

DAPL FALL INSTITUTE – OCTOBER 22, 2007

LEASING DUE DILIGENCE ON FEDERAL LANDS: PROCEDURES AND STRATEGIES

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I. Introduction

II. Background: BLM Land Use Plans

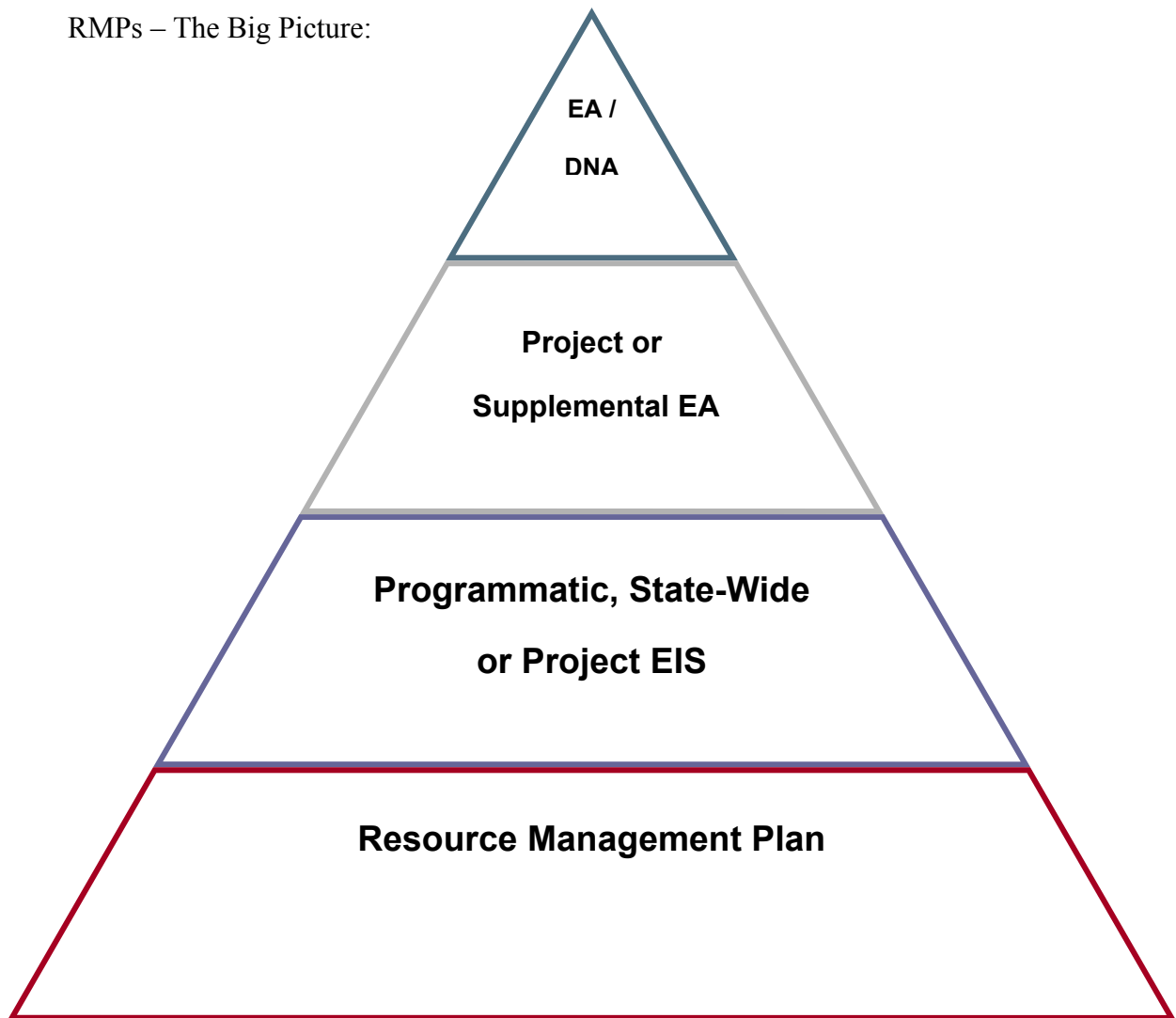
A. Resource Management Plans:

- The purpose of RMPs is to establish guidance, objectives, policies, and management actions for public lands administered within particular BLM resource area.
- RMPs designate:
 - (1) lands open to oil and gas development;
 - (2) lease stipulations; and
 - (3) levels of production or use to be maintained on those lands open for development.
- Once an RMP is approved, all future management actions, such as leasing, must conform to the RMP. 43 C.F.R. § 1610.5-3(a).
- Prior to lease sales, BLM must determine whether the issuance of a particular oil and gas lease is consistent with the RMP.
- **“Conformance”** means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment. 43 C.F.R. § 1601.0-5(b).

B. Continuing Inventory Requirement for Land Use Planning:

- Section 201(a) of FLPMA provides that “the Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values....” 43 U.S.C. § 1711(a).
- The purpose of keeping this inventory current is “to reflect changes in conditions and to identify new and emerging resources and other values.”

RMPs – The Big Picture:



C. National Environmental Policy Act (NEPA) – Land Use Plans:

- Section 102 of NEPA requires federal agencies to “insure the integrated use of the natural and social sciences . . . in planning and decision making.” 42 U.S.C. § 4332.
- Approval of an RMP is considered a major Federal action significantly affecting the quality of the human environment and, therefore, requires preparation of an environmental impact statement under NEPA. 43 C.F.R. § 1601.0-6.

D. RMP - Key Components and Legal Issues for Industry to Consider:

1. Areas Open and Closed for Leasing
2. Reasonably Foreseeable Development (RFD) Scenario
3. Least Restrictive Lease Stipulations:
 - BLM required to apply the least restrictive constraint to meet resource protection objectives. BLM’s Manual 1601 on Land Use Planning specifically directs BLM:
 - (1) to identify which areas would be subject to different categories of restrictions as included in the DEIS;
 - (2) to show that the least restrictive lease stipulation that would offer adequate protection of a resource has been selected. *See* BLM Handbook H-1601-1, App. C. II. F. at 16.

E. Status of Leasing Pending RMP Updates

- BLM’s Land Use Planning Handbook states that existing RMPs remain in effect during the revision or amendment process.
- BLM Instruction Memorandum No. 2004-110, Fluid Mineral Leasing and Related Planning and NEPA Processes (February 2004), provides that lands open for leasing under an existing RMP may be leased during a revision or amendment process.
- BLM IM 2004-110, Change 1, Fluid Mineral Leasing and Related Planning (August 2004), grants BLM State Directors discretion to defer oil and gas leasing during land use planning “when there are legitimate BLM-recognized resource concerns.” Fluid mineral leasing shall continue when BLM determines that leasing will not constrain the reasonable choice of alternatives under consideration in the planning process.

III. BLM Oil and Gas Leasing Procedures

A. BLM State Office - Quarterly Lease Sales

As required by the Mineral Leasing Act, each BLM state office must conduct a competitive oil and gas lease sale at least four times per year, if public lands are available for leasing and BLM receives nominations for leasing. 43 C.F.R. § 3120.1-2.

B. Nominations

Interested members of the public and industry nominate parcels for competitive lease by submitting expressions of interest to a particular BLM state office that identify specific tracts of land that are desired for lease. 43 C.F.R. § 3120.3.

C. Parcel Listing

Prior to conducting a quarterly lease sale, the BLM state office prepares a preliminary list of oil and gas lease parcels that may be offered at that sale.

D. Lease Sale Documentation

Individual BLM field offices then prepare Determinations of NEPA Adequacy (DNAs) for parcels within their respective jurisdictions to determine (1) whether the issuance of a particular oil and gas lease is consistent with the applicable RMP; and (2) whether BLM can properly rely upon existing NEPA documents that analyze the potential impacts of oil and gas leasing (i.e. an environmental impact statement that accompanies an RMP).

DNAs are administrative documentation created by BLM, and are not defined in NEPA or otherwise considered sufficient to satisfy NEPA requirements for pre-leasing analysis. *Pennaco Energy Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004).

Occasionally, BLM prepares individual Environmental Assessments (EAs) under NEPA for a particular lease sale.

For lands where the surface is managed by the U.S. Forest Service and minerals managed by the BLM, the Forest Service forwards recommendations to BLM as to which parcels should be offered for lease. Forest Service makes this recommendation after analysis of the applicable land use plan and related NEPA documents.

E. RMP Classification of Lands for Leasing Purposes

In its land use plans, BLM classifies lands in a particular management area in one of four ways for leasing:

- (1) available for leasing with standard stipulations;
- (2) available for leasing with special stipulations;
- (3) available for leasing with no-surface occupancy stipulations; or
- (4) closed for leasing.

F. BLM Options for Leasing Offering

Upon completion of the DNA forms, the BLM field offices either recommend to the BLM State Office that parcels (1) be offered for sale as nominated; (2) offered with slightly modified legal descriptions or additional lease sale notices and stipulations; or (3) that certain parcels not be offered for lease until additional NEPA documentation is prepared and/or a new RMP or RMP Amendment completed.

G. Deferral Pending Additional NEPA Analysis

BLM may defer offering certain parcels for lease until new NEPA analysis is conducted, either through an environmental impact statement promulgated under the RMP process or completion of a “site specific” leasing environmental assessment.

H. Final Sale List Posting

Upon completion of the DNA forms by the BLM field offices, the BLM State Office prepares a final sale list and post a notice to the public that a competitive lease sale will take place no less than 45 days after the date of posting. 43 C.F.R. § 3120.4-2.

I. Competitive Lease Sale

A competitive lease sale is a public auction with parcels offered by oral bidding. 43 C.F.R. § 3120.5-1. BLM does not accept sealed or mailed bids. If not bid on and acquired on the day of the sale, leases remain available for purchase at a reduced rate over the next two years. 43 C.F.R. § 3120.6. On the day of the auction, a successful bidder must submit an executed lease bid form and pay advance rentals and not less than the \$2-per-acre minimum bonus bid.

J. Lease Issuance

BLM completes the leasing transaction by issuing the lease to the high bidder after the lease sale, after it adjudicates any lease protest that may have been filed. 43 C.F.R. § 3120.5-3.

K. Notification of Protest

BLM is required to notify bidders prior to the sale that particular parcels have been protested. This notification may be provided in the lease parcel listing or be made verbally just prior to the lease sale.

IV. Strategies for Proactive Involvement in the BLM Leasing Process

A.

V. Lease Protest and Administrative Appeal Procedures

A. Protest Period

BLM generally provides a 45 day protest period where any member of the public may “protest” the inclusion of certain parcels in a particular lease sale. 43 C.F.R. § 3120.1-3. This protest period usually runs concurrently with the 45 day notice period prior to the sale date. BLM now requires that a lease protest be filed at least 15 days prior to a lease sale. *See* BLM Instruction Memorandum 2005-176.

B. Protest Content

BLM does not require a specific format for a lease protest. Protesting parties must include a statement of reasons for their protest and be specific in their objections. Most protests from environmental organizations include intricate legal arguments premised upon alleged violations of NEPA, FLPMA, the Endangered Species Act, the Clean Air Act, Clean Water Act, and the National Historic Preservation Act.

C. Reasons for Filing Protest

In order for a person or organization to bring an appeal to the U.S. Department of the Interior Board of Land Appeals or federal court, challenging BLM’s leasing decision, the person must first file a protest to BLM’s lease offering decision.

D. Effect of Protest

Parcels subject to a protest should remain in the sale offering unless the BLM State Director decides to withdraw the parcels pending resolution of the protest. BLM may suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale. 43 C.F.R. § 3120.1-3.

E. Lease Protest Decisions

A BLM lease protest decision is a written decision by the Director of the BLM State Office that addresses the merits and arguments of the protest. The decision is usually written by the minerals staff for the State Office under the supervision of the Deputy State Director for Minerals. BLM may (1) deny the protest; (2) grant the protest; or (3) partially deny or grant the protest as to particular parcels.

F. Non-Issuance of Leases Pending Protest Resolution

In the event of a protest for a particular lease parcel, BLM may not issue a lease until after resolution of the protest. BLM protest decisions are issued after the lease sale and the time period for issuance of these decisions varies, from a few weeks to as much as two years after the date of the sale.

G. Decision Upholding Protest - Withdrawal

If the BLM State Director issues a decision upholding the protest with a determination that the parcel(s) should not be leased, then BLM will decline the competitive or non-competitive offer, refund all monies, and retroactively withdraw the parcel from the lease sale.

H. Decision Upholding Protest –Modification

If the BLM State Director upholds the protest, but determines that the parcel can be leased with revisions to stipulations or legal land description adjustments, then BLM offers the lease to the high bidder with any revised description/stipulations.

I. Decision Denying Protest

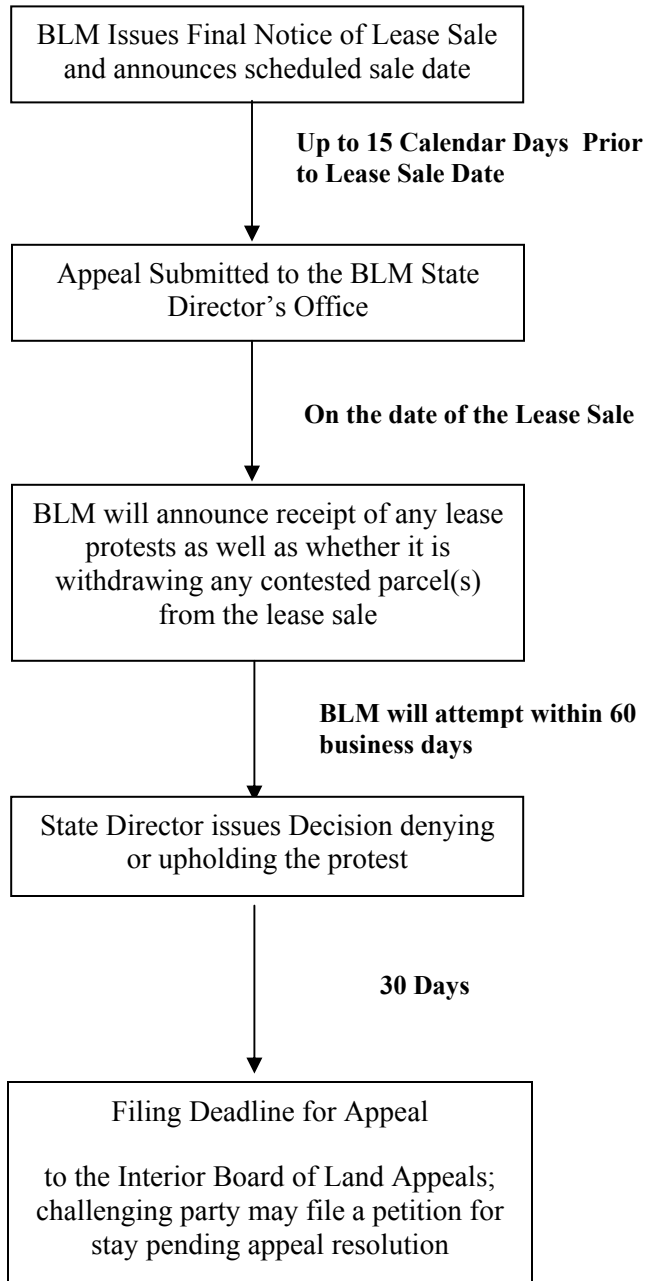
If the BLM State Director denies the protest after the sale, the BLM is supposed to issue the lease concurrently with the protest decision.

J. Appeal or Legal Challenge to Lease Protest Decisions

If a person's lease protest is denied by BLM, then that person may file an administrative appeal with the Interior Board of Land Appeals or they may file a law suit in federal court (either within the state of the lease protest or in the U.S. District Court, District of Columbia).

In the event of an appeal of BLM's decision to deny a protest, the BLM may continue with lease issuance unless the Interior Board of Land Appeal grants a stay. If the Board grants a stay, then BLM must suspend lease issuance or issue a suspension on existing affected leases.

**SUMMARY OF BLM ADMINISTRATIVE APPEALS TIMELINE
FOR OIL AND GAS LEASE PROTESTS**



IV. Oil and Gas Leasing Issues Confronting Industry

A. *Pennaco Energy, Inc. v. Interior*, 377 F.3d 1147 (10th Cir. 2004)

1. **Background:**

- BLM issued three oil and gas leases to Pennaco in Feb. 2000 in Powder River Basin, Wyoming. CBM development planned.
- Wyoming Outdoor Council argued that, prior to the lease sale, BLM failed to adequately consider the unique environmental impacts of CBM development, in violation of NEPA.
- For the lease sale, BLM relied on two documents for NEPA purposes:
 - (1) *1985 Buffalo RMP EIS*: analyzed impacts of conventional oil and gas development; did not address CBM.
 - (2) *1999 Wyodiak DEIS*: analyzed impacts of CBM development; but was post-leasing analysis and did not address whether to lease these tracts of land for CBM development in the first place.

2. **Legal Proceedings:**

a. IBLA Decision:

- CBM impacts different from conventional development (i.e. water, air quality); the RMP failed to analyze these issues;
- Concluded that the 1985 RMP was inadequate because it did not contemplate CBM development;
- BLM could not rely on the RMP to satisfy its NEPA obligations; BLM's leasing decision reversed.

b. District Court: Reversed IBLA. Held that RMP and DEIS, combined, satisfied NEPA.

c. 10th Circuit: BLM failed to take a "hard look" at the environmental impacts of CBM at the leasing stage.

Reversed the District Court decision, and remanded with instructions to reinstate the IBLA decision (remand to BLM for "appropriate action").

B. BLM Response to the *Pennaco* Decision

1. BLM actions on remand: BLM prepared an Environmental Assessment.
2. Scope of Curative EA:
 - The EA tiered to the 1985 RMP, which BLM amended in 2003 with the Powder River Basin O&G EIS, which analyzed CBM impacts and developed new mitigation measures.
 - This EA considers options open to BLM prior to lease issuance and identification of new lease stipulations for future development.
 - The EA also examines BLM's leasing decisions between February 2000 and August 2004 in the coal bearing areas of the Buffalo Field Office.

C. Documenting Geology: Colorado Lease Sales:

1. Background:
 - *Western Slope Environmental Resource Council*, 163 IBLA 262 (Oct. 28, 2004) & *WSERC*, 164 IBLA 329 (Feb. 8, 2005)
 - May, August, Nov. 2002 & May 2003 lease sales; parcels overlie the Piceance Deep Coal Field; 1989 RMP did not analyze CBM impacts.
2. Environmental Arguments:
 - Environmental plaintiffs asserted *Pennaco*-based arguments re CBM impacts.
 - Alleged BLM failed to adequately consider the unique impacts of CBM development before deciding to offer parcels for lease.
3. BLM Arguments:
 - CBM development here different from Powder River Basin; 90% of water co-produced with oil and gas is disposed of or used for underground injection.
 - CBM development here is similar to CBM development in San Juan Basin.
 - Documented in Administrative Record for lease sale.

4. IBLA Analysis:
- CBM development in Piceance Basin not significantly different from conventional oil and gas production.
 - BLM documented geologic realities in the administrative record.
 - No objective proof that CBM development will result in impacts associated with large volume of water produced with CBM as in *Pennaco* case.
 - Environmental arguments rejected.
 - BLM leasing decision affirmed.

D. RMP/NEPA Adequacy - Utah Lease Sales:

1. ***SUWA*, 164 IBLA 118 (Nov. 30, 2004)**
- SUWA protested BLM Utah's August 2002 lease sale.
 - SUWA focused on 7 parcels offered in the August 2002 lease sale.
 - SUWA raised two issues on appeal to IBLA:
 - (1) BLM required to prepare an EIS b/c non-NSO leases
 - (2) BLM violated the NHPA
- a. **IBLA Analysis and Decision:**
- The seven parcels at issue came from the Salt Lake and Kanab Field Offices, and that a NEPA document was not prepared for these land use plans – Management Framework Plans (MFPs) from 1975 and 1976 – and that BLM did not subsequently prepare NEPA documents for the lease sale, or to supplement the MFPs.
 - IBLA reversed BLM's decision to lease seven tracts from the August 2002 sale because BLM's documentation of NEPA adequacy (DNA) for the lease sale was based upon underlying BLM MFPs that did not contain NEPA analysis for oil and gas leasing.
- b. **Ramifications:**
- BLM's deferred 58 tracts just prior to the December 10, 2004 oil and gas lease sale.

- Potential impact of an adverse decision: Temporary stay of processing permits pending resolution (i.e. development of new NEPA documentation).

2. SUWA, 166 IBLA 270 (2005):

a. Initial Decision

- BLM Utah’s May 2001 oil and gas lease sale.
- The IBLA reversed BLM’s decision denying SUWA’s lease protest for 10 parcels located in the Price resource area.
- The Board held that the 1988 EA on Cumulative Impacts—supplement to the 1983 Price MFP—did not take the requisite hard look at the effects of oil and gas leasing. *Id.* at 285.

b. Decision on Reconsideration: SUWA, 166 IBLA 270A (2006)

- On October 19, 2005, BLM sought reconsideration of the decision as it pertained to the 10 parcels in the Price resource area.
- BLM sought reconsideration because it had mistakenly failed to include the 1975 Environmental Analysis Record (1975 EAR) as part of the administrative record for this case.

c. Industry Interventions & Document Submissions:

- A company, after realizing that BLM had once again failed to include *all* of the pertinent documents from the administrative record, sought to intervene, or in the alternative seek amicus curia status, to ensure that the Board had the complete record before it.
- In its motion for partial reconsideration, BLM included the 1975 EAR, but it failed to include the 1984 EA Supplement. The 1984 and 1988 EA Supplements tier off the 1975 EAR and Price MFP and should have been included as part of the administrative record.
- After considering these additional document, the Board granted BLM’s motion for reconsideration and vacated its earlier decision as to the 10 parcels located in the Price resource area.
- After inclusion of the additional documents from BLM and BBC, the Board held that the record—the 1975 EAR and the 1984 and 1988 EA Supplements—when viewed as a whole provides sufficient basis to support leasing in the Price Resource Area.

E. Pre-Leasing NHPA Compliance:

1. National Historic Preservation Act – Overview:

- Under Section 106 of the NHPA, as amended at 16 U.S.C. 470f, agencies must consider how their actions affect properties which are included in or eligible for the national Register of Historic Places.
- The NHPA and its regulations also require agencies, under certain conditions, to consult with the State Historic Preservation Officer (SHPO), Native American Tribes, and other parties entitled to consultation. *See* 36 C.F.R. § 800.2(c).

2. NHPA Section 106 Consultation Process:

The Section 106 process consists of the following steps for the agency's authorized officer:

- a. establish whether the proposed action is an undertaking for the purposes of NHPA under 36 C.F.R § 800.16(y);
- b. determine whether the project has the potential to cause effects on historic properties, 36 C.F.R. § 800.3(a); Importantly, if there is no potential for the proposed action(s) to cause effects on historic properties, then the Section 106 process ends, and nothing further is required.
- c. coordinate additional reviews as prescribed by other relevant statutes, 36 C.F.R. § 800.3(b);
- d. identify relevant parties for consultation, 36 C.F.R. § 800.3(c), (f);
- e. identify the area of potential effects, 36 C.F.R. §§ 800.4 & 800.5;
- f. if there would be adverse effects, engage in further consultation to find ways to avoid, minimize or mitigate such effects, 36 C.F.R. § 800.6.

3. *SUWA*, 164 IBLA 1 (Nov. 10, 2004)

- SUWA protested BLM Utah's March 2002 lease sale.
- IBLA remanded 17 parcels offered in the March 2002 lease sale.
- BLM failed to comply with the NHPA re identification of historic properties and Section 106 Consultation.

a. **SUWA Argument:**

- SUWA argued that lease issuance without stipulations to ensure long-term preservation of historic properties constitutes an adverse effect that triggers NHPA Section 106 consultation requirements.
- Because leases do not contain adequate stipulations, the “inescapable conclusion” is that the lease sale *per se* constitutes an adverse effect.
- SUWA argued that BLM’s DNA was inadequate and BLM land use plans were outdated.

b. **BLM Argument:**

- BLM argued that under the NHPA regulations if undertaking has no potential to cause effects then no need to identify and consult under section 106.
- BLM complied with section 106 through the BLM-SHPO Protocol – which does not require SHPO review when there is a “No Potential to Effect” determination by qualified BLM staff.
- BLM focus = issuance of lease has no potential to effect.

c. **IBLA Analysis and Decision:**

- Dispute as to the point at which BLM is required to meet the identification and consultation requirements under Section 106 of the NHPA: either Leasing Stage or APD Stage.
- Oil and gas lease sales are an “undertaking” as defined in the NHPA regulations.
- The issuance of a lease constitutes an irreversible, irretrievable commitment of resources.
- BLM required to initiate the section 106 consultation process.
- BLM cannot rely upon a finding of “No potential to effect” to circumvent the process.
- The administrative record does not show that BLM complied with the section 106 process.
- Reversed BLM’s decision to lease the parcels.

4. ***The Mandan*, 164 IBLA 343 (Feb. 9, 2005)**

- September 2004 lease sale; 150 parcels in Montana and North Dakota.
- Indian Tribe claiming aboriginal ties to lands in leasing area.

a. **Plaintiffs' Arguments:**

- BLM violated NHPA because it did not comply with NHPA prior to lease sale.
- BLM required to consult with Indian Tribes, survey parcels, and resolve any adverse effects to such historic properties prior to the lease sale.

b. **BLM Arguments:**

- BLM can utilize a “phased approach” to NHPA compliance for lease sales.
- BLM’s underlying RMP and NEPA documents analyzed oil and gas leasing.
- BLM attached cultural resource stipulations to leases.

c. **IBLA Holding and Analysis:**

- Lease sale affirmed. BLM complied with Section 106 through a phased approach.
 - (1) Phase 1: Land use planning process
 - (2) Phase 2: Lease sale approval process (analysis of whether to include individual parcels in the pending lease sale or add lease stips)
 - (3) Phase 3: APD approval process (analyze potential impacts of drilling for specific well sites)
- At each phase, BLM narrows its focus.
- Courts endorse phased Section 106 approach when no surface disturbing activity will occur until the Section 106 process is complete.

- Distinguishes *SUWA*, 164 IBLA 1 (Nov. 10, 2004)
 - Utah lease sale administrative record devoid of any meaningful evaluation of whether sale will result in “adverse effects.”
 - In this case, the record showed a meaningful evaluation took place and numerous parcels offered with NHPA protective stipulations.
 - Unlike Utah, BLM added cultural resource lease stipulations where appropriate.

F. Wilderness Characteristics

1. *SUWA v. Norton*, U.S. District Court, District of Utah (Aug. 1, 2006) “The Kimball Decision”
 - a. Background:
 - BLM Utah – November 2003 lease sale
 - First sale subsequent to Interior – State of Utah wilderness settlement to offer former WIA lands for lease
 - b. Arguments:
 - SUWA argued BLM violated NEPA and NHPA.
 - SUWA alleged Richfield Field Office land use plan and related NEPA documents did not take a “hard look” at a no-leasing alternative (four lease parcels).
 - SUWA argued BLM violated NEPA by failing to consider “significant new information” about wilderness values and characteristics for 16 lease parcels.
 - BLM asserted that existing environmental analyses were sufficient and that the constituent elements of wilderness (scenery, wildlife, etc.) had been analyzed.
 - BLM argued that the 1999 re-inventory did not rise to the level of significant new information under NEPA to require development of a new EA or EIS.

- c. Court holding:
- Held that BLM violated NEPA by selling four leases in Richfield field office without first preparing an adequate pre-leasing document;
 - Held that BLM violated NEPA after arbitrarily determining that it did not need to supplement existing NEPA analyses in light of BLM's 1999 re-inventory and subsequent new information provided by SUWA.
- d. Ramifications:
- SUWA sought to challenge numerous other lease sales before the same judge
 - Similar arguments are appearing in protests filed against lease sales in Colorado
 - BLM delayed issuance of 6 Utah RMPs to add a new management alternative that protects wilderness characteristics.
- e. Appeal to the 10th Circuit Court of Appeals
- Two members of industry appealed the District Court's Ruling to the Tenth Circuit Court of Appeals.
 - BLM declined to appeal, deciding instead to issue supplements to the Draft RMPs to address.
 - 10th Circuit granted industry's request, and appellate briefing is currently in progress. Oral argument on the merits is anticipated in January or February 2008.

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