



CONTACT US:

If you have any questions or desire any additional information regarding a news item, please call or email your usual Fulbright contact or the author referenced below.

Jeff Dykes
Ken Wonstolen
Bret Sumner
Poe Leggette
Steve McNabb
Nan Pell
Laura Morton
Bill Sparks
Dave Chung
Letitia McKoy
Stephanie Kinzel
Mari Deminski

* * *

Editor: Susan Quinn

* * *

www.fulbright.com

September 2007

BLM Issues Supplement to Draft Resource Management Plan (RMP) for the Price Planning Area in Carbon and Emery Counties, Utah; New Alternative Closes 60% of the Area to Oil and Gas Leasing

On September 14, 2007, BLM issued for public comment a Supplement to the Draft RMP for the Price Resource Area in Carbon and Emery Counties, Utah. This supplement expands BLM's analysis of managing non-Wilderness Study Area (WSA) lands with wilderness characteristics.

The Draft RMP Supplement adds a new fifth alternative (Alternative E) for management of resources and uses in the Price Resource Area. Under this new alternative, BLM imposes extensive protective management prescriptions for 27 areas of non-WSA lands with wilderness characteristics, totaling over 937,440 acres. These 27 areas are derived from BLM's 1996-1999 wilderness re-inventory performed at the direction of then Secretary of the Interior Bruce Babbitt, as well as from subsequent wilderness proposals submitted to BLM by the Southern Utah Wilderness Alliance (SUWA).

Under this new alternative, approximately 60% of the Price Resource Area would be closed to oil and gas leasing. *See* Supplement to Draft RMP at 4-2. In addition to closing all wilderness characteristics areas to oil and gas leasing, some of the other proposed management prescriptions include: managing visual resources as the most restrictive class I, and closing these areas to OHV use, coal leasing, and new road construction. *See id.* at 2-12 and 2-13.

While BLM's current preferred alternative for the Price RMP (Alternative D) does not contain these protective proscriptions for wilderness characteristics, BLM notes that in issuing the Record of Decision for the Final RMP, it may pick and choose management components of various alternatives when making its final decision. It will be important for interested stakeholders from industry and the Utah counties to submit comments on this Supplement to the Draft RMP. Given that BLM did not field check many wilderness characteristics areas, and instead performed desk reviews relying primarily upon old data from the 1990s, interested parties should provide with their comments as much up-to-date ground-truthing information as possible (*i.e.* precise quantified data and photographs documenting roads, trails, development, and other human imprints) on areas that allegedly contain wilderness characteristics. Comments on the Supplement to the Price Draft RMP are due to BLM prior to December 13, 2007.

BLM developed this supplement, in part, in response to the 2006 federal court decision regarding a Utah BLM oil and gas lease sale that found that BLM did not adequately analyze wilderness characteristics under NEPA prior to the sale (commonly called the "Kimball Decision"). Later this year or in early 2008, BLM plans to issue similar Draft RMP Supplements for five other planning areas, including the Vernal Resource Area.

Bret Sumner

Moab Draft Resource Management Plan Released for Public Comment

On August 27, 2007, the Utah BLM released the Moab Draft RMP/EIS for public comment. This RMP will provide BLM with direction for managing approximately 1.8 million acres of public land in Grand County, and the northern third of San Juan County, Utah.

Two issues are particularly important for future oil and gas development and could indicate future BLM RMP decision processes, while creating precedent for other Utah RMPs currently being supplemented and revised. First, the preferred alternative (Alternative C) of the EIS would include five Areas of Critical Environmental Concern (over 63,000 acres) that would be subject to a no-surface occupancy lease stipulation. Second, BLM proposes to create three wilderness characteristics areas (Mary Jane Canyon, Fisher Towers, and Beaver Creek) that would be almost entirely closed to oil and gas leasing. These three “wilderness characteristic” areas were originally citizen wilderness proposals and were part of BLM’s 1996-99 reinventory. This RMP could set a dangerous precedent in terms of its treatment of non-Wilderness Study Areas lands that allegedly contain wilderness characteristics.

In addition, BLM’s preferred alternative places no-surface occupancy lease stipulations on lands that were part of BLM’s 1996-99 reinventory, although these lands are not specifically labeled as non-WSA lands with wilderness characteristics. BLM’s preferred alternative would also close an additional 339,000 acres to off-highway vehicle travel. BLM plans to hold several public meetings on this draft RMP/EIS and will accept public comments until November 30, 2007.

Bill Sparks

Federal District Court Rules Citizens’ Wilderness Inventory is Not Significant New Information

On January 22, 2003, the New Mexico BLM held a competitive oil and gas lease sale that included lease parcels in the Nutt Grasslands area of Luna and Sierra Counties, New Mexico. Several environmental groups sued for declaratory and injunctive relief asserting that BLM failed to consider a citizen’s wilderness proposals and that BLM improperly issued oil and gas leases prior to completing a site-specific assessment of environmental impacts to an area proposed for wilderness. *Chihuahuan Grasslands Alliance v. Norton*, No. CIV-03-1423, slip op. at 7 (D. N.M. June 18, 2007). The U.S. District Court for the District of New Mexico rejected the plaintiffs’ claims and found that BLM lawfully issued the challenged leases.

In 1999, the New Mexico Wilderness Association (NMWA) prepared a Citizens’ Wilderness Inventory (also referred to as the Nutt Grasslands Wilderness Proposal) identifying about 75,000 acres that allegedly qualified for wilderness designation. *Id.* at 8. Based on this proposal, the NMWA protested the January 2003 lease sale and urged BLM to conduct a wilderness inventory on the Nutt Grasslands area. The groups also requested that BLM remove all the Nutt Grasslands parcels from the sale. *Id.* at 9.

In siding with BLM, the court rejected the plaintiffs’ arguments that BLM violated NEPA by failing to prepare an EA or EIS prior to leasing the Nutt Grasslands parcels. The court found that BLM “envisioned oil and gas leasing in this area and examined the effects of such activity on various natural resources” when preparing the 1992 Mimbres RMP/EIS. *Id.* at 19-20. Relying on Ninth and Tenth Circuit precedent, the court found that BLM was not required to conduct a site-specific pre-leasing NEPA analysis. *Id.* at 22-23.

Importantly, the court distinguished several cases, including Judge Kimball’s decision in *S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1256 (D. Utah 2006). *Id.* at 25-27. Specifically, as to certain parcels involved in the SUWA decision, the

agency relied on a DNA, which relied on other non-NEPA documents, in declining to prepare an environmental analysis prior to a lease sale. *Id.* In SUWA, the agency never prepared an EA or EIS prior to issuing the certain leases in that case. *Id.* In contrast, the *Chihuahuan Grasslands Alliance* court found that, prior to issuing the Nutt Grasslands leases, BLM prepared a DNA which relied on existing NEPA documentation, *i.e.* the RMP/EIS. *Id.* at 25-26.

The court also rejected the plaintiffs' claim that BLM did not satisfy its "NEPA obligations with respect to wilderness considerations." *Id.* at 32. Specifically, it noted that BLM considered wilderness values (*e.g.*, wildlife habitat and grazing, potential displacement of wildlife, scenic trails, areas with restricted vehicle use, recreational areas, etc.) prior to leasing the challenged parcels because the RMP/EIS analyzed potential impacts to those values. *Id.* at 32-33. At bottom, the court viewed the "new information" alleged by the plaintiffs as being essentially just their "disagreement with [BLM's] conclusion that the area lacked potential for solitude and recreation." *Id.* Importantly, the court found that BLM was not obligated to consider the wilderness proposal when deciding whether to lease the Nutt Grasslands parcels, in part because it noted that BLM apparently "no longer engages in [the] practice or has [the] policy" of allowing citizens' groups to submit wilderness concerns for consideration. *Id.* at 34. The court did, however, take the position that BLM would be obligated to consider the wilderness proposal at a site-specific stage of analysis. *Id.* at 34-36.

On August 7, 2007, the plaintiffs appealed the district court's ruling to the Tenth Circuit.

David Chung and Bill Sparks

Fulbright & Jaworski L.L.P. makes NO WARRANTIES OR REPRESENTATIONS OF ANY SORT with respect to this report, including any warranties or representations as to the accuracy or completeness of any of the information, facts, or opinions contained herein. By having requested receipt of these reports, the recipient acknowledges that the receipt of these reports does not constitute the receipt of legal advice and does not, by itself, establish an attorney-client relationship. These reports are provided as a courtesy solely for the recipient's information and may not be reproduced, disseminated, or distributed, in part or in whole, by any means, outside of the recipient's organization without express written authorization from Fulbright & Jaworski L.L.P.

www.fulbright.com • 866-FULBRIGHT [866-385-2744]

AUSTIN • BEIJING • DALLAS • DENVER • DUBAI • HONG KONG • HOUSTON • LONDON • LOS ANGELES
MINNEAPOLIS • MUNICH • NEW YORK • RIYADH • SAN ANTONIO • ST. LOUIS • WASHINGTON, D.C.