that new development or land uses within core areas should only be authorized "when it can be demonstrated the activity will not cause declines in Greater Sage-Grouse populations." EO 2011-5 at 3 (item 3) (emphasis added). It also provides that development must be "consistent" with the stipulations specified in the EO before it can be demonstrated that declines in sage-grouse populations will not occur. Id. (item 4) (emphasis added). The EO provides that agencies such as the BLM must work to "ensure a uniform and consistent application of this Executive Order" in order to maintain and enhance Greater Sage-Grouse habitats and populations. Id. (item 12) (emphasis added).

The BLM in the final EIS makes no provisions that specifically provide for compliance with these requirements. It ignores these requirements. It makes no provisions whatsoever that specifically provide for and help ensure conservation of sage-grouse populations.

Issue Number: PP-WO-OilTar-13-14-18
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

BLM goes so far as to totally ignore and eliminate sage-grouse core habitat in the final EIS—it now makes an effort to deny the very existence of sage-grouse core habitat. Compare DEIS Fig. 2.3.3-3 (showing large areas of sage-grouse core habitat in Adobe Town) with FEIS Fig. 2.3.3-3 (having deleted any recognition of the existence of sage-grouse core habitats in the Adobe Town area despite recognition (mapping) of these core areas in the EO). The BLM is not at liberty to deny the very existence of sage-grouse core habitat and the provisions the EO makes for these areas, even if it can conclude these core habitats are not per se excluded from consideration for development under the terms of the EO.

Issue Number: PP-WO-OilTar-13-14-19
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

Besides totally ignoring the provisions in the body of the EO mentioned above, the final EIS is also deficient because it also totally ignores the stipulations in Attachment B of the EO which guide sage-grouse conservation. For example, the final EIS is silent as to whether the BLM will comply with the surface disturbance limitation specified in the EO. Surface disturbance must be limited to no more than five percent of suitable sage-grouse habitat per an average of 640 acres (one section). EO at 8. There also is to be no surface occupancy within 0.6 miles of sage-grouse leks within core areas, EO at 9, yet the final EIS is silent as to this requirement. Many other stipulations are provided for in the EO but ignored in the final EIS, such as provisions for seasonal use in core areas, transportation limitations, and provisions to minimize noise and reduce the impacts of overhead power lines.

Issue Number: PP-WO-OilTar-13-14-23
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

Clearly IM WY-2012-019 establishes far more than just a need to "coordinate" with the State EO, it establishes a policy where the BLM will abide by the provisions in the EO. The final EIS is deficient and "wrong" because it fails to adopt the conservation measures of the EO in any specific form, leaving any conservation of sage-grouse to vague and undefined coordination with the EO and IM and potential future, unknown, and unspecified RMP decisions and guidance. There is no assurance whatsoever that the EO will actually be abided by under the BLM's preferred alternative in the final EIS. While the BLM may be able to treat the EO as not excluding areas from consideration for oil shale leasing it is not afforded the latitude to then also avoid specifically applying the EO stipulations to potential oil shale leasing areas. IM WY-2012-019 specifically requires application of these stipulations yet the final EIS is completely silent about what if any stipulations will apply. This is wrong.

Issue Number: PP-WO-OilTar-13-14-25
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

The Fish and Wildlife Service's nominal approval of the State EO only applies if it is fully implemented and the BLM's proposed decision makes no provisions to fully implement the EO. The BLM repeatedly states or implies in the final EIS that because the U.S. Fish and Wildlife Service (FWS) has expressed some support for the Wyoming core area policy and the related EO that as long as BLM intimates it is pursuing the EO it is meeting its responsibilities. The BLM misstates what the FWS has said and misperceives what must be done to provide for compliance with the EO in the view of the FWS. In its June 24, 2011 letter where the FWS expressed some level of support for the core area policy and EO, the FWS nevertheless said repeatedly that its view that this could be an adequate regulatory mechanism for conservation of the sage-grouse was contingent upon adequate implementation of the policy.

Issue Number: PP-WO-OilTar-13-14-27

Organization: Wyoming Outdoor Council

Issue Excerpt Text:

So clearly implementation is the key to this State policy being viewed as an adequate regulatory mechanism for conservation of the sage-grouse. And implementation of the State policy must be made effective by not only the State, but also the Federal government. Yet here BLM proposes no actual implementation of the EO at all, it only talks vaguely in terms of "coordinating" with IM WY-2012-019 and the EO and possibly making RMP changes, yet the BLM makes no provisions for adopting the stipulations in the EO. There is no substance in BLM's decision only vague and undefined reference to the EO. That is not implementation. And worse, BLM totally eliminates and ignores the whole concept of core areas in the final EIS, that is, BLM eliminates the whole purpose of the State's policy. That definitely does not represent full, effective implementation.

Consequently, the provisions allowing BLM to not exclude sage-grouse core areas from oil shale lease applications that are made in the final EIS are "wrong" because this decision is not accompanied by specific implementation of the stipulations provided for in the Wyoming EO, as well as in BLM IM WY-2012-019, as both of these documents require. Therefore the State's policy is not being implemented as the FWS requires in order for its endorsement to apply.

Issue Number: PP-WO-OilTar-13-14-28
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

BLM's Proposed Decision Relative to Sage-Grouse in Wyoming is not in Accordance with its Own IMs and the NTT Conservation Measures. In addition to not meeting the FWS conditions for recognition of the validity and utility of the EO, the BLM also fails to abide by its own IMs when it fails to provide for any concrete adoption of the provisions in the EO. Besides IM WY-2012-019, IM 2012-044 provides that the National Technical Team's (NTT) conservation measures must be considered and analyzed in the land use planning process. The NTT conservation measures "must be subjected to a hard look analysis as part of the planning and NEPA processes." "As appropriate, the conservation measures must be considered and incorporated into at least one alternative in the land use planning process."

Issue Number: PP-WO-OilTar-13-14-30
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

Yet there is no indication here that the NTT conservation measures, or even the conservation measures in the EO, were subjected to a "hard look." Nor has any alternative considered and incorporated the EO conservation measures into the final EIS, as IM 2012—044 provides for. Thus, again, the final EIS is "wrong" because it fails to adequately consider and specifically adopt the conservation measures specified in the Wyoming EO. Vague references to coordinating with IM WY-2012-019 and the EO and making adjustments to RMPs do not meet the "hard look" requirement nor do they represent a consideration and incorporation of the relevant conservation measures (stipulations) into these land use plan amendments.

Issue Number: PP-WO-OilTar-13-14-31
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

BLM's proposed decision relative to sage-grouse does not abide by the CEQ NEPA regulations or BLM's NEPA Manual. The preferred alternative as it relates to accepting applications for oil shale leasing in the Adobe Town area is also wrong because it does not abide with the requirements for mitigation that are specified in the Council on Environmental Quality (CEQ) NEPA regulations, as well as the provisions in the BLM's NEPA Handbook. The CEQ NEPA regulations provide that "to the fullest extent possible" Federal agencies shall "[u]se all practicable means" so as "to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." 40 C.F.R. § 1500.2(f). Providing relative to sage-grouse for "coordination" with a BLM IM and compliance with unspecified potential future RMP decisions and guidance does not represent using all practicable means to the fullest extent possible to avoid or minimize any possible adverse effects. To achieve that BLM should have specified that the EO provisions that disturbance levels will not exceed five percent of suitable sage-grouse habitat per section of land, that surface occupancy within 0.6 miles of the perimeter of a lek occurring in core habitat will be based on no surface occupancy, and that the other stipulations in the EO would be adopted and abided by.

Issue Number: PP-WO-OilTar-13-14-33
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

Moreover, the final EIS does not state how its preferred alternative will (or will not) achieve the "requirements" specified in sections 101 and 102(1) of NEPA. 40 C.F.R. § 1502.2(d). One of those requirements is to "preserve important . . . natural aspects of our national heritage." 42 U.S.C. § 4331(b)(4). Providing for "coordination" with an IM and the EO says nothing about how this "requirement" will actually be met with respect to sage-grouse. The final EIS also does not state "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why there were not." 40 C.F.R. § 1505.2(c).

Issue Number: PP-WO-OilTar-13-14-36
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

BLM's NEPA Handbook requires the use of the best available science when analyzing the effects of an action. BLM National Environmental Policy Handbook H-179-1 at 55. It says, "[u]se the best available science to support NEPA analyses, and give greater consideration to peer reviewed science and methodology over that which is not peer-reviewed." It is well known that the provisions in the EO are based on the best available science regarding sage-grouse conservation. This thoroughly researched document has been very carefully assembled by the Governor's Sage-Grouse Implementation Team and has been heavily vetted. It is not clear the same can be said regarding IM WY-2012-019 (it is based on the EO and the

implementation team's contributions toward the EO but the IM itself was not subject to peer review so far as we know) or any potential future RMP revisions. The implications of this are that if the best available science is to serve as the basis for decision-making in the oil shale EIS, it is clear the actual, scientifically-based EO stipulations should be adopted, not vague and non-specific provisions not based on peer reviewed science, as would be the case if all that were required was coordination relative to IM WY-2012-019 and the EO and compliance with unknown future RMP revisions or amendments.

Issue Number: PP-WO-OilTar-13-15-7
Organization: National Wildlife Federation

Issue Excerpt Text:

BLM's stated reason for opening the Core Areas to development is that the agency has concluded that such exclusion is not consistent with Wyoming's Greater Sage-Grouse Core Area Protection Strategy under Wyoming Executive Order 2011-5 (WyE02011-5) which, according to BLM, has "been recognized by the USFWS as an adequate regulatory mechanism for the conservation of greater sage-grouse."

Thus, for the Proposed Plan, BLM has modified the Alternative2(b) approach to the Greater sage-grouse core and priority habitat set forth in the draft PEIS to be "coordinated" with the policy direction adopted by the BLM Wyoming State Office in BLM Instruction Memorandum WY-2012-019, Greater Sage-Grouse Habitat Management Policy on Wyoming Bureau of Land Management Administered Lands Including the Federal Mineral Estate, signed and dated February 10, 2012. Specifically, according to BLM, WyE02011-5 "does not generally preclude mineral development; rather, it establishes conditions designed to maintain and enhance greater sage-grouse habitat, including mitigation measures."

While it is true that WyE02011-5 does not prohibit all mineral development, it is also clear that the Executive Order did not consider the potential impacts of oil shale development in sage-grouse habitat. WyE02011-5 was written primarily to address the explosion of oil and gas drilling in these habitats. With respect to mineral development, it therefore speaks in terms of reducing the density of oil and gas and mining activities to no more than one location per 640 acres. This approach is based upon research specific to sage-grouse losses in the drilling fields. It also represents a strategy that may be achievable in terms of oil and gas well pad locations or small underground mining operations; it is not compatible with BLM's determination that the most likely extraction technique for oil shale deposits in Wyoming will require extensive strip mining.

There are, therefore, enormous inconsistencies between the mitigation measures outlined in the Executive Order, BLM's corresponding Instruction Memorandum and the impacts associated with oil shale extraction identified in the FPEIS. For example, Table 4.1.1-1 of the FPEIS states that an oil shale surface mine with retort will disturb the entire surface of the 5760-acre federal lease over the 20-year time-frame analyzed. BLM also concluded that "[b]ecause shales are not as rich in Wyoming as they are in Utah, a larger area is necessary to get the same oil equivalent." So oil shale strip mines in Wyoming are expected to be larger than operations elsewhere. In the arid environs where oil shale and tar sands development is being proposed, "[r]eclamation to functional systems similar to that found pre-disturbance

will take in excess of 50 years (Baker 2006)." Therefore, habitats disturbed by oil shale and tar sands development would be unavailable for decades even after reclamation has been initiated. In contrast, WyE02011-5 provides that "[t]he number of active mining development areas ... are not to exceed an average of one site per square mile" within Core Areas and that the "all surface disturbance [is limited] to no more than 5 percent of the core landscape ..." One oil shale mining operation would exceed the 32 acres of disturbance within one square mile (640 acres) contemplated by WyE02011-5 and would instead consume surface disturbance limits for over 115,000 acres of core landscape, assuming that no other activities were present.

Issue Number: PP-WO-OilTar-13-16-17
Organizations: Western Resource Advocates, Natural Resources Defense Council, and Southern Utah Wilderness Alliance

Issue Excerpt Text:

WRA and NRDC share the BLM's goal of protecting core and priority habitats to ensure the long-term viability of the species. Importantly, at this crucial time the BLM is pursuing a National Sage-Grouse Planning Strategy. By opening core population areas to future oil shale leasing absent scientific studies indicating that commercial oil shale leasing is compatible with protecting the species, the BLM would undermine its ongoing National Planning Process. Furthermore, failure to achieve the goals of protecting core and priority habitat will likely result in the species being listed under the Endangered Species Act.

Issue Number: PP-WO-OilTar-13-16-19
Organizations: Western Resource Advocates, Natural Resources Defense Council, and Southern Utah Wilderness Alliance

Issue Excerpt Text:

Further, the stipulations included as part of the State's sage-grouse policy make it incumbent on the BLM to ensure that any conservation measures that the agency might require of lessees will adequately protect core populations. The USFWS found that the State's strategy could protect sage-grouse populations only if fully implemented. However, the Final PEIS lacks any provisions to ensure that the stipulations that are central to USFWS' support will be applied to future leasing decisions, or that any future commercial oil shale technologies could be consistent with sage-grouse conservation or recovery.

Summary

The BLM did not adequately protect core areas in Wyoming thereby failing to meet the protective requirements of FLPMA and undermining the ongoing National Planning Process. The decision to protect core areas in Colorado and Utah, but not in Wyoming is arbitrary and capricious. Further, oil shale leasing in sage-grouse Core Areas will create valid existing rights which may impair the BLM’s ability to protect sage-grouse habitat in the future.

The BLM violated the policy laid out in BLM WO IM 2012-44 in the following ways:

1. The BLM did not give the National Technical Team (NTT) conservation measures a "hard look" and the Proposed RMPA is not consistent with the recommendations from the NTT report.
2. The BLM did not incorporate NTT conservation measures into at least one alternative and did not reference the NTT report as a policy recommendation for management in the Final PEIS (p. 4-130).

The Final PEIS did not comply with the Governor of Wyoming's Executive Order (EO) 2011-5 or BLM Wyoming's IM-2012-019, in the following ways:

1. The BLM Wyoming IM-2012-019 requires full implementation of EO 2011-5, but the Final PEIS provides no provisions to implement specific mitigation measures.
2. Executive Order 2011-5 was written to address oil and gas drilling in sage-grouse habitats but the most likely extraction technique for oil shale deposits will require extensive strip mining. Thus this EO is not appropriate for oil shale extraction.
3. The Adobe Town area likely meets the criteria in the lease screening procedure to identify areas not available for leasing (BLM Wyoming IM-2012-019). The BLM must determine if Adobe Town meets these criteria before making it available for leasing.
4. The BLM eliminates sage-grouse core habitat from the Adobe Town area in the Final PEIS, even though these areas are recognized in EO 2011-5.
5. The FWS approval of EO 2011-5 is contingent on full implementation of the EO, but the Final PEIS makes no provisions to do so; thus the Final PEIS is not in compliance with the FWS.
6. The provisions in EO 2011-5 are based on the best available science regarding sage-grouse conservation, and thus should be adopted instead of BLM Wyoming IM-2012-019.

The Final PEIS violates NEPA in the following ways:

1. The BLM fails to "[u]se all practicable means," "to the fullest extent possible," "to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." 40 CFR. § 1500.2(f).

2. The BLM fails to explain how its preferred alternative will achieve the NEPA requirements to "preserve important . . . natural aspects of our national heritage." 42 U.S.C. § 4331(b)(4).
3. The BLM fails to state "whether all practicable means to avoid or minimize environmental harm from the alternative selected has been adopted, and if not, why they were not." 40 CFR § 1505.2(c).

Response

As was the case with the 2008 OSTS PEIS, the scope of the decision-making to be supported by the development of this Proposed RMPA is limited to an allocation decision. This land use allocation does not authorize any future lease or development proposal. The BLM has conducted sufficient analysis pursuant to NEPA to support this land use allocation decision making. The BLM will similarly determine the appropriate NEPA analysis required to support decision making regarding any future proposed actions, including, but not limited to, additional planning, leasing, or development. The BLM managers retain authority to approve, modify or deny future lease and development proposals based on consideration of factors, including, but not limited to, impacts on natural and cultural resources, economic viability, community concerns, and any other pertinent factors. Site-specific issues must be resolved at the lease sale and development stages of the process as the current experimental state of the oil shale and tar sands industries does not allow this PEIS to include sufficient specific information or cumulative impact analyses to support future leasing decisions within these allocated lands. The scope of any future environmental analysis would depend upon the specific technology proposed for use, as well as the resources specific to the area proposed for leasing and/or development. Reference should be made to the applicable regulations governing oil shale and tar sands development for more specifics on the information that would or may be required from applicants to inform this analysis.

Under FLPMA, the BLM is required to prevent unnecessary and undue degradation. One practice available to the BLM under FLPMA for minimizing impacts is making land use allocations that reduce conflicts among resource uses in the first place. Another practice is to apply mitigation at the leasing and/or development stage that protects other resources. The BLM uses a combination of these practices in managing lands. The BLM has not violated FLPMA because it has chosen not to exclude core and priority habit in Wyoming from future oil shale leasing and development. The BLM has recognized the Wyoming Greater Sage-Grouse Core Area Protection Strategy detailed in Wyoming EO 2011-5, and has directed interim management in Wyoming of Greater Sage-Grouse core and priority habitat to be consistent with that policy direction. The process, guidelines, and stipulations for development that are a part of

Attachment B of EO 2011-5 are a key part of the document and provide mitigation that will minimize impacts and certainly would prevent unnecessary or undue degradation. The FWS recognized the sage-grouse core area strategy outlined in EO 2011-5 as an excellent model for meaningful conservation of sage-grouse if fully supported and implemented. The Wyoming BLM incorporated EO 2011-5 into their interim management for sage-grouse in Wyoming (BLM Wyoming IM-2012-019), including all of its provisions for all resources, including oil shale.

The EO 2011-5 and BLM Wyoming IM-2012-019 addresses all resources and potential surface disturbance, not just oil and gas, including transmission lines, surface mines, oil and gas, agriculture, processing facilities, housing and other uses. Please see Appendix K of the Final PEIS, pages 93-110 for EO 2011-5 and pages 115-192 for BLM Wyoming IM 2012-019.

For the Proposed RMPA considered here, the BLM modified the Alternative 2(b) approach for Wyoming to the GSG core and priority habitat to be coordinated with the policy direction in the Wyoming Governor's EO 2011-5. Wyoming EO 2011-5 does not generally preclude mineral development; rather, it establishes conditions designed to maintain and enhance Greater Sage-Grouse habitat (e.g., mitigation measures).

The BLM is in the process of developing several land use plan amendments and revisions for sage-grouse management in Wyoming, as part of BLM's National GSG Planning Strategy (BLM WO IM-2012-044). At least one of the alternatives within each of the GSG planning efforts in Wyoming will incorporate the provisions of EO 2011-5 and BLM Wyoming IM-2012-019. Because these GSG planning efforts are currently being conducted, it is uncertain whether the provisions in EO 2011-5 and the interim program direction in BLM Wyoming IM-2012-019 will amend the decisions in the OSTS ROD.

If an oil shale lease were to be issued in Wyoming, in core GSG habitat, it would create certain rights; however, any lease issuance would be predicated upon a NEPA analysis through which stipulations (including criteria under EO 2011-5) and other terms could be developed and considered for adoption. Any rights would be limited by the terms of that lease. For example, if appropriate, based on the NEPA and other analysis, a lease might include the limitation: "Surface disturbance will be limited to five percent of suitable sage-grouse habitat per an average of 640 acres." A density disturbance calculation tool has been developed and is available on the Wyoming sage-grouse website.

The BLM has not violated the policy set forth in BLM WO IM 2012-044 as the protester has claimed. The conservation measures presented in the National Technical Team (NTT) report are currently being analyzed in at least one alternative for all land use plan amendments associated with this National GSG Planning Strategy, which is a separate from this oil shale and tar sands

planning effort. This is a targeted plan amendment that is only making allocation decisions for oil shale and tar sands resources. In addition, prior to leasing, the BLM will conduct additional NEPA analysis to support any decisions, including but not limited to the decision not to lease to protect the sage-grouse resource or to lease with conditions.

Lands within the Adobe Town "Very Rare and Uncommon Area" are excluded from oil shale leasing and development under the Proposed RMPA; because this area would not be available for leasing unless a future plan amendment opening the area is completed, no additional sage-grouse protection measures will be required.

The Draft PEIS was prepared in accordance with both NEPA and FLPMA land use planning requirements. While the BLM has a multiple use mandate, this does not mean that the BLM will allow every use on every acre. In accordance with FLPMA, the Secretary has the discretion to manage public lands as he determines appropriate.

Sage Grouse Policy – Colorado

Issue Number: PP-WO-OilTar-13-04-12
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Finally, BLM's reliance on sensitive sage-grouse habitat does not justify the proposed oil shale and tar sands resource allocation restrictions. See 2012 OSTS PFEIS at ES-6 (leasing exclusions include core or priority sage-grouse habitat, as defined by such guidance as the BLM or the DOI may issue, except in Wyoming, where such habitat protections will be consistent with Wyoming's Greater Sage-Grouse Core Area Protection Strategy). With respect to sage grouse, the State of Colorado has completed the process of identifying core or priority sage grouse habitat and established a conservation plan that acts as a supplement to local conservation efforts. Id at 2-37; Colorado Greater Sage-Grouse Conservation Plan (Jan. 2008). The local governments, including Garfield County, have also implemented conservation efforts for sage grouse and their habitats in northwestern Colorado. Northwest Colorado Greater Sage-Grouse Conservation Plan (Apr. 2008); Parachute-Piceance-Roan Greater Sage-Grouse Conservation Plan (Apr. 2008). However, BLM fails to acknowledge whether the identified core/priority habitat areas identified in the OSTS PFEIS will be consistent with the State or local processes, or whether the State and local processes will be granted the same deference as the Wyoming plans.

Response

The 2010 FWS findings on petitions to list the GSG identified habitat conversion and fragmentation from wildlife, invasive plants, energy and infrastructure development, urbanization, and agriculture conversion as the primary threats to the species throughout its range. The GSG are currently identified as candidate species (warranted for listing under ESA, but precluded due to higher listing priorities) by the FWS and are currently on the Wyoming, Colorado, and Utah BLM State sensitive species list. The BLM policy is to conserve the species and take no action that will contribute toward the need to list the species under ESA.

On December 22, 2011, the BLM issued WO IM-2012-043, Greater Sage-Grouse Interim Management Policies and Procedures. This IM provides interim conservation policies and procedures to be applied to ongoing and proposed authorizations and activities while the BLM develops and decides how to best incorporate long-term conservation measures for GSG into applicable land use plans.
The policies and procedures identified in this IM are designed to minimize habitat loss in Preliminary Priority Habitat (PPH) and Preliminary General Habitat (PGH) and will advance the

BLM's objectives to maintain or restore habitat to desired conditions by ensuring that field offices analyze and document impacts to PPH and PGH and coordinate with states and the Fish and Wildlife Service. The direction in this IM is time-limited: for each planning area where GSG occur, the conservation policies and procedures described in this IM will be applied until the BLM makes decisions pertaining to management of GSG habitat through the land use planning process. The BLM has initiated programmatic planning efforts, separate from this OSTS planning effort, to address these issues. All such land use planning decisions are expected to be completed by the end of 2014. The WO IM-2012-043 specifically states, "BLM field offices do not need to apply the conservation policies and procedures described in this IM in areas in which (1) a state and/or local regulatory mechanism has been developed for the conservation of the Greater Sage-Grouse in coordination and concurrence with the FWS (including the Wyoming Governor's EO 2011-5, Greater Sage-Grouse Core Area Protection); and (2) the state sage-grouse plan has subsequently been adopted by the BLM through the issuance of a state-level BLM IM." The PEIS is consistent with interim policy guidance to protect the GSG.

The BLM is currently in the process of developing plan amendments to address GSG habitat management and conservation in Northwest Colorado. As part of the effort, the BLM is analyzing a range of alternatives that are specifically structured to identify and incorporate appropriate conservation measures in BLM land use plans to conserve, enhance or restore GSG habitat by reducing, eliminating, or minimizing threats to that habitat. All of the BLM planning efforts associated with the National Greater Sage-Grouse Planning Strategy (WO IM-2012-044) have been directed to coordinate with state and local wildlife agencies to delineate PPH and PGH areas. With the exception of the State of Utah, all states have submitted their own PPH and PGH maps. In some circumstances, states have submitted their own alternative with specific conservation measures that would be applied to these PPH and PGH areas to be analyzed as part of the GSG plan revisions and/or amendments.

At the time that the proposed OSTS PEIS was completed, the BLM was "currently coordinating with the Division of Colorado Parks and Wildlife and UDWR to refine the delineation of priority/core habitats in these states" (PEIS, 3-203). Over the course of the summer of 2012, the CPW finalized a PPH/PGH map, including habitat linkage areas, for Colorado using updated sage-grouse telemetry and seasonal habitat use information. This map has been included in the OSTS PEIS, and is also being used for analysis in the Northwest Colorado Greater Sage-Grouse Plan Amendment initiative.

Since the State of Colorado completed its Northwest Colorado Greater Sage-Grouse Conservation Plan in 2008, new science regarding GSG, boundary modifications to priority and general GSG habitat, and a March 23, 2010 "warranted but precluded" listing decision by the

FWS highlighted the need to formalize sage-grouse management on BLM lands nationally through regulatory mechanisms (land use planning). The State of Colorado and the BLM continue to coordinate closely. For instance, the State of Colorado did not submit a unique alternative to be incorporated into the GRSG plan amendment for BLM Colorado. Instead, the State of Colorado is a vital cooperator in the development an alternative based largely on the GSG Colorado Conservation Plan (2008) for the BLM's GSG land use plan amendment for Northwest Colorado.

The State of Wyoming's Core Area Strategy (to which the protestor alludes) was completed in 2010. The BLM formally adopted the goals and objectives of the State's Sage-Grouse Core Protection Area Strategy for habitat conservation, restoration, and reclamation practices for Sage-Grouse habitats in Wyoming through BLM Wyoming IM-2012-019. The State of Wyoming's information was used in both the Draft and Final OSTS PEIS.

Policy – Federal Information Quality Act

Issue Number: PP-WO-OilTar-13-01-19
Organization: Center for Regulatory Effectiveness

Issue Excerpt Text:

BLM has failed to comply with the Data Quality Act. The scientific data and studies relied upon and disseminated in the 2012 Final PEIS are subject to the Data Quality Act (DQA). The Office of Management and Budget's (OMB) government-wide data quality guidelines, implementing the DQA, requires that agencies establish a pre-dissemination review process to "substantiate the quality of the information it [the agency] has disseminated....) In discussing the need for the pre-dissemination review process, OMB explains, "Agencies shall treat information quality as integral to every step of an agency's development of information, including creation, collection, maintenance, and dissemination.")? Thus, the pre-dissemination review process is far more than a simple tick-list of steps that are applied to existing data to determine if it is ready for release. The pre-dissemination review is an essential quality assurance process that takes place throughout the development and analysis of information disseminated by an agency.

Accordingly, BLM needs to verify that the information complies with the DQA standards as part of its pre-dissemination review process. The DQA and its general government-wide guidance require that data used by an agency adhere to the "rigorous standards of objectivity, integrity, and utility."

Under BLM DQA guidelines:

Before disseminating information to members of the public, the originating office must ensure that the information is consistent with OMB and DOI guidelines and must determine that the information is of adequate quality for dissemination. If the information is influential, financial, scientific, or statistical information, then the BLM will provide a higher level of review of conclusions of the program offices and the program managers and senior management will be responsible for ensuring accountability for reviewing information to be disseminated to the public.

While numerous agencies (such as the Department of Transportation and the Environmental Protection Agency) maintain pre-dissemination review records,) there is no evidence that BLM has conducted any pre-dissemination review to ensure that the information in the PEIS is consistent with OMB and DOI guidelines and that it is of adequate quality for dissemination.

Moreover, in addition to failing to conduct a pre-dissemination review, BLM also has relied on information that does not meet the quality standards required by the DQA. The DQA and BLM guidelines require that BLM ensures and maximizes the "objectivity, utility, and integrity of disseminated information." "Objectivity" focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased. "Integrity" refers to the protection of information from unauthorized access or

revision, to ensure that the information is not compromised through corruption or falsification. "Utility" refers to the usefulness of the information to the intended users, including the public.

BLM fails to maximize the objectivity, utility, and integrity of disseminated information by relying on numerous outdated, irrelevant, and unsubstantiated studies. Specifically, BLM fails to consider technological improvements by relying on the assumption that 2.6 to 4 bbl of water will be required per barrel of oil shale produced. As discussed in the preceding Section, these figures are not based on sound science and, thus, fail to meet the DQA requirements. In addition, in determining the amount of wastewater that will result from oil shale production, BLM cites an unnamed study by the Department of Interior dating back to 1973. These are a few of the numerous instances of DQA violations that plague the 2012 Final PEIS.

Issue Number: PP-WO-OilTar-13-03-7
Organization: Duchesne County Commission (Utah)

Issue Excerpt Text:

D. The proposed action is in violation of the Federal Data Quality Act (Information Quality Act) see Public Law 106-554, Section 5I5. Findings: In this case, the BLM failed to ensure and maximize the quality, objectivity, utility and integrity of information (including statistical information). Instead, as stated in the attached letters from Uintah County and the Utah Association of Counties, the BLM failed to recognize and incorporate information readily available to the BLM that contradicts core findings of the PEIS that oil shale and tar sands technologies are not commercially or economically viable. This failure to use objective and accurate information was pointed out by Duchesne County in its DEIS comment letter dated April 30, 2012 and in Resolution #12-08 that was provided to the BLM. Instead, the BLM continued to use subjective information tailored to support the pre-determined action set forth in the settlement agreement.

Response

As is evidenced by the reference section at the end of each Chapter, the information used in the PEIS consists primarily of information from peer-reviewed, scientific journals and other documents. The BLM believes it is in compliance with the Office of Management and Budget's (OMB) Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information (67 FR 8452 dated February 22, 2002). Specifically, please see part V.3.b.i:

> b. " In addition, "objectivity" involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data

shall be generated, and the analytic results shall be developed, using sound statistical and research methods.

i. If data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity."

See also OMB's Final Information Quality Bulletin for Peer Review (70 FR 2664, dated January 14, 2005).

The protester states that, "… the BLM fails to consider technological improvements by relying on the assumption that 2.6 to 4 bbl of water will be required per barrel of oil shale produced." However, other than this conclusory representation, the BLM has not received further data from the protester, or any other source, that would change its analysis. The BLM is aware that some companies claim their technology uses no water. On a commercial basis, in addition to water that may or may not be needed to produce the oil shale, water uses could include water for mining and drilling operations, cooling of equipment, transport of ore and processed shale, dust control for roads and mines, crushers, overburden and source rock piles, cooling of spent shale exiting the retort, fire control for the site and industrial area, irrigation for revegetation and sanitary and potable uses. Depending on the quality of the oil shale produced, water may be required for additional processing/upgrading of the product at the surface. These items have not been addressed in these representations.

Uintah County, in its April 9, 2012 Resolution Opposing the BLM's recent PEIS process, stated that "the development and production of oil from oil shale has been proven beyond a doubt to be technologically and economically feasible." The Resolution also stated that "technology to extract oil from the oil shale rock is not only economically feasible, but it requires little to no consumption of water, contrary to myths which falsely claim that oil shale requires large consumption of water resources." However, again, other than these conclusory representations, the BLM has not received further data from the County, or any other source, that would change its analysis. Demonstration that a technology is capable of extracting kerogen from oil shale is not the same as demonstration that such extraction can be done commercially, using oil shale from the Piceance or Uintah Basins. Lab and field tests so far performed by many of these companies may demonstrate capacity, but they do not demonstrate the commercial viability of such technology.

The information provided by Uintah County in its Information Quality Act (IQA) Information Correction Request for the various companies represents that tests have been performed, but does not show specific test results or how these test results demonstrate the ability to produce a profit at a commercial scale producing oil shale or tar sands resources in the Piceance or Uintah Basins. For the most part, the asserted information provided appears to be representations intended for

presentation to investors and not as evidence of a commercial operation. The asserted information provides overviews of the technology and extraction processes, but little more.

The information Uintah County provided does not supports its assertion that the testing done to date with these technologies demonstrates that oil shale development in the Piceance or Uintah Basins is economic on a commercial scale using these technologies. While these technologies appear to hold promise, and many have been lab and/or field tested, most of the technology descriptions in Uintah County's IQA Information Correction Request fails to provide detail in their depiction of results and technical data that would support our revision of the analytical assumptions underlying this planning process.

Regarding the BLM's further compliance with the Information Quality Act, please see the response relating to NEPA and new technologies above ("NEPA-New Technology").

Policy – Consistency with Local Plans

Issue Number: PP-WO-OilTar-13-03-14
Organization: Duchesne County Commission (Utah)

Issue Excerpt Text:

The BLM has failed to cooperate with state and local governments to promote consistency with their land use plans. Instead, the BLM has blindly pursued their agenda, driven by the settlement agreement. The State of Utah and many counties containing oil shale and tar sands resources have established an Energy Zone (see Duchesne County Resolution #12-06 provided in previous comments) that provides for energy development as the priority land use. Although the PEIS publishes the written comments of cooperators, the BLM has made no valid attempt in the PEIS to explain why its preferred alternative cannot be more consistent with such local and state plans, other than to rely on the false premise that "the nascent character of the oil shale and tar sands technologies demands a measured approach."

The preferred alternative in the PEIS and proposed plan amendments entirely ignore the input of the task force, the cooperating agencies, and the other stakeholders which the 2005 Energy Policy Act directed the BLM to honor and follow; and moreover the 2012 OSTS PEIS violates various memoranda of understanding (MODs) with counties, cities and local government coalitions which require the BLM to (1) publish the written input of cooperators who have unresolved disagreements over the substantive elements of the EIS document, and (2) describe the objectives of the cooperators' land use plans and policies.

Response

As previously stated, Section 202 of FLPMA and BLM's planning regulations require the BLM land use plans, including amendments, to be consistent with the planning of other Federal departments and agencies, and of the states and local governments, to the extent consistent with the laws governing the administration of the public lands, including their purposes, policies, and programs. The BLM acknowledges that several of the cooperating agencies have identified the proposed plan amendments to be inconsistent with local plans, and has provided a more detailed discussion of these points in Section M.1 of Appendix M, as called out in Section 7.4 of the Final PEIS (Final PEIS, Comment Response Document, p. 155).

The BLM has not ignored input from the public or cooperating agencies. The BLM prepared a summary of public comment received during the scoping period that began on April 14, 2011, and posted that summary to the OSTS Web site in late summer 2011. The summary of comments received was also published with the Draft PEIS, on February 3, 2012, and the Final

PEIS on November 9, 2012. All public comments on the Draft PEIS have been considered and responded to in the Comment Response Document of the Final PEIS. Additionally, the BLM summarized and published the written input of cooperating agencies in the Final PEIS (pp. M-1 to M-281). All input provided by cooperating agencies has been taken into full consideration. The designation of a preferred alternative and the final decision, however, remains the exclusive responsibility of the BLM (BLM Land Use Planning Handbook, p. 8).

The BLM has explained the rationale behind the proposed plan amendments, including those that are asserted to be inconsistent with state and county plans, policies, or programs. As previously stated, the BLM believes that because of the nascent character of the oil shale and tar sands technologies, a measured approach should be taken to oil shale and tar sands resources leasing and development. This approach ensures that any commercial oil shale program meets the intent of Congress, is consistent with the requirements of NEPA and FLPMA, takes advantage of the best available information and practices to minimize impacts, and offers opportunities for states, tribes, local communities, and the public to be involved at each decision point.

Policy – RD&D

Issue Number: PP-WO-OilTar-13-04-18
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Neither the EP Act nor its implementing regulations allow BLM to limit commercial leasing to RD&D lease conversions. The regulations promulgated in 2008 "set out the policies and procedures for the implementation of a commercial leasing program for the management of federally-owned oil shale." 73 Fed. Reg. at 69414. The RD&D lease conversion regulation is but one small aspect of BLM's broader commercial leasing program. See 43 C.F.R. §3926.10. BLM's research and development program announced in 2005 is entirely separate. See 70 Fed. Reg. 33753 (2005).

The Preferred Alternative, therefore, unlawfully predicates all commercial leasing on the successful completion of the conditions for an RD&D lease and subsequent lease conversion. 2012 OSTS PFEIS at ES-6, 2-37. The EP Act does not allow BLM to merge the two programs by providing for an RD&D first requirement.

Further, the Preferred Alternative omits large amounts of geologically prospective lands from leasing and instead limits development to small, scattered areas more suitable for an RD&D lease or tied to RD&D leases already issued. Id at ES-6, 2-36 - 2-41, 2-68 - 2-73. The small, scattered areas available for leasing under the Preferred Alternative render a commercial leasing program less feasible and discourage commercial development. The additional layer of NEPA analysis will also cause unreasonable delays in oil shale development. Id. at 2-31 ("Additional NEPA analysis would be required prior to issuance of RD&D lease and prior to conversion of an RD&D lease to commercial oil shale lease..."). These commercial leasing constraints are also contrary to the EP Act because they hinder rather than promote oil shale development.

Consequently, BLM's claim that it has effectively provided for a commercial leasing program is clearly specious. BLM did not call the Preferred Alternative a commercial leasing program in the draft. It merely added the term when Garfield County and others cited the conflicts with the 2005 EP Act. The minor changes to land available for leasing are de minimus when compared with the lands now closed. To the contrary, the Preferred Alternative's RD&D first requirement blatantly violates the EP Act and implementing regulations because it fails to provide for a separate, comprehensive commercial leasing program. BLM's actions to change the name of the alternative to add "commercial" without changing the alternative impeaches its conclusion that it has honored the law. Similarly, if BLM concluded in 2008 that this alternative was not consistent with the EP Act, then BLM must somehow explain what has changed, other than politics. It cannot do so and thus the OSTS PFEIS violates the EP Act as well.

Issue Number: PP-WO-OilTar-13-05-3
Organization: Excalibur Industries Inc.

Issue Excerpt Text:

Additionally, it interposes Research and Development Leases ("RD&D Leases") as a predicate step to securing a commercial lease even when a proven process rendered environmentally clean needs no demonstration of the technology

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Issue Number: PP-WO-OilTar-13-09-32
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Neither the EP Act nor its implementing regulations allow BLM to limit commercial leasing to RD&D lease conversions. The regulations promulgated in 2008 "set out the policies and procedures for the implementation of a commercial leasing program for the management of federally-owned oil shale." 73 Fed. Reg. at 69414. The RD&D lease conversion regulation is but one small aspect of BLM's broader commercial leasing program. See 43 C.F.R. §3926.10. BLM's research and development program announced in 2005 is entirely separate. See 70 Fed. Reg. 33753 (2005); supra Section V.B.!

The Preferred Alternative, therefore, unlawfully predicates all oil shale commercial leasing on the successful completion of the conditions for an RD&D lease and subsequent lease conversion. 2012 OSTS PFE1S at ES-6, 2-37. The EP Act does not allow BLM to merge the two programs by providing for RD&D as the first requirement.

Issue Number: PP-WO-OilTar-13-09-36
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

The amount of lands available for oil shale and tar sands leasing still is dramatically reduced by 74% and 70% respectively. The small, scattered areas available for leasing under the Preferred Alternatives render a commercial leasing program less feasible and discourage commercial development.

Consequently, BLM's claim that it has effectively provided for a commercial leasing program is clearly specious. BLM did not state that its focus in the PDEIS was to establish a commercial leasing program, but instead it focused on determining which lands should not be available for application for further leasing and development. 2012 OSTS PDEIS at E-I, 1-4. BLM merely added the phrase "commercial leasing program" when Uintah County, CLG, and others identified the conflicts with the 2005 EP Act. See 2012 OSTS PFEIS at ES-2 ("BLM's focus ... consistent with congressional policy as expressed in the Energy Policy Act of 2005 that a commercial leasing program be established for these resources."). Merely adding the words does not make it so.

The Preferred Alternative's requirement for RD&D first blatantly violates the EP Act and implementing regulations because it fails to provide for a separate, comprehensive commercial leasing program. BLM's addition of the phrase "commercial leasing program" to the purpose and need section of the OSTS PFEIS without changing the alternative impeaches its conclusion that it has honored the law.

Similarly, if BLM concluded in 2008 that this alternative was not consistent with the EP Act, then BLM must somehow explain what has changed to make Alternative 2b consistent with the law now, other than politics. It cannot do so and thus the PFEIS violates the EPAct as well.

Issue Number: PP-WO-OilTar-13-12-4
Organization: American Shale Oil LLC

Issue Excerpt Text:

On its face, the PEIS expressly preserves AMSO's vested rights under the Lease. The PEIS itself provides that the scope of its analysis does not include review of the decisions by the Secretary of the Interior to issue the 160-acre RD&D leases and that such prior issued "RD&D leases and the conversion right to commercial operations on the preference acreage represent a prior existing right that may be exercised upon compliance with the terms of the lease." (PEIS, 1-17) (emphasis added).

However, in what appears to be an attempt to circumvent the statement about the prior existing right, the PEIS incorporates conclusions that are not supported by the best available scientific research and data, imposes additional and unreasonable restrictions on the developers of the oil shale reserves and proposes more restrictive options as preferred alternatives. This approach effectively gives the BLM a green light to reject an application for conversion of RD&D lease to a commercial lease based on environmental requirements that are supported by outdated data and no longer viable scientific conclusions. Effectively, the PEIS interferes with AMSO's exercise of its vested conversion right by making it extremely difficult for AMSO to satisfy the environmental conditions of the Lease.

Summary

The Proposed RMPA's RD&D requirement violates the Energy Policy Act of 2005 because it fails to provide for a separate, comprehensive commercial leasing program. The Proposed RMPA implements extensive commercial leasing constraints that hinder rather than promote oil shale development (including limiting development to small, scattered areas more suitable for an RD&D lease or tied to RD&D leases already issued; requiring additional NEPA analysis prior to issuance of an RD&D lease and prior to conversion of an RD&D lease to commercial oil shale lease; and requiring RD&D Leases as a predicate step to securing a commercial lease even when a proven process rendered environmentally clean needs no demonstration of the technology).

In addition, the RD&D requirements interferes with vested conversion rights by allowing the BLM to reject an application for conversion of RD&D lease to a commercial lease based on environmental requirements.

Response

As explained in response above (response to "Policy – Energy Policy Act"), the BLM has complied with the requirements of the Energy Policy Act in developing a proposed plan which allows the BLM to ensure that technological and environmental impacts are well understood prior to commercial development.

As noted above, changes were made to the proposed plan amendment in response to concerns raised regarding the BLM's proposal to require RD&D before commercial leasing can occur. As explained in the response above, in section 2.5 of the Final PEIS, and on page 158 of the Comment Response Document, under the proposed plan amendment, the Secretary may issue commercial leases where the potential lessee intends to employ a technology that has proved commercially viable on non-federal lands within or outside the study area or where the potential lessee has succeeded in converting an RD&D lease to commercial lease for a tract on other open lands (rather than begin with another RD&D lease on a new leasehold). In these circumstances, the RD&D lease would not be a "predicate step" to securing a commercial lease when a proven process rendered environmentally clean needs no demonstration of the technology.

The BLM continues to recognize the valid existing rights of RD&D lease holders, including the right to convert the lease to commercial operations. This has been acknowledged throughout the planning effort. As noted on pages 1-12 and 1-13 of the Final PEIS, "RD&D leases issued prior to the ROD for this planning initiative would be [subject to] prior existing rights and are not the subject of decisions within this PEIS, with the exception that all alternatives address the subsequent availability of the lands contained in the leases should the initial leaseholder relinquish the existing leases." As stated on page 1-17, "These RD&D leases and the conversion right to commercial operations on preference acreage represent a prior existing right that may be exercised upon compliance with the terms of the lease." Thus, in adopting the proposed planning decisions, the BLM does not intend to interfere with a current RD&D lease existing rights.

Compliance with "environmental requirements" is a program-wide consideration and was not just a consideration introduced through this PEIS. The BLM's 2008 regulations set out the policies and procedures for the commercial leasing program of federally-owned oil shale and any associated minerals located on Federal land. These regulations identify a number of requirements relating to land use planning (43 CFR 3900.5); the introduction of lease stipulations (43 CFR 3900.62); and conducting additional NEPA analysis before competitive sale of lease tracts (43 CFR 3921.20). Other regulations require information necessary for the BLM to

evaluate the environmental impacts of issuing the proposed lease. The regulations, as well as NEPA and FLPMA, give the BLM the authority to reject an application for conversion to a commercial lease that does not provide sufficient information for the BLM to complete its own NEPA and land use planning requirements.

Water Resources

Issue Number: PP-WO-OilTar-13-07-17
Organization: API - American Petroleum Institute

Issue Excerpt Text:

Furthermore, any notion that development of a robust oil shale leasing program is not possible due to water use needs is incorrect. Oil shale production requires 1-3 barrels of water per barrel of oil--less water than is required to produce other future transportation fuels or a 2-liter bottle of soda--and technology exists to reduce such requirements even further. Under a 2-barrel of water requirement, a 1 million barrel/day oil shale industry would require roughly 100,000 acre feet of water each year, or about 2% of Colorado's available water resources (roughly 1% of water in the Colorado River Basin). That in turn would generate roughly l5% of the Colorado's state Gross Domestic Product (GDP).

By comparison, agriculture (utilizes 80-90% of Colorado water resource) and tourism and recreation (utilize about 5% of Colorado water resource) respectively contribute 1-2% and roughly 5% of Colorado state GDP. Importantly, oil shale producers already own enough water rights to produce 10% of U.S. liquid fuel needs.

It is also important to note that BLM's analysis does not provide credit for water recovery or reuse. In addition, ignoring well-known and clear technology and industry trends, and despite the fact that such facilities are neither technically or economically attractive for oil shale projects, the analysis includes significant additional water usage needs that are associated with coal-fired rather than natural gas-fueled power plants.

Response

Water quantity and quality issues and impacts are discussed in Sections 4.5 and 5.5 of the Final PEIS, and cumulative water impacts are discussed in sections in Chapter 6. The potential effect of global climate change on water resources is discussed in Sections 4.5.1.2 and 5.5.1.2 of the Final PEIS. These issues are important; however, because the decision-making process which it has been prepared to support pertains only to land use allocation, the document addresses potential environmental consequences of oil shale and tar sands development on a programmatic level, rather than addressing site-specific impacts. At the programmatic level, information is not available on the exact water supplies that would be used for development of specific oil shale leases. For example, water supplies could come from conversion of existing water rights, application for new water rights, construction of new surface water diversion and storage facilities, construction of well fields, imported water from other watersheds, or a combination of

these approaches. Therefore, due to the level of uncertainties surrounding project specific technologies, designs, and usage of water at this programmatic stage of analysis, a variety of assumptions have been developed in order to take an adequate "hard look" at the environmental consequences related to water resources surrounding the actions proposed in the various alternatives of the Final PEIS.

Given this uncertainty, this EIS is limited to acknowledging that water used for oil shale development will not be available for other purposes, but conclusions cannot be drawn as to which other water uses will have less supply available as oil shale development proceeds. An actual project would undergo two further levels of NEPA analysis (lease stage and project design phase). When subsequent tiers of NEPA analysis are performed on proposals for development of specific leases, information will become available about the proposed water supply for those leases, and an analysis of impacts on other water uses can be performed at that time. After development of multiple leases is analyzed, information will also become available concerning trends in water supply for oil shale development and aggregate water demand, allowing detailed analysis of cumulative impacts. Because of the character of the decision to be made, and the limitations in information, specific or quantified impacts on surface water or groundwater use or quality are not, nor can they be addressed in this document; these impacts would be addressed in project-specific NEPA documents.

While the Final PEIS does not provide "credit" related to specific projects that use water recovery or water reuse, the Final PEIS does summarize the assumptions associated with a 1,500-megawatt (MW) and a 600-MW conventional coal-fired and a 505-MW natural gas-fired electric power plant in table 4.1.6-1. In this way, the analysis does note the variation of water use between coal-fired rather than natural gas-fueled power plants that might be necessary to generate energy to be used to develop oil shale and tar sands resources. This table provides impacting factors for land and water use for a 505-MW natural gas-fired power plant, which, given recent trends, is the most likely type of new power plant that would be built to meet the needs of a future oil shale industry. Large oil shale facilities may use self-supplied co-generated gas or natural gas in an on-site power plant, which would reduce demand on the off-site power grid. It is also possible that future power would be provided by renewable energy sources, particularly wind, which would reduce air emissions and water use for power production.

Air Quality

Issue Number: PP-WO-OilTar-13-10-15
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

The PRMP amendments are not consistent with the CAA which requires BLM to comply with, inter alia, the national primary and secondary ambient air quality standards, 40 C.F.R. § 50.1-50.14, along with requirements for the prevention of significant deterioration of air quality, 40 C.F.R. §§ 51.166 & 52.21, protection of visibility, 40 C.F.R. § 51.300, along with the general conformity prohibition, 40 C.F.R. 51.580. The PFEIS did not fully analyze whether the proposed oil shale and tar sands activity allowed under the PRMP amendments will comply with the NAAQS and will prevent significant deterioration (PSD) of air quality, as required by the Clean Air Act (CAA). The BLM acknowledges that "It is not possible to predict site-specific air quality impacts until actual oil shale projects are proposed and designed" and does not undertake such analyses. PFEIS at 4-54. The BLM failed to complete an analysis to determine (1) compliance with the NAAQS, (2) how much of the incremental amount of air pollution allowed in clean air areas (i.e., PSD increment) has already been consumed in the affected areas, and (3) how much additional increment consumption will occur due to development allowed by the PRMP Amendments. Without this analysis, the BLM cannot ensure that the air quality in the study areas will not deteriorate more than allowed under the CAA. Finally, the BLM failed to provide a complete an analysis of impacts of development allowed by the PRMP Amendments to air quality values, including visibility, in impacted Class I and sensitive Class II areas.

Summary

The BLM has not demonstrated compliance with the Clean Air Act because the BLM failed to complete an analysis to determine (1) compliance with the National Ambient Air Quality Standards (NAAQS), (2) how much of the incremental amount of air pollution allowed in clean air areas has already been consumed in the affected areas, (3) how much additional increment consumption will occur due to development allowed by the PRMP Amendments, and (4) impacts of development allowed by the PRMP Amendments to air quality values, including visibility, in impacted Class I and sensitive Class II areas.

Response

As noted in Section 1.2.2 of the Final PEIS, as well as in the Comment Response Document

(page 73), the detailed level of analysis suggested by protesting parties is neither necessary, nor available at this programmatic level; neither specific development sites nor specific technologies have been proposed, and detailed site development plans are unavailable. If and when an application for a lease for a specific project is submitted, a project-specific NEPA analysis subject to public and agency review and comment will be required.

As part of such project-specific review, the BLM may, at its discretion, require detailed air quality modeling and analysis, including, as noted in Sections 4.6.1 and 5.6.1, near- and far-field modeling and photochemical grid modeling. Furthermore, the BLM is required to notify Federal Land Managers in potentially affected areas of the potential impacts on air quality related values, including visibility.

In addition, a prospective lessee would be required to apply for preconstruction air permits from air regulatory agencies. These applications generally require establishment of air quality protocols, extensive modeling and analysis noted above for air impacts, including, if applicable, impacts on NAAQS, prevention of significant deterioration increments, and air quality related values including visibility, and may require preconstruction monitoring to establish baseline air quality.

Regarding contributions to cumulative impacts from industrial development in the region, including fugitive emissions of methane, volatile organic compounds, hazardous air pollutants from oil and gas infrastructure and those from future oil shale and tar sands developments, such an analysis would require many assumptions that are premature at this programmatic stage in the review process.

If and when any lease applications are made, detailed analysis of such effects will be appropriately evaluated in project-specific NEPA analyses conducted prior to issuing the leases and approving plans of development. The BLM cannot approve leases and plans of development that do not comply with all applicable air regulations.

Climate Change and Greenhouse Gas Emissions

Issue Number: PP-WO-OilTar-13-10-11
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

The PRMP amendments and FPEIS are not consistent with NEPA, which requires BLM to take a hard look at the indirect effects of reasonably foreseeable activities, including greenhouse gas and other emissions resulting electricity production used for in-situ oil shale development. 40 C.F.R. § 1508. The BLM failed to analyze the full suite of emissions that would result from the increased need for electrical power generation to support in-situ oil shale production, even at the RD&D level. As noted in protesters' PDEIS comments, even using BLM's conservative energy use factors, the electricity needed to support even 50,000 barrels/day of development is equivalent to 15% of the generation from the electric power industry (from coal) in 2010 in Colorado and Utah and 12% in 2010 in Wyoming. It is quite possible that the region simply cannot withstand, without adverse effects, the significant increases in water use and greenhouse gas, mercury, NOx, particulates and other pollutant emissions would result from increased power needs. BLM's failure to fully analyze and disclose these potential emissions and their effects on various resources violates NEPA.

The PRMP amendments and FPEIS are not consistent with NEPA, which requires BLM to take a hard look at the indirect effects of reasonably foreseeable activities, including greenhouse gas and other emissions resulting from refining and end-use combustion of mined oil. 40 C.F.R. § 1508.8(b). BLM defines its PRMP land use allocations as "activities and foreseeable development that are allowed, restricted, or excluded for specific areas covered by a land use plan." PEIS at 1-1. Because the entire purpose of oil shale and tar sand development is to have it refined and burned, resulting greenhouse gas emissions are therefore reasonably foreseeable "direct or indirect" impacts of the PRMP amendments. They are "indirect effects which . . . are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8. Comments on BLM's PDEIS stated that, "NEPA regulations require that NEPA documents address not only the direct effects of federal proposals, but also 'reasonably foreseeable' indirect effects," and, "BLM is required to take a hard look at direct, indirect, and cumulative impacts to and from climate change in the planning area in the RMP." Western Resource Advocates et al. at 29. BLM's failure in the FPEIS to analyze, or even attempt to analyze, the effects of emissions from refining and end-use combustion violates NEPA.

Issue Number: PP-WO-OilTar-13-10-14
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

The PRMP amendments and FPEIS are not consistent with Secretarial Orders (S.O.) No. 3289, which mandates that all Department of the Interior agencies "analyze potential climate

change impacts when undertaking long-range planning exercises, setting priorities for scientific research and investigations, developing multi-year management plans, and making major decisions regarding potential use of resources under the Department's purview." S.O. 3289, incorporating S.O. 3226. The PRMP amendments and FPEIS fall squarely under this guidance. The PEIS states, "The maximum potential increase in cumulative GHG emissions from all potential oil shale and tar sands activities cannot be predicted with accuracy." Protestors' cited climate change impact analysis requirements S.O. 3289 and S.O. 3226 in comments on BLM's PDEIS. Western Resource Advocates at 28 and 29. BLM's failure to assess, or even attempt to assess or estimate, direct, indirect and cumulative greenhouse gas emissions from oil shale and tar sands activities prevents a full analysis of "potential climate change impacts when undertaking long-range planning exercises" and violates S.O. 3289 and S.O. 3226

The PRMP amendments and FPEIS are not consistent with NEPA, which requires BLM to take a hard look at direct, indirect and cumulative effects of the PRMP amendments, including in this case effects to and from greenhouse gas emissions and climate change. 40 C.F.R. § 1508. The BLM failed to estimate cumulative greenhouse gas emissions and other pollutants that could result from all phases (exploration, extraction, processing, transportation, refining, end-use combustion) of oil shale and tar sands development that would result from the PRMP amendments. The FPEIS claims that such analysis is not possible because of uncertainties relating to oil shale and tar sands development technology. For example, BLM states, "The maximum potential increase in cumulative GHG emissions from all potential oil shale and tar sands activities cannot be predicted with accuracy." PEIS at 4-61. Nowhere in the PEIS does BLM attempt to estimate cumulative greenhouse gas or other pollutant emissions resulting from future development under the PRMP amendments. BLM's failure to assess, or even attempt to assess, the cumulative greenhouse gas emissions or other pollution resulting from development activities allowed by the PRMP amendments violates NEPA.

Issue Number: PP-WO-OilTar-13-10-8
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

Summary

The BLM's Final PEIS fails to comply with NEPA because there was no analysis of:

1. The full suite of emissions, including greenhouse gas, mercury, NOx, particulates and other pollutant emissions, that would result from the increased need for electrical power generation to support in-situ oil shale production.
2. The estimated cumulative greenhouse gas emissions and other pollutants that could result from all phases (exploration, extraction, processing, transportation, refining, and end-use

combustion) of oil shale and tar sands development.

The Final PEIS is not consistent with SOs 3289 and 3226 because direct, indirect and cumulative greenhouse gas emissions from oil shale and tar sands activities are not estimated.

Response

The impacts of climate change are discussed in the document at a level of detail appropriate to analysis of landscape allocations. The lack of scientific tools designed to predict climate change on regional or local scales limits the ability to quantify potential future impacts, not only with respect to actions already underway, but even more so with respect to actions not yet proposed, and for which (like oil shale and tar sands), likely technologies for resource development, and the impacts therefrom, are not yet known. Currently, the BLM does not have an established mechanism to accurately predict the effect of the decisions of the PEIS on global climate change.

Chapter 4.6 of the Final PEIS describes the potential impacts of oil shale development on air quality and the potential effects associated greenhouse gas emissions, based on certain assumptions made for analytical purposes; impacts related to tar sands development activities are analyzed in Chapter 5.6. The BLM acknowledges that oil shale development will impact air quality resources and that greenhouse gas emissions will occur. However, as has been acknowledged throughout the planning process, the proposed decisions included in this Final PEIS are land allocation decisions and the data needed for the detailed emissions estimates of the full suite of potential emissions are not available at this time (Final PEIS, pp. 4-54 to 4-56; Comment Response Document, p. 68). Until specific oil shale development sites and technologies are proposed and detailed site development plans are available, a quantification of potential emissions that would allow meaningful alternative comparison and informed decision making with respect to particular development projects is not available (Final PEIS, Comment Response Document, p. 68). As noted on page 4-56 of the Final PEIS, "compounding the problem for the present analysis is the fact that there is no commercially proven technology for extracting liquid fuels from oil shale or tar sands." Without adequate equipment and activity assumptions, the BLM has determined "that preparing an emissions inventory for the PEIS is not a scientifically defensible effort" (p. 4-56). The information and the qualitative analysis in Section 4.6.1.1 of the Final PEIS provides an adequate discussion of air quality and climate change for purposes of supporting decision making of the scope contemplated in this planning initiative.

Regarding the analysis of the need for power generation to support in-situ oil shale production,

the BLM has acknowledged that additional power generation would be needed to support commercial oil shale development. However, the ability to analyze the full suite of emissions relating to an increased need for power generation is limited by the lack of definitive information about the power requirements of commercial oil shall development and thus, a quantitative estimate of potential emissions cannot be made at the programmatic stage (Final PEIS, Section 4.16, p. 4-13 to 4-15).

It is likewise neither necessary nor possible to meaningfully estimate and analyze the potential indirect effects of refinement and consumption of mined oil as part of the Final PEIS analysis, given the programmatic nature of the review and the enormous degree of uncertainty regarding commercial oil shale development technologies and activities. Even when the BLM has information about oil-producing proposals on BLM lands, it is unusual for the BLM to discern how oil will ultimately be used and whether its consumption is ultimately caused by the BLM action, and thus, potential indirect effects are not reasonably foreseeable.

The BLM recognizes greenhouse gas emissions as a serious national and worldwide issue. In implementing Proposed RMPA, the BLM will conduct additional environmental reviews to consider impacts from leasing and/or project and site specific development activities. As part of this future analysis, "it may be necessary as part of the air quality analysis to conduct air quality modeling" (Final PEIS, pp. 4-54 and 5-43). If necessary, measures to mitigate potential air quality impacts, including emissions of greenhouse gases, will be considered at that point (see Final PEIS, Section 4.6.2, p. 4-63, and Section 5.6.2, page p. 5-52). The BLM cannot approve leases and plans of development that do not comply with all applicable air regulations. In compliance with the NEPA, the public will have the opportunity to participate in the environmental analysis process for actions implementing the Proposed Plan, if adopted.

By considering climate change and greenhouse gas emissions in its analysis, the BLM has complied with the BLM and DOI policy, including SOs 3289 and 3226.

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Wildlife

Issue Number: PP-WO-OilTar-13-04-26
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

Without any explanation, BLM now incorporates the previously rejected scaled back leasing allocations into its Preferred Alternative. 2012 OSTS PFEIS at 2-29, 2-37, 2-42, 6-79. Some of the resources covered by the stipulations and restrictions in place for oil and gas leasing in Colorado include sage-grouse leks and nesting habitats, raptor habitats, and wildlife habitat. 2008 OSTS PFEIS at 2-37; 2012 OSTS PFEIS at 2-42. The "[w]ildlife habitat includes a combination of winter range, crucial winter range, summer range, and calving areas for antelope, deer, elk, and moose, as well as seclusion areas for other wildlife." Id. A large portion of the lands excluded from leasing in Colorado under the Preferred Alternative was due to the wildlife habitat stipulations and elk and mule deer winter habitat. See 2012 OSTS PFEIS at 2-101 - 2103, 6-19,6-83,6-240.

These exclusions are unwarranted considering the excessive numbers of elk and mule deer in and around the most geological prospective areas for oil shale development for Colorado. The Colorado Parks and Wildlife 2011 estimates show about 36,000 mule deer and about 65,000 elk in the area. Ex.B, Colorado Parks and Wildlife Population Numbers (Apr. 26, 2012) (See the deer population numbers for DAU II, 12, and 41. See also the elk population numbers for DAU 6, 10, and 14). These numbers are either above or within the long term objective population target numbers. Id It is apparent that the elk and mule deer populations are not suffering in Garfield County and require no additional protection then what is already available in the RMPs.

Under the No Action Alternative, the wildlife habitats identified for spatial or temporal protection in BLM RMPs that would be present in the lease application lands in Colorado include: 27,977 acres of raptor nesting and fledging habitat, 89,310 acres of big game severe winter range, 24 acres of big game winter range, 30 acres of big game, and 163,100 acres of deer and elk summer range. Id at 6-19, 2-101 - 2-102, 6-240. The number of acres of wildlife habitat protected by stipulations under the Preferred Alternative is zero. Id. at 6-240. BLM completely failed to provide any explanation or reasoned analysis as to why these lands now should be excluded from leasing. BLM also fails to provide any maps, besides those showing mule deer and elk summer and winter habitat. For example, and without limitation, there are no maps showing the raptor nesting areas, big game severe winter range, elk crucial winter range, or various other wildlife habitat stipulation areas at listed in the OSTS PFEIS. See id at 2-10 I - 2103, 6-19,6-240.

The amount of acres of elk and mule deer habitat in Colorado under the No Action Alternative are 245,634 acres of mule deer winter habitat, 172,773 acres of mule deer summer habitat, 320,262 acres of elk winter habitat, and 172,542 acres of elk summer habitat. Id at 6-22. The Preferred Alternative would only include 44,869 acres of mule deer winter habitat, 19,558 acres

of mule deer summer habitat, 46,756 acres of elk winter habitat, and 19,565 acres of elk summer habitat. Id. at 2-103, 6-83, 6-240. The lands available for leasing that included the seasonal habitat for mule deer and elk are proposed to be reduced by about 85% and 87% respectively. Again, BLM fails to provide any explanation or reasoned analysis as to why these lands should be excluded from leasing.

Issue Number: PP-WO-OilTar-13-04-27
Organization: Garfield County Board of County Commissioners (Colorado)

Issue Excerpt Text:

The Colorado RMPs allow oil and gas development to proceed in these same areas subject to stipulations to reduce interference with wildlife during crucial time-periods and to prevent the reduction of habitat to a level where it is insufficient to maintain winter wildlife populations. White River ROD and Approved RMP, at 2-26-2-28, A-19-A-21 (July 1997); Grand Junction Resource Area RMP and ROD, at 2-14-2-16 (Jan. 1987); ROD and RMP of the Glenwood Springs Resource Area, at 13 (Table 2), 14, 18-19, App. B51 - B52 (1988). Reasons for closing lands to oil and gas development included the need to protect WSAs, for example, not wildlife habitat. White River ROD and Approved RMP, at 2-9; Grand Junction Resource Area RMP and ROD, at 2-7-2-10; ROD and RMP of the Glenwood Springs Resource Area, at 13 (Table 2), 14. There is no explanation in the OSTS PFEIS as to why oil and gas development can occur and oil shale development is excluded. The same time limitations currently used for oil and gas would be just as effective in protecting elk and mule deer seasonal habitats from the potential impacts of oil shale development.

In this context, BLM completely fails to provide a reasoned analysis for its 180-degree change in position for excluding a large portion of the Colorado lands available for leasing in order to protect wildlife habitat. Therefore, BLM's selection of the Preferred Alternative is arbitrary and capricious.

Issue Number: PP-WO-OilTar-13-09-25
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

The OSTS PFEIS also excludes other areas to protect big game habitat. OSTS PFEIS Table 2.7-1 at 2-101 (comparing Alternatives 1 and 2), 4-21 (development impacts are incompatible with recreation use), 4-85, 4-87. Given the high numbers of elk and deer, especially in western Colorado where the exclusions have the greatest impact, it is not clear why such exclusions are necessary and the OSTS PFEIS does not provide additional documentation.

Summary

The Final PEIS does not explain why exclusions to protect big game habitat are necessary, given the high numbers of elk and deer in western Colorado. Further, the BLM does not provide a rationale for why areas that are available for oil and gas development in BLM Colorado RMPs are excluded from oil shale development in the Proposed RMPA to protect habitat.

Response

The Secretary, acting through the BLM, manages the public lands under FLPMA. As noted above (response to "Policy – Reconsideration of 2008 PEIS Allocations"), under FLPMA, the Secretary must manage the public lands in accordance with land use plans, and retains the discretion to establish, revise, and amend those land use plans, as appropriate, to address resource management issues. Although FLPMA requires the BLM to manage public lands for multiple use and sustained yield, FLPMA does not require all uses to take place on all lands and does not specify particular acreages that must be allocated to particular uses. Rather, the Secretary has wide latitude to allocate the public lands to particular uses, and to employ the mechanism of land use allocation to protect for certain resource values, or, conversely, develop some resource values to the detriment of others, short of unnecessary and undue degradation.

The Energy Policy Act did not specify the acreage that must be available for such program, nor how the requirements of such program should be balanced with other resource uses. Rather, while the Act encourages commercial development of oil shale and tar sands resources, the question of where such development is most appropriate and the under what restrictions it may be conducted is left, under FLPMA, to the Secretary, acting through the BLM.

In the Proposed RMPA, the Secretary, acting through the BLM, has proposed a policy decision that in view of the nascent character of the oil shale and tar sands industries closes areas to oil shale and tar sands development to protect wildlife resources. In balancing what is known about the oil shale resource development technologies and potential impacts with protection of wildlife habitat, the Secretary has chosen to err on the side of caution.

Although full field development for an oil and gas operation (which has been considered as a possible analogue to potential oil shale and tar sands development) does have the capacity to result in adverse impacts to biological resources if not appropriately mitigated, because of the mature character of the oil and gas industry, the relative effectiveness of protective stipulations is better understood in that context. This has been explained in the NEPA analyses for both the

2008 and 2012 oil shale and tar sands land use plan allocation initiatives. In the case of oil shale and tar sands, however, it has not yet been determined how effective protective stipulations might be. While the current oil shale RD&D leases are subject to protective stipulations, because those leases are still at an early stage, the BLM has not yet been able to determine how effective these measures are, in practice, even for RD&D scale activities. Generally, the more concentrated the development, the more likelihood the impacts will be significant. Therefore, instead of adopting the same protective measures used in conventional oil and gas development (e.g., timing limitations, short of exclusions from development) the BLM is employing the land use allocations as a protective measure.

Indeed, based on what is known today, commercial development of oil shale and tar sands resources appears to be more similar to a larger-scale surface disturbance effort than it does an oil and gas operation. Besides taking into account multiple uses in its land use allocation decisions under FLPMA, the BLM needs to ensure that technological and environmental impacts are well understood prior to commercial development. As previously stated, the BLM believes that because of the nascent character of the oil shale and tar sands technologies, a measured approach should be taken to oil shale and tar sands resources leasing and development. This approach ensures that any commercial oil shale program meets the intent of Congress, is consistent with the requirements of NEPA and FLPMA, takes advantage of the best available information and practices to minimize impacts, and offers opportunities for states, tribes, local communities, and the public to be involved at each decision point.

Threatened, Endangered, and Special Status Species

Issue Number: PP-WO-OilTar-13-10-6
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

The ESA requires Section 7 consultation for "any action [that] may affect listed species or critical habitat." 50 C.F.R. § 402.14. Under the ESA's governing regulations, agency "action" means "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Courts have determined that the "act of approving, amending, or revising" a land management plan constitutes 'action' under Section 7 of the ESA. Forest Guardians v. Forsgren, 478 F.3d 1149, 1154 (10th Cir. 2007). Unless and until BLM undertakes formal consultation with FWS pursuant to Section 7 of the ESA to ensure that the direct, indirect and cumulative impacts of the PRMP amendments will not result in prohibited take or jeopardy of federally listed species, a decision approving the PRMP amendments will violate ESA.

Issue Number: PP-WO-OilTar-13-10-7
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

In addition to its ESA violations, the PRMP does not comply with BLM Manual 6840: Special Status Species Management and BLM Manual 6500: Wildlife and Fisheries Management, which requires BLM to "restore, maintain, and improve wildlife habitat conditions." Oil shale and tar sands development in special status species habitat is clearly inconsistent with these mandates.

Summary

The Proposed RMPA is not in compliance with Section 7 of the ESA because the BLM has not completed consultation with the FWS. The Proposed RMPA does not comply with BLM Manuals 6840 and 6500 because OSTS leasing and development would be permitted in special status species habitat.

Response

Section 7.6 of the Final PEIS provides a thorough explanation of the BLM's compliance with the ESA and, correspondingly, BLM Manual 6840 regarding "Special Status Species Management." As stated on page 7-10 of the Final PEIS, the BLM considered initiating consultation with the FWS under Section 7(a)(2) of the ESA but determined that preparation of a biological

assessment (BA) before a lease- or site-specific project had been proposed would be based largely on conjecture and speculation. Without information regarding when and where a project could occur, it is not possible to adequately analyze potential impacts to species or their habitat, if any. The BLM considered making assumptions for the purposes of a BA, but was left with no credible basis on which to make such assumptions. Thus, the BLM determined that such assumptions would be speculative; any BA would be a speculative assessment of the effects from future site-specific projects, not of the current proposed planning-level allocations. The BLM determined that the amendment of RMPs to identify lands as available for future commercial leasing or development of oil shale and tar sands would have no effect on listed species or critical habitat.

The BLM has also complied with the policy, goals, and objectives set forth in BLM Manual 6500 (“Wildlife and Fisheries Management”). Conservation measures for regulated species are provided in Appendix F of the Final PEIS and will be considered and implemented if warranted by environmental analysis when specific projects are proposed. These programmatic mitigation measures and conservation measures, as well as those determined during lease-specific NEPA evaluations, will be implemented for each commercial development under the proposed program (p. 94). As stated on pages 88 and 89 of the Final PEIS’ Comment Response Document, "specification in mitigation requirements, impact significance determinations, and measurable standards of protection is deferred to specific project assessments that would be developed in consultation with state and Federal natural resource management agencies. It is expected that this consultation process will identify species and habitats of concern in the project area, the need for additional survey, quantitative significance criteria, and specific mitigation requirements. New or revised conservation measures may be determined during these lease-specific NEPA evaluations and consultations with the FWS and other state and Federal resource agencies. These changes could include but are not limited to changes to the list of species, buffer or setback distances around known locations for protected species, and measures to avoid or minimize impacts on particular habitats (e.g., wetlands)." These programmatic and project-specific measures are anticipated to provide the necessary protections of special status species habitat.

Sage Grouse – Data and Analysis

Issue Number: PP-WO-OilTar-13-09-21
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

BLM also stated the Preferred Alternatives were avoiding priority habitat areas in accordance with the BLM Greater Sage-Grouse National Technical Team Report (Team Report). id. at 94. It's entirely improper to rely on the conclusions and recommendations in the Team Report as they are based on controversial and potentially inaccurate scientific data and the report itself has never been peer reviewed. See e.g. Center for Environmental Science, Accuracy and Reliability, Science or Advocacy? Ecology & Conservation of Greater Sage-Grouse: A Landscape Species & Its Habitats, pp. 2-7 (Feb. 1, 2012); Jim Cagney et al., Grazing Influence. Objective Development. and Management in Wyoming's Greater Sage-Grouse Habitat (March 2010); Seth M. Harju et al., Thresholds & Time Lags in Effects of Energy Development on Greater Sage-Grouse Populations, 74 J. Wildlife Management. 437 (2010); Rob Roy Ramey Il, Laura M. Brown, & Fernando Blackgoat, Oil & Gas Development & Greater Sage Grouse (Centrocercus urophasianus): A Review of Threats and Mitigation Measures, 35 J. Energy and Dev. 49 (2011).

Summary

The BLM should not rely on the conclusions and recommendations in the NTT Report as they are based on controversial and potentially inaccurate scientific data and the report itself has never been peer reviewed.

Response

The protestor claims that conclusions in the Report on National Greater Sage-Grouse Conservation Measures (also referred to as the NTT Report) are controversial and potentially inaccurate and that the report has never been peer reviewed. As stated in the report itself, however, the document was developed specifically to provide the BLM with "the latest science and best biological judgment to assist in making management decisions." The document emphasizes and references a substantial number of publications dealing with a variety of aspects of sage-grouse ecology and management, summarized in the 2010 listing petition (75 FR 13910), as well as Knick and Connelly (2011b). Habitat requirements and other life history aspects of sage-grouse, excerpted from the FWS listing decision (75 FR 13910), are summarized in

Appendix A of the report, which provides context for the proposed conservation measures. The NTT Report also provides perspectives on the nature and interpretation of the available science in Appendix B of the report.

It is important to note that the NTT Report was not simply developed internally by the BLM, but was developed by a National Technical Team, which consisted of resource specialists and scientists from the BLM, State Fish and Wildlife Agencies, FWS, Natural Resources Conservation Service, and USGS. The conservation measures described in this report are not an end point but, rather, a starting point to be used in the 68 GSG plan amendments and revisions throughout the West that the BLM is currently developing. Consistent with the NTT Report, the Proposed RMPA does not allocate priority sage-grouse habitats recently mapped or identified in Colorado and Utah as available for oil shale and tar sands leasing and development. In accordance with BLM Wyoming IM 2012-043, "Greater Sage-Grouse Interim Management Policies and Procedures," under the Proposed RMPA, potential oil shale development in Wyoming will adhere to EO 2011-5, Greater Sage-Grouse Core Area Protection. It is understood that if the Proposed RMPA is adopted, any proposed oil shale leasing in Wyoming core areas would need to demonstrate development criteria consist with EO 2011-5 through leasing or project-specific NEPA. Any future oil shale and tar sands leasing and development activities shall comply with all ongoing BLM planning and management efforts to conserve Greater Sage-Grouse and its habitat (e.g., WO IMs 2012-43 and 2012-44). Relevant conservation guidelines, policies, and IMs pertinent to GSG conservation were provided in Appendix K of the Final PEIS.

Cultural Resources

Issue Number: PP-WO-OilTar-13-10-12
Organizations: Center for Biological Diversity, Grand Canyon Trust, Living Rivers, and Sierra Club

Issue Excerpt Text:

The PRMP amendments and FPEIS are not consistent with Section 106 of the National Historic Preservation Act, which requires BLM to consider impacts to properties, sites, and objects that are included or are eligible for inclusion in the National Register of Historic Places, including tribal cultural and religious resources, and consult with the Advisory Council on Historic Preservation and affected tribes before approving the amended resource management plans. 16 U.S.C. § 470f; 36 C.F.R. § 800.2(c)(2)(ii); 36 C.F.R. § 800.1(c) (requiring consultation early in decision-making process). Approving the proposed amendments to the ten management plans is an "undertaking." 16 U.S.C. § 470w(7). BLM's failure to undergo consultation prior to approvals the Amendments violates the NHPA. See 36 C.F.R. § 800.2(c)(2)(ii)(A) & (C). BLM also violated NHPA by failing to consider the Amendments' effects on cultural and religious sites, identify any adverse effects, and avoid or mitigate any adverse effects. See 36 C.F.R. §§ 800.5, 800.6.

Issue Number: PP-WO-OilTar-13-14-40
Organization: Wyoming Outdoor Council

Issue Excerpt Text:

The final EIS provides that historic trails are lands excluded from commercial oil shale leasing. FEIS at Table 2.3.2-2. Thus, the corridor surrounding the Cherokee Historic Trail that traverses the Adobe Town area should not be available for application for oil shale leases pursuant to the preferred alternative in the final EIS. While a comparison of Figures 3.1.1-11 and 2.3.3-6 in the final EIS indicates that this corridor may have been excluded from leasing, the final EIS is far from explicit or clear in this regard.

Summary

The BLM has failed to comply with Section 106 of the National Historic Preservation Act (NHPA) because no consultation with the Advisory Council on Historic Preservation and affected tribes has taken place. Further, the BLM failed to consider the Proposed RMPA's effects on cultural and religious sites, to identify any adverse effects, and to avoid or mitigate any adverse effects.

It is unclear whether the Proposed RMPA makes the Cherokee Historic Trail corridor that

traverses the Adobe Town area available for oil shale and tar sands leasing and development.

Response

The BLM has not violated Section 106 of the NHPA. Appendix L of the Final PEIS documents how the BLM conducted Government-to-Government Consultation and the NHPA Section 106 Consultation. As described in Appendix L, the BLM distributed a letter to 25 tribes in July 2011 notifying them of its intention to take a fresh look at land use allocation decision made in 2008 regarding the management of oil shale and tar sands resources. The BLM has followed up with additional letters, e-mails, phone calls, and meetings for tribes who have indicated that they wish to continue Government-to Government Consultation or have cooperating agency status. Once the Draft PEIS was completed, a second mailing was sent to all federally recognized tribes with interests in the area under consideration. Follow-up meetings and discussions occurred after the issuance of the Draft PEIS (Final PEIS, Appendix L, p. L-1).

The BLM also consulted with the Advisory Council on Historic Preservation (ACHP; Final PEIS, Appendix L, p. L-21) as well as the respective State Historic Preservation Officers (SHPO; Final PEIS, Appendix L, p. L-17). In the ACHP response letter dated July 17, 2012, the ACHP indicated that the BLM's efforts to identify historic properties is a proactive step, and the ACHP looks forward to working with the BLM when Section 106 consultation is initiated for site-specific projects. Further, the Wyoming and Colorado SHPOs have formally concurred with the BLM's determination that there will be "no historic properties affected." No response was received from the Utah SHPO. Under Section 106 regulations, "...the agency official may proceed after the close of the 30 day review period if the SHPO/[Tribal Historic Preservation Officer] THPO has agreed with the finding or has not provided a response, and no consulting party has objected...." 36 CFR 800.5 (c)(1).

The Final PEIS did consider impacts on cultural resources, as described in Sections 6.1.2.9 and 6.2.2.9, and impacts to Indian Tribal concerns, as described in Sections 6.1.2.10 and 6.2.2.10. Of the public lands that would remain available for application for oil shale leasing under Alternative 2, approximately 7 percent in the Piceance Basin, approximately 48 percent in the Uinta Basin, and approximately 8 percent in the Green River and Washakie Basins have been surveyed for cultural resources. Of the public lands that would remain available for application for tar sands leasing under the Proposed RMPA, approximately 14 percent have been surveyed for cultural resources. Additional resources likely occur in unsurveyed portions of the study area. Any future leasing and development would be subject to compliance with Section 106 of the NHPA as well as all other pertinent laws, regulations, and policies. Compliance with these laws

would result in surveys for cultural resources and measures to avoid, minimize, or mitigate impacts to cultural resources or denial of the lease or project. Deferring cultural surveys to future site-level NEPA analysis is appropriate for a large-scale land use planning effort, such as this one.

According to the Proposed RMPA, a corridor extending at least 0.25 miles on either side of all congressionally designated National Scenic and Historic Trails will be excluded from potential future oil shale and tar sands leasing and development. If and when the Cherokee Trail is designated as a National Historic Trail, this level of protection would be applied. Until then, that portion of the Cherokee Trail that is within the Adobe Town Very Rare and Uncommon Area would be excluded from leasing because this Adobe Town Area is excluded from leasing. Appropriate inventories of trail resources will be conducted at the site-level to inform the appropriate NEPA and other environmental reviews prior to any leasing and/or development decisions for those trails where a corridor has not yet been established to determine the area of potential impact to protect resources, qualities, values, and associated settings, and primary use or uses of the trails within the viewshed (Final PEIS, p. 2-33).

Socio-Economics

Issue Number: PP-WO-OilTar-13-17-40
Organization: Rio Blanco County (Colorado)

Issue Excerpt Text:

Shamefully, a regional socioeconomic study released in 2008 by the Associated Governments of Northwest Colorado (AGNC) and the Colorado Department of Local Affairs … is cited nowhere in this 'revised' PEIS. In particular, very little appears to have been done in reviewing the socioeconomics of our region or considering how impacts might be mitigated.

Response:

Economic, fiscal, and demographic projections included in the 2008 report entitled "Northwest Colorado Socioeconomic Analysis and Forecasts" by BBC Research and Consulting were reviewed, and data was included where appropriate. The 2008 BBC report was cited on pages 6-62 and 6-310 of the Final PEIS and is included in the reference list for Chapter 6.

As discussed in the Final PEIS' Comment Response Document (pp. 101 to 104), regions of influence were established for conducting socioeconomic analyses. The economic baseline for each region of influence used data current in August 2011, as discussed in detail in section 3.11 (Final PEIS, pp. 3-246 to 3-284). Rio Blanco County is included in the Colorado region of influence (Table 3.11.2-1).

Recreation

Issue Number: PP-WO-OilTar-13-13-44
Organizations: Biodiversity Conservation Alliance, Western Watershed Project, Californians for Western Wilderness

Issue Excerpt Text:

The BLM's failure to take the legally required 'hard look' at impacts to recreation and wilderness resources is also exemplified by the failure of the BLM to examine impacts to the Adobe Town Dispersed Recreation Use Area ("DRUA"). According to the BLM, "None of the designated recreation sites or SRMAs is located in an area overlying the oil shale resources." FEIS at 3-34. However, the Adobe Town DRUA, established under the 2009 Rawlins RMP, does in fact overly potential oil shale resources, including lands proposed for oil shale leasing in the Preferred Alternative. Elsewhere, BLM refers to the DRUA as encompassing lands where oil shale resources are found. FEIS at 3-36.

Response

The BLM's statement on page 3-34 of the Final PEIS denotes that there are no "designated recreation sites" or special recreation management areas (SRMA) located in an area overlying the oil shale resources. This statement is true and there is no conflict within the BLM's descriptions of the area on page 3-34 and 3-36. The area is not an SRMA and the BLM does not consider the dispersed recreation management area in question to be a "designated site."

The statement on page 3-34 specifically regards recreation sites established in areas of heavy recreational use and larger areas of dispersed but heavy recreational use which have been identified and designated as SRMAs. The Adobe Town Dispersed Recreation Management Area is located within the Western Extensive Recreation Management Area (ERMA), as established in the Rawlins RMP ROD (2008). Generally, ERMAs are lands within a planning area that have been delineated as not meriting special recreation management consideration. The PEIS provides an analysis of the potential impacts to recreation resources from making lands available to oil shale leasing and developing in Chapter 6 of the PEIS.

It is true that portions of the DRUA have oil shale resources (units G and H in their entirety and portions of units E and F). Units E, F and H are lands with wilderness characteristics and thus, are not available for oil shale leasing and development under the Proposed RMPA (see response to "Wilderness Characteristics Inventory and Analysis" above).

Wild and Scenic Rivers

Issue Number: PP-WO-OilTar-13-06-22
Organization: Enefit American Oil

Issue Excerpt Text:

F. BLM fails to acknowledge that Evacuation Creek does not contain wild and scenic river characteristics. BLM failed to respond to Enefit's request that it clarify confusing and inaccurate statements about Evacuation Creek and potential wild and scenic river designation. Enefit Comment letter, at 22-23. While BLM disclaims making any additional designations or changes to land use decisions, no attempt is made to provide correct information that Evacuation Creek is no longer eligible for designation as a WSR and to clarify that Enefit is permitted to develop lands adjacent to Evacuation Creek subject to existing lease stipulations. See BLM Response, at 56. Several statements in the PEIS create confusion and the potential for misunderstandings or even litigation in relation to Evacuation Creek. See Enefit Comment letter, at 22-23.

Issue Number: PP-WO-OilTar-13-09-24
Organizations: Uintah County, Utah Association of Counties, and the Coalition of Local Governments

Issue Excerpt Text:

Wild & Scenic Rivers Act - The OSTS PFEIS also excludes lands in Uintah County on the basis of the need to protect the wild and scenic river qualities of Evacuation Creek. 2012 OSTS PFEIS at 4-47- 4-48. The OSTS PFEIS assigns visual protection and excludes land from leasing based on the segment's eligibility for management under the Wild and Scenic Rivers Act, 16 U.S.C. §1275(a). Evacuation Creek, however, was studied as part of the Vernal RMP and released due to its lack of suitability. Vernal RMP and FEIS, Record of Decision at 125. The OSTS PFEIS contradicts BLM manual and policy by imposing WSRA management on a stream segment that has been studied and found not to qualify. The study process as set out in BLM Manual 8351 calls for two steps, a review of eligibility and determination of suitability. BLM lacks the authority to manage for WSRA based only on eligibility, especially when it was found to be unsuitable.

Summary

In its management of Evacuation Creek in the Vernal Field Office, the Proposed RMPA is not consistent with BLM's Wild and Scenic River policy because the creek has been previously studied during the Vernal RMP revision process and found not to be suitable for inclusion in the National Wild and Scenic River System. The BLM failed to respond to Enefit's request that it

clarify confusing and inaccurate statements about Evacuation Creek and potential Wild and Scenic River (WSR) designation.

Response

A river or a segment of a river may be designated as a WSR by Congress or the Secretary of the Interior under the authority of the Wild and Scenic Rivers Act of 1968. Land management agencies conduct inventories of rivers and streams within their jurisdictions and make recommendations to Congress regarding the potential inclusion of suitable rivers into the WSR system as part of their land use planning process. These special areas are managed to protect outstanding scenic, recreational, geologic, fish and wildlife, historic, cultural, or other values, and to preserve the river or river section in its free-flowing condition. The WSR boundaries are established to include a corridor of land along either side of the river as determined to be appropriate for protection of the river's values. The law recognizes three classes of rivers: wild, scenic, and recreational. It is the BLM's policy to manage potentially eligible and suitable WSRs in a manner to prevent impairment of the river's suitability for WSR designation until Congress or the Secretary makes a final determination regarding the river's status. Where a river or river segment has been found to be "eligible" for inclusion in the WSR system as part of one of these inventories, the BLM will protect the lands along the eligible segment until a "suitability" determination has been made as part of the land use planning process (BLM Manual 6400.3.5 regarding "Wild and Scenic Rivers"). During this interim period, a corridor extending at least 0.25 mi from the "high water" mark on each bank of the river is established. If the river or river segment is found to be "non-suitable," the lands along the river then would be available for other uses.

During preparation of the 2008 OSTS PEIS, the Vernal Field Office was undergoing a resource management plan revision to replace and consolidate the Diamond Mountain RMP (1994) and the Book Cliffs RMP (1985). Resources in the Field Office were managed in accordance with these two plans prior to the completion of the Vernal RMP in October 2008. As part of the RMP process, the Field Office conducted WSR inventories and determined portions of several rivers to be eligible for potential designation as a Wild and Scenic River (WSR). Included in this group were several segments which also overlie oil shale and tar sands depositions, including the segment of specific concern to the protesting parties: Evacuation Creek. Upon review of the protest issue, the BLM has also identified portions of Bitter Creek and the White River as segments considered to be eligible during the Vernal RMP revision process that also overlie oil shale and tar sands deposits.

Both the Draft and Final 2008 OSTS PEIS excluded from commercial oil shale and tar sands leasing segments of rivers determined to be eligible for WSR status by virtue of a WSR inventory. Because the Vernal RMP revision process was ongoing at that time and a determination had not been completed as to which segments in the Field Office were suitable for inclusion in the WSR System, a corridor extending at least 0.25 mi from the "high water" mark on each bank of the river was excluded from commercial oil shale and tar sands leasing for portions of Evacuation Creek, Bitter Creek, and the White River.

The ROD for the Vernal RMP was signed in October 2008 wherein the BLM determined that these eligible WSR segments were not suitable to forward to Congress to make a final determination about WSR status. When the OSTS PEIS ROD was signed a few weeks later, in mid-November 2008, the BLM should have incorporated the decisions on these two eligible segments into the OSTS ROD but failed to do so. The BLM's 2008 OSTS ROD inappropriately closed these creek and river segments to oil shale and tar sands leasing and development. The 2008 OSTS ROD noted, in footnote 14, that a land use plan amendment would be required prior to making these segments available for application for leasing.

In 2011, when the BLM began to reassess the allocation decisions in the 2008 OSTS ROD, the No Action Alternative brought forward the decisions from the 2008 OSTS ROD, and under this alternative, in the March 2012 Draft and November 2012 Final PEIS, 0.25 miles on either side of the Evacuation Creek, Bitter Creek, and White River segments in question was closed to oil shale and tar sands leasing and development. Under the Proposed RMPA (Alternative 2) these lands were also closed to oil shale and tar sands leasing and development as it was based, in part on Alternative C in the 2008 OSTS PEIS, which closed 0.25 miles on either side of the segments to oil shale and tar sands leasing and development. Alternative 3 in the 2012 Draft and Final PEIS also closed these areas to oil shale and tar sands leasing and development. Alternative 4, which considered fewer exclusion criteria, incorrectly considered these lands as closed in the 2012 Draft EIS; the areas should have been considered as available because they had been determined not to be suitable in 2008. The BLM remedied this error with Alternative 4 in the November 2012 Final PEIS by presenting as open for leasing and development roughly 4,700 acres of the Evacuation Creek, Bitter Creek, and White River segments that were determined not to be suitable in the Vernal RMP revision. However, these areas remained closed under all other alternatives of the Final PEIS, including the Proposed RMPA.

In reviewing the protesters' concerns regarding this issue, the BLM has determined that the Evacuation Creek, Bitter Creek and White River segments shall not be excluded from oil shale and tar sands leasing and development under the Proposed RMPA because they were determined not to be suitable for inclusion in the WSR System in the 2008 Vernal RMP ROD. The Proposed RMPA (Alternative 2), then, will be revised in the ROD to open for leasing

approximately 4,700 acres of land within these 3 segment areas. (Please note that while the estimated acreage added to the Proposed RMPA for the 3 WSR segments is 4,700 acres, adding these segments into the Proposed RMPA required recalculating the alternative's total acreage from its constituent parts. In the process, the estimated total acreage of Proposed RMPA increased by about 3,000 acres from that presented in the Final PEIS. This smaller-than-expected increase is due to uncertainties in the Geographic Information System re-estimate of the Proposed RMPA acreage, an error of less than 1 percent). In this respect, the Proposed RMPA resembles Alternative 4 in the Final PEIS. The protests are granted.

The BLM notes, however, that other resources are present in these segments of Evacuation Creek, Bitter Creek, and White River that fall under the exclusion criteria of the Proposed RMPA (these other resource exclusions were analyzed in the Draft and Final PEIS in Alternative 2). Portions of the Enefit American Oil's RD&D parcel in the Evacuation Creek segment area are, as a planning/allocation matter, excluded from oil shale or tar sands leasing and development in the Proposed RMPA due to the presence of sage-grouse habitat. Portions of the White River segment area possess wilderness characteristics and, thus, are allocated as excluded in the Proposed RMPA as well. While interpretation of specific provisions of the protestor's lease exceed the scope of the PEIS, nevertheless, as a general matter, a lessee's rights are determined by the terms of its lease, and decisions made in the ROD would be subject to valid existing rights.