FEDERAL LAND USE PLANNING PRIMER UNDER FLPMA AND NFMA

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I. INTRODUCTION

On April 26, 2002, the Interior Board of Land Appeals ("IBLA") invalidated three federal lease parcels slated for coalbed methane ("CBM") development in the Powder River Basin ("PRB") of Wyoming. The IBLA found the Bureau of Land Management's ("BLM's") environmental pre-leasing analysis for the Buffalo Resource Management Plan ("RMP") to be insufficient to support the leasing decisions because it was conducted prior to commercial CBM development. Further, IBLA found that the project specific environmental analysis for these tracts failed to consider pre-leasing alternatives. *Wyoming Outdoor Council, et al ("WOC")*, 156 IBLA 347 (April 26, 2002). Although subsequently reversed by the federal District Court of Wyoming in *Pennaco Energy, Inc. v. United States Department of Interior*, Case No. 02-CV-116-B (May 30, 2003), the WOC case spotlights the extent to which the tremendous increase of CBM development, particularly in the PRB, has tested the limits of federal land use plans.

The Federal Land Policy and Management Act ("FLPMA") and the National Forest Management Act ("NFMA"), both enacted in 1976, provide the statutory basis for the BLM and the United States Forest Service ("USFS") to identify and inventory resources on public lands and national forests. The original plans developed under these statutes some 10 to 15 years ago do not consider the impacts of commercial-scale development of CBM. Many plans are out of date and are in the process of being revised. In the midst of this revision process, the U.S. Department of Agriculture ("USDA") has proposed controversial new planning regulations and roadless rules which have been challenged in federal courts in several states. In addition, litigation has been brought alleging that outdated plans and environmental analysis fail to support CBM leasing decisions in the PRB. The Wyoming Outdoor Council has appealed to IBLA for review of every lease sale involving CBM development in the PRB since February, 2000. The Northern Plains Resource Council has bypassed the IBLA, filing a complaint directly in federal district court for the District of Montana to challenge some 575 federal CBM leases issued prior to completion of the pre-leasing environmental impact statement ("EIS") in the Montana PRB. Environmental groups have also filed suit in federal court appealing the recent records of decision ("RODs") approving the amendment of the Powder River and Billings RMPs and the plan amendments for the PRB Oil and Gas Project.

The purpose of this presentation is to consider the impacts of this pending litigation in the PRB in the broader context of BLM and the USFS efforts to update their land use plans nationwide. Specifically, this paper seeks to provide the resource developer with a basic overview of the BLM and USFS procedures for land use plan revision, how to participate in that process and how to appeal the plans. Further, the presentation addresses:

1. What level of National Environmental Policy Act ("NEPA") analysis is required to support oil, gas and CBM leasing decisions under the RMPs and Land and Resource Management Plans ("LRMPs")?

2. What is the difference in NEPA analysis at the land use planning stage governing leasing decisions and analysis at the site-specific level prior to issuance of a permit to drill? How will USFS new planning rules impact the timing of this NEPA analysis?

3. To what extent can leasing continue during the update of RMPs and LRMPs and how are existing leases impacted by a new round of land use plan amendments and revisions?

II. OVERVIEW OF BLM AND USFS LAND USE PLANNING AS APPLIED TO OIL, GAS AND CBM DEVELOPMENT[1]

A. BLM Land Use Plans Under FLPMA

1. Multiple Use and Mineral Resources

FLPMA requires that public lands be managed under principles of multiple use, in accordance with land use plans developed by BLM under Section 202 of the Act.[2] Mineral resources are specifically listed among resource values included within the term "multiple use" as defined by FLPMA.[3] Further, FLPMA requires that "public lands be managed in a manner that recognizes the nation's need for domestic sources of minerals," including implementation of the Mining and Minerals Policy Act of 1970.[4]

2. BLM's Resource Management Plans

BLM's land use plans are termed Resource Management Plans ("RMPs"). The RMP inventories resources within geographic management areas and determines whether areas are open or closed to certain land uses and the terms and conditions applicable to such uses. For example, areas of critical environmental concern ("ACEC") and areas unsuitable for surface coal mining are designated in the RMP.[5]

In the context of oil, gas and CBM leasing, the RMP authorizes areas open and closed to leasing, lease stipulations and mitigation alternatives. The environmental impacts of alternative

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1 Additional background on NFMA and FLPMA land use planning is provided by Scott W. Hardt, "Federal Land Use Planning and its Impact on Resource Management Decisions," Public Land Law II, Paper No. 4 (Rocky Mt. Min. L. Fdn. 1997); Laura Lindley, "NEPA and Federal Land Use Planning: 'Streamlining' and its Impacts on Resource Management Decisions, *Public Land Law*, Paper No. 2 (Rocky Mt. Min. L. Fdn. 2003); this paper also updates Denise A. Dragoo, Compliance with Land Use Planning and NEPA Prior to Issuance of Federal Oil and Gas Leases," *Coalbed Methane Institute*, Paper No. 15A (Rocky Mt. Min. L. Fdn. 2002).

2 43 U.S.C. §§ 1712; 1712(c)(1); § 303(a) FLPMA, 43 U.S.C. § 1732(a) (2000).

3 § 103(c) FLPMA; 43 U.S.C. § 1702(c) (2000).

4 § 102(a)(12) FLPMA; 43 U.S.C. § 1701(a)(12) (2000).

5 43 C.F.R. § 1610.7 (2002).

leasing scenarios are determined based upon "Reasonably Foreseeable Development" scenarios which consider impacts at various levels of leasing based on the number of projected wells.[6]

Once the RMP is adopted, all project-specific land use decisions must be made in conformity with the plan.[7] Similar to a local zoning plan or land use code, the RMP does not approve any site-specific action, but defines broad, long-term, multiple use objectives and resource uses for public lands.[8] BLM has broad discretion in determining the mix of uses under its RMP, so long as multiple uses are considered in reaching its decision.[9] Under BLM's planning protest procedures at 43 C.F.R. Part 1610, protests must be made prior to BLM's final decision, within 30 days after the RMP's FEIS is issued. Unlike site-specific decisions, the RMP or plan revision is not subject to administrative review by the IBLA, but is the final decision of the Department subject to appeal to federal district court.[10]

3. BLM's Update of RMPs

a. General Requirements

Under FLPMA, RMPs may be modified informally by routine update with new resource data or formally, after NEPA analysis and public comment through: (i) plan amendment or (ii) complete revision.[11] Amendment of the RMP is discretionary with BLM, but may be triggered by: (1) new interpretations not known or considered in the existing RMP; (2) new information or changed circumstances which invalidate RMP decisions or implementation decisions; (3) ongoing actions result in impacts substantially different from those projected in the RMP/EIS or NEPA analysis; and (4) new information that creates plan inconsistency between the RMP and resource-related plans of Indian tribes, state and local governments or federal agencies.[12] An RMP may be amended[13] if this new data or change in policy alters the scope of a particular resource use, such as a new listing of threatened or endangered species. A complete revision is triggered by new data or circumstances affecting the entire plan or major portions thereof.[14] Both amendments and revisions require NEPA analysis, although revisions always require an EIS while amendments may only require an EA.[15] If amendment of the RMP is required in response to a site-specific project, a combined NEPA analysis may be conducted of the project and the plan amendment.[16]

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6 BLM Handbook, H-1624-1.

7 43 U.S.C. § 1712 (2000); 43 C.F.R. § 1610.3-2 (2002); 43 C.F.R. § 1610.5-3 (2002).

8 *See, generally*, BLM planning regulations at 43 C.F.R. Part 1600; Land Use Planning Handbook, BLM Handbook H-1601-1 (11/22/00).

9 *Headwaters, Inc. v. BLM Medford Dist.*, 914 F.2d 1174 (9th Cir. 1990), *rehearing den.*, 940 F.2d 435 (9th Cir. 1991).

10 43 C.F.R. § 1610.5-2(b) (2002).

11 FLPMA § 202(b), 43 U.S.C. § 1712(b) (2000).

12 BLM Handbook H-1601-1 VI.C.; *see SUWA*, 144 IBLA 70, 88-90 (when RMP no longer accurately reflects facts known to BLM on matters critical to resource decisions, BLM must initiate actions to amend or revise the RMP whether changes occur within 2 years or 10 years of the ROD).

13 43 C.F.R. § 1610.5-5 (2002).

14 43 C.F.R. § 1610.5 (2002).

15 *Id.*

16 43 C.F.R. § 1610.5-5 (2002).

b. Energy-Related Time Sensitive Plans

BLM has recognized that many of its existing RMPs are outdated, making the plans and decisions based on these plans subject to numerous lawsuits, protests and appeals.[17] BLM proposes to update all 162 existing land use plans over the next 10 years with priority given to those plans subject to litigation and those needing updating to implement the National Energy Policy.[18] CBM development has been identified as a key component of the National Energy Policy, central to addressing the near-term demand for natural gas.[19] RMP amendments relating to the development of CBM in the PRB are among those land use plans which have been prioritized by BLM as energy-related "time-sensitive."[20] BLM committed to update the plans within two to three years from adoption of its National Energy Plan Implementation action plan in March, 2002.[21]

c. Powder River Basin RMPs

In keeping with this expedited schedule, in January 2003, BLM, in cooperation with the USFS and the State of Wyoming, issued the Final EIS ("FEIS") and Proposed Plan Amendment for the PRB Oil and Gas Project ("PRB FEIS"). In December, 2002, BLM and the State of Montana jointly issued the Final Statewide EIS and Proposed Amendment of the Power River and Billings RMPs ("Montana FEIS"). A ROD was issued on April 30, 2003, by the Wyoming BLM approving amendments to the Buffalo and Platte River RMPs and adopting an RFD scenario which forecasts an estimated 51,000 CBM wells in the EIS area over the next 10 years. The planning area includes approximately 8 million acres of BLM, USFS, state and private lands within Campbell, Converse, Johnson and Sheridan Counties, Wyoming. The USFS proposes to issue RODs for forest lands within the Medicine Bow-Routt National Forest and Thunder Basin National Grassland. The Montana BLM approved proposed RMP amendments to the Powder River and Billings RMPs under "Alternative E" of the Montana FEIS by ROD issued April 30, 2003. Under this alternative, BLM would facilitate CBM development while providing appropriate levels of resource protection on a site-specific basis. The RFD scenario under the Montana FEIS proposed the drilling of 5,400 to 15,600 CBM wells and production of 4,800 to 13,400 CBM wells, requiring 200 to 550 field compressors, 20 to 50 cell compressors and 3,200 to 8,900 miles of plastic, low-pressure gathering lines.[22]

RMP amendments in the Wyoming and Montana PRB were not updated quickly enough to avoid litigation. Under BLM's current policy, existing land use decisions remain in effect during the revision of the RMP, unless they are specifically determined to violate federal law.[23]

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17 Letter from BLM to Stakeholders, Henry Bison, BLM Assistant Director, Renewable Resources and Planning, January 17, 2002.

18 *See* Executive Order 13212, "Actions to Expedite Energy-Related Projects;" Recommendations of the National Energy Policy Development Group (May, 2001).

19 Statement of Rebecca Watson, Assistant Sec'y Land & Minerals Management, U.S. Dep't. Interior Oversight Hearing Before the House Subcommittee on Energy & Mineral Res., July 6, 2002, and June 24, 2003, reprinted at BLM website, www.blm.gov.

20 *See* BLM's listing of time-sensitive plans at www.blm.gov.

21 BLM, National Energy Plan Implementation, BLM Action 42, Mar. 2002.

22 Final Statewide Oil and Gas EIS and Proposed Amendment of the Powder River and Billings RMPs (Dec. 23, 2002), at 4-1 and 4-2; Vol. II, Minerals Appx. at MIN-5, MIN-16.

23 BLM Handbook H-1601-1, V.II.E., 11/22/00.

Leasing may continue during RMP revision so long as it does not constrain the reasonable choice of alternatives under consideration. Instruction Memorandum ("IM") 2001-191, Aug. 6, 2001. Therefore, as the RMPs were being amended, the Wyoming and Montana BLM offices proceeded with competitive oil and gas lease sales in the PRB. These leasing decisions were challenged by environmental groups in both states.

During amendment of the Buffalo and Platte River RMPs, the Wyoming Outdoor Council appealed every BLM lease sale involving CBM development occurring after February, 2000. The Wyoming Outdoor Council challenged the adequacy of the RMP NEPA analysis for plans which predated commercial-scale CBM development. In *Wyoming Outdoor Council (WOC)*, 156 IBLA 347, 358 (April 26, 2002), the IBLA found that the pre-leasing NEPA analysis accompanying the Buffalo RMP adopted in 1985 did not contemplate the impacts associated with the relatively new methods of CBM extraction, including produced water and the air quality impacts of transportation.[24] In May, 2003, the Wyoming federal district court reversed the IBLA's decision, finding that the Buffalo RMP/EIS in combination with the more recent Wyodak Project EIS were adequate to analyze the impacts of CBM leasing and development.[25]

In reliance on its April, 2002 *WOC* decision, the IBLA also found that the Great Divide RMP/EIS completed in 1990 failed to evaluate impacts related to CBM development and reversed BLM's decision to lease 5 parcels for CBM production.[26] In the same decision, IBLA affirmed leasing of a parcel included within the Green River RMP/EIS, prepared in 1997, noting that this NEPA analysis considered CBM issues before designating lands as open to oil and gas development.[27] With respect to lease sales involving the Pinedale RMP, the IBLA denied Wyoming Outdoor Council's stay request, primarily because petitioners had failed to demonstrate that CBM development was anticipated on the parcels, noting on this basis that, "[t]hus, the serious issues relating to CBM extraction and development animating our issuance of stays in *WOC*, 153 IBLA at 388-389 and related cases are absent here."[28] The Wyoming Outdoor Council's appeals on some 40 additional leases are still pending before the Department.[29]

Environmental groups in Montana bypassed the IBLA by directly filing a complaint in federal district court to challenge the issuance of all federal CBM leases within the Billings and Powder River Resource Areas issued prior to completion of the Montana FEIS.[30] These environmental groups have also appealed the April 30, 2003 RODs approving amendment of the Powder River and Billings RMPs issued by Montana BLM and the plan amendments for the PRB Oil and Gas Project issued by the Wyoming BLM.[31] Both RODs have been challenged in Montana federal district court. Motions have been filed to dismiss the plaintiffs' challenge of the

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24 On similar grounds, the IBLA initially stayed the lease sale of the 3 parcels, at *WOC*, 153 IBLA 379, Oct 6, 2000, and subsequently upheld their April 2002 decision on reconsideration at *WOC*, 157 IBLA 259 (Oct. 15, 2002).

25 *Pennaco Energy, Inc. v. DOI*, Case No. 02-CV-116-B, Order, May 30, 2003.

26 *Wyoming Outdoor Council*, 158 IBLA 384, April 15, 2003.

27 *Id*. at 395.

28 *Wyoming Outdoor Council*, 156 IBLA 377 at 384, June 28, 2002.

29 *See* Protest of June 4, 2002 lease sale, filed with Wyoming State Director by the Wyoming Outdoor Council.

30 *Northern Plains Resource Council v. BLM*, Case No. CV-01-96BLG-RWA (D. Mont. March 27, 2002).

31 *Western Organization of Resource Council v. Clarke*, Case No. 03-CV-70 (D. Mont. May 1, 2003).

Wyoming BLM's ROD for improper venue in the Montana federal court or in the alternative to transfer the claim to the Wyoming federal district court.[32]

B. USFS Land Use Plans Under NFMA[33]

1. Multiple Use and Sustained Yield--Mineral Resources

National Forest System Lands are managed under a Congressional mandate for multiple use and sustained yield. Forest Service Organic Act ("Organic Act"), codified as amended at 16 U.S.C. §§ 473-482, 551; 16 U.S.C. § 475 (2000). Multiple Use and Sustained Yield Act of 1960 ("MUSYA"), 16 U.S.C. § 528-531 (2000). Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1600-14; National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. 1600, et seq.; 16 U.S.C. § 1604(e), 1607 and 1609 (2000).

Historically, the USFS developed as a surface management agency with a mandate to protect and develop timber resources. The NFMA and MUSYA do not extend USFS jurisdiction to patenting and leasing of mineral resources on forest lands. Also, NFMA, unlike FLPMA, does not list minerals among the resources included within the term "multiple use and sustained yield," which does include: outdoor recreation, range, timber, watershed, wildlife and fish and wilderness.[34] Mineral development is primarily governed by the Secretary of the Interior under the Mining Law of 1872, as amended, 30 U.S.C. § 22, et seq, and the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181, et seq.[35] While DOI has primary responsibility for issuing licenses, permits and leases, the USFS cooperates with the DOI to assure that impacts to surface resources are mitigated.[36]

National Forest System Lands are generally available for exploration and mining unless specifically precluded by statute or formal withdrawal.[37] USFS current rules require that mineral exploration and development in the planning area be considered in the management of renewable resources recognizing (i) active mines within the forest plan; (ii) outstanding or reserved mineral rights; (iii) probable occurrence of locatable, leaseable and common variety minerals; (iv) potential for mineral development and the need for withdrawal of areas from development; and (v) probable effect of management prescriptions on mineral exploration and development.[38] By contrast, the 2000 and 2002 proposed USFS planning regulations provide little guidance on the manner in which mineral exploration and development should be addressed.[39]

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[32] Partial motion to dismiss filed by DOI, June 20, 2003; motion to dismiss filed by intervenor State of Wyoming, June 23, 2003; motion to dismiss field by joint lessee defendant intervenors, June 30, 2003.

[33] *See generally,* "Overview of Forest Planning and Project-Level Decisionmaking," USDA Office of the General Counsel, June 2002, available at USFS website, www.fed.us.gov.

[34] 16 U.S.C.§ 1604(e).

[35] *See* USFS regulations at 36 C.F.R. § 228.1 (2002) "It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for management of such resources is in the Secretary of the Interior."

[36] Forest Service Manual ("FSM") 2800 Minerals and Geology at 2822 (3/17/94).

[37] FSM 2822.1 (3/17/94).

[38] 36 C.F.R. § 219.22 (1982).

[39] *Compare* 36 C.F.R. § 219.22 (1982) with 36 C.F.R. § 219.26 (2000) (identifying and designating suitable uses). Notably, the Thunder Basin National Grassland LRMP designates mineral production and development areas

a. Mineral Leasing Act -- Coal Leases

With the exception of coal leases and oil and gas reserves, the Mineral Leasing Act of 1920, as amended, authorizes the Secretary of Interior to issue permits and leases without the consent of the Secretary of Agriculture. However, the DOI generally accepts USFS recommendations on leaseable minerals.[40]

With respect to coal leasing, the DOI is the lead federal agency, with primary authority for leasing federal coal reserves under the Mineral Leasing Act, as amended by the Federal Coal Leasing Amendments Act of 1976 ("FCLAA").[41] FCLAA amends the Mineral Leasing Act to provide that a coal lease or exploration license may not be issued without the consent of the surface management agency and subject to such conditions as it may prescribe to protect non-mineral interests.[42] Under FCLAA, the USFS prepares land use plans where there is substantial development interest in coal leasing within National Forest System Lands.[43] Such plans are to include an assessment of coal reserves recoverable by surface and underground methods.[44]

Coal mining suitability determinations under § 522 of the federal Surface Mining Control and Reclamation Act ("SMCRA") are made in the context of land use planning by the appropriate surface managing agency.[45] The DOI has delegated the unsuitability review for National Forest System Lands to the USFS which applies unsuitability criteria set forth in DOI's Coal Management Program.[46] The coal program establishes 20 unsuitability screening criteria for making unsuitability determinations. Currently, the USFS planning rules fail to address how the USFS planning process interacts with the Coal Management Program administered by the DOI, Office of Surface Mining Reclamation and Enforcement ("OSM").

SMCRA § 522(e)(2), 30 U.S.C. § 1272(e)(2)), specifically provides that, subject to valid existing rights, no surface coal mining operations shall be permitted within the boundaries of any National Forest unless the Secretary of the USDA finds that: (i) there are no significant recreational, timber, economic or other values which may be incompatible with surface mining; (ii) surface operations are incidental to an underground mine; or (iii) as to lands in the West without significant forest cover, surface mining is in compliance with the MUSYA, NFMA and SMCRA.[47]

b. Mineral Leasing Act -- Oil, Gas and CBM Leases

The USFS also has input into oil and gas leasing activities (including CBM leasing and development) on National Forest System Lands. It is these resources which are the focus of this

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managed for solid mineral operations. ROD, FEIS and LRMP Revision, Thunder Basin National Grassland, USFS, July 31, 2002 at 21.

40 FSM 2822 (3/17/94).

41 Pub. L. 94-377, § 1(a), Aug. 4, 1976, 90 Stat. 1083.

42 30 U.S.C. § 201(a)(3)(A)(iii) (2000); *See* FSM 2822.04 (3/17/94).

43 30 U.S.C. § 201(a)(3)(A)(i)(ii) (2001).

44 30 U.S.C. § 201(a)(3)(A)(iii) (2001).

45 30 U.S.C. § 1272(a)(5) (2000).

46 *See* 43 C.F.R. § 3420.1-4(e)(2) (2002); 43 C.F.R. § 3461.5 (2002); BLM Handbook H-1601-1 Appx. C.II.E.3; FSH 2822.15.

47 *See generally,* Ronald E. Van Buskirk, Denise A. Dragoo, "The Designation of Lands as 'Unsuitable' for Surface Coal Mining Operations," 27B Rocky Mt. Min. L. Inst. 339 (1982).

paper. Under the Federal Onshore Oil and Gas Leasing Reform Act of 1987[48] ("FOOGLRA" or "Leasing Reform Act") and implementing rules, the DOI may not issue leases on forest lands without the consent of the USDA.[49] The USFS considers the potential of Forest Service lands for oil and gas leasing in the context of land use planning.[50]

Similar to BLM, the USFS oil and gas leasing analysis determines lands open and closed to leasing and the terms and conditions of leasing under a standard lease form, lease stipulations, alternatives to leasing based upon the reasonably foreseeable impacts of post-leasing activity.[51] Unlike BLM, the USFS leasing decisions involve two steps: first, identifying lands administratively available for lease under the Forest Plan; and second, once specific lands are proposed for lease, verifying consistency of leasing with the Forest Plan and ensuring that conditions of surface occupancy are properly included as lease stipulations.[52]

Under the first step, or leasing analysis, USFS identifies and maps areas potentially suitable for leasing.[53] For example, the ROD for the Thunder Basin National Grassland ("TBNG") LRMP Revision (2002), specifically states that USFS has completed its leasing analysis and notifies BLM under 36 C.F.R. 228.102(d) of lands identified as "administratively available for lease."[54] The ROD makes 423,940 acres of the TBNG east of the coal outcrop available for oil and gas leasing with a variety of lease stipulations. New leasing decisions for the area west of the coal outcrop line were deferred pending completion of the PRB EIS in which USFS and BLM as cooperating agencies analyzed the cumulative effects of CBM development. As required by 43 C.F.R. § 3101.7-1(c), BLM will only offer and issue leases within the TBNG upon USFS future decisions to authorize specific lands for CBM leasing. At the second stage of analysis, after BLM has designated specific lease parcels,[55] the USFS will verify that oil and gas leasing has been adequately addressed in the PRB-EIS and other NEPA documents, is consistent with the TBNG LRMP revision and will ensure that conditions of surface occupancy are included in lease stipulations.[56]

2. USFS Land and Resource Management Plans

a. General Requirements (1982 Rules)

As with BLM's RMPs, the USFS develops Land and Resource Management Plans ("LRMPs" or "Forest Plans") to guide and coordinate multiple uses and the availability of lands

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48 Pub. L. No. 100-203, subtitle B, 101 stat. 1330, codified at 30 U.S.C. § 226(g)-(h); *see* Charles L. Kaiser and Scott Hardt, "Fitting Oil and Gas Development into the Multiple-Use Framework: A New Role for the Forest Service," 62 U. Colo. L. Rev. 827 (1991).

49 30 U.S.C. § 226(g) (2000).

50 36 C.F.R. § 228.102 (2002).

51 36 C.F.R. § 228.102(c) (2002).

52 36 C.F.R. § 228.102(d) (availability for lease); § 228.102 (e) (consistency of leasing with LRMP) (2002).

53 36 C.F.R. § 228.102(c) (2002).

54 FEIS and LRMP Revision, ROD, TBNG, July 31, 2002 at 42.

55 *See Wyoming Outdoor Council v. USFS,* 165 F.3d 43 (D.C. Cir. 1999) (upholding USFS decision to delay application of the second stage of lease analysis until after BLM has designated lease parcels).

56 36 C.F.R. § 228.102(e) (2002).

for resource management.[57] The LRMP is one of three levels of Forest planning and decisionmaking[58] including: (1) a nationwide strategic plan; (2) the LRMP for each administrative unit of the National Forest System (the 192 million acres within 156 National Forests, National Grasslands and other areas managed by the USFS are collectively known as the National Forest System); and (3) project decisions for particular uses, such as oil and gas development.[59] As with the RMP, the LRMP does not approve any site-specific action, but serves as a zoning plan defining broad categories of use and the terms and conditions for such uses.[60]

Under the current (1982) rules, LRMP approval results in the following:[61]

(i) establishment of forest-wide or grassland-wide multiple use goals and objectives, 36 C.F.R. § 219.11(b);

(ii) establishment of management requirements (standards and guidelines), 36 C.F.R. § 219.13 to 219.27;

(iii) establishment of management areas and management area direction, 36 C.F.R. § 219.11(c);

(iv) resource management determinations, i.e., designation of suitable timber land and allowable timber sale quantity, 36 C.F.R. § 219.14 and 219.16; lands suitable for grazing, 36 C.F.R. § 219.5; provision of outdoor recreation opportunities, 36 C.F.R. § 219.21; identification of probable occurrence of various minerals and development potential, 36 C.F.R. § 219.22; and identification of lands available for oil and gas leasing, subject to constraints, 36 C.F.R. § 228.102(c) and (d);

(v) wilderness recommendations, 36 C.F.R. § 219.17; and

(vi) monitoring and evaluation requirements, 36 C.F.R. § 219.11(d).[62]

b. New Planning Rules

The USFS regulations governing planning are in flux. The planning regulations currently in effect were adopted in 1979 and 1982 to implement NFMA (herein the "1982 rules"). 36 C.F.R. Part 219; 47 Fed. Reg. 43026 (Sept. 30, 1982). New regulations amending the planning process were finalized under the Clinton Administration and became effective on November 9, 2000, subject to phase in (the "2000 planning rules").[63] The Bush Administration delayed

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57 16 U.S.C. § 1604(e) (2000); *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979); *Wind River Multiple-Use Adv. v. Espy*, 835 F. Supp. 1362, 1372 (D. Wyo. 1993), *aff'd* 85 F.3d 641 (10th Cir. 1996).

58 Forest Service Decisionmaking System, www.fs.fed.us/forum/nepa/decionmkaing.

59 36 C.F.R. § 219.4 (2002).

60 *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 140 L. Ed. 2d. 921, 118 S. Ct. 1665 (1998).

61 *See, e.g.*, FEIS and LRMP Revision, TBNG, ROD, July 31, 2002.

62 *Id.* at 17; Overview of Forest Planning and Project Land Decisionmaking, USDA Office of General Counsel, June 2002, at 1; *see Citizens for Environmental Quality v. U.S.*, 731 F. Supp. 970, 977-78 (D. Colo. 1989).

63 65 Fed. Reg. 67514.

implementation of the 2000 rules pending further study and in December, 2002 proposed changes to the rules (the "2002 proposed rules").[64]

Until final adoption of the 2002 proposed rules, the date for mandatory compliance with the 2000 planning rule has been indefinitely extended. 66 Fed. Reg. 27551 (initial extension until May 9, 2002); 67 Fed. Reg. 35431, May 20, 2002) (indefinite extension). Due to concerns raised with the 2000 planning rule and uncertainty pending adoption of the 2002 proposed rule changes, forest managers have generally chosen to prepare amendments and revisions under the 1982 rule rather than the 2000 rule. In addition, on January 10, 2001, the USFS issued an interpretive rule clarifying that officials may choose to apply the appeal procedures under the 1982 rule rather than the new pre-decisional objection procedures of 36 C.F.R. § 219.31 (2000).[65] Therefore, in most circumstances, the original 1982 rules continue to govern USFS planning and appeal procedures.[66]

c. Multiple Use and "Ecological Sustainability"

The 2000 planning rules and 2002 proposed rules move away from multiple use management to "ecological sustainability." The 2000 planning rule defines sustainability as interdependent ecological, social and economic elements, but gives first priority in planning to "ecological sustainability."[67] The 2002 proposed rule eliminates this priority and makes "ecological sustainability" co-equal with the other two components of sustainability consistent with the MUSYA. Proposed 36 C.F.R. §§ 219.2(b)(6) and 219.13 (2002).

The proposed 2002 rules contain a general presumption that all lands are potentially suitable for a variety of uses, including energy resource development and mining activities, except when specific uses are determined to be unsuitable for a particular use. Proposed 36 C.F.R. § 219.4(a)(4) (2002). This presumption returns the USFS closer to multiple use principles as defined in the MUSYA and NFMA.[68]

3. USFS Update of Forest Plans

a. Overview

NFMA authorizes amendment of an LRMP, as necessary, at the discretion of the USFS.[69] Forest Plans are modified by: (i) non-significant amendment; (ii) significant amendment; and (iii) complete revision. Under the current 1982 rules, determination of whether LRMP

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64 67 Fed. Reg. 72770 (Dec. 6, 2002).

65 66 Fed. Reg. 1864, Jan. 10, 2001.

66 By Order dated July 14, 2003, the Wyoming federal court dismissed as unripe Wyoming's challenge to the 2000 planning rules because those rules are being revised. *Wyoming v. DOA,* Civ. No. 01-CV-8603 (D. Wyo).

67 36 C.F.R. § 219.2(a) and 219.1(b)(3) (2000); the USFS adopts the term "sustainability," defined in the 1987 Bruntland Commission Report, as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Bruntland Report of the World Commission on Environment and Development (Oxford University Press 1987); Deborah J. Shields, USDA Forest Service, "Challenges to Sustainable Development in the Mining Sector," Industry and Environment 23 (Special Issue 2000) 16-19.

68 Limited multiple use principles were first established in the 1897 Organic Act, Act of June 4, 1897, ch. 2 § 1, 30 Stat. 11, 34-36, *see* 16 U.S.C. § 475 (2000).

69 16 U.S.C. § 1604(f)(4) (2000).

amendment is required and the significance of any amendment is also in the discretion of the USFS.[70] If amendments are significant, USFS follows similar procedures to amend the LRMP as those required for initial adoption, including preparation of an EIS and public review and comment.[71] If an amendment is determined to be non-significant, the USFS "may implement the amendment following appropriate public notification and satisfactory completion of NEPA procedures."[72] In determining whether a proposed amendment would result in a significant change in a plan, the USFS makes an analysis of Forest Plan objectives and guidelines.[73] The Forest Service Land and Resource Management Planning Handbook lists four factors which may be used to determine the significance of an amendment: (i) timing in relation to the original plan or revision; (ii) location and size; (iii) impact on Forest Plan goals, objectives and outputs; and (iv) impact on LRMP management prescriptions.[74] However, the criteria under the FSH Handbook are not judicially enforceable[75] and the courts have determined that the decision to amend is a highly discretionary judgment call by USFS.[76]

b. LRMP Revision

LRMPs are to be revised every 15 years in accordance with the NFMA.[77] The 2000 rules require the Chief of the Forest Service to develop an LRMP revision schedule for National Forest System units that have not completed revisions of their plans. The current LRMP revision schedule was published on Nov. 30, 2001[78] and may be updated to reflect the Forest Service Energy Implementation Plan developed in response to the National Energy Plan.[79] The revision schedule lists each National Forest, National Grassland and National Recreation Area, the date of NFMA required revision and the scheduled revision initiation and completion dates.

While a significant amendment of a Forest Plan is under consideration, the USFS may continue to process non-significant amendments.[80] The existing LRMP remains in effect until the plan amendment or revision is finally adopted.[81]

c. PRB LRMPs

In the Wyoming PRB, the USFS has initiated LRMP revisions on two plans which may be impacted by CBM development. The DEIS released in 2002 for the Medicine Bow National

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70 36 C.F.R. § 219.11(f) (1982); *Sierra Club v. Cargill,* 11 F.3d 1545, 1548 (10th Cir. 1993) (the regulation "expressly commends the significance of an amendment to the Forest Supervisor's judgment.")

71 36 C.F.R. § 219.11(f) (1982).

72 *Id.*

73 *Id.*

74 FSH 1909.12 § 5.32 (8/3/92).

75 *See Western Radio Servs. Co. Inc. v. Espy*, 79 F.3d 896, 901-02 (9th Cir. 1996).

76 *Prairie Wood Products v. Glickman*, 971 F. Supp. 457, 464 (D. Or. 1997), ("[n]either the statute, the regulations nor the Handbook guidelines make any set of criteria binding" on the USFS.)

77 16 U.S.C. § 1604(f)(5) and 36 C.F.R. § 219.9(a) (2000). The Medicine Bow National Forest Plan was challenged for failure to timely revise the LRMP. *See Biodiversity Assc. v. USFS,* Civ. No. 01-CV-078(b) (D. Wyo., filed May 21, 2001).

78 66 Fed. Reg. 59775.

79 In August, 2001, the USFS developed a plan to implement Executive Order 13212, "Actions to Expedite Energy-Related Plans" and the Energy Policy Conservation Act. *See* ROD TBNG LRMP Revision (2002) at 16.

80 *Sierra Club v. Cargill,* 11 F.3d 1545, 1549 (10th Cir. 1993).

81 36 C.F.R. § 219.29 (1982).

Forest Revision confirms that the Forest has medium to low potential for oil and gas development.[82] The plan revision for the TBNG, completed in 2002, determines that some 58,460 acres west of the coal outcrop line have potential for CBM development.[83] The ROD defers leasing decisions on the TBNG pending completion of the PRB EIS. The USFS was a cooperating agency with BLM in preparing the PRB FEIS released in January, 2003.[84] USFS participated with BLM in the development of the RFD scenario for oil, gas and CBM development and will use the NEPA analysis to determine whether to modify lease stipulations in the TBNG LRMP as revised 2002.[85]

III. INTEGRATION OF NEPA INTO BLM AND USFS LAND USE PLANS

A. NEPA and Public Participation in Planning

1. BLM RMPs

Each RMP and plan revision is a "major federal action significantly affecting the human environment" requiring an environmental impact statement ("EIS") under § 102(2)(C) of NEPA.[86] NEPA also provides the process for public involvement in the adoption and amendment of RMPs.[87] The regulations of the Council on Environmental Quality ("CEQ") implementing NEPA require public involvement in defining the scope of environmental analysis and in commenting on the DEIS and the FEIS accompanying the proposed RMP.[88]

The CEQ rules give form to FLPMA's general planning procedures. *Compare* the process for preparing RMPs or plan amendments at 43 C.F.R. § 1610.4 with CEQ regulations for preparing an EIS at 40 C.F.R. § 1501.7 (scoping); § 1502.15 (alternatives); 1502.11 (environmental assurances); 1505.2(1) (monitoring). The proposed RMP or RMP amendment is generally integrated into the RMP/EIS and circulated as one document.[89] Once the RMP/EIS is final, a separate decision adopting or amending the RMP is set forth in a ROD.

2. Protest of BLM RMPs and RMP EIS

The RMP/EIS supports the selection of the RMP and this decision is documented in the ROD. Protests on the proposed RMP must be filed with the BLM State Director prior to issuance of the ROD and within 30 days of publication of notice availability of the RMP/FEIS.[90] The decision of the State Director is final agency action which is not subject to administrative review by the IBLA. In the PRB, plan revision protests were assigned to the Assistant Director of BLM rather than to the Wyoming and Montana BLM State Directors and the Assistant

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82 Medicine Bow National Forest LRMP DEIS (2002), Executive Summary at 10.
83 FEIS and LRMP Revision ROD, TBNG (USFS July 31, 2002) at 42.
84 *Id.*
85 *Id.*
86 43 C.F.R. § 1601.0-6 (2002); Departmental Manual § 516, Appx. 6.
87 43 C.F.R. § 1601.0-6 (2002).
88 CEQ Rules at 40 C.F.R. §§ 1503.1, 1503.4 (2002).
89 BLM H-1624-1.
90 43 C.F.R. § 1610.5-2 (2002).

Director's decisions were the final decisions of the DOI subject to judicial review.[91] Although the objective of the pre-decision protest process is to resolve objections, many of the same issues raised in these protests also appear in the complaint appealing the RODs.[92]

The RMP and the RMP/EIS are subject to review by the IBLA, only "as applied" to specific resource decisions such as oil and gas development.[93] The IBLA and courts will consider whether the EIS is adequate to support the land use decision under § 102(2)(C) of NEPA. The RMP/EIS must confirm that BLM has "taken a hard look" at the environmental consequences of a proposed action consistent with *Kleppe v. Sierra Club*, 437 U.S. 390, 410, n. 21 (1976). The IBLA applies a deferential standard and BLM's decision will not be overturned unless it is shown by a preponderance of the evidence that it failed to consider "substantial environmental questions of material significance."[94]

3. USFS Forest Plans and LRMP/EIS

The NFMA requires the development of a new Forest Plan to be accompanied by an EIS and public review process conducted in accordance with NEPA.[95] Under USFS current rules, this procedure also applies to significant amendments. Non-significant amendments follow a simplified procedure requiring public notice and NEPA analysis which may include an environmental assessment and finding of no significant environmental impact ("FONSI").[96]

Currently, the USFS rules integrate the notice of preparation of an LRMP with the publication of a notice of intent to prepare an EIS under NEPA.[97] The rules provide that a draft and final EIS for a proposed plan will be prepared according to NEPA procedures.[98] Significant amendments to a plan are completed through the same procedures as those required for development and approval of a plan.[99]

The 2000 and proposed 2002 planning rules do not always require USFS preparation of an EIS for Forest Plans and have less defined procedures for public involvement in the plan amendment process. The 2000 regulations still require an EIS for revision of a Forest Plan, but allow the USFS discretion to determine whether to prepare an EIS or EA for a plan amendment.[100] The rules require public notice and comment prior to completion of a draft and

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91 ROD Montana FEIS and Proposed Amendment of PRB and Billings RMPs, April 17, 2003 at 132; ROD and RMP Amendments for the PRB Oil and Gas Project, April 17, 2003 at 18.

92 *Compare* ROD Montana EIS at 12, and ROD PRB EIS at 17, protests: (i) impacts not properly assessed; (ii) impact assessment methodology flawed; (iii) document inadequate with Complaint, Cause of Action I-IV failure to prepare a single EIS; failure to supplement EIS; failure to analyze full range of alternatives; failure to analyze fully direct, indirect and cumulative impacts of CBM development.

93 43 C.F.R. § 1610.5-3 (2002); 43 C.F.R. § 4.400 (2002).

94 *Southern Utah Wilderness Alliance*, 127 IBLA 331, 350 (1993).

95 16 U.S.C. § 1604(g)(1); 36 C.F.R. § 219.10(b) (1982); *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1167-68 (10th Cir. 1999).

96 36 C.F.R. § 219.10(f) (1982).

97 36 C.F.R. § 219.7 (1982).

98 36 C.F.R. §§ 219.8(c) and 219.10(b) (1982).

99 36 C.F.R. § 219.10(f) (1982).

100 36 C.F.R. § 219.6 (2000).

final EIS.[101] A 90-day comment period is required in the case of a significant amendment for which an EIS is prepared.[102] However, rules for public participation are not specified.

The 2002 proposed rules move towards separating programmatic and project-level planning decisions.[103] LRMP adoption, significant amendment and revision are programmatic functions not necessarily requiring an EIS.[104] The proposed rules generally provide that USFS allow early and frequent opportunities for individuals and entities seeking to participate in the planning process. The USFS determines the methods and timing of these opportunities for participation, although it must encourage participation by interested individuals and organizations, including private landowners whose lands are within adjacent to or affected by a management decision on National Forest System Lands.[105] Under the proposed rule, an EIS need not necessarily be prepared for plans, revisions and amendments and a new plan, plan amendment or revised plan can be categorically excluded from NEPA analysis.[106]

Additional NEPA analysis is required at the site-specific project level of decisionmaking. Pursuant to USFS proposed rule § 219.10(d)(3), plans may be automatically amended by a site-specific project decision to the extent that the project is inconsistent with a plan. A project decision (as distinct from a planning decision) is subject to review under USFS's new rules adopted on June 4, 2003, at 36 C.F.R. Part 215.[107]

4. Appeal of Forest Service Planning Decisions

a. Overview

The USFS has separate appeal procedures for decisions involving: (i) Forest Plan revisions and amendments under NFMA (36 C.F.R. Part 217 (1982) or Part 219 (2000) (proposed 2002); (ii) projects or activities implementing a Forest Plan and documented in an EA, EIS or FONSI (36 C.F.R. Part 215, as amended effective June 4, 2003); and (iii) permits or written authorizations such as decisions on special use permits (36 C.F.R. Part 251, Subpart C).

Under the new planning rules, the USDA, at its own discretion, provides processes for pre-decision objection and appeal of the significant amendment, revision or approval of an LRMP.[108] For plans prepared under the 1982 planning regulations, Appendix A to § 219.35(b)(2000) provides USFS the option to select the pre-decision objection process under § 219.32 (2000) or the post-decision administrative appeal and review procedures of Part 217 (1982) in effect prior to November 9, 2000. This election is available until November, 2003. At

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101 36 C.F.R. § 219.09 (2000).

102 36 C.F.R. § 219.8(b) (2000).

103 36 C.F.R. § 219.6 (proposed 2002).

104 This distinction between programmatic and project-level planning has already been recognized in the context of USFS two-stage leasing analysis applied under the 1982 rules. *See Wyoming Outdoor Council v. USFS*, 165 F.3d 43, 49 (D.C. Cir. 1999).

105 36 C.F.R. § 219.12 (proposed 2002).

106 36 C.F.R. § 219.6 (proposed 2002); Categorical Exclusions, FSH 1909.15, Ch. 30.

107 Notice, comment and appeal procedures for National Forest System projects and activities, finally adopted on June 4, 2003, 68 Fed. Reg. 33582.

108 36 C.F.R. Part 219 (2000) (proposed 2002).

the time of adoption of the new planning rules in November, 2000, some 34 National Forests and Grasslands out of a total of some 156 plans were in revision.[109]

Also under the new rules, non-significant amendments to LRMPs that are included as part of a decision on a proposed action for which a NEPA analysis is prepared is subject to pre-decision notice and comment and possible appeal. The right to appeal is limited to those who commented prior to the decision.[110]

Plans, projects and activities which are categorically excluded from documentation under NEPA are not subject to review under 36 C.F.R. §§ 217 or 219.[111] Categorical exclusions are determined by Forest Service policy at FSH 1909.15, Ch. 30, § 31. For example, as part of the Healthy Forest Initiative, on June 5, 2003, the USDA, USFS and DOI published notice of revision of FSH 1909.15, Ch. 30, § 31.2, and DOI Manual 516 DM, Ch. 2, Appx. 1, to add two new categorical exclusions on both public lands and forest lands for: (1) hazardous fuels reduction activities; (2) rehabilitation projects for lands impacted by fire or fire suppression.[112]

b. Post-Decision Appeals (1982 Rules)

The USFS has the option of applying plan appeal procedures under either the 1982 rules or the 2000 rules.[113] The primary difference between the 1982 planning appeals procedures at 36 C.F.R. § 217 and the 2000 and 2002 procedures at 36 C.F.R. § 219, is a new pre-decision objection process. The 1982 rules provide for post-decision appeal,[114] initiated by a notice of appeal filed within 45 days of the ROD for a non-significant plan amendment or 90 days from issuance of a ROD for a significant amendment or revision of a Forest Plan.[115]

The notice of appeal is filed with the next higher line officer, and, each in turn, has discretionary review authority, e.g., a decision by the Forest Supervisor is appealed to the Regional Forester, a decision by the Regional Forester is reviewed by the Chief of the Forest Service and a decision by the Chief of the Forest Service is reviewed by the Secretary of Agriculture.[116] The final administrative decision may be appealed to federal district court.[117] Unless a higher level officer exercises discretion to review a receiving officer's decision, the decision is final.[118]

The USFS also notifies BLM if appeals of either Forest-wide oil and gas leasing decisions or decisions for specific lease lands are filed under 36 C.F.R. § 217.[119]

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109 USFS Questions and Answers, Nov. 9, 2000, www.fed.us.gov; "Overview of Forest Planning and Project Level Decisionmaking," USDA Office of the General Counsel, June 2002, at 2.

110 36 C.F.R. § 215.3(c) (June 4, 2003); 36 C.F.R. § 215.11(a) (June 4, 2003).

111 36 C.F.R. § 215.4(a) (June 4, 2003).

112 68 Fed. Reg. 33814, June 4, 2003; USFS Interim Directive No. 1909.15-2003-1.

113 66 Fed. Reg. 1864, June 10, 2001.

114 36 C.F.R. § 217.6-14 (1982).

115 36 C.F.R. § 217.8 (1982).

116 36 C.F.R. § 217.7 (1982).

117 5 U.S.C. §§ 701-706 (2000).

118 36 C.F.R. § 217.7(d); 217.16 (1982).

119 36 C.F.R. § 228.103 (2002).

c. Pre-Decisional Objection Process

The 2000 planning rule replaces the administrative appeal process at 36 C.F.R. Part 217 with a pre-decisional objection process under 36 C.F.R. Part 219. Under these new procedures, objections are made earlier in the decisionmaking process, within 30 days of public notice of availability of an FEIS on a plan amendment or revision or within 30 days of the decision not to prepare an EIS (i.e., EA or FONSI).[120] Within 10 days after close of the objection period, the USFS must publish notice of objections in a local newspaper. Objectors may also request meetings with USFS on their objections and USFS must respond to the objections in writing within a reasonable time.[121] The responsibility of the reviewing officer is the final decision of the USDA, eliminating appeals through the chain of command. The proposed Forest Service plan, amendment or revision cannot be approved until the reviewing officer has responded to the objection.[122]

Notably, when the USFS is participating in a multi-agency decision subject to objection, the USFS may waive their objection procedure to adopt the administrative review procedures of another participating agency. The USFS new pre-decisional objection rules are similar to BLM's plan protest procedures which may encourage cooperation in oil and gas leasing decisions involving both agencies.[123]

d. No Administrative Stay of LRMP

Under current rules at 36 C.F.R. Part 217, the adoption, amendment or revision of the LRMP cannot be administratively stayed during appeal.[124] Requests for administrative stay will be considered under § 217.10(c) to stay implementation of a project or activity included in a plan. However, under the new appeal rules at 36 C.F.R. Part 215, an automatic stay is imposed during appeal of projects and activities implementing LRMPs which include a non-significant amendment as part of the decision.[125]

IV. STAGED DECISIONMAKING, LEASING AND DEVELOPMENT OF OIL, GAS AND CBM RESOURCES

A. BLM Land Use Planning - Staged Decisions

BLM's Land Use Planning Handbook specifically addresses oil, gas and CBM development and requires two levels of decisionmaking and NEPA analysis as to these resources: (i) land use plan decisions; and (ii) site-specific "implementation decisions."[126] At the land use plan level, the RMP authorizes areas open and closed to leasing, general lease stipulations and mitigation alternatives.[127] These determinations are made prior to offering lands

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120 36 C.F.R. § 219.32 (2000); proposed 36 C.F.R. § 219.19 (2002).

121 *Id.*

122 *Id.*

123 *Compare* 43 C.F.R. § 1610.5-2 (2002).

124 36 C.F.R. § 217.10(b)(c) (1982); 36 C.F.R. § 219.32 (2002) replaces appeal with pre-decision contest.

125 Mandated by § 322, Interior and Related Agencies Appropriation Act of Fiscal Year 1993, Pub. L. 102-381, 106 Stat 1419 ("Appeals Reform Act"); 36 C.F.R. § 215.9 (June 4, 2003); 36 C.F.R. § 215.11 (June 4, 2003).

126 BLM Handbook H-1601-1, Appx. C.II.F.

127 *Id.*

for oil and gas lease sale. The environmental impacts of alternative leasing scenarios are set forth in the RMP/EIS. BLM predicts post-leasing impacts from oil, gas or CBM development using historic geologic data to project Reasonably Foreseeable Development ("RFD") scenarios. Site-specific conditions of approval ("COAs") and mitigation plans are developed by a second stage of decisionmaking through further NEPA analysis of oil and gas development prior to approval of the application for permit to drill ("APD").

In addition to environmental review at planning and site-specific stages, some leases are also subject to an intermediate project-level of NEPA analysis to assess the cumulative impacts of the overall development. BLM's new I.M. No. 2003-152 adopted on April 14, 2003, refers to the NEPA analysis on these project-level decisions as "Geographic Area NEPA." The Geographic Area NEPA allows BLM to examine a broader area and combine the analysis of site-specific and cumulative effects in one NEPA document, and one public comment procedure, rather than multiple NEPA documents.[128] The intent of this new policy is to streamline the permitting process through one project level document which addresses oil and gas field development in sufficient detail to reduce the need for additional site-specific analysis.[129] These significant new developments may also trigger a change to the RFD scenario or amendment of the RMP.

Since 1999, with the issuance of the Wyodak FEIS, the Wyoming BLM has been requiring that CBM projects within a field or "geologic play" be submitted as a plan of development ("POD"). In Southwestern Wyoming, some six oil and gas development projects have been completed since 1999, including the Pinedale Anticline Oil and Gas Exploration and Development Project in Sublette County, Wyoming, the Continental Divide/Great Wamsutter Project EIS, the Wyodak EIS (1999), and most recently the PRB FEIS (2003).

B. USFS Planning - Staged Decisions

The Forest Service Planning Handbook provides for two overall phases of decisionmaking. The first level of decision involves development of a Forest Plan and EIS that provides direction for Forest-wide resource management programs, practices, uses and protection measures. The second level of decision implements the Forest Plan. This level of decision making involves site-specific NEPA analysis.[130]

As discussed above at Section II.B.1.b., in the context of oil and gas leasing, USFS planning level decisions are further divided into two steps. First, as to Forest-wide leasing decisions, the USFS follows LRMP planning requirements of 36 C.F.R. Part 219 to determine areas open and closed to leasing, identify alternatives to leasing, project the type and amount of post-leasing activity that is reasonably foreseeable under each alternative and establish lease stipulations and the terms and conditions of leasing.[131]

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128 *Id*. at ¶ 4, p.3.

129 *Id.; see* Laura Lindley, "NEPA and Federal Land Use Planning: 'Streamlining' and its Impact on Resource Management Decisions," *Public Land Law*, Paper No. 2 (Rocky Mt. Min. L. Fdn. 2003).

130 FSM 1922, 53 Fed. Reg. 26807, 26809 (July 15, 1988); *see Ohio Forestry Assoc. v. Sierra Club*, 118 S.Ct. 1665, 1668, 1671 (1998).

131 36 C.F.R. § 228.102(c)(d) (2002).

The second step in the leasing analysis occurs when specific lands (i.e., lease tracts or parcels) are being considered for leasing, at which time the USFS reviews the earlier area or forest-wide leasing decision and verifies that leasing of specific lands has been adequately addressed in a NEPA document and is consistent with the Forest LRMP.[132] DOI may not issue leases on forest lands over the objection of the USDA.[133]

Finally, to implement these leasing decisions, the Leasing Reform Act authorizes the Secretary of Agriculture to regulate site-specific surface disturbing activities under a federal oil and gas lease at the time an application for permit to drill ("APD") is submitted.[134]

C. Tiering

The CEQ regulations and policies of both BLM and USFS allow tiering or cross-referencing of NEPA documents generated at various stages of decisionmaking. The IBLA has held that a site-specific NEPA analysis may tier to the RMP/EIS if the analysis is specific enough to address the site-specific proposal.[135] Tiering has been incorporated into BLM's decisionmaking process by Instruction Memorandum ("I.M.") 99-149 which requires BLM to make a Determination of Land Use Conformance and NEPA Adequacy (referred to as a "DNA" checklist). The checklist is used to review and document conformance of the proposed action with land use plans and to determine whether existing NEPA documents issued at the planning level, project level or site-specific level are adequate to provide environmental analysis of the proposed action. If these documents are not adequate, a new EA or EIS is then prepared on the leasing decision.[136]

BLM's use of existing NEPA analysis to support CBM leasing under the 1985 Buffalo RMP/EIS resulted in a challenge to the February 2000 lease sale by the Wyoming Outdoor Council. The BLM Buffalo Field Office authorized the issuance of leases on the basis of a DNA review determining that the impacts of leasing were adequately analyzed under the 1985 RMP/EIS and the project-specific Wyodak Draft EIS. The Buffalo Field Manager relied on the Tenth Circuit's decision in *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609, 620 (10th Cir. 1987) to reject the protest on the basis that a detailed site-specific analysis of CBM development was not possible at the pre-leasing stage, absent concrete site-specific proposals accompanying the APD. In *Park County*, plaintiffs challenged BLM's issuance of leases under NEPA although an environmental analysis had been prepared prior to leasing and a site-specific EA was conducted prior to granting an APD. The court upheld this staged approach to environmental analysis, stating:

> When BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in a lease area. When an APD is submitted, BLM then

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132 36 C.F.R. § 228.102(e) (2002).

133 30 U.S.C. § 226(h) (2000).

134 30 U.S.C. § 226(g) (2000).

135 *Southern Utah Wilderness Alliance*, 124 IBLA 162 (1992).

136 E.g., in *WOC*, 156 IBLA 377 (June 28, 2002), the IBLA upheld a lease sale supported by a pre-leasing EA prepared by the BLM Pinedale Field Office.

> has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken. . . . In short, the specificity that NEPA requires is simply not possible absent concrete proposals.[137]

In *WOC*, 156 IBLA 347 (April 26, 2002), the IBLA rejected BLM's DNA determination and concluded that neither pre-leasing NEPA analysis of the Buffalo RMP nor the post-leasing Wyodak Project DEIS supported BLM's decision to lease three tracts for CBM development.[138] The oil and gas leasing analysis under the Buffalo RMP/EIS predated commercial development of CBM and the Wyodak Draft EIS did not consider pre-leasing alternatives. The IBLA's decision was overturned on appeal in *Pennaco Energy, Inc. v. U.S. DOI*, 02-CV-116 (D.Wyo. May 30, 2003). The court therein relied on *Park County* to uphold BLM's CBM leasing decisions on the basis of the DNA and determined that the "hard look" test under NEPA is satisfied for the purpose of oil and gas leasing decisions by a general pre-leasing analysis, contemplating that a more detailed site-specific environmental analysis will be conducted upon issuance of an APD.[139]

D. Ripeness and Staged Decisionmaking

Under the ripeness doctrine, BLM and USFS land use plans and planning EISs are only subject to review "as applied" to specific resource decisions, such as oil and gas permitting or timber sales.[140] The Ninth Circuit has determined that the LRMP EIS is "programmatic" in nature and that site-specific impacts need not be fully evaluated until a "critical decision" has been made to act on site development.[141] The D.C. Circuit has upheld the two-stage leasing analysis used by USFS in making oil and gas leasing decisions against a challenge by the Wyoming Outdoor Council.[142] The court determined that a challenge to the Forest-wide leasing EIS was not ripe under NEPA until USFS made site-specific findings under 36 C.F.R. § 228.102(e) and BLM issued a lease. Therefore, until site-specific leasing plaintiffs failed to establish an "irreversible and irretrievable commitment of resources necessary to establish ripeness."[143]

As a result of the application of the ripeness doctrine, judicial and administrative review of BLM and USFS planning decisions and NEPA analysis may be delayed or even time-barred pending application to a site-specific decision. In *Montana Snowmobile Ass'n v. Wildes*, the Ninth Circuit concluded that challenge to an LRMP was barred by the six-year statute of limitations under the APA.[144] The court noted, however, had the action not been time-barred, the

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137 *Park County*, 817 F.2d at 69.

138 *See also WOC on Reconsideration*, 157 IBLA 259 (Oct. 15, 2002) (DNA criticized and analogized to a categorical exclusion).

139 Order at 17-18.

140 In *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 140 L. Ed. 2d 921, 118 S.Ct. 1665 (1998), the Supreme Court determined that, without a specific timber sale, the Forest Plan was not ripe for review.

141 *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1523 (9th Cir. 1992); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994).

142 *Wyoming Outdoor Council v. USFS*, 165 F.3d 43 (D.C. Cir. 1999).

143 165 F.3d 49.

144 *Montana Snowmobile Ass'n v. Wildes*, 2002 U.S. App. LEXIS 2072 (9th Cir., Feb. 5, 2002).

challenge of the LRMP would have been ripe because, upon adoption, the plan immediately impacted the right to operate snowmobiles.

V. WHAT LEVEL OF NEPA ANALYSIS WILL SUPPORT AN OIL AND GAS LEASING DECISION?

A. Overview

Although subsequently overturned on appeal, the IBLA in the *WOC* cases determined that neither the 1985 Buffalo RMP/EIS, nor the post-leasing Wyodak Project EIS was sufficient to support CBM leasing decisions.[145] In IBLA's view, the 1985 Buffalo RMP/EIS predated commercial level CBM development and, therefore, did not analyze these impacts. IBLA noted that this type of pre-leasing analysis of CBM impacts had been undertaken in the then pending PRB EIS.[146] The project-level environmental analysis under the Wyodak Project DEIS was found deficient under NEPA because although it analyzed the impact of some 5,000 CBM project leases (including the subject leases), these leases had already been issued, precluding analysis of pre-leasing alternatives.[147] On appeal, the Wyoming federal court reversed the IBLA and acknowledged that, while IBLA was correct in finding that each NEPA document was individually inadequate, in combination, the two documents satisfied the "hard look" requirement for NEPA analysis at the general leasing level of decisionmaking.[148] In January, 2003, the BLM released the PRB FEIS which includes an extensive pre-leasing analysis of alternatives based on updated RFD scenarios, and specifically considers the impacts of CBM development which had concerned the IBLA. This level of NEPA analysis is illustrative of the type of pre-leasing analysis necessary to support CBM leasing decisions.

B. Use of RFD Scenarios to Determine the Potential for Oil, Gas and CBM Development

Both the BLM and the USFS predict post-leasing impacts from oil and gas development based on RFD scenarios (for "reasonably foreseeable development").[149] RFD scenarios are developed for each leasing alternative in the land use plan EIS. The RFD projects development over the life of the land use plan (10 years for USFS and 10-15 years for BLM) and is based on local geologic data regarding potential oil and gas development and historic drilling records.[150] Additional data has also been made available based on a recent interagency inventory of onshore federal oil and gas resources and reserves including those within the Paradox/San Juan, Uinta/Piceance, Greater Green River and Powder River Basins and the Montana Thrust Belt. This scientific inventory was prepared in January, 2003, by U.S. Departments of Interior, Agriculture and Energy under the Energy Policy and Conservation Act Amendments of 2000,

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145 *WOC*, 156 IBLA at 358-359.

146 *WOC*, 156 IBLA 358 n. 6.

147 *Id.*

148 *Pennaco Energy, Inc. v. U.S. DOI*, (D. Wyo), 02-CV-116-B, Order dated May 30, 2003 at 18.

149 BLM Manual Supplement 1624.2, 1624.22; H-1624-1, III.A; Forest Service Manual Ch. 1950; Forest Service Handbook 1909.15; 36 C.F.R. § 228.102(c)(3)(4) (2002).

150 *See, e.g.*, BLM H-1624-1, Ch. III.B.4, 5; Ch. III.B.8; Illus. 5, examples of RFD scenarios in areas of moderate to low oil and gas potential; Illus. 6, areas of high oil and gas potential.

Pub. L. 106-49 § 604 (the "EPCA Inventory").[151] BLM has instructed land managers to incorporate the EPCA Inventory results into pending RMP amendments and revisions.[152] BLM and USFS use this data to develop RFD scenarios to project the number of wells anticipated to be drilled for the next 10-15 years. The RFD scenarios are then used to analyze potential direct, indirect and cumulative impacts of oil, gas and CBM development.

C. RFD Scenarios --- CBM Development in the Wyoming and Montana PRB

Prior to amendment of PRB land use plans, the RFD projections of the anticipated number of wells proposed under existing plans were a target for those seeking to challenge CBM leasing. In *WOC*, 156 IBLA 377 (June 28, 2002), plaintiffs sought to stay lease sales within the Pinedale Resource Area which exceeded the number of leases set under the RFD scenario for the applicable RMP/EIS. The IBLA denied plaintiffs' stay request, determining that BLM was in the process of amending the Pinedale RMP and that I.M. No. 2001-191 allows leasing during the RMP/EIS amendment if BLM concludes that leasing will not constrain the choice of alternatives under consideration.[153] The BLM Pinedale Field Office had undertaken a pre-leasing environmental analysis which IBLA found adequate to support this conclusion. Exceedence of the RFD scenario was also raised in litigation challenging CBM leasing during amendment of the Billings and Powder River RMPs.[154]

Under the new leasing analysis, BLM and USFS have worked together to develop specific RFD scenarios for CBM development in the Montana and Wyoming PRB. RFD alternative scenarios were set forth in the PRB FEIS and the Montana FEIS, both released by BLM on January 17, 2003. The three alternatives considered in the PRB FEIS include: (1) the proposed action (i.e., development of 51,000 CBM wells over a 10-year period); (2) the proposed action with reduced emission levels and expanded water handling scenario (i.e., replace some gas-fired compressors with electrical compressors and limit discharge of produced water); and (3) no action.[155] The Montana FEIS presents five alternatives, including the no action alternative and four alternatives describing different methods of protecting other land uses and resources affected by CBM activities.[156] Alternative E, the preferred CBM development alternative, proposed CBM leasing subject to resource protection requirements on both a site-specific and ecosystem-specific basis.[157]

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151 BLM has established a Land Use Planning Team to develop guidance on integrating EPCA Inventory into land use plans. Statement of Rebecca Watson, Asst Sec. Land and Minerals Management, DOI, Oversight Hearing, House Resources Subcommittee on Energy and Mineral Resources, June 24, 2003, reprinted at BLM website www.blm.gov.

152 I.M. No. 2003-137, April 3, 2003, "Integration of EPCA Inventory Results into Land Use Planning and Energy Use Authorizations."

153 *See National Wildlife Federation, et al*., 150 IBLA 385 (1999) (oil and gas leasing under RMP/EA was not obsolete because its RFD projections did not go beyond 1991 where the basic data, analysis and reasoning of the EA were still valid.

154 *NPRC v. BLM*, Civil No. CV-0196-BDG-RWA, (D. Mont. 2002).

155 PRB FEIS at xxiii.

156 Montana FEIS at Chapter 2, SUM-6.

157 *Id.*

The USFS ROD on the FEIS and LRMP revision for the TBNG was issued on July 31, 2002, prior to adoption of the final RFD scenarios. USFS deferred CBM leasing decisions pending issuance of BLM's PRB FEIS but has yet to issue a ROD.

On April 30, 2003, the BLM issued RODs amending RMPs within the PRB of Wyoming and Montana to allow leasing on the basis of the RFD scenarios.[158] The RFD scenario for the Buffalo and Platte River RMPs forecasts 51,000 CBM wells over the next 10 years. The RMPs will be amended to include CBM development and to adopt new operational requirements and mitigation measures to reduce the impacts of CBM activities.[159] The RFD scenario for the Powder River and Billings RMPs forecasts drilling 5,400 to 15,600 CBM wells.[160] These RMPs are amended to reflect the new RFD thresholds and to replace essentially all aspects of the plans concerning oil, gas and CBM development.[161] The ROD adopts alternative E, but narrows resource protection to site-specific, rather than eco-system specific.[162] Both the Montana and the Wyoming PRB RODs have been challenged in the Montana federal district court by environmental groups, including the Wyoming Outdoor Council.[163]

D. Lands Open for Leasing

Land use plans are used by both BLM and USFS to determine whether lands are open for leasing and the conditions by which leasing may be allowed.[164] The recent EPCA Inventory of five western oil and gas basins includes an analysis of lease stipulations which condition development based upon (1) whether the lands are open or closed to leasing; and (2) the degree of access afforded by lease stipulations on "open lands." These oil and gas lease stipulations were compiled from both BLM and USFS land use plans within the study area.[165] Approximately 39% of federal lands in these basins were found to be available for federal oil and gas leasing with standard lease stipulations, 25% were available for leasing with more stringent restrictions, and 36% were found to be not available for leasing.[166] RFD scenarios are used by both BLM and USFS to establish lease stipulation and mitigation alternatives.[167]

A determination that lands are available for oil and gas leasing represents a commitment to allow surface use under standard lease terms and conditions unless stipulations construing development are attached to the leases.[168] The criteria for stipulation waiver, exception and

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158 ROD and RMP Amendments for the PRB Oil and Gas Project (April 17, 2003); ROD for the Final Statewide Oil and Gas EIS and Proposed Amendment of the PRB and Billings RMPs (April 17, 2003).

159 ROD and RMP Amendments for PRB Oil and Gas Project at 1, 6.

160 Montana FEIS Vol. II, MIN-5, MIN-6.

161 ROD, Montana FEIS, at 3.

162 *Id*.

163 *Western Organization of Resource Council v. BLM*, Civil No. 03-CV-70 (D. Mont., May 1, 2003).

164 BLM H-1624-1; 36 C.F.R. § 228.102(c)(1)(i)-(iii) (2002). E.g., Appendix O, "RMP and LRMP Decisions on Areas Open or Closed to Leasing," Buffalo RMP, Casper RMP, Thunder Basin National Grassland LRMP, PRB O&G FEIS (Jan. 2003).

165 EPCA Study, Methodology, at 2-8.

166 EPCA Study, Executive Summary at xii - xiii (Jan. 2003).

167 BLM, H-1624-1; USFS, 36 C.F.R. § 228.102(c); USFS, 36 C.F.R. § 228.102(c)(1)(i); FSM 2822.42; 2822.43 (3/17/94); standard lease terms are set forth in Form 3100-11, Offer to Lease and Lease for Oil and Gas, U.S. DOI, BLM (June 1988).

168 *Id*.

modification must also be set forth in the land use plan.[169] Standard lease forms can be modified to provide for no surface occupancy ("NSO"); controlled surface use ("CSU") and timing limitations ("TL").[170] Under BLM's Handbook, land use plan decisions identify: (1) areas open to lease subject to standard stipulation; (2) areas open to leasing subject to minor constraints, such as seasonal restrictions (i.e., "TLs"); (3) areas open to lease, but subject to major, highly restrictive lease stipulations (i.e., NSO); (4) areas closed to leasing; and (5) special lease stipulations that apply to areas open for leasing.[171] BLM is to apply the least restrictive constraint to meet resource protection objectives.[172]

For example, the PRB EIS lists standard lease terms and conditions applied by BLM and USFS to oil, gas and CBM development.[173] The RFD developed under the PRB EIS was also used to establish standard conditions of approval ("COAs") for applications for permit to drill, specifically relating to CBM development.[174] Mitigation measures under the PRB EIS included a Water Management Plan to handle produced CBM water and a suggested form of water well agreement between operators and landowners to assure remediation of possible CBM impacts.[175] These stipulations, COAs and mitigation measures were adopted in BLM's ROD approving plan amendments for the PRB Oil and Gas Project.[176]

The USFS used the cumulative effects analysis under the RFD for the Powder River Basin FEIS to determine whether to authorize CBM leases within the Thunder Basin National Grassland and to set mitigation requirements for lease authorization.[177] The USFS determined that the unique aspects of CBM development would be adequately mitigated using the COAs proposed in the FEIS and existing lease stipulations, lease notices and land use allocations under the 2001 Revised Thunder Basin National Grassland LRMP.

E. New Policies Affecting Lands Open to Leasing and Constraints on Leasing

1. Overview

In determining whether lands are open or closed to leasing, a principal consideration by both BLM and USFS is the wilderness or other protected status of affected lands. Despite recent attempts to settle longstanding wilderness and road policies, these issues remain controversial. Under the Wilderness Act of 1964, 16 U.S.C. § 1131-36 (2000), a roadless area of 5,000 acres or larger is eligible for wilderness classification. Therefore, wilderness and road classifications have been intertwined in the land use planning process.

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169 *Id.*

170 BLM: 43 C.F.R. § 3101.1-2 to 1-4; USFS: 36 C.F.R. § 228.102(c)(1)(ii).

171 BLM Handbook H-1601-1, App C.F. at 16.

172 *Id.*

173 E.g., Appendix P, "Review of Leases, Lease Notices and Lease Stipulations, PRB O&G FEIS (Jan. 2003) lists standard lease terms and special stipulations applied by BLM and the USFS to oil, gas and CBM development.)

174 Powder River Basin FEIS, Appendix "C," Section 1 (COAs); Appendix G (water well agreement--CBM development); Appendix I (water management plan for CBM APDs).

175 *Id.*

176 PRB O&G FEIS, Appendix P-36.

177 FEIS, Proposed Plan Amendment for the Powder River Basin Oil and Gas Project at 5-2 to -5 (Jan. 2003).

Only Congress can designate wilderness areas.[178] However, under the 1982 rules, the USFS uses the planning process to inventory, evaluate and consider roadless areas for possible inclusion by Congress in the National Wilderness Preservation System.[179] The USFS road policy has been completely revised by rule promulgated on January 12, 2001. A comprehensive analysis of road systems within each Forest is required by the new Road Management Rule and Transportation Policy which went into effect on January 12, 2001.[180] The final Roadless Area Conservation Rule prohibiting construction on inventoried roadless areas ("IRAs") was also published on January 12, 2001 at 66 Fed. Reg. 3244. This rule was enjoined on Monday, July 14, 2003, by order of the Wyoming federal district court.[181] Under USFS interim roadless policies in effect during this injunction, the Chief of the Forest will make determinations regarding road construction on IRAs pending resolution of the litigation.[182]

Nationwide, the BLM has 15.8 million acres of wilderness study areas ("WSAs") which are managed under RMPs so as not to impair wilderness characteristics and values pending consideration by Congress. Pursuant to § 603 of FLPMA, public lands were to be inventoried by BLM and those with wilderness characteristics were designated as WSAs and recommended to the President for possible Congressional designation as wilderness areas. These WSA recommendations were to be finalized by 1991, i.e., within 15 years of enactment of FLPMA. Therefore, with respect to most current RMP revisions, including those in the Montana and Wyoming PRB, the plan objective is to protect the wilderness characteristics of WSAs until Congress determines whether to designate these lands under the Wilderness Act of 1964. WSAs are not open to new leasing and existing oil and gas leases must be developed under BLM's interim management policy to prevent impairment to wilderness characteristics.[183] Under a controversial change in the BLM's interim wilderness policy guidelines issued on January 10, 2001, BLM allowed land managers to inventory wilderness characteristics of public land under § 201 FLPMA and to use the plan amendment process to propose the wilderness inventory areas ("WIAs") as new WSAs. Public lands in Utah have been the focus of debate regarding BLM's wilderness reinventory.

2. Utah's Wilderness Reinventory

In Utah, the issue of WSA designation was reopened during the Clinton Administration and, until April of this year, was a scoping issue and planning priority for RMP revision. In 1996, then Secretary of Interior Babbitt initiated a "reinventory" of public lands in Utah under § 201 of FLPMA and identified some 2.6 million acres of federal land as "wilderness inventory areas" ("WIAs").[184] This reinventory process was not subject to public comment or NEPA analysis and was challenged by the State of Utah and the Utah Association of Counties. The

178 16 U.S.C. § 1131-36 (2000).
179 36 C.F.R. § 219.17 (1982).
180 Road Management Rule, Jan. 12, 2001, 66 Fed. Reg. 3206; Transportation Policy, Jan. 12, 2001, 66 Fed. Reg. 3219.
181 *Wyoming v. USDOA,* Civil No. 01-CV-886B (D. Wyo.).
182 66 Fed. Reg. 44111, Aug. 22, 2001; 66 Fed. Reg. 65796, Dec. 20, 2001.
183 BLM Handbook H-8550-1, Interim Management Policy for Lands Under Wilderness Review (7-5-95).
184 *See* Utah Wilderness Inventory Report, BLM, 1999.

Utah federal district court initially enjoined the reinventory; however, this injunction was overturned by the Tenth Circuit, allowing the reinventory to proceed to completion in 1999.[185]

The wilderness reinventory was a key scoping issue in Utah's pending BLM land use revisions for the Vernal RMP and the Price RMP, initiated in 2001. As a result of this planning process, BLM was considering the designation of WIAs for protection as "new WSAs" pursuant to BLM's interim management policy ("IMP") for lands under wilderness review.[186] The RMP revision process provided the first opportunity for public comment and NEPA review of Utah's WIAs and resulted in a range of comments.[187]

On Friday, April 11, 2003, the Utah wilderness reinventory was set aside as a result of a settlement between Secretary of Interior Norton and Utah's Governor Michael Leavitt. *Utah v. Babbitt* (now *Utah v. Norton*), No. 96CV 870-B (D. Utah). The matter was appealed to the Tenth Circuit Court of Appeals on June 16, 2003. The Utah settlement removes wilderness reinventory lands from designation as new WSAs through the current land use planning process. However, the revised RMPs may protect values identified in the 1999 wilderness inventory by other special management designation and mitigation measures. In a letter dated April 3, 2003 to Senator Robert Bennett (R-Utah), Secretary Norton confirmed that the land use planning process can be used to determine how best to manage lands with wilderness values in the context of "multiple use."

As planning proceeds, the Utah BLM can protect the wilderness characteristics of the reinventory lands by preventing "unnecessary and undue degradation" or by designating areas of critical environmental concern ("ACECs"). Therefore, reinventory lands which received significant public support for wilderness designation during public scoping of Vernal and Price RMPs may still be protected in some manner without formal WSA classification. These types of protection will need to be more consistent with BLM's multiple use mandates but may include closure of lands to certain uses and lease stipulations and mitigation alternatives to those areas which remain open to use.[188] Draft RMP/EIS are scheduled for release in September, 2003 for the Vernal RMP and December, 2003 for the Price RMP.[189]

The Utah settlement may also impact BLM's wilderness policy nationwide in that BLM has agreed not to apply to interim management policy to lands other than FLPMA § 603 WSAs and has generally agreed not to establish WSAs under FLPMA's § 201 inventory process.[190] With respect to lands already designated as WSAs, the Tenth Circuit recently ruled that BLM has "an immediate and continuous obligation" to manage WSAs so they remain eligible for wilderness classification.[191]

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185 *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998).
186 *See* Pre-Plan analysis for Price RMP, April 14, 2001.
187 *See* RMP Scoping Summaries, BLM website www.pricermp.com and www.vernalrmp.com.
188 *See* BLM Handbook H-1624-1.
189 BLM Planning Newsletter, Issue 3, June, 2003, available on BLM website, www.blm.gov.
190 Utah Settlement at 13-15.
191 *SUWA v. Norton*, 301 F.3d 1217 (10th Cir. 2002).

3. R.S. 2477 Rights of Way--"Recordable Disclaimer Rules"

A related issue which impacts whether BLM public lands are open or closed to lease is the classification of roads. The designation of county or state roads across public lands may impact roadless characteristics and the eligibility of an area for designation under the Wilderness Act. R.S. 2477 was an 1866 Act of Congress, repealed by FLPMA in 1976, which granted rights of way to state and local governments "for the construction of highways" on federal lands not reserved for public uses. Many roads were not recorded in title records at the time of repeal of R.S. 2477, complicating the issue of what constituted a road right of way in 1976. Disputes over title lead the State of Utah to file a notice of intention to sue the BLM to seek title to some 15,000 state and county roads.

On January 6, 2003, BLM adopted "recordable disclaimer rules"[192], to clarify the process by which BLM can disclaim a right of way across public lands subject to state and county roads. On April 10, 2003, the State of Utah and the DOI reached agreement ("MOU")[193] on the administration of R.S. 2477 rights of way in Utah and the application of the new rules. The MOU establishes an "acknowledgement process" by which Utah's State and local government can claim title to roads on public lands which existed prior to 1976. The MOU gives priority to state and county applications for R.S. 2477 classifications and BLM disclaimer but limits application of the rules to exclude National Parks, Refuges, Wilderness and WSAs. In addition, the MOU is limited in scope to lands managed by the DOI and does not apply to National Forest lands managed by the USDA.[194] Although both the Vernal and Price BLM Field Offices in Utah assert the classification of roads under R.S. 2477 is an issue outside the scope of the RMP revisions, BLM's RMP/EISs will need to address road designations in determining how to protect wilderness values of lands within the planning area.[195]

The MOU has come under attack in Congressional deliberations on the 2004 Interior Appropriations Bill, H.R. 2691. On Thursday, July 17, 2003, Representative Mark Udall (D. Colo.), sought to amend the bill to prohibit the use of taxpayer funds to implement BLM's recordable disclaimer rules.[196] This rider would have effectively nullified the R.S. 2477 MOU. The Udall amendment was further amended by Rep. Charles Taylor to apply the exemptions negotiated under the Utah MOU to all BLM lands. The amendment exempts from the recordable disclaimer rules rights of way located within National Parks, National Wildlife Refuges, Wilderness Areas and Wilderness Study Areas.[197]

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192 68 Fed. Reg. 494.

193 Available from BLM website at www.blm.gov.

194 SUWA has suggested that the 10th Circuit's June 27, 2003 dismissal of an appeal by three Utah Counties in *SUWA v. BLM*, Docket No. 01-4173, undermines the settlement agreement. However, the settlement specifically excludes wilderness areas and, therefore, does not appear to be impacted by the 10th Circuit's decision, which in any case was dismissed on jurisdictional, not substantive, grounds. The Utah federal district court ruled that three Utah counties improperly attempted to construct roads through federal wilderness claiming the roads were public under RS 2477. *SUWA v. BLM, (*Civil No. 96-CV-8366, D. Utah),

195 *See* Price RMP Planning Bulletin No. 2, May, 2002.

196 H.R. 2691, Interior Dept. Appropriations FY 2004 bill.

197 The House approved H.R. 2691, as amended, by a vote of 268-152.

4. USFS Road Management Rule and Transportation Policy

On January 12, 2001, the USFS initiated a new Road Management Rule and Transportation Policy requiring each National Forest to develop a Forest Transportation Atlas inventorying all roads within each National Forest.[198] The rule also requires the USFS to identify unneeded roads that should be decommissioned.[199]

As set forth above, under the current planning rules at 36 C.F.R. § 219.17, USFS inventories and evaluates roadless areas for possible wilderness designation by Congress. The USFS Transportation Policy amends the Forest Service Manual to set interim requirements for new road construction in sensitive unroaded and roadless areas until a comprehensive analysis of the road system can be incorporated into the Forest Plan.[200] The interim requirements apply to both "inventoried roadless areas" and "unroaded areas" contiguous to inventoried roadless areas.[201]

The Road Management Rule became effective January 12, 2001. The Transportation Policy also became effective on January 12, 2001, but has been modified by the Interim Directive published on December 20, 2001, 66 Fed. Reg. 65796. This Interim Directive removes "contiguous unroaded areas" from the Roadless Rule pending Forest Plan amendment or revision.[202]

5. The Roadless Area Conservation Rule ("Roadless Rule")

a. Overview

Under the USFS 1982 planning rules, roadless areas were evaluated on a "local" basis by Forest Supervisors for each LRMP to determine their wilderness characteristics and to make recommendations regarding potential wilderness areas.[203] The new roadless rule promulgated on January 12, 2001 and currently enjoined, imposes a nationwide prohibition on road construction, reconstruction and timber harvest in inventoried roadless areas.[204] Other activities which may affect roadless areas were left to local land management planning under LRMPs.[205]

Under the new rule, "inventoried roadless areas" are defined as "undeveloped areas typically exceeding 5,000 acres" that met the criteria for wilderness consideration under the Wilderness Act and that were inventoried during the National Roadless Area Review Evaluation ("RARE") process initiated in 1972 and RARE II completed in 1979.[206] The Roadless Rule prohibits construction or reconstruction of roads in inventoried roadless areas on National Forest System Lands unless the road falls within one of several exceptions.[207] Included among these

198 66 Fed. Reg. 3206, 3207 (Jan. 12, 2001).
199 66 Fed. Reg. 3207; 36 C.F.R. § 212.5(b).
200 66 Fed. Reg. 3219, 3220 (Jan. 12, 2001).
201 *Id*. at 3236.
202 *Id*. at 65797.
203 36 C.F.R. § 219.17 (1982).
204 *Id*.
205 66 Fed. Reg. 3244 (Jan. 12 2001).
206 65 Fed. Reg. 30276, 30287.
207 36 C.F.R. § 294.12, 294.13; 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001).

exceptions is the construction of roads needed "in conjunction with the continuation, extension or renewal of a mineral lease on lands that [were] under lease" on the date of publication of the rule.[208]

The Roadless Rule also permits "cutting, sale or removal of timber incidental to the implementation of a management activity not otherwise prohibited by this subpart."[209] The preamble to the rule sets forth several examples of management activities allowed under this exemption.[210]

b. History/Status of Roadless Rule

The restrictions on road construction in roadless areas began as a temporary suspension imposed on January 28, 1998. 63 Fed. Reg. 4351. This was extended to an 18 month moratorium on road construction effective March 1, 1999.[211] Following NEPA analysis of the policy in a DEIS, the Clinton Administration proposed the new rules regarding roadless areas on May 10, 2000.[212] After issuance of an FEIS, the final Roadless Rule published on January 12, 2001, 66 Fed. Reg. 3244, prohibited the building of roads on some 54.3 million acres of inventoried roadless areas.[213] The effective date was extended until May 12, 2001 to allow for review by the Bush Administration.

On May 10, 2001, enforcement of the rule was preliminarily enjoined by the federal district court for the District of Idaho in *Kootenai Tribe of Idaho v. Venneman*, 2001 W.L. 1141275 at *2 (D. Idaho May 10, 2001). This injunction was vacated by the Ninth Circuit in *Kootenai Tribe of Idaho v. Venneman*, 313 F.3d 1094, 1125-26 (9th Cir. 2002). On April 14, 2003, the Ninth Circuit supported the ruling of the three-judge panel and remanded the case to the Idaho federal district court. On Monday, July 14, 2003, enforcement of the Roadless Rule was once again enjoined, this time by the Wyoming federal court. In *Wyoming v. USDOA*, Civil No. 01-CV-86B, (D. Wyoming), the court enjoined the Roadless Rule finding that the USFS "was driven by political haste" to promulgate the rule despite inadequate opportunity for public review and comment.[214] In addition, the court found that the Roadless Rule violated the Wilderness Act, finding, "In this case, the Forest Service designation of 58.5 million acres as 'roadless areas' was a thinly veiled attempt to designate 'wilderness areas' in violation of the clear and unambiguous process established by the Wilderness Act for such designation."[215]

These actions are but two of several lawsuits which have challenged the Roadless Rule. The most active pending case is in North Dakota before Judge Daniel L. Hovland in which oral argument on motions for summary judgment are scheduled on August 28, 2003.[216] Due to this pending litigation, the USDA imposed interim directives applicable during injunction, first

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208 36 C.F.R. § 294.12(b).
209 36 C.F.R. § 294.13(2).
210 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001).
211 64 Fed. Reg. 7290, Feb. 12, 1999.
212 65 Fed. Reg. 30276.
213 66 Fed. Reg. 3244 at 3285.
214 Order at 99.
215 *Id.* at 100.
216 Consolidated cases *North Dakota v. Veneman*, Civil No. 01-CV-87, and *Billings County v. USDA*, Civil No. 01-CV-45 (D. ND).

adopted on July 27, 2001 and revised on December 20, 2001. These interim directives appear to be in operation once again. These directives remove authority from the local Forest Supervisors and reserve to the Chief of the Forest authority to make decisions regarding: (1) road construction or reconstruction in National Forests until a roads analysis is completed and incorporated into the LRMP; and (2) timber harvesting pending revision or amendment of the LRMP to consider protection of inventoried roadless areas.[217]

On July 10, 2001, the USFS published an Advanced Notice of Proposed Rulemaking ("ANPR") to allow further comment on the roadless areas policies.[218] More than 700,000 comments were received on the ANPR. Previous to the most recent July 14th injunction, on June 9, 2003, the Bush Administration announced that the Roadless Rule would go into effect, subject to certain exceptions. The Chugach and the Tongass National Forests were to be exempted from the Roadless Rule in a future rulemaking.[219] In addition, the USDA announced that a new rule would be proposed to allow Governors to apply for exemptions for the protection of health and safety, reduction of fire hazard, restoration of wildlife habitat, maintenance of dams and other facilities and to provide access to private property.[220]

On July 15, 2003, the USFS published an advanced notice of proposed rulemaking ("ANPR") and a proposed rule regarding the Tongass and Chugach National Forests. The ANPR solicits comments on the applicability of the Roadless Rule to both Forests.[221] The proposed rule exempts the Tongass National Forest from application of the Roadless Rule.[222] These actions were based in part on an agreement to settle litigation challenging application of the Roadless Rule as a violation of the Alaska National Interest Lands Conservation Act ("ANILCA") [223] The settlement will exempt the Tongass National Forest from the Roadless Rule, but maintains roadless areas defined under the 1997 Tongass Forest Plan, recently upheld by federal district court of Alaska. Some 300,000 roadless acres within the Tongass National Forest would be made available for timber harvest under the recent revision to the LRMP.

6. Species Diversity--Ecological Sustainability

As shown in the recent EPCA Inventory, the majority of constraints imposed on leasing currently result from timing limitations which are generally imposed to protect plant and animal communities and habitat.[224] Recent and proposed changes to the USFS planning rules emphasizing "ecological sustainability" principles may result in more stringent lease stipulations, and mitigation requirements and, in some cases, could result in closure of lands to leasing.

The NFMA requires that LRMPs "provide for a diversity of plant and animal communities based on suitability and capability of the specific land area to meet overall multiple use objectives . . .".[225] Pursuant to NFMA and in furtherance of the requirements of the

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217 66 Fed. Reg. 44111 (Aug. 22, 2001).
218 66 Fed. Reg. 35918.
219 USDA News Release No. 0200.03, website www.usda.gov/news/releases.
220 *Id.*
221 ANPR, 68 Fed. Reg. 41864, July 15, 2003.
222 Proposed rule, 68 Fed. Reg. 41865, July 15, 2003.
223 *Alaska v. USDA,* Civil No. A01-39 CV (D. Alaska).
224 EPCA Inventory at xvi, timing limitations impact 57% of oil reserves and 62% of natural gas resources.
225 16 U.S.C. § 1604(g)(3)(B).

Endangered Species Act of 1973[226], USFS current planning rules use a species "viability" standard to maintain viable populations of vertebrate species in the planning area.[227] Certain species present in the area are identified and selected as management indicator species and are monitored to indicate the effects of management activities.[228] Currently, all management prescriptions must "provide for and maintain a diversity of plant and animal communities to meet overall multiple-use objectives.[229]

By contrast, the 2000 rules give first priority in planning to ecological sustainability.[230] The rules mandate that USFS must ensure that plans provide for maintenance or restoration of ecosystems and provide complex guidance on how to assess ecosystems and species diversity.[231] The proposed 2002 rule makes ecological sustainability one of three co-equal components of sustainability along with social and economic elements.[232] The proposed rule allows USFS greater discretion in implementing ecological sustainability by one of two possible options. The first, more manageable option assures diversity at two levels: eco-system and species.[233] The second option, assesses diversity at ecosystem and species levels as part of a broader planning area, including multiple geographic areas and analysis of surrounding landscapes beyond the boundaries of the National Forest. This option appears to go beyond USFS current jurisdiction under the NFMA.[234]

VI. POST-LEASING, SITE-SPECIFIC ENVIRONMENTAL ANALYSIS

Following planning level oil, gas and CBM leasing, both land management agencies require further NEPA analysis of site-specific "implementation decisions" such as approval of the APD and pipeline routing.[235] Under USFS regulations, no permit to drill on a federal oil and gas lease within National Forest System Lands may be granted without the USFS analysis and approval of a surface use plan of operations. The operator is required to submit a proposed surface use plan of operations as part of an APD to the appropriate BLM office for forwarding to the USFS.[236] Although separate NEPA analysis is required prior to BLM's issuance of an APD or USFS approval of a surface plan of operations, the site-specific NEPA analysis may tier off or cross-reference the land use plan EIS if the analysis is specific enough to address the site-specific impacts.[237]

The operator is required to provide BLM with a surface use program and a drilling plan, including environmental mitigation measures as required by Onshore Oil and Gas Order No. 1.[238] The USFS also requires that the surface use plan of operations submitted on Forest land

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226 16 U.S.C. §§ 1531-1544 (2000).
227 36 C.F.R. § 219.19 (1982).
228 36 C.F.R. § 219.19 (a)(1) (1982).
229 36 C.F.R. § 219.27 (1982).
230 36 C.F.R. § 219.19 (2)(a) (2000).
231 36 C.F.R. § 219.20 (2000).
232 36 C.F.R. § 219.2(b)(6); § 219.13 (proposed 2002).
233 36 C.F.R. § 219.4(b) (option 1).
234 *See* proposed definition of "plan area," proposed at 36 C.F.R. § 219.13(b)(1)(i)(ii).
235 *See* BLM Handbook H-1601-1, Appx. C.II.f; 36 C.F.R. § 228.106.
236 36 C.F.R. § 228.106.
237 *SUWA*, 124 IBLA 162 (1992).
238 43 C.F.R. § 3162.3 (2001).

contain the information specified by the BLM Onshore Oil and Gas Order in effect when a surface use plan of operations was submitted.[239] Before approving the APD/surface use plan, BLM and the USFS will conduct a NEPA analysis to determine the site-specific conditions under which exploration and development will be allowed on specific leases and whether to grant waivers, exceptions or modifications. Site-specific activities must also conform to the RMP and Forest Plans.[240] In turn, a site-specific environmental analysis may generate information which is incorporated into the RMP through the "maintenance" process. Under the USFS proposed 2000 rules, LRMPs would be automatically updated by a site-specific project decision.[241]

BLM and USFS have yet to issue APDs or site-specific decisions to allow oil, gas or CBM drilling operations under the land use plan in the Powder River Basin revised under the RODs for the Montana FEIS and the PRB EIS. However, the BLM has issued new policy guidance to improve the process for issuance of APDs. I.M. 2003-152 as released on April 14, 2003, allows the processing of multiple APD applications with a master drilling plan. The BLM Buffalo Field Office refers to Multiple PAD packages as "Plans of Development" and has developed a "Coalbed Methane Well APD and ROD Preparation Guide."[242]

VII. MONITORING, EVALUATION AND MODIFICATION OF LAND USE PLANS

A. Overview -- CEQ Rules

Land use plan monitoring is authorized by NEPA, NFMA and FLPMA to assure implementation and to determine the need for plan amendment. NEPA does not mandate the implementation of the environmentally preferable alternative identified in the land use plan EIS.[243] However, if mitigation procedures are incorporated by BLM or USFS into the land use plan EIS and RODs, CEQ regulations require that "a monitoring and enforcement program shall be adopted and summarized . . . for any mitigation."[244] Although CEQ regulations do not mandate mitigation, if the agency incorporates mitigation in the ROD, it is part of the decision to be implemented.[245] Both BLM and USFS incorporate mitigation measures under their land use plans to address oil, gas and CBM development. These measures include standard lease stipulation, COAs and mitigation plans to address impacts on other resources. In addition, the RMP and LRMP revisions appear to be moving towards "Adaptive Environmental Management" ("AEM") and collaborative decisionmaking.[246]

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239 36 C.F.R. § 228.106(c).

240 43 C.F.R. § 3162.5-1; BLM Handbook H-1624-1(b)(3); H-1602, Appx. C.II.f; 36 C.F.R. § 228.107, 108.

241 36 C.F.R. § 219.10(d)(3) (proposed 2002).

242 Attachment to I.M. 2003-152, at 3.

243 *See Vermont Yankee Nuclear Power Plant v NRDC,* 435 U.S. 519, 518 (1978) (holding enforceable requirements of NEPA are "essentially procedural").

244 40 C.F.R. § 1505.2(c) (2002).

245 *See generally,* Denise Dragoo, "What's New with NEPA?" 47 Rocky Mtn. Min. L Inst. § 22 at 22-9 (2001).

246 AEM was introduced by CEQ in 1997 as a method of continuous monitoring and adaptation extending beyond the preparation of an FEIS and ROD. CEQ, "The National Environmental Policy Act: A Study of its Effectiveness After Twenty-Five Year" (1997).

B. BLM RMPs

BLM is required to adopt a monitoring plan and schedule to evaluate the implementation of land use decisions under the RMP.[247] The ROD for the Montana FEIS and RMP amendments requires monitoring of: (i) the land use plan; (ii) site-specific implementation projects; and (iii) resources impacted by oil, gas and CBM development.[248] The land use plan is monitored to ensure compliance with decisions, monitor the effectiveness of the plan and the validity of the decisions.[249] At the project level, oil and gas operations, permit and lease compliance is monitored by physical inspection and enforcement, including the sampling of water quality at discharge points and produced water.[250] A resource monitoring table attached to the ROD as Appendix C lists a series of items to be monitored for such resources as air quality, water quality and cultural resources. The ROD then establishes an interagency work group for CBM development. Affected federal, state and local governments appoint representatives to work with BLM in the PRB to develop monitoring and mitigation measures to ensure plan compliance.[251]

The ROD for the Wyoming PRB EIS adopts a comprehensive Mitigation, Monitoring and Reporting Plan ("MMRP") incorporated into the ROD at Appendix E. The MMRP states that due to the uncertainties associated with CBM development, "mitigation measures may need to be modified as development evolves."[252] The BLM Buffalo Field Manager is designated to implement the MMRP by establishing a Power River Basin Working Group consisting of BLM and cooperating federal, state and local agencies to develop and implement monitoring plans.

The Pinedale Field Office has gone the furthest towards applying AEM in the context of oil and gas leasing, under its ROD for the Pinedale Anticline Project.[253] The Pinedale ROD implements restrictive resource protection measures through a monitoring and implementation plan. AEM teams comprised of citizen groups, operators and federal, state and local government agencies are appointed to develop and monitor resource-specific mitigation plans. As the result of a legal challenge[254], the AEM work groups have adopted a charter under the Federal Advisory Committee Act.[255]

C. Modification of USFS Forest Plans

Monitoring is a requirement under USFS current planning regulations. Among other issues, the rules require the plan to evaluate the effects of forest plan management on adjacent land, resources and communities,[256] determine population trends of the management indicator species and habitat changes[257] and measure the effects of prescriptions, including significant

247 43 C.F.R. § 1610.4-9; BLM Handbook, H-1601, V, VI.
248 ROD, Montana FEIS at 11.
249 *Id.*
250 *Id.*
251 ROD, Montana EIS at 14.
252 ROD PRB EIS, Appx E, E-1.
253 Pinedale Anticline Oil and Gas Explor. & Dev. Project, ROD (July 27, 2000).
254 *Yates Petroleum Corp. v. Norton*, Civil No. 00-CV-206J (D. Wyo. filed Nov. 6, 2000).
255 5 U.S.C. App 2 (2000).
256 36 C.F.R. § 219.7(f).
257 36 C.F.R. § 219.19(a)(6).

changes in land productivity.[258] The 2000 regulation requires each Forest Plan to incorporate a plan monitoring strategy for monitoring and evaluation of ecological sustainability.[259] The 2002 proposed rule drops references to ecological sustainability in favor of monitoring and evaluation of the overall effects of activities on achieving plan objectives and adaptive management.[260]

The ROD for the TBNG LRMP Revision specifically requires an adaptive management approach to LRMP monitoring and implementation.[261] The ROD directs the Forest Supervisor to work with the State of Wyoming to develop an MOU to establish a scientific technical review committee to develop a monitoring implementation plan. The committee would include representatives from the Wyoming Game and Fish Commission, the University of Wyoming, USFS and the Wyoming Department of Agriculture.[262] The monitoring implementation plan will describe monitoring methods for LRMP implementation and effectiveness. The committee will assist in general monitoring and will issue interim reports in two to five years to determine the need for LRMP amendment.[263]

VIII. CONCLUSION

BLM and USFS are currently in the process of major revision of their land use plans in areas critical to energy production. In the Powder River Basin, plans originally adopted prior to commercial production of CBM are now being updated to address those impacts. Both agencies' land use planning processes involve similar approaches to analysis of oil, gas and CBM leasing decisions. The land use plan determines lands open and closed to leasing and the terms and conditions of leasing under a standard lease form, additional lease stipulations and mitigation alternatives to meet multiple use and sustainability objectives. USFS's new planning priorities for ecological, social and economic sustainability will impact the availability of lands for leasing and the terms and conditions under which leases may be issued. The new wilderness policies of both BLM and USFS will impact the availability of lands for oil, gas and CBM leasing and associated ancillary facilities, including roads. However, so long as lands are open for leasing under existing land use plans, these areas can continue to be leased during the plan revision if leasing will not constrain the reasonable choice of alternatives under consideration.[264]

Although USFS's new planning rules allow additional discretion to determine what level of NEPA analysis will accompany leasing decisions, both BLM and USFS must confirm that the agency has taken a "hard look" at the environmental impacts of the decisions. The focus of this "hard look" appears to be moving from plan-level analysis to the site-specific decisions implementing land use plans. Relying on the 10th Circuit decision in *Park County*, the Wyoming federal district court overturned the IBLA's *WOC* decision and has determined that, at the plan level, this "hard look" requirement "is a more general requirement than at the project-level stage."[265] In addition, under staged decisionmaking, RODs and associated NEPA analysis

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258 36 C.F.R. § 219.12(k)(2); FSH 1909.12 ch. 6.2-monitoring requirements (8/3/92).
259 36 C.F.R. § 219.11 (2000).
260 Proposed 36 C.F.R. § 219.11 (2002).
261 ROD TBNG LRMP Revision 2002 at 44.
262 *Id.*
263 *Id.*
264 I.M. 2001-191 (Aug. 6, 2001).
265 *Pennaco Energy, Inc., v. U.S. DOI,* Case No. 02-CV-116 (D. Wyo.), Order dated May 30, 2003 at 18.

are unripe for review until site-specific decisions are taken to implement these plans.[266] On the other hand, the statute of limitations can run on a challenge to plan elements by the time a site-specific action is taken.[267]

As a result, operators and the public at large will need to be involved earlier in the agency decisionmaking process regarding leasing and plan level decisions. Under current planning policies, challenge of planning level lease stipulations and mitigation requirements may be delayed until the operator submits an application for permit to drill or other site-specific application for approval by the land management agency. In addition, BLM and USFS new procedural regulations provide additional barriers to operators or members of the public who fail to fully participate by commenting on NEPA documents and by protesting prior to the plan decision. Therefore, operators should participate in the planning process as early as possible and comment and protest on planning documents prior to adoption to preserve their right to judicial review.

266 *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998).

267 *Montana Snowmobile Ass'n*, 2002 U.S. App. LEXIS 2072 (9th Cir., Nov. 7, 2001).

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