

# LOS PADRES FORESTWATCH

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## BY FACSIMILE

November 30, 2005

Mike Pool  
California State Director  
Bureau of Land Management  
2800 Cottage Way, Suite W-1834  
Sacramento, CA 95825-1886

Re: **PROTEST OF THE INCLUSION OF PARCELS ALONG THE BOUNDARY OF THE LOS PADRES NATIONAL FOREST, THE BITTER CREEK NATIONAL WILDLIFE REFUGE, THE CUYAMA RIVER, THE CARRIZO PLAIN NATIONAL MONUMENT, AND WITHIN THE WIND WOLVES PRESERVE, IN THE DECEMBER 14, 2005 COMPETITIVE OIL AND GAS LEASE SALE**

Dear Mr. Pool:

On behalf of Los Padres ForestWatch ("ForestWatch"), we respectfully protest the inclusion of 11 proposed lease sale parcels on Bureau of Land Management ("BLM") lands on the boundary of the Los Padres National Forest, the Cuyama River, the Bitter Creek National Wildlife Refuge, the Carrizo Plain National Monument, and within the Wind Wolves Preserve. For the reasons stated below, we request that these parcels be withdrawn from the December 14, 2005 lease sale. This protest is filed pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3.

The BLM proposes to offer at the scheduled December 14, 2005 Competitive Oil & Gas Lease Sale certain parcels located in the BLM's Caliente Resource Area. ForestWatch protests the inclusion of the following 11 parcels:

12-05-08	12-05-18	12-05-20
12-05-21	12-05-22	12-05-23
12-05-24	12-05-25	12-05-26
12-05-27	12-05-28	

These parcels contain important habitat for rare plants and animals protected under various state and federal laws and regulations, provide recreational access to the Los Padres National Forest and Carrizo Plain National Monument, and contain sacred assemblages of Native American heritage resources. Despite the high sensitivity of these lands, the BLM has failed to conduct the necessary level of environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, the Federal Lands Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, the Clean Air Act



(“CAA”), 42 U.S.C. §§ 7401 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*

In addition, the BLM failed to adequately notify the public of the lease sale and the method by which interested parties could file a timely protest of the inclusion of certain parcels in the lease sale. This failure to follow internal procedures is arbitrary and capricious, and must be set aside in accordance with the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*

Therefore, ForestWatch requests that the BLM withdraw these parcels from leasing until the agency has conducted the appropriate studies and has fully complied with applicable law.

## **STANDING**

ForestWatch is a nonprofit 501(c)(3) conservation organization working to protect and restore the natural and cultural heritage of the Los Padres National Forest and other public lands along California’s Central Coast. ForestWatch is a known and active participant in public land management in central California, with a demonstrated interest in energy development on California’s BLM lands, including lands and resources managed by the Bakersfield Field Office. ForestWatch has over 150 members and over two dozen partner organizations that use the disputed lands for recreation and other purposes, and that are concerned with protecting wildlife, scenery, water quality, heritage sites, and other values.

ForestWatch is concerned about the impacts of mineral leasing and development on the Los Padres National Forest. We are equally concerned about oil and gas development that affects nearby public and private lands, such as the Carrizo Plain National Monument, the Wind Wolves Preserve, the Bitter Creek National Wildlife Refuge, other lands administered by the BLM, and the public trust lands that encompass the Cuyama River.

## **BACKGROUND**

On October 28, 2005, the BLM issued a Notice of Competitive Lease Sale (“Notice”), announcing the auctioning of 28 parcels containing over 19,000 acres of federal lands in the State of California. Eleven of these parcels are located within, or along the boundaries of, sensitive resource areas and popular recreation sites in the Los Padres National Forest, the Carrizo Plain National Monument, the Bitter Creek National Wildlife Refuge, the Wind Wolves Preserve, and the Cuyama River.

The Los Padres National Forest is home to more endangered, threatened, and sensitive species than any other national forest in the nation. It is perhaps most well-known for its active role in the California Condor Recovery Program. The forest also provides diverse recreation opportunities like hiking, camping, hunting, angling, horseback riding, and mountain biking to nearby communities. The subject parcels along the forest boundary (12-05-20, 12-05-21, 12-05-24, 12-05-25, and 12-05-26) provide similar resource values and crucial habitat linkages to adjacent wildlife preserves. Several of the parcels are clustered in Santa Barbara Canyon, which serves as a gateway to the Dick Smith and San Rafael Wilderness Areas.

The Carrizo Plain National Monument lies immediately north of the Los Padres, and contains the largest concentration of threatened and endangered plant and animal species in the state. According to the Presidential Proclamation that created the monument in 2001, mineral leasing and development are incompatible with monument resources. Two of the disputed parcels (12-05-08 and 12-05-23) occur immediately adjacent to the monument boundary, and would detract from monument values.

The upper stretch of the Cuyama River is considered by the U.S. Forest Service to be one of only a few “Areas of High Ecological Significance” in the region. It provides habitat for several sensitive species, and flows directly through one of the disputed parcels (12-05-28).

The Bitter Creek National Wildlife Refuge was purchased by the federal government in 1985 to preserve critical condor foraging and roosting habitat in the southern San Joaquin Valley. It’s the site where the last female condor was trapped in 1986. Two of the disputed parcels (12-05-20 and 12-05-22) are located on the refuge boundary.

The Wind Wolves Preserve is the largest privately-owned nature preserve on the West Coast. It links the Bitter Creek National Wildlife Refuge and the Carrizo Plain to the Los Padres National Forest. One of the disputed parcels (12-05-18) is located inside the boundary of this wildlife preserve.

## STATEMENT OF REASONS

### **I. The BLM Failed to Prepare an Environmental Impact Statement for the Lease Sale, in Violation of NEPA.**

NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). The BLM’s decision to lease specific lands constitutes a major federal action and an irreversible and irretrievable commitment of resources for which an EIS must be prepared.

Instead of preparing an EIS for this lease sale, the BLM merely prepared a Documentation of Land Use Plan Conformance and NEPA Adequacy (“DNA”), dated October 28, 2005. In the DNA, the BLM concludes that the sale is sufficiently analyzed and provided for in the Caliente Resource Management Plan (“CRMP”), dated May 5, 1997. However, because significant new information and circumstances have transpired since this initial environmental analysis, the BLM must prepare a supplemental EIS before proceeding with the lease sale.

NEPA requires federal agencies to take a hard look at new information or circumstances concerning the environmental effects of a federal action, even after an initial environmental analysis has been prepared. Agencies must supplement the existing environmental analysis if the new circumstances “raise significant new information relevant to environmental concerns.” Portland Audubon Society v. Babbitt, 998 F.2d 705, 708-09 (9<sup>th</sup> Cir. 2000). Specifically, an agency “must be alert to new information that may alter the results of its original environmental analysis, and continue to take a ‘hard look’ at the environmental effects of [its] planned actions.” Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9<sup>th</sup> Cir. 2000).

NEPA's implementing regulations further underscore an agency's duty to be alert to, and to fully analyze, potentially significant new information. An agency "shall prepare supplements to either draft or final environmental impacts statements if...there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).

An agency must prepare a Supplemental EIS "if the new information is sufficient to show that the remaining action will... 'affect the environment' in a significant manner or to a significant extent not already considered." Marsh v. Oregon Natural Resources Council, 109 S.Ct. 1851, 1859 (1989). Guidance established by the Council on Environmental Quality states that "if the proposal has not yet been implemented, EISs that are more than 5 years old should be carefully reexamined to determine if [new circumstances or information] compel preparation of an EIS supplement." See 46 Fed. Reg. 18026 (1981)(Question 32).

When considering whether BLM has taken a hard look at the environmental consequences that would result from a proposed action, the Interior Board of Land Appeals will be guided by the "rule of reason." Bales Ranch, Inc., 151 IBLA 353, 358 (2000). "The query is whether the [BLM's DNA] contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the proposed action." Southwest Center for Biological Diversity, 154 IBLA 231, 236 (2001) (quoting California v. Block, 690 F.2d 753, 761 (9<sup>th</sup> Cir. 1982).

The BLM failed to take a hard look at new information and new circumstances that have come to light since the BLM's Caliente Resource Management Plan approved over eight years ago. This new information and new circumstances include:

- *Establishment of the Carrizo Plain National Monument.* The CRMP was approved nearly five years before the Carrizo Plain was established by Presidential Proclamation as a National Monument. Because the monument was not yet created, the CRMP in no way could have evaluated the impacts of oil leasing and development on monument values, whether this leasing occurred on the monument itself or along its boundaries.
- *Significant Deterioration of Air Quality in the San Joaquin Valley.* In April 2004, the Environmental Protection Agency granted the State of California's request to reclassify the San Joaquin Valley ozone non-attainment area from "severe" to "extreme" for the 1-hour federal standard. This reclassification resulted in more stringent federal air quality requirements on sources in the basin. Major sources are now subject to federal permitting requirements if their emissions of ozone precursors exceed 10 tons per year (lowered from 25 tpy). Emission offset ratios increased as well. It also resulted in a new State Implementation Plan (SIP) for San Joaquin Valley ozone in 2004. The CRMP EIS used less-stringent significance thresholds to evaluate the impact of the BLM's leasing program on air quality. BLM must supplement its EIS with an evaluation of these more stringent air quality requirements. The DNA does not evaluate or even disclose the effect of the lease sale on the attainment of these new air quality standards. Likewise, the DNA does not evaluate new air quality standards included in the 2003 PM-10 Plan for the San Joaquin Valley (and 2005 amendments thereto); the San Joaquin Valley Unified Air Pollution Control District Rule 2201 (New Source Review) and Rule 2020 (Permit Exemptions), which require pollution controls and mitigation from new or modified stationary sources of air pollution; and several other changes to air quality standards in San Luis Obispo, Santa Barbara, and Ventura counties.

- *U.S. Forest Service Oil and Gas Leasing Analysis.* The U.S. Forest Service began its analysis of whether to offer certain lands in the Los Padres National Forest for oil and gas leasing, pursuant to the Federal Onshore Oil and Gas Leasing Reform Act. The Forest Service commenced this analysis in 1995. The CRMP EIS, approved two years later, did not evaluate the cumulative impacts of its leasing program combined with the Los Padres leasing analysis. In July 2005, the Forest Service issued the Final EIS and Record of Decision opening 52,075 acres of forestland to oil and gas development. The new plan authorizes drilling in three areas of the forest, the largest of which is the South Cuyama High Oil and Gas Potential Area (“HOGPA”). Several of the disputed parcels are adjacent to the South Cuyama HOGPA. The BLM has never analyzed the combined, cumulative impacts of its leasing program with the reasonably foreseeable development on the South Cuyama HOGPA. Under NEPA, the BLM is required to analyze the effects of the proposed action along with all past, present, and reasonably foreseeable future actions, including areas of future oil and gas leasing on the Los Padres National Forest. The 2005 Oil and Gas Leasing Analysis for the Los Padres National Forest constitutes significant new information and circumstances necessitating preparation of a Supplemental EIS.
- *Expansion of California Condor Range.* The CRMP failed to anticipate the expansion in numbers and extent of the California condor. Nearly all of the disputed parcels are within the historic range of the endangered California condor.
- *Substantial Increase in Oil Prices and Demand.* The CRMP failed to account for increased demand for oil and gas drilling resulting from the recent doubling or tripling of the price of oil. Thus, the CRMP EIS underestimated the true extent of oil and gas drilling that would take place over the life of the plan.

By neither analyzing or acknowledging this new information, the BLM violated NEPA and FLPMA. Absent such an updated analysis, leasing these lands is arbitrary, capricious, contrary to law, and an abuse of discretion.

## **II. The BLM Failed to Conduct Site-Specific Pre-Leasing Analysis of Mineral Development Impacts on the Public Lands in the Disputed Parcels, in Violation of NEPA**

Federal law requires performing NEPA analysis before leasing, because leasing limits the range of alternatives and constitutes an irretrievable commitment of resources. Despite this mandate, the BLM attempts to defer site-specific NEPA analysis to the APD stage. Specifically, the DNA states that:

The direct and indirect *general area-wide impacts* are summarized on the pages listed in #1 above. These impacts were analyzed sufficiently to attach stipulations as required in WO IM 99-204. The exact site specific impacts will be analyzed at the time surface disturbance is proposed.”

DNA, p.3. (emphasis added).

This explanation is wholly inadequate. The BLM must analyze the *specific* impacts of subsequent development prior to leasing. Sierra Club v. Peterson established the requirement

that a land management agency undertake appropriate environmental analysis *prior* to the issuance of mineral leases, and not forgo its ability to give due consideration to the “no action alternative,” 717 F.2d 1409 (D.C. Cir. 1983). This case challenged the decision of the Forest Service and BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without preparing an EIS. The agencies had conducted a programmatic NEPA analysis, then recommended granting the lease applications with various stipulations based upon broad characterizations as to whether the subject lands were considered environmentally sensitive. The agencies decided that no EIS was required at the leasing stage of the proposed development. *Id.* at 1410. The court held that the agency’s decision violated NEPA:

Even assuming, arguendo, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose “mitigation” measures upon a lessee... Thus, with respect to the [leases allowing surface occupancy] the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

*Id.* at 1414 (emphasis added). The appropriate time for preparing an EIS is prior to a decision “when the decision-maker retains a maximum range of options” prior to an action which constitutes an “irreversible and irretrievable commitment of resources.” *Id.*, citing Mobil Oil Corp. v. F.T.C., 562 F.2s 170, 173 (2<sup>nd</sup> Cir. 1977).

In the present case, the BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbances. None of the environmental documents previously prepared by BLM examine the site-specific impacts of mineral leasing and development. The agency has not analyzed the new information, nor has it assessed what stipulations might protect special surface values. This violates federal law by approving leasing absent environmental analysis as to whether NSO stipulations should be attached to some or all of the disputed parcels.

### **III. The BLM Failed to Formally Consult with the U.S. Fish & Wildlife Service Regarding the Impacts of the Lease Sale on Protected Species, in Violation of the ESA.**

Section 7 of the Endangered Species Act requires BLM to formally consult with the U.S. Fish and Wildlife Service to determine whether the lease sale and subsequent development of the specific parcels in dispute will jeopardize the continued existence of a listed species, or adversely modify a listed species’ critical habitat.

The BLM failed to initiate this formal consultation as required by law. Instead, the BLM merely relies on the eight-year-old Caliente RMP Biological Opinion, and the four-year-old Oil and Gas Programmatic Biological Opinion in Kern and Kings Counties. The BLM must re-initiate consultation for this specific lease sale to afford the U.S. Fish and Wildlife Service an opportunity to evaluate new scientific information relating to affected species, as well as to cumulative impacts that were not evaluated in the CRMP nor the subsequent Biological Opinions.

For this reason, failure to consult with the U.S. Fish and Wildlife Service on this lease sale is a violation of the Endangered Species Act.

#### **IV. The Notice of Competitive Oil and Gas Lease Sale Failed to Conform to the Agency's Own Requirements Regarding the Filing of Protests**

On June 27, 2005, the BLM issued Instruction Memorandum No. 2005-176 to all State Directors, regarding filing of protests on lands included in oil and gas lease sales. This Instruction memorandum established a new policy, requiring that all protests of competitive oil and gas leases be filed and received at least 15 calendar days prior to the date of the sale.

The new policy required the BLM to notify the public of this new 15-day deadline in each Notice. Specifically, the Instruction Memorandum directs the BLM to “[i]nset the language in Attachment 2 into all competitive oil and gas lease sale notices,” and that the BLM “will post this policy in each public room and in each sale notice.” The memorandum refers to Attachment 2 for specific language to include in the Notice.

Despite this clear requirement in the Instruction Memorandum, the BLM failed to insert the language in Attachment 2 into the Notice. Rather, the Notice incorrectly stated that protests must be submitted “prior to the date of the sale,” with no mention of the 15-day deadline. This omission severely curtailed our right to adequately review the project file for this lease sale. ForestWatch did not become aware of this 15-day deadline until today, which, coincidentally, is the last day to file a proper protest with the BLM in accordance with the new policy.

The BLM also failed to post this policy in the public room of the Bakersfield Field Office, as required in the Instruction Memorandum. On November 22, 2005, I personally visited the public room to pick up some documents I requested and, after thoroughly inspecting the public notice bulletin board, the information counter, and any other publicly-accessible areas, recall seeing no such notice posted anywhere in the BLM Bakersfield Field Office.

The agency's failure to include the required language in the Notice, and to post the required language in the field office, effectively robbed ForestWatch and other interested members of the public of an adequate opportunity to protest or otherwise participate in this lease sale. Instead, ForestWatch was forced to hastily craft a protest without knowing whether the BLM intends to proceed with the old policy of allowing protests to be filed up to the day of the sale, or with the new policy of requiring protests to be filed 15 days prior to the lease sale. This noncompliance with agency policy is arbitrary and capricious in accordance with the Administrative Procedure Act, 5 U.S.C. § 702.

On this basis alone, ForestWatch protests the entire lease sale, and requests that BLM provide adequate notice to the public about which protest filing deadline applies to this lease sale.

#### **CONCLUSION**

For these reasons, we respectfully request that the BLM California State Director withdraw the disputed leases from the lease sale, pending adequate NEPA analysis and compliance with other legal and biological requirements.

Withdrawing the disputed parcels is within BLM's broad discretion in leasing federal lands. In 1931 the Supreme Court found that the Mineral Leasing Act "goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare." U.S. ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). A later Supreme Court decision stated that the MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman, 85 S.Ct. 792, 795 (1965). Thus, the BLM has discretionary authority to approve or disapprove mineral leasing of public lands. Before the lease sale, no right has vested for the applicant or potential bidders, and BLM retains the authority not to lease.

We urge the BLM to properly exercise its discretion and withdraw the protested parcels from the lease sale until proper pre-leasing analysis has been performed. BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law.

In the event that the BLM proceeds to offer these parcels, all prospective bidders should be informed of the pending protest, in conformance with the Instruction Memorandum.

Sincerely,

Jeff Kuyper  
Executive Director