

Data Submitted (UTC 11): 11/2/2017 7:00:00 AM

First name: Rebecca

Last name: Fischer

Organization: Wildearth Guardians

Title:

Comments: Comments on the Ruby Mountains Oil and Gas Leasing in the Humboldt-Toiyabe National Forest

Ms. Elliot,

Please find attached comments from WildEarth Guardians regarding the proposed oil and gas leasing in the Ruby Mountains District of the Humboldt-Toiyabe National Forest.

Feel free to contact me at the information listed below if you have any questions.

Sincerely,

Rebecca Fischer

WildEarth Guardians submits the following scoping comments on the Forest Service's proposed decision to make lands in the Humboldt-Toiyabe National Forest available for oil and gas leasing. The agency is considering making 54,000 acres in the Mountain City-Ruby Mountains-Jarvis Ranger District south of Elko, Nevada available for oil and gas leasing.¹ The

Forest Service is also in the process of developing an Environmental Assessment, in conjunction with the Bureau of Land Management ("BLM"), to consider the impacts of the proposal.

WildEarth Guardians is a nonprofit environmental advocacy organization dedicated to protecting the wildlife, wild places, wild rivers, and health of the American West. On behalf of our members, Guardians has an interest in ensuring the Forest Service fully protects public lands and resources as when it considers conveying the right for the oil and gas industry to develop publicly-owned minerals.

As discussed below, WildEarth Guardians requests that the Forest Service reject the BLM's request to make lands available for leasing within the Humboldt-Toiyabe National Forest.

1 Notice of the proposal is available on the Forest Service's website at:

http://a123.g.akamai.net/7/123/11558/abc123/forestservice.download.akamai.com/11558/www/nepa/107601_FSP LT 3_4053592.pdf.

I. Legal Background

According to the Mineral Leasing Act of 1920, 30 U.S.C. [sect][sect] 181[ndash]287, as amended by the Federal Onshore Oil and Gas Leasing Reform Act ([ldquo]FOOGLRA[rdquo]) of 1987, although the BLM is generally in charge of oil and gas leasing on public lands, [ldquo][t]he Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture.[rdquo] 30 U.S.C. [sect] 226(h). Thus, the Forest Service has the right to refuse the BLM's request to lease national forest lands. *Id.*; see also *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1042 (10th Cir. 2011) ([ldquo]For land within the National Forest System, however, a lease may not be issued over the objection of the Forest Service.[rdquo]).

The Forest Service must coordinate its leasing decisions with the BLM. Thus, the agencies have entered into a Memorandum of Understanding ([ldquo]MOU[rdquo]) on the issue.² This document echoes the requirements of the Mineral Leasing Act. It provides that [ldquo][t]he BLM issues and administers oil and gas leases on NFS [national forest system] lands only after the Forest Service authorizes leasing for specific lands.[rdquo] MOU Between U.S. Dep[rsquo]t of Interior BLM & U.S. Dept. of Agric. Concerning Oil and Gas Leasing Operations 2 (2006) ([ldquo]hereinafter MOU[rdquo]). Under the MOU, the Forest Service also [ldquo][s]erve[s] as the lead agency for oil and gas

leasing availability analyses and decisions.[rdquo] MOU at 4.

The Forest Service has also developed regulations to guide its oil and gas leasing analyses. These provide, among other things, that a [ldquo]leasing analysis shall be conducted by the authorized Forest officer in accordance with the requirements of 36 CFR part 219 (Forest

land and resource management planning) and/or, as appropriate, through preparation of NEPA.[rdquo] Documents.[rdquo] 36 C.F.R. 228.102(c). Thus, the Forest Service must comply with the National Forest Management Act ([ldquo]NFMA[rdquo]), 16 U.S.C. [sect][sect] 472a, 521b, 1600, 1611[ndash]1614, the National Environmental Policy Act ([ldquo]NEPA[rdquo]), 42 U.S.C. [sect][sect] 4321[ndash]4370h, and NEPA regulations promulgated thereunder by the White House Council on Environmental Quality ([ldquo]CEQ[rdquo]), 40

C.F.R. [sect] 1500, et seq.

II. The Forest Service Should Reject the BLM's Request to Make Lands Available for Leasing in the Humboldt-Toiyabe National Forest.

A. The Forest Service Has the Power to Reject the BLM's Request and Must Consider This as an Alternative.

It is clear under the Mineral Leasing Act as amended and the MOU between the BLM and the Forest Service, that the Forest Service retains the right to reject the BLM's request to make lands available for leasing. Unfortunately, the Forest Service has already presumed that the lands in questions will be made available for leasing, thereby violating its own regulations and the requirements of NEPA.

2 The MOU is available online on the Forest Service's website under "Links of Interest," <https://www.fs.fed.us/geology/energyOil&Gas.html> (attached as Exhibit 1).

Forest Service regulations require that the agency's leasing analysis "identify alternatives to the areas [open to leasing] listed in paragraph (c)(1) of this section, including that of not allowing leasing." 36 C.F.R. [sect] 228.102(c)(1) (emphasis). Additionally, NEPA forbids an agency from predetermining a decision before the public has had input into a project. The Tenth Circuit has held that "if an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 713 (10th Cir.

2010) (citing *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002)). The Tenth Circuit further stated that "[w]e [have] held that ... predetermination [under NEPA] resulted in an environmental analysis that was tainted with bias" and was therefore not in compliance with the statute. *Id.* (citing *Davis*, 302 F.3d at 1112[n]13, 1118[n]26)).

But, predetermining that leasing will occur is precisely what the Forest Service is doing. For example, the notice for the scoping comment period states that, "[b]ased on an initial review of the lands, the following stipulations are being considered[...]" The notice posted in the Elko Daily Free Press reaffirms this conclusion. It provides, "[t]he Forest Service proposes to determine which NFS lands will be made administratively available to the BLM for oil and gas leasing, and what stipulations to include to protect resources." 3 Thus, the Forest Service is not

deciding whether lands will be made available for leasing, but where and what stipulations the agency will impose. As a result, it will be nigh impossible for the Forest Service to credibly consider a no action alternative during its leasing analysis.

In sum, the Forest Service has the authority to reject the BLM's request to make lands available for leasing and must seriously consider this option instead of predetermining the outcome at the scoping comment stage.

B. The Forest Service Should Reject the BLM's Request Because the Lands Proposed for Leasing Have Very Low Potential for Development.

The Forest Service also has a number of reasons why it should reject the BLM's request to make lands in the Humboldt-Toiyabe National Forest available for leasing.

First and foremost, the requested lands have little to no development potential. As it stands, of the 1,124,320 million acres of federal oil and gas under lease in Nevada, only 27,001 acres are in production.⁴ Put another way, only a little more than 2% of all leased federal oil and

gas acres in Nevada are actually producing oil and gas. According to GIS data obtained from the Nevada Bureau of Mines and Geology, the Humboldt-Toiyabe National Forest has very low development potential as shown by the map below. Finally, even the oil and gas industry has

³ The legal notice posted in the Elko Daily Free Press is available on the Forest Service's website at: [http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/107601_FSP LT 3_4054046.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/107601_FSP_LT_3_4054046.pdf).

⁴ This is according to BLM statistics on oil and gas at the end of FY 2016, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics>.

admitted that leasing in Nevada is [ldquo]speculative[rdquo] and [ldquo]do[es] not appear to be from reputable companies.[rdquo]5

These facts raise serious questions over whether the proposed oil and gas leasing would simply allow industry to hoard more leases to strengthen their balance sheet while generating minimal, if not negative, revenue to the American public. With companies allowed to bid as low as \$2.00 per acre for oil and gas leases and to pay only a nominal rental of \$1.50 per acre per year, it would seem that industry is poised to secure leases for rock bottom prices and use these leases to inflate their assets. All the while, taxpayers will have to pay the cost of Forest Service and BLM administration of the leases, any inspections and enforcement, and lose the opportunity for these public lands to be dedicated to higher and better uses. As a result, the Forest Service should use its discretion to reject the BLM[rsquo]s request to make these lands available.

5 Tim Pearce, [lsquo]Something[rsquo]s Fishy: Oil Speculation Skyrockets in State with [lsquo]Very Little Oil,[rsquo] The Daily Caller (Aug. 19, 2017) <http://dailycaller.com/2017/08/19/somethings-fishy-oil-speculation-skyrockets-in-state-with-very-little-oil/> (attached as Exhibit 2); see also Jeremy Nichols, Something Weird Is Going on in Nevada, WildEarth Guardians Blog (Aug. 30, 2017) <https://climatewest.org/2017/08/30/something-weird-is-going-on-in-nevada/>.

C. The Forest Service Should Reject the BLM's Request Because the Underlying Land Management Plan for the Forest is Severely Outdated.

NFMA requires that [the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.] 16 U.S.C. [sect] 1604(a). Land and resource management plan ([LRMP]) must [be revised (A) from time to time when the Secretary [of Agriculture] finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.] Id. at 1604(f)(5).

The Forest Service developed the [current] Humboldt-Toiyabe LRMP in 1986.⁶ The LRMP does not consider the impacts of allowing oil and gas leasing in the Ruby Mountains portion of the forest. Upon a new evaluation of the Ruby Mountains area of the forest, the Forest Service may decide to close some lands to oil and gas leasing. If the Forest Service decides to allow oil and gas leasing now, this would preclude consideration of a no action alternative should the Forest Service revise the LRMP in the near future. Thus, the Forest Service should postpone a decision on leasing oil and gas within the Ruby Mountains district until the agency amends or revises the LRMP for the forest.

III. If the Forest Service Decides to Proceed with Leasing, the Forest Service Must Prepare an Environmental Impact Statement

A federal agency must prepare an EIS when a major federal action [significantly affects the quality of the human environment.] 42 U.S.C. [sect] 4332(2)(C); 40 C.F.R. [sect] 1502.4. A federal action [affects] the environment when it [will or may have an effect] on the environment. 40

C.F.R. [sect] 1508.3 (emphasis added); *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 429 (10th Cir. 1996) ([If the agency determines that its proposed action may [significantly affect] the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.]) (emphasis added). Significance is gauged based on the context and intensity of the proposed action. 40 C.F.R. [sect] 1508.27. Context [means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.] Id. [sect] 1508.27(a). Intensity [refers to the severity of impact,] and is determined by weighing ten factors, including the unique characteristics of the geographic area such as ecologically critical areas; the degree to which the effects are likely to be highly controversial; the degree to which the possible effects are highly uncertain or involve unique or unknown risks; and whether the action has cumulatively significant impacts. Id. [sect] 1508.27(b). Finally, a federal agency may also consider whether the action is one that: (1) [normally requires an environmental impact statement,] under the agency's regulations.

Here, the Forest Service summarily concludes that it will prepare an EA in its notice of the proposed action. But, the Forest Service must consider the factors required by NEPA. The

6 The Humboldt-Toiyabe LRMP can be found on the Forest Service's website at:
https://www.fs.usda.gov/detail/htnf/landmanagement/planning/?cid=fsm9_026859.

proposed leasing will be in an area that has little to no existing development and is likely to be highly controversial. Indeed, the Forest Service has already received 8,000 comments on the issue.⁷ Additionally, the Forest Service has prepared an EIS for similar actions in the past. For example, when considering whether to allow oil and gas leasing on the Humboldt-Toiyabe National Forest in the Ely Ranger District, the Forest Service prepared an extensive EIS.⁸ These factors support the conclusion that the Forest Service is likely required to prepare an EIS. Thus, the agency should do so at the beginning stages of the analysis in order to avoid duplicating efforts at a later date.

1. Conclusion

In sum, the Forest Service retains broad power to reject the BLM's request to make lands available for oil and gas leasing. Based on the information presented above, Guardians recommends that the agency use this power to reject the proposal before it. But, should the Forest Service decide to move forward, Guardians urges it to prepare an EIS.

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<<https://twitter.com/RebeccaJFischer>>