



United States  
Department of  
Agriculture

Forest  
Service

Rocky  
Mountain  
Region

740 Simms Street  
Golden, CO 80401  
Voice: 303-275-5350  
TDD: 303-275-5367

File Code: 1570  
11-02-00-0015 (215)  
Date: MAR 24 2011

Mr. Jeremy Nichols  
Climate and Energy Program Director  
WildEarth Guardians  
1536 Wynkoop, Suite 301  
Denver, CO 80202

Dear Mr. Nichols:

On February 8, 2011, you filed a notice of appeal on behalf of WildEarth Guardians concerning Forest Supervisor Phil Cruz's Record of Decision (ROD) for the South Hilight Field Coal Lease by Application. Your appeal was filed pursuant to 36 CFR 215. Forest Supervisor Cruz signed the ROD selecting Alternative 2, as modified, on December 17, 2010, and the legal notice of the decision was published in the newspaper of record on December 26, 2010.

I have reviewed the appeal record, including your appeal, the ROD, the Final EIS, and the supporting documentation in the project record. I have weighed the recommendation from the Appeal Reviewing Officer (ARO) and incorporated it into this decision. A copy of the ARO's letter is enclosed. This letter constitutes the appeal decision on the specific relief requested.

#### **FOREST ACTION BEING APPEALED**

Forest Supervisor Cruz's South Hilight Field Coal Lease by Application ROD authorized:

- 1) Consent to lease lands with National Forest System (NFS) surface in the South Hilight Field Lease by Application totaling 1,625.04 acres; and
- 2) Pre-mining activities on 2,570.73 acres of NFS lands. Pre-mining activities included the installation of dewatering wells, associated power lines, two-track roads to access each well, pipelines, overstripping of top soil, and removal of overburden to lay back slopes to meet safety requirements of the mine.

#### **APPEAL REVIEWING OFFICER RECOMMENDATION**

Appeal Reviewing Officer (ARO) William T. Bass found that the Medicine Bow-Routt National Forests & Thunder Basin National Grassland failed to comply with the notice, comment, and appeal procedures pursuant to 36 CFR 215 for the South Hilight Field Coal Lease by Application project. The regulation at 36 CFR 215(b)(1)(v) states the following, "For a proposed action that is analyzed and documented in a draft environmental impact statement (EIS), a statement that the opportunity to comment ends 45 days following the date of publication of the notice of availability (NOA) in the Federal Register (§215.6(a)(2)). The legal notice must be published after the NOA and contain the NOA publication date." The regulation at 36 CFR 215.5(b)(2)(ii) further states, "Legal notice of the opportunity to comment on a proposed action shall be published in the applicable newspaper of record." Because procedural requirements were not



followed, the ARO recommended that I reverse the Forest Supervisor's decision in whole and direct him to remedy the deficiency, should he decide to proceed with the project.

**DECISION**

I concur with the ARO's analysis as presented in the recommendation letter, and I reverse the Forest Supervisor's decision in whole. The Forest Supervisor is directed to review the concerns identified by the ARO and to take appropriate action to address them, should he decide to proceed with the South Hilight Field Coal Lease by Application project.

This decision constitutes the final administrative determination of the Department of Agriculture (36 CFR 215.18(c)).

Sincerely,

A handwritten signature in black ink, appearing to read 'Antone L. Dixon', written over the printed name.

ANTONE L. DIXON  
Deputy Regional Forester,  
Resources

cc: Melissa M Martin, Phil Cruz, Rhonda Boyd, Rick Cooksey

Enclosure (1)



Forest  
Service

Rocky  
Mountain  
Regional Office

740 Simms Street  
Golden, CO 80401-4702  
Voice: 303-275-5350  
TDD: 303-275-5367

File Code: 1570-1

Date: March 11, 2011

Route To:

Subject: ARO Recommendation - South Hilight Lease by Application (WYW174596)  
#11-02-00-015-215, Douglas Ranger District, Medicine Bow-Routt National Forests &  
Thunder Basin National Grassland

To: Antoine Dixon, Appeal Deciding Officer

As the designated Appeal Reviewing Officer, this is my recommendation on disposition of the appeal filed by Jeremy Nichols of WildEarth Guardians (WEG) under the regulations at 36 CFR 215. Forest Supervisor Cruz signed the Record of Decision (ROD) for the South Hilight Field Lease by Application on December 17, 2010, and a legal notice of the decision was published in the newspaper of record on December 26, 2010. My recommendation is based on the appeal and the decision documentation (36 CFR 215.18(a)).

## BACKGROUND

The Record of Decision (ROD) adopts the FEIS for the Wright Area Coal Lease Applications issued in July, 2010. The Bureau of Land Management (BLM) was the lead agency in preparing the EIS. The Forest Service, among others, was a cooperating agency. The Wright Coal Lease Application EIS concerns a number of tracts under various ownerships. One tract is the South Hilight Field partially located on the Thunder Basin National Grassland (TBNG), Douglas Ranger District.

BLM administers the Federal Coal Leasing Program under the Mineral Leasing Act as amended and the Federal Coal Leasing Amendments Act of 1976. If any proposed lease tract contains surface lands which are under the jurisdiction of any Federal agency other than the Department of Interior (USDI) or are occupied by a qualified surface owner, that agency or individual must consent to the issuance of the lease, and in the case of a Federal agency, may prescribe terms and conditions to be imposed on that lease (U.S.C. 43 CFR 3400.3-1 and 3420.4-2).

The selected configuration for the South Hilight Field tract (Figure ES -3 from the Final EIS) includes 1625.04 acres of National Forest System (NFS) lands in the Thunder Basin National Grassland (TBNG) administered by the USDA-Forest Service (USFS). Consequently, the Forest Service must provide consent and prescribe terms and conditions for the South Hilight Field tract to be leased.

The Forest Supervisor made two decisions in the ROD:

- 1) The first decision is to consent to lease the lands with NFS surface in the South Hilight Field LBA (BLM Case File No. 174596). The decision is to select NFS lands contained



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in the Alternative 2 as modified and as described in Chapter 2 of the *Wright Area Coal Lease Applications EIS* excluding the lands within Sections 1 & 2, T42N, R71W.

This decision gives the BLM consent to offer the following NFS lands for coal leasing by competitive bid:

T.43N., R.71W., 6th P.M., Campbell County, Wyoming

Section 23: Lots 1 through 16;	649.36 acres
Section 26: Lots 1 through 8;	316.04 acres
Section 35: Lots 1 through 16;	659.64 acres

Total for LBA WYW174596      1,625.04 acres

The consent decision is conditioned on application of the Notice for Lands of the National Forest System under Jurisdiction of the Department of Agriculture (FS Notice) on the South Hilight Field Federal Coal Lease tract (BLM Case File No. WYW174596), if and when the tract is leased. This notice addresses compliance with basic requirements of environmental statutes and Forest Service special requirements. BLM's special requirements can be found in the stipulations in Appendix D of the Final EIS.

- 2) The second decision is to authorize Thunder Basin Coal Company, LLC to conduct pre-mining activities on the following NFS lands:

T.42N., R.71W., 6th P.M., Campbell County, Wyoming

Section 1: Lots 7 through 10 and 15 through 18;	316.43 acres
Section 2: Lots 5 through 20;	629.26 acres

T.43N., R.71W., 6th P.M., Campbell County, Wyoming

Section 23: Lots 1 through 16;	649.36 acres
Section 26: Lots 1 through 8;	316.04 acres
Section 35: Lots 1 through 16;	659.64 acres

Total for pre-mining activities on NFS lands:      2,570.73 acres

Pre-mining activities occur on the above lands but are required to completely develop the adjacent lease. The pre-mining activities include the installation of dewatering wells, associated power lines, two-track roads to access each well, pipelines, overstripping of top soil, and removal of overburden to lay back to slopes to meet safety requirements of the mine.

## **RELIEF REQUESTED**

WildEarth Guardians requested the following relief:

1. That the ROD consenting to the issuance of the South Hilight LBA and authorization of pre-mining activities on the TBNG be vacated and set aside.
2. That if the USFS decides to continue to consider offering its consent to the South Hilight LBA and authorization of pre-mining activities, that the Supervisor be instructed to fully comply with USFS notice and comment regulations.
3. That if the USFS decides to continue to consider authorization of pre-mining activities, that the Supervisor be instructed to conduct a thorough NEPA analysis for the impacts of pre-mining activities, and to fully comply with USFS special-use regulations in issuing any special-use permit for pre-mining activities.
4. That if the USFS decides to continue to consider offering its consent to the South Hilight LBA, that the Secretary of Agriculture first determine whether the lands in question are suitable for surface mining in accordance with SMCRA.
5. That if the USFS decides to continue to consider offering its consent to the South Hilight LBA and authorization of pre-mining activities, that the Supervisor be instructed to fully analyze and assess the indirect and cumulative global climate change impacts associated with the LBA, and fully consider in detail a range of alternatives to address the global climate change impacts associated with the LBA.
6. That if the USFS decides to continue to consider offering its consent to the South Hilight LBA and authorization of pre-mining activities, that the Supervisor be instructed to fully analyze and assess the indirect and cumulative air quality impacts associated with development of the LBA and protect air quality standards in accordance with the Grassland Plan.
7. That if the USFS decides to continue to consider offering its consent to the South Hilight LBA and authorization of pre-mining activities, that the Supervisor be instructed to fully comply with all other Grassland Plan standards and guidelines, including standards related to the protection of ferruginous hawk nest sites.

#### **STATEMENT OF REASONS (APPEAL ISSUES)**

The Appellant included eight main issues in their Statement of Reasons.

- **Issue I:** The Supervisor has not been delegated authority to Consent to the South Hilight LBA.
- **Issue II:** The Supervisor failed to comply with the notice and comment procedures under 36 CFR 215.
- **Issue III:** The Secretary of Agriculture has not made a finding that surface mining can occur on lands within the TBNG that are part of the South Hilight coal lease.
- **Issue IV:** The Forest Supervisor failed to comply with special use permit regulations.

- **Issue V:** The supervisor failed to analyze and assess global climate change impacts in accordance with NEPA.
- **Issue VI:** The Supervisor failed to adequately analyze and assess air quality impacts.
- **Issue VII:** The Supervisor failed to comply with Grassland Plan Standards related to air quality protection.
- **Issue VIII:** The Supervisor failed to assure compliance with Ferruginous Hawk standards.

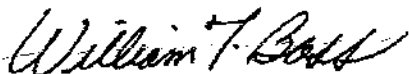
## DISCUSSION

Appeal Issue II argues that the Forest Supervisor failed to comply with the notice and comment procedures on the consent decision and the pre-mining activities per 36 CFR 215 requirements. The regulation at 36 CFR 215.5(b)(1)(v) requires that for a proposed action analyzed in a draft environmental impact statement (EIS), a notice must be published stating that the opportunity to comment ends 45 days following the date of publication of the notice of availability (NOA) in the Federal Register (§215.6(a)(2)). The legal notice must be published after the NOA and contain the NOA publication date. 36 CFR 215.5(b)(2)(ii) requires that the legal notice be published in the applicable newspaper of record.

There was no notice published in the newspaper of record for the availability of and comment period on the DEIS as required. Therefore, I concur with the Appellant on this issue. I have also determined that there is no need to review the remaining issues because this procedural error invalidates the decision thereby rendering the other issues moot.

## RECOMMENDATION

I recommend that the Forest Supervisor's Record of Decision be reversed in whole because procedural requirements were not followed.



WILLIAM T. BASS  
Appeal Reviewing Officer