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**BEFORE THE BOARD OF LAND APPEALS,
UNITED STATES DEPARTMENT OF THE INTERIOR**

)	
Forest Guardians,)	Appeal No. IBLA 2003-159
)	
Appellant,)	
)	
v.)	
)	
Edwin L. Roberson)	
Field Manager)	
Roswell Field Office)	
BUREAU OF LAND MANAGEMENT,)	
)	
Respondent.)	
_____)	

APPELLANTS' STATEMENT OF REASONS

Introduction

Forest Guardians, appellants, file this Statement of Reasons in support of their appeal of the Bureau of Land Management (BLM) Decision Record, Finding of No Significant Impact (FONSI), and Environmental Assessment (EA) for the Habitat Protection Zone (EA No. NM-060-2000-030). The decision was entered by Edwin L. Roberson, Field Manager, Roswell Field Office, New Mexico BLM. The Decision record was made public February 2, 2003.

Forest Guardians hereby submit reasons for appeal of the Habitat Protection Zone (HPZ) Environmental Assessment (EA), and FONSI. In the following detailed statement of facts the continued development of subsurface minerals under the auspices of this EA will violate the legal requirements of the Federal Land Policy Management Act (FLPMA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).

The BLM sanctioned oil and gas lease development is based in generalized science, without proven and testable means to preserve hydrological resources in the Pecos Basin. The evaluation of foreseeable impacts is inadequate, and cannot testify to the cumulative impacts of proposed development. Furthermore, the HPZ EA fails to adequately discuss the full value of aquatic habitats within Bitter Lakes National Wildlife Refuge (BLNWR); a resource which, in its present condition, provides rare reproductive habitat for seven federally listed endangered species. Three of the aforementioned seven species exist nowhere else, but the protected waters of Bitter Lakes and associated headwaters. The cumulative impacts of close to one hundred new oil and gas wells throughout the this upper watershed cannot be adequately gauged at present, and hence represent a real and imminent threat of jeopardy of at least seven federally protected aquatic obligate species breeding within the refuge.

The HPZ EA summarizes Bureau of Land Management's (BLM) obligations throughout implementation of the proposed action of oil and gas development on 18,385

acres of federal mineral estate and approximately 14,045 acres of federal surface estate proximal to, and within the immediate headwaters of Bitter Lakes National Wildlife Refuge. We herein formally contest the rationale that there will be no “undue or unnecessary environmental degradation” as a direct result of this proposed action, directly contrary to the requirements of FLPMA, 43 U.S.C. § 1732 (b). In addition, an Environmental Impact Statement must be prepared due to high likelihood of significant impacts that would result from the implementation of this proposal, including the imminent potential for degradation of the regional airshed, aquifer, unique natural resources, and one of the region’s most highly valued preserves for unique, narrow endemic wildlife and avian migratory populations.

It is evident that the subsurface geology of this region, and particularly the distribution, connectivity, and movement of subsurface drainage into the Pecos basin, is poorly understood. Such a lack of information places all habitats and organisms downstream of hydrocarbon extraction at an unknown risk. Given proximity of these developments to the BLNWR, caution has to be exercised in the performance of any disturbance and resource extraction. There is no mitigation or remediation that can reverse accidental contamination of the waters of this singularly important resource. Until the hydrological processes of the greater Pecos basin, within and beyond the 100-year floodplain, are entirely understood, development of oil and natural gas can only be seen as premature and potentially harmful. Until that time, the land under BLM jurisdiction within the HPZ should receive No Surface Occupancy (NSO) status, until further research determines no impact from proposed actions.

Statement of Facts

1.) The Decision Record of 2/03/03 establishes a Habitat Protection Zone consisting of 14,045 acres of federal surface ownership, and 18,385 acres of federal mineral estate. This land lies entirely within Chavez County, New Mexico, northeast of the city of Roswell.

2.) Within the boundaries of the HPZ and lands incorporated under Alternative A are all or part of 29 oil and gas leases. Reasonable and foreseeable development of existing oil and gas leases is projected to be approximately 91 new wells. The majority of these lands where the new wells will be located are within the water source area feeding BLNWR or the 100-year floodplain of the Pecos River.

3.) Development of federal surface ownership and the federal mineral estate has an immediate and lasting impact on the ecological integrity of BLNWR. The refuge is of immeasurable value to wildlife, biodiversity conservation, and the thousands who visit the site annually for recreational and educational experience.

4.) Aquatic habitats within the refuge harbor eight species with federal protection under the ESA. The four proposed endangered aquatic invertebrates; Pecos assiminea (*Assiminea pecosensis*), Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), and Noel's amphipod (*Gammarus desperatus*), are exceptionally rare. Three of these four species are known to occur only on the refuge at this time. Water quality, and adequate water levels in springs, creeks and runs are essential to these aquatic invertebrates as well as the continued existence of imperiled fish including the endangered Pecos Gambusia (*Gambusia pecosensis*). Water quality and potential environmental contaminants do not affect aquatic life alone, as the endangered Interior Least Tern (*Sterna antillarum athilosis*) forages throughout the refuge, and through egg shell thinning has illustrated the adverse impacts of bioaccumulation of environmental contaminants in its prey base.

a. In March of 2000, the Sandhill Fire burned through the Dragonfly Spring area of BLNWR. This single event reduced Noel's amphipod prior occurrence density of 11,625/m² to a count of merely four individuals, in this last remaining vestige of habitat. Vegetative cover shading the spring was eliminated, and water chemistry was dramatically altered through ash deposition, virtually eliminating this population. The HPZ EA does not address wild land fire as a correlated and potential impact of oil and gas development in the uplands surrounding BLNWR.

5.) The current Biological Opinion upon which the BLM claims the HPZ EA is based does not address the four endemic, aquatic invertebrates presently proposed to be listed as Endangered (FR Vol. 67, No. 29). Given that these species were proposed for listing over fifteen months ago, and that three of the species are not located anywhere other than the BLNWR, it is incumbent on the BLM to ensure the protection of these species even though they have not yet been listed under the ESA.

6.) The plan level consultation resulting in the 05/14/97 Biological Opinion (BO) issued by the U. S Fish and Wildlife Service (FWS) specifically addresses the limitations of the document as such, “This plan level consultation, however, does not eliminate the need for BLM to conduct future action-specific biological assessments pursuant to 50 CFR § 402.12 to determine if any actions are likely to adversely affect listed or proposed species or adversely modify critical habitat.” At present no further biological assessments of foreseeable impacts to listed or proposed species are on record with the BLM Roswell Field Office. (Howard Parman, BLM staff - RFO, pers. comm.) Basing the HPZ EA on the recommendations of the reasonable and prudent alternative for Pecos gambusia from the BO is narrow in scope, and cannot apply to the existing 29 leases in the habitat protection zone. Due to the cumulative effects of development planned for the HPZ further consultation with the FWS is needed at this time, as anticipated in the 1997 BO. As listing of four additional endangered species and nomination of proposed critical habitat is impending, it would be prudent to address each of these species and applicable critical habitat with formal ESA Section 7 consultation. The BO goes on to state, “Future Federal actions are subject to the consultation requirements established in section 7”, and barring consultation, evidence of conferencing between the managing agency and FWS must be provided.

7.) In 1997, the FWS found oil and gas development as proposed in the Roswell DRMP/EIS likely to jeopardize the continued existence of Pecos gambusia. The jeopardy opinion was partly based on the fact that the BLNWR populations constituted 63% of known Pecos gambusia. The four proposed aquatic invertebrates are more widely distributed throughout the refuge than is the Pecos gambusia, yet they share many

habitat attributes. Three of the four proposed aquatic invertebrates are thought to exist solely within the borders of the refuge. Consequently, the same factors likely to jeopardize the Pecos gambusia as described in the BO are also likely to jeopardize the continued existence of these rare invertebrates. Given that the critical habitat proposed for three of the invertebrate species exists entirely within the refuge, localized contamination from oil and gas development could decimate most if not all of these remaining populations.

PROCEDURAL HISTORY OF APPEAL

- 1.) Informal consultation on the Roswell DRMP/EIS began on November 8, 1991 between the U.S. Fish and Wildlife Service and BLM Roswell Field Office (RFO).
- 2.) On July 9, 1996, BLM provided FWS with a Biological Assessment, in which “may adversely affect” determinations were made for three species (Pecos bluntnose shiner, Pecos gambusia, and Interior Least Tern). At this time formal consultation began on these three endangered species.
- 3.) On May 14, 1997 U.S. Fish and Wildlife Service (USFWS) provided the BLM with a Biological Opinion (BO) on the effects of the RMP on three endangered species extant on managed lands of the RFO. In the BO, FWS found that, “Roswell DRMP/EIS...are likely to jeopardize the continued existence of the Pecos bluntnose shiner (*Notropis simus pecosensis*) and Pecos gambusia (*Gambusia nobilis*)...[and] are likely to adversely modify critical habitat designated for the Pecos bluntnose shiner.”
- 4.) The Roswell Record of Decision (ROD) for adoption of the approved RMP was signed in October, 1997. Reasonable and Prudent alternatives of the Biological Opinion (BO) were adopted. As stated in the BO, “ future federal actions are subject to the consultation requirements established in section 7, and, therefore, are not considered cumulative in this analysis.”

5.) On February 12, 2002, FWS published a proposed rule to list the Roswell springsnail, Koster's springsnail, Pecos Assiminea, and Noel's amphipod as endangered with critical habitat (67 Federal Register 6459). Proposed critical habitat for the amphipod and both springsnail species exists entirely within the boundaries of Bitter Lakes National Wildlife Refuge.

6.) The Habitat Protection Zone Environmental Assessment Finding of No Significant Impact (FONSI) was signed and the environmental assessment was issued on October 22, 2002. The FONSI proclaims no threat of undue or unnecessary environmental degradation, and found that preparation of an Environmental Impact Statement was not required. The EA failed to adequately address the environmental impacts from anticipated oil and gas development in the HPZ, including the cumulative effects of development in the HPZ on four proposed endangered species and their proposed critical habitat.

7.) Appellants provided written comment on the HPZ EA on 12/16/02.

8.) Decision Record NM-060-2000-030, dated 2/03/03, implements the HPZ EA without further environmental analysis.

9.) On March 03, 2003, the Appellants filed a Notice of Appeal with the IBLA. By orders dated April 04, 2003, the IBLA granted an extension of time for Appellants to file their Statement of Reasons to and including May 02, 2003.

JURISDICTION, PARTIES, AND STANDING

Forest Guardians is a 501(c)(3) non-profit organization staffed by professional environmental advocates who are dedicated to preserving landscapes, ecosystems and species across the American Southwest. For more than a decade, Forest Guardians has led efforts to protect and restore native species and ecosystems across the Southwest, including an extensive program to protect natural ecosystems and biodiversity on lands

administered by the Bureau of Land Management. With a membership of over 1,300 we have the support of primarily southwestern individuals and families interested in preserving the natural heritage of our public lands.

Forest Guardians members have frequently visited Bitter Lakes National Wildlife Refuge and the adjacent public lands over the last decade for purposes of viewing native wildlife--especially birds--, walking, enjoying scenic views and picnicking. In particular, Forest Guardians members in the Roswell and Carlsbad area are especially familiar with the Refuge and have birded at the Refuge for more than a decade. Our members live, recreate and work in and near the BLNWR and the adjacent public lands at issue in this appeal and they have hiked, camped, photographed wildlife plants and scenery in the area and on the BLNWR. These members value the Refuge and its environs for its ability to provide excellent wildlife viewing opportunities, solitude and quiet. The ability of Forest Guardians' members to enjoy these values would be severely degraded if the BLM were to allow oil and gas development within the watershed of and immediately adjacent to the BLNWR.

The annual dragonfly festival, hosted by Friends of Bitter Lakes National Wildlife refuge, is one example of ongoing public outreach through the refuge that brings the scientific community, refuge officials, and educators in contact with the general public, including Forest Guardians members, in a natural setting. Such continued outreach to the public, and dissemination of valuable biological information is a highly valued role of the refuge and experts conducting research in the greater Pecos river watershed. Preservation of present biological resources, and explicit protection of aquatic resources in this watershed, are critical elements to the continued efficacy of the greater mission of this wildlife refuge. Forest Guardians members are committed to the continued appreciation of this essential environmental preserve, however, loss of native species would forever taint the spirit of this experience.

ARGUMENT

1. The BLM Plan Violates the Federal Land Policy Management Act

The BLM HPZ EA proposed action and alternatives violate the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784, and its regulations (43 CFR USC 1700 et seq.). Development of mineral resources in accordance with the Mineral Leasing Act of 1920 as proposed to be carried out in the HPZ EA will unduly threaten, “the quality of scientific, scenic, ecological, environmental, air and atmospheric, (and) water resource...values” through unknown cumulative impacts of full lease development.

- a. Pursuant to FLPMA 1701 (a)(7) “that management be on the basis of multiple use and sustained yield”. “Multiple use” as defined in 1702(c),

“the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output”.

BLM has both failed to take the hard look at the unique, literally irreplaceable values that could be potentially be harmed as a result of oil and gas development adjacent to BLNWR and weigh the relative harms and benefits. This weighing of costs and benefits is an essential component of FLPMA’s multiple use mandate, yet the agency has failed to demonstrate that it engaged in such a process.

- b. Furthermore, pursuant to 1701 (a)(8), “public lands will be managed in a manner that ...will preserve and protect certain public lands in their natural condition.”

The impending development of mineral resources on the HPZ is in direct contrast to the literal reading of FLPMA §§1701(a)(7)(8). There is no guarantee that surface and subsurface contamination of hydrological resources can be avoided. This practice is recognized as potentially threatening to the immediate protected features and prompted the Practices for Oil and Gas Drilling in Cave and Karst Areas (Roswell Approved Resource Management Plan and Record of Decision, 1997). Impacts of drilling through such strata include, but are not limited to waste, fresh water pollution, blowouts, cave-ins, seepages, fires, and endangerment of fish, wildlife, and botanical resources. The EA documents such threats, stating:

“Drilling, completion, production, and abandonment of wells on existing leases could increase negative impacts on both known and undiscovered caves. Impacts include contamination of cave ecosystems from drilling fluids, oil and gas leakage, groundwater contamination, and surface disturbance from heavy equipment. The potential for drilling fluids, cement, hydrocarbons, and chemicals to enter cave ecosystems increases with each well drilled. Long-term impacts of leaky casings caused by corroded pipe or poor cementing could allow hydrocarbons to leak into cave systems, threatening the stability of cave ecosystems.” pp. 15-16

Furthermore, the 05/97 U.S. Fish and Wildlife Service Biological Opinion summarizes potential threats from oil and gas leasing as follows, “

Impacts from development in floodplains include the possibility of soil and water contamination from leaks or ruptures, increased sediment load in the runoff from pads and roads, additional non-point source pollution, and greater erosion rates. Oil field development in or adjacent to floodplains would lead to additional roads and pipeline crossings in floodplains. Floodplain hydraulics could be changed, possibly increasing flood hazards at the development site or elsewhere on the river. pp.15

The high likelihood of encountering cave and karst features, and the sensitivity of organisms within the HPZ further exemplify the need for further delineation of No Occupancy status over much of the HPZ. It is not in the best interests of BLNWR or the associated rare, threatened and endangered species to have a reduced risk of groundwater contamination or destruction of habitat. The value of this unique geological/wetland formation necessitates a guarantee of no possible contamination.

Hence, it is the BLM's responsibility to provide an impervious barrier to contamination stemming from oil and gas development.

- 2. The BLM HPZ EA Indecision Notice violates the Endangered Species Act (16 USC 1531 et seq.).**
 - a.** The potential jeopardy and take of Pecos gambusia and Pecos bluntnose shiner.
 - b.** Lack of consultation in the form of extensive conferencing to ensure the preservation of four aquatic invertebrate species proposed as endangered, is required under section 7 (4). There is no evidence of conferencing between The U.S. Fish and Wildlife Service and the BLM with regards to the four proposed species. The U.S. Fish and Wildlife service is currently three months delinquent on a finding for the proposed species and associated critical habitat. Under the imminent finding of four new endangered species, three of which are found exclusively within BLNWR, further caution is recommended, at least at the prerequisite level of conferencing. Forest Guardians advises a current Biological Assessment of potential threats to the four proposed aquatic invertebrates be prepared with accurate assessments of cumulative impacts on groundwater resources entering BLNWR and aquifers underlying the HPZ.
- 3. BLM Failed to Fully Disclose All Significant Information and Failed to Prepare an EIS Despite Finding Significant Impacts, in Violation of NEPA.**

Once it is found that a significant impact may occur, an Environmental Impact Statement must be prepared. 42 U.S.C. § 4332; 40 C.F.R. § 1501.4. For at least the last eight years, the issue of potentially developing leases within the watershed of the BLNWR has generated significant concern from at least one agency, the U.S. Fish and Wildlife Service. This concern is grounded by the agency's belief that significant and irreplaceable public values in the form of endangered native fish and wildlife could be rendered extinct by the project.

In fact, as stated elsewhere in this appeal, the agency was so concerned that it determined that the decision to allow oil and gas leasing would jeopardize the continued

existence of the Pecos bluntnose shiner. Since that point in time the FWS has determined that four additional highly endemic aquatic species with even greater dependence on the waters of BLNWR merit protection under the ESA. The fact that endangered species habitat could be effected is one of the most basic criteria requiring the production of an EIS. For ESA reasons alone we believe the proposed action passes a threshold that merits analysis under a full EIS.

One additional concern is that the BLM is violating NEPA because the EIS that it tiers to is outdated, inaccurate and obsolete. In particular, the need for ESA listing of the 4 aquatic snails and amphipods merits additional analysis that the BLM has never conducted at either the programmatic or site-specific level. Relevantly, as noted by the Council on Environmental Quality in its response to question 32 in 'Forty Most Asked Questions:'

“As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully re-examined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement. If an agency has made substantial changes in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decision regarding the proposal.

In this very instance, the BLM has new circumstances in the form of draft proposals for listing of the four species that it has never considered at either the project or site-specific level. It is quite clear that this new information warrants both additional analysis and in light of its significance and in concert with other information full analysis in the form of an EIS.

Conclusion

For the reasons set forth above, BLM violated applicable law and policies by deciding to approve continued development of leases via the HPZ decision notice. Without performing a full EIS, and considering alternative values that would be harmed, the BLM would approve development of leases in this incredibly environmentally sensitive area. The public controversy and the potential for highly significant impacts requires that the BLM consider no-development

Respectfully submitted on April 30, 2003.