# *CENTER FOR BIOLOGICAL DIVERSITY V. BUREAU OF LAND MANAGEMENT*: FRACTURED DEFERENCE IN CALIFORNIA'S MONTEREY SHALE FORMATION

**Synopsis:** The Northern District Court of California held that the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) when it sold four oil and gas leases on federal land in California.[1] Plaintiffs alleged, and the court agreed, that BLM improperly ignored the potential effects of hydraulic fracturing (fracking)[2] in the Monterey shale formation prior to leasing federal lands in California for oil and gas development. Consequently, the court held that the agency violated NEPA by failing to take a "hard look" at the potential impact fracking would have on the surrounding environment.[3] As discussed herein, issuance of the subject leases did not approve or result in any surface-disturbing activity or otherwise cause a change in the physical environment and the analysis contained in BLM's NEPA documents at the time of the lease sale were properly commensurate with the level of detail concerning oil and gas development known and anticipated at the time of leasing. Site-specific environmental review of fracking should have taken place at the drilling stages, at which time BLM would have known exactly where a well or wells may be drilled and what technology would be used to drill wells and produce hydrocarbons. By ignoring that an agency can comply with NEPA by implementing a phased "hard look" approach, the United States Magistrate Judge overstepped his judicial authority by substituting his own personal preference regarding how the well-established NEPA process should proceed. The ruling is the first of its kind in California.[4]



1. Ctr. for Biological Diversity v. Bureau of Land Mgmt., 937 F. Supp. 2d 1140, 1144 (N.D. Cal. 2013). The parties voluntarily consented to have a U.S. Magistrate Judge conduct the proceedings in this case pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Fed. R. Civ. Pro. *See generally* Dkt. #9.

2. Although hydraulic fracturing is frequently referred to as "fracing" by the oil and gas industry, I use "fracking" throughout this note because the district court adopted "fracking" as the abbreviation for hydraulic fracturing.

3. The parties have not appealed the decision of the U.S. Magistrate Judge and the parties are currently negotiating a settlement. *See generally* Dkt. # 89.

4. Karen Gullo, *First California Challenge Is Defeat for U.S.*, BLOOMBERG, (Jan. 11, 2014), http://www.bloomberg.com/news/2013-04-08/u-s-failed-to-take-hard-look-at—judge-rules.html.

## I. INTRODUCTION

The hydrocarbons underlying the Monterey Shale Region of California's Fresno and Monterey counties are estimated to contain fifteen billion barrels of oil, which can only be economically accessed through alternative drilling techniques such as fracking.[5] BLM sold the oil and gas leases at issue after preparing an Environmental Assessment (EA) on the 2,700 acres of land to be affected by the sale; the document did not consider the environmental effects fracking would have on the surrounding environment.[6]

The Center for Biological Diversity and the Sierra Club brought an action for declaratory and injunctive relief under the Administrative Procedure Act (APA). They argued that the leases were issued in violation of NEPA, the Federal Land Policy and Management Act of 1976 (FLPMA), and the Mineral Leasing Act of 1920 (MLA).[7] The parties eventually filed cross motions for summary judgment.[8] The plaintiffs alleged that BLM failed to conduct a proper NEPA analysis because the agency only considered a single-well development scenario for all four leases, rather than considering the impact that new drilling technologies like fracking would have on the environment.[9]

Conversely, BLM primarily argued that because environmental impacts of fracking were still uncertain, it had no duty to investigate or disclose those impacts until the drilling stage.[10] As an expert in land development, BLM submitted that great deference should be granted to its findings.[11] Alternatively, BLM contended that its decision expressly conformed to the regional resource management plan (RMP) and its corresponding environmental documents to which the EA was tiered, and thus reasonably concluded, based on all relevant matters of environmental concern, that no further environmental analysis was required.[12]

5. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1144-45. *See, e.g.*, *Review of U.S. Shale Gas and Shale Oil Plays*, U.S. ENERGY INFO. ADMIN. (2011) http://www.eia.gov/analysis/studies/usshalegas/ ("The largest shale oil formation is the Monterey/Santos play in southern California, which is estimated to hold 15.4 billion barrels or 64 percent of the total shale oil resources.").

6. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1150.

7. *Id.* at 1144; *see also* Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2012); NEPA, 42 U.S.C. § 4321 (2012); FLPMA, 43 U.S.C. § 1732(a) (2012); MLA, 30 U.S.C. § 181 (2012).

8. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1150.

9. *Id.* at 1148; *See, e.g.*, 42 U.S.C. § 4321:

> The purposes of this chapter are: to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

10. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1153. *See, e.g.*, 40 C.F.R. § 1508.13:

> Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it.

11. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1154.

12. *Id.* at 1156; *see also* 43 U.S.C. § 1732(a) (requiring BLM to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans.") A land use plan for specific public lands generally establishes allowable resource uses, resource condition goals and objectives to be attained, and general management practices needed to achieve those goals and objectives. 43 C.F.R. § 1601.0-5(n). Moreover,

Finally, BLM argued that even though the impact of fracking is widely unknown,[13] the agency nevertheless considered the remote impact of fracking and its EA noted that any fracking done on the well development sites would have "'very little (if any) disturbance to the human environment.'"[14]

Seemingly taking only the plaintiffs' arguments into consideration, the court held that BLM's EA violated NEPA because it relied on a stale single-well development projection, rather than contemplating how the leases would be potentially developed, i.e., the implementation of new drilling technologies.[15] The court found both the EA and BLM's finding of no significant impact (FONSI) erroneous as a matter of law and granted the plaintiffs' motion for summary judgment.[16]

This case note will argue that the court should have concluded that BLM's FONSI and EA were sufficient as a matter of law and that BLM's lease sale complied with NEPA. Moreover, this note also will address why BLM's team of interdisciplinary experts, the agency itself as the administrator of more than 245 million acres of public land, and the environmental documents prepared in planning for the lease sale should have been given professional deference instead of being second guessed by the judiciary.[17] This note ultimately concludes that the court unreasonably found that the potential impact of hydraulic fracturing required an Environmental Impact Statement (EIS)[18] before the drilling stage.

## II. BACKGROUND

### *A. Legal Background*

NEPA was enacted to integrate environmental values into the decision-making process of federal agencies.[19] The statute requires an agency to prepare an EA to analyze whether the agency's proposed "major federal action" will have a significant effect on the quality of the human environment.[20] Furthermore, an EA is intended to be a "concise public document" that discusses the environmental impacts of both the proposed action and action alternatives.[21] Because an EA is

land use plans guide "[a]ll future resource management authorizations and actions and subsequent more detailed or specific planning shall conform to the approved plan." *Id.* § 1610.5-3(a).

13. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1156.

14. *Id.* at 1148.

15. *Id.* at 1144.

16. *Id.*; 40 C.F.R. § 1508.13 (defining FONSI).

17. *Decision Support, Planning, & NEPA*, BUREAU OF LAND MGMT, (Jan. 13, 2014), http://www.blm.gov/wo/st/en/prog/planning.html.

18. When an EA discloses that the proposed action will have a significant effect on the quality of the human environment, BLM is required by section 102(2)(c) of NEPA to prepare an EIS before deciding whether to approve that action. *See, e.g.*, In Defense of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep't of Interior, 751 F.3d 1054, 1068 (9th Cir. 2014).

19. *National Environmental Policy Act (NEPA)*, EPA, (Jan. 14, 2014), http://www.epa.gov/compliance/nepa/.

20. Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1185 (9th Cir. 2008) ("As a preliminary step, an agency may prepare an [EA] in order to determine whether a proposed action may significantly affect the environment and thereby trigger the requirement to prepare an EIS.").

21. *Environmental Assessments & Environmental Impact Statements*, EPA (Jan. 15, 2014), http://www.epa.gov/reg3esd1/nepa/eis.htm.

intended to be an overview of environmental concerns, agencies may supplement, tier to, incorporate by reference, or adopt previous NEPA environmental analyses so that redundancy and unnecessary paperwork can be avoided.[22]

Once the EA is prepared, the agency may conclude that there is "no significant effect associated with the proposed project."[23] If the agency determines that there is no significant effect associated with the proposed project, also referred to as "no significant impact on the quality of the human environment," the agency may "issue a FONSI in lieu of preparing an EIS."[24] Deference is given to the agency to determine if a FONSI is appropriate.[25] Where an agency's FONSI determination is challenged, the standard of review is whether the agency action was arbitrary and capricious.[26]

The MLA gives the Secretary of the Interior authority to lease public-domain lands to private parties for the production of oil and gas.[27] Once BLM develops an RMP, which typically includes a corresponding Record of Decision and Final EIS, BLM can issue pursuant to the MLA leases for the land slated for an oil and gas lease sale.[28] RMPs are developed by local BLM field offices as a concurrent function of the NEPA process in order to establish management goals and protect resources on BLM land.[29] RMPs are used by BLM as part of the management of federal lands under FLMPA.[30] BLM is afforded significant discretion in granting leases.[31] Once a lease sale has occurred, the lessee cannot pursue any activity that will result in a surface disturbance until it submits—and BLM reviews and approves—the Application for Permit to Drill (APD).[32]

22. *See, e.g.*, 40 C.F.R. § 1508.28:

> Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

*See also* 40 C.F.R. § 1502.20.

23. Center for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1006 (9th Cir. 2011) (quoting Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1009 (9th Cir. 2006)).

24. *Id.*

25. *See, e.g.*, High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 640 (9th Cir. 2004) (normally, "an agency's decision not to prepare an EIS is reviewed under the arbitrary and capricious standard.").

26. *Id.*

27. 30 U.S.C. §§ 181-195 (2012).

28. Defendants' Cross-Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, Ctr. for Biological Diversity, No. 5:11-cv-06174-PSG, 937 F. Supp. 2d 1140 (N.D. Cal. 2013) 2012 WL 3964585 [hereinafter Defendants' Cross-Motion & Response].

29. *What is an RMP?*, BLM (2013), http://www.blm.gov/co/st/en/fo/gjfo/rmp/rmp/information.html; 43 C.F.R. § 1610.1 ("resource management plan shall be prepared and maintained on a resource or field office area basis, unless the State Director authorizes a more appropriate area.").

30. Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1220 (9th Cir. 2011) (citing 43 C.F.R. § 1610.2 (2013)).

31. *See, e.g.*, Sacramento Mun. Util. Dist. v. FERC, 616 F.3d 520, 542 (D.C. Cir. 2010) ("[I]t is within the scope of the agency's expertise to make such a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.") (quoting Envtl. Action, Inc. v. FERC, 939 F.2d 1057, 1064 (D.C. Cir. 1991)).

32. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-256 (declaring that "[n]o permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned"); 30 U.S.C. § 226(g).

A different standard applies to a Non-Surface Occupancy lease (NSO) in determining when and how oil and gas drilling may occur on the land.[33] The purpose of a NSO lease is to protect the surface area of the land by severely restricting the type of activity that can be conducted without BLM approval.[34] On federal land, accessing subsurface minerals on lands leased with stipulations containing a NSO requires approval from BLM upon a showing that any action taken will cause only a limited, controlled disturbance.[35]

Courts have viewed NSO leases differently than standard leases on federal land.[36] Because BLM must approve any action on the land, with a showing by the actor that there will be no surface disturbance, there is no EA requirement for a NSO lease.[37] Therefore, courts have viewed NSO leases in a less stringent manner than a typical lease that allows for surface disturbance.[38]

### *B. Factual Background*

The Monterey Shale Formation—part of the Mountain Diablo Range—covers a vast area of California. Major cities within the region are Bakersfield and Fresno.[39] The Monterey Shale formation is the largest shale oil formation in the United States and is estimated to contain more than fifteen billion barrels of oil.[40] The oil contained in the Monterey Shale Formation is equal to 64% of the United States' total shale oil resources.[41]

BLM's geologic study of the Monterey Shale Formation began several years prior to the agency's decision to issue oil and gas leases on the land.[42] BLM's management of federal lands and oil development on federal lands is subject to the requirements of the MLA and FLPMA.[43] FLPMA requires BLM to "develop, maintain, and, when appropriate, revise land use plans."[44] Furthermore, before BLM can grant public lands for oil and gas development, BLM must complete a three stage process: (1) BLM must complete an RMP for the general region, which

33. Conner v. Burford, 848 F.2d 1441, 1444 (9th Cir. 1988); *Oil and Gas Leasing Stipulations and Lease Notices*, BLM (Aug. 2012), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/land_use_planning/rmp/white_river/documents/rmpa-3.Par.17322.File.dat/08_WRFO_RMPA- EIS_Appendix%20A_Aug2012.pdf.

> Areas identified as NSO are open to oil and gas leasing but surface disturbing activities cannot be conducted on the surface of the land. Access to oil and gas deposits would require horizontal drilling from outside the boundaries of the NSO areas. The NSO areas are avoidance areas for rights-of-way; no rights-of-ways would be granted in NSO areas unless there are no feasible alternatives.

34. *Conner*, 848 F.2d at 1444.

35. *Id.*

36. *Id.*; Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 782 (9th Cir. 2006); Pennaco Energy, Inc. v. U.S. Dep't of Interior, 377 F.3d 1147, 1154 (10th Cir. 2004).

37. *Conner*, 848 F.2d at 1444.

38. *Id.*

39. *Review of Emerging Resources: U.S. Shale Gas and Shale Oil Plays*, U.S. ENERGY INFO. ADMIN., (Jan. 18, 2014), http://www.eia.gov/analysis/studies/usshalegas/.

40. *Id.* ("The next largest shale oil plays are the Bakken and Eagle Ford, which are assessed to hold approximately 3.6 billion barrels and 3.4 billion barrels of oil, respectively.")

41. *Id.*

42. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1144.

43. *Id.* at 1146; 43 U.S.C. §§ 1701-1782.

44. 43 U.S.C. § 1712.

"describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps;"[45] (2) BLM leases specific parcels; and (3) lessees submit applications for drilling permits for BLM review and approval.[46]

In 2006, BLM's geological research of the Monterey Shale Formation appeared in the newly-promulgated RMP.[47] The RMP for the Mountain Diablo Range and the Central Coast of California covered approximately 274,000 acres of lands and 588,197 acres of "split estate" lands within twelve central California counties.[48] The RMP covers a wide spectrum of potential land uses, including those that may have an effect on the human environment.[49] BLM included a mitigation section in the RMP, which discussed the environmental effects oil and gas development on public lands would have on air quality, wildlife habitat, and water resources.[50] After receiving and responding to public comments relating to implementation of the land use plan, BLM adopted the RMP in 2007.[51] The adopted management plan for the area included special stipulations for oil and gas leases, which incorporated mitigation provisions for any new oil and gas leases issued on the public land or mineral estate.[52] The mitigation provisions were intended to protect water and air quality, as well as any endangered or BLM-designated special status species existing on or near the lease site.[53]

The RMP also contained, based on past activity on BLM-administered lands, a Reasonable Foreseeable Development Scenario for Oil and Gas on the land

45. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1146; *see also* Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 504 (D.C. Cir. 2010) (citing Norton v. S. Utah Wilderness Alliance, 542 U.S. 59, 71-72 (2004)).

46. *See, e.g.*, Pennaco Energy Inc. v. U.S. Dep't of Interior, 377 F.3d 1147, 1151 (10th Cir. 2004); *see also* 43 U.S.C. § 1701; Pub. L. No. 94–579, 90 Stat. 2743 (1976).

47. *Id.*

48. Split estate refers to the situation where the property interest in subsurface mineral rights is owned by the United States and administered by the BLM, and the surface lands are owned by a private entity. This situation commonly arises as a result of several federal land-grant statutes enacted in the early 1900's—including, for instance, the Stock Raising Homestead Act of 1916, which provided that grants of federal land would convey the surface estate to a private individual while reserving the underlying minerals to the United States. *See, e.g.*, Watt v. W. Nuclear, Inc., 462 U.S. 36, 50 (1983).

49. 43 C.F.R. § 1601.0 -.5: The resource management plan generally establishes in a written document:

(1) Land areas for limited, restricted or exclusive use; designation, including [Areas of Critical Environmental Concern] designation; and transfer from Bureau of Land Management Administration;
(2) Allowable resource uses (either singly or in combination) and related levels of production or use to be maintained;
(3) Resource condition goals and objectives to be attained;
(4) Program constraints and general management practices needed to achieve the above items;
(5) Need for an area to be covered by more detailed and specific plans;
(6) Support action, including such measures as resource protection, access development, realty action, cadastral survey, etc., as necessary to achieve the above;
(7) General implementation sequences, where carrying out a planned action is dependent upon prior accomplishment of another planned action; and
(8) Intervals and standards for monitoring and evaluating the plan to determine the effectiveness of the plan and the need for amendment or revision.

50. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1144.

51. Defendants' Cross-Motion & Response, *supra* note 28, at 3.

52. *Id.*

53. *Id.*

(RFD).[54] The RFD scenario estimated the level and type of future oil and gas activity in the planning area. The scenario described the steps involved in exploring for and developing deposits of oil and gas, contained trends and assumptions affecting oil and gas activity, and discussed estimates for future oil and gas exploration and development.[55]

The MLA requires BLM to offer quarterly competitive oil and gas lease auctions in each state where there are eligible lands available for leasing.[56] Furthermore, at the discretion of the Secretary of the Interior, the competitive auctions of oil and gas leases can be held more frequently than quarterly.[57] In 2011, BLM received interest from oil and gas companies regarding the lands in the Monterey Shale Formation, which are governed by the RMP.[58] In response to this interest, BLM issued a draft EA for public comment in 2011.[59]

There were three alternatives proposed and analyzed in the EA: (1) a competitive oil and gas lease sale of 2,605 acres of the federal mineral estate; (2) a lease sale for 6,401 acres, including those mentioned in the first alternative; and (3) BLM takes no action and does not offer for lease any of the federal mineral estate.[60] The EA also included a description of the purpose and need for the lease sale. Implementing the RFD scenario, the EA contained an in-depth analysis of potential environmental impacts to the land in the event the lease sale took place.[61] Topics included were: (a) the history of minimal mineral development in the area; (b) air and atmospheric values, including specific challenges to air quality; (c) water quality considerations; and (d) occurring or possible occurring special status species.[62]

The EA also included information regarding the process of the lease sale and information on further stages of environmental evaluation.[63] The EA contained language suggesting that the lease itself did not contain the right to begin drilling.[64] Although the lease authorizes a development right as part of an administrative function, no well would be drilled until after the APD was submitted and approved by BLM.[65]

54. *Id.*

55. RMP for the Southern Diablo Mountain Range and Central Coast of California (2007), App'x F, *available at* http://www.blm.gov/ca/pdfs/hollister_pdfs/SouthernDiablo-CenCoastRMP/ROD-August2007/ROD-Complete-8-07.pdf (last visited Aug. 21, 2014).

56. 30 U.S.C. §§ 181-263 (2012).

57. *Id.*

58. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1144.

59. *Id.*

60. *Id.* at 1147.

61. *Id.*

62. *Id.*

63. *Id.*

64. Defendants' Cross-Motion & Response, *supra* note 28, at 4.

65. *Surface Operating Standards for Oil and Gas Exploration and Development*, BLM (Oct. 28, 2014), *available at* https://www.blm.gov/ut/enbb/files/CCDO_EA.12.19.13_(508).pdf.

> *The Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development* (commonly referred to as The Gold Book) was developed to assist operators by providing information on the requirements for obtaining permit approval and conducting environmentally responsible oil and gas operations on Federal lands and on private surface over Federal minerals. Operations include

The APD is a complimentary function to the site-specific EA because it contains an environmental analysis that is more tailored to the lands surrounding the potential drill site.[66] It is in the APD stage that specific environmental information is provided to BLM so that the agency can determine whether the lessee's proposed activity on the land is satisfactory or whether it should be modified to ensure environmental and other resource protection.[67] Here, specific language from the EA stated, "site-specific analysis of impacts from oil and gas development is constrained at the leasing stage because there is no reliable information on where and how these resources would be developed."[68] Mitigation factors to be considered as a predicate to approving an APD would include Environmental Best Management Practices (BMPs).[69] Moreover, BLM's "approval of an APD does not relieve the operator from obtaining any other authorizations or approvals required for conducting drilling" such as state-issued water permits.[70]

After considering the environmental impact of the proposed lease sale, a FONSI was issued by BLM's acting California State Director.[71] Following the FONSI determination, BLM approved the decision to offer a competitive oil and gas lease auction of eight parcels.[72] The eight parcels were a part of the 2,703 acres of federal mineral estate included in Alternative One of the EA.[73] Included in its Decision Record, BLM stated that, "at the [APD] stage, when the site specific development proposals are received, they will be evaluated via subsequent environmental analysis."[74] Two of the four proposed leases included in the sale were NSO leases.[75]

## III. ANALYSIS

On September 14 and 20, 2011, BLM issued four leases, two of which contained a NSO stipulation.[76] The plaintiffs immediately filed for declaratory and injunctive relief, challenging, among other things, the agency's NEPA compliance. The Northern District Court of California held that BLM was not

exploration, production, reclamation, associated rights-of-way (ROWs), and Special Use Authorizations (SUAs).

66. *Id.*

67. *Id.*

68. Defendants' Cross-Motion & Response, *supra* note 28, at 4.

69. *Id.* Indeed, the governing land use plan states that once an APD:

> [i]s submitted, a site-specific evaluation will be made by the BLM to ensure compliance with NEPA requirements. Based on the results of that evaluation, additional Conditions of Approval may be added, and the operator may only begin construction after complying with lease stipulations and Conditions of Approval of the drilling permit.

RMP for the Southern Diablo Mountain Range and Central Coast of California (2007), App'x F at F-5.

70. *Surface Operating Guidelines for Oil and Gas Exploration and Development*, BLM, at 3, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PRPROTECTI_/energy/oil_and_gas.Par.18714.File.dat/OILgas.pdf.

71. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1147.

72. *Id.*

73. *Id.*

74. Defendants' Cross-Motion & Response, *supra* note 28, at 4.

75. *Id.*

76. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1153.

required to complete an EIS on the land contained in the NSO leases.[77] The court reasoned that the NSO leases required BLM to conduct further investigation into the environmental impacts before allowing any surface disturbance to the land.[78] Relying on *Conner v. Burford*, the court went on to reason that the absolute grant of surface occupancy was not an "irretrievable commitment of resources."[79] Furthermore, the court concluded that NEPA was not triggered if and until BLM changed the status of the NSO lease lands.[80]

In contrast, the district court held that BLM violated NEPA by failing to conduct an EIS on the two non-NSO leases.[81] The court reasoned that it was the agency's responsibility to conduct an EIS when the two non-NSO leases were proposed for sale because of the probable environmental impact on the lands.[82] The court, with all due respect, got it wrong.

Contrary to the Northern District Court's holding, BLM did not violate NEPA. The agency completed an adequate EA, which resulted in the FONSI regarding the two non-NSO leased lands, and correctly determined that further environmental review would take place at the APD stage, thereby satisfying all NEPA mandates.[83] In order for the court to determine otherwise, it had to reach beyond the applicable standard of review, thereby exceeding its review authority. Thus, the court exceeded the scope of its review set by Congress, and erroneously applied its own stricter standards, thereby substituting its own judgment for that of the agency's expertise.

When a conflict arises under NEPA, the APA must be used to file a lawsuit in federal court because there is no section contained in NEPA under which a cause of action can be brought.[84] Consequently, when an agency decides that an EA is sufficient and it does not complete an EIS, its action is reviewed under the APA's arbitrary and capricious standard.[85] The arbitrary and capricious standard of review under the APA is highly deferential to the agency in its decision making process.[86]

Acknowledging the deference given to the agency, the district court stated that the "review is highly deferential to the agency's expertise" and that "BLM

77. *Id.*

78. *Id.* at 1153.

79. *Id.* (citing *Conner*, 848 F.2d 1441, 1447 (9th Cir. 1988); 42 U.S.C. § 4332(C)(v) (which requires an EIS to include a statement of "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented")).

80. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1153.

81. *Id.* at 1153-54.

82. *Id.*

83. *Id.*

84. *Id.*

85. Defendants' Cross-Motion & Response, *supra* note 28, at 12-13. An agency's decision not to prepare an EIS is reviewed under the arbitrary and capricious standard." *Id.* (quoting High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 640 (9th Cir. 2004)).

86. *Id.* at 11. "This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric., 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting Indep. Acceptance Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000)).

. . . is the recognized expert in this field, not the court."[87] The court went on to state that it must use NEPA's "hard look" approach to evaluate the environmental consequences of leasing.[88] Furthermore, the burden was on the plaintiffs to show that BLM violated NEPA.[89] Had the court actually implemented these review standards, it would have concluded that BLM's breadth of environmental review at the oil and gas leasing stage satisfied NEPA.

Preparing an EA alone is sufficient in some circumstances to satisfy the requirements of NEPA.[90] The agency findings in the EA will determine if the agency needs to go further by preparing an EIS.[91] The EA is intended to be a concise document that looks to the potential environmental impacts as required by NEPA.[92] In the case at hand, BLM prepared an EA on the land contained in the two non-NSO leases.[93] The non-NSO leases contained a large number of land use restrictions, conditions, and stipulations that BLM determined would prevent significant environmental degradation.[94] The plaintiffs failed to show, with objective proof, that the mitigation measures would be inadequate to protect the environment. Nor did the plaintiffs submit any evidence to show that BLM failed to consider a substantial environmental question of material significance to leasing.[95] Additionally, the plaintiffs did not offer any legal precedent holding that a phased approach to complying with NEPA was a *per se* violation of the statute.

Regardless of BLM's adoption of multiple lease stipulations and BMPs, the agency still prepared an EA for the non-NSO leases, relying heavily on their expertise in land management.[96] The EA consisted of an appropriate analysis level regarding the proposed lease sale's context and intensity.[97] Context and intensity of the action are used by BLM to determine if the impact to the land and the environment will be significant.[98] Context refers to "society as a whole (human [and] national, the affected region, the affected interests, and the locality)."[99] When an action is tailored to one site, for example, the significance will be most

87. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1151. *See also* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (defining a "hard look" review):

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

(quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

88. *Id.*

89. City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1175 (9th Cir. 1997).

90. *Id.*

91. *Id.*

92. 40 C.F.R. § 1508.9(a).

93. Defendants' Cross-Motion & Response, *supra* note 28, at 14.

94. *Id.*

95. *Id.* at 14-15.

96. *Id.*

97. Defendants' Cross-Motion & Response, *supra* note 28, at 19, 26.

98. *Id.* at 26.

99. 40 C.F.R. § 1508.27

focused on the locale of the specific site.[100] Intensity refers to the severity of the impact.[101]

The court noted that when BLM is preparing an EA for a site-specific action, the "significance usually depends on the impact of the action on the locale rather than the world as a whole."[102] Here, however, there was not a site-specific proposal for any of the land in the proposed leases. Thus, BLM's duty to take fracking's environmental impacts into *full* consideration had not yet been triggered.[103]

The court went on to state that intensity must be measured by looking to the ten factors outlined in 40 C.F.R. section 1508.27.[104] In addition, the court emphasized the responsibility of BLM to consider any reasonably foreseeable effects on the land.[105] The court simply jumped the gun: these studies could have legally occurred at the APD stage.

Looking to the RFD scenario laid out in the governing RMP, the EA completed by BLM contemplated that there would be only one exploratory well drilled on each lease.[106] Making this determination required BLM to evaluate the context, or locale, of the geographic area.[107] Relying heavily on historical data, BLM reached the one-well scenario by going back more than twenty years into the data contained in the field office responsible for the leased lands.[108] While a

100. *Id.*

101. *Id.*

102. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1154 (quoting 40 C.F.R. § 1508.27).

103. *Id.*

104. *Id.* The ten intensity factors to be required are:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial;
> (2) The degree to which the proposed action affects public health or safety;
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial;
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts;
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources;
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973; and
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27.

105. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1155.

106. *Id.*; *see also* RMP App'x F, at F-1.

107. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1148; RMP App'x F, at F-1.

108. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1148-49; RMP App'x F, at F-1:

handful of exploratory wells had been spudded, the historical data suggested that there was little development in the area over the past twenty years, with no production wells ever successfully drilled on the lands.[109] BLM argued to the court that their collection of data, including the history of well development in the area, was sufficient to create a reasonable projection of a single-well development.[110]

Upon completion of the EA, BLM concluded that a FONSI should be issued.[111] BLM argued that the EA and FONSI together were sufficient to establish that no significant impact would occur on those leased lands.[112] Specific language from the FONSI stated:

> [N]one of the existing leases . . . have been developed since their effective authorization dates, and no applications for permits to drill have been submitted to BLM for entry into [the] Federal mineral estate in Monterey County for over 20 years.[113]

Evidence of a lack of development for more than two decades on the land in question was a sufficient inquiry into the locale context. Furthermore, the conclusion reached by BLM based on this inquiry should have satisfied the court's concern about any potential disturbance.

Additionally, the FONSI indicated that there was only a possibility that one, if any, of the ten intensity factors outlined by the statute would have an impact on these leases.[114] BLM reasoned that the projected single exploratory well scenario would have a minimal impact on the surrounding environment, only possibly triggering one of the ten potential intensity factors.[115] The court, however, disagreed with BLM's finding.[116] In particular, the court found that at the time of the lease sale, BLM failed to consider all of the "reasonably foreseeable" possibilities that could have an environmental impact on the land.[117] NEPA simply does not require BLM to always prepare a site-specific EIS prior to issuance of oil and gas leases that do not contain NSO stipulations when the

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> There are 30 active oil fields and gas fields within the HFO management area, with a total administrative area of 188,000 acres. Within those administrative areas, the actual productive areas total about 58,000 acres. During the past 10 years, more than 1,000 wells have been drilled within the [RMP] area, 93% of which were within field boundaries, with only 7% being classified as wildcats (outside administrative field boundaries). Although there are nearly 5,400 acres of federal mineral estate within these productive boundaries (9% of the total), there was not a single well on federal mineral estate. This trend is not likely to change much, because nearly all of the activity in each of the past 10 years occurred in 3 fields where the federal share of mineral estate is only 1%. Regarding new field discoveries, there have been fewer than 3 fields discovered within the last 10 years, none of which contained federal mineral estate. Because of the low amount of activity on federal mineral estate, a more detailed description of past and current activities throughout the entire [RMP] area is unnecessary.

109. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1149.

110. *Id.*

111. *Id.*

112. *Id.*

113. Defendants' Cross-Motion & Response, *supra* note 28, at 19.

114. *Id.* at 19-20.

115. *Id.*

116. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1155.

117. *Id.*

agency can show that it will continue to apply NEPA in stages that correspond to specific development.

The court rejected BLM's argument that the EA was sufficient because it was part of a tiered regional management plan that BLM previously created.[118] BLM asserted that the tiered EA addressed all of the potential environmental impacts associated with future oil and gas leases on the land.[119] Additionally, when there is a comprehensive impact statement in place that corresponds with the EA, there is generally not a requirement that future leases have site-specific impact statements.[120] Language in the FONSI explicitly noted that the land was subject to the Record of Decision implementing the governing RMP.[121]

Citing *Kern*, the court noted that, "[t]iering, or avoiding detailed discussion by referring to another document containing the required discussion, is expressly permitted."[122] Nonetheless, the court argued that BLM's tiered regional management plan was not sufficient because it failed to consider the potential for fracking and its environmental impacts on the land included in the leases.[123] The court then missed the next logical step when it failed to accept that additional NEPA analysis would occur once the lease operators proposed drilling techniques within a required APD as specifically envisioned by NEPA.[124] BLM even included language in the EA which indicated its intent to further analyze the situation once the site-specific drilling proposals were received:

> [S]ite-specific analysis of impacts from oil and gas development is constrained at the leasing stage because *there is no reliable information available on where and how these resources would be developed.* Actually, withholding analysis of impacts until an application for a permit to drill (APD) is the only meaningful way to analyze such issues as air quality impacts, water quality impacts, infrastructure extensions, because analyzing site-specific impacts across large tracts of lands that may or may not be developed is not feasible. Subsequent analysis of site-specific impacts also provides an opportunity for public comment on the process of authorizing new oil and gas developments, as well as compatibility with other land use issues in the County.[125]

Therefore, the analysis in the EA, tiered to the RMP's EIS, was properly commensurate with the level of detail concerning oil and gas development known and anticipated at the time of leasing. Further, any subsequent drilling techniques would be analyzed at the APD stage. The FONSI was appropriate.

118. *Id.*

119. *Id.*

120. Defendants' Cross-Motion & Response, *supra* note 28, at 13. "'A comprehensive programmatic impact statement generally obviates the need for a subsequent site-specific or project-specific impact statement, unless new and significant environmental impacts arise that were not previously considered.'" Pit River Tribe v. U.S. Forest Serv., 469 F.3d at 783 (quoting Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994)).

121. Defendants' Cross-Motion & Response, *supra* note 28, at 19 (stating that "[i]n the FONSI, BLM expressly found that the implementation of the Proposed Action will not have significant environmental impacts beyond those already addressed in the Record of Decision (ROD) for the Hollister Field Office Resource Management Plan.").

122. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1157 (quoting Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002)).

123. *Id.* at 1158-1159.

124. *Id.*

125. Defendants' Cross-Motion & Response, *supra* note 28, at 7.

BLM is an expert in land management and therefore must be granted a moderate amount of deference in reaching factual findings about impacts to the land. BLM is the manager of more than 245 million acres of federal land.[126] In addition, BLM manages 740 million areas of subsurface mineral estate.[127] BLM manages these federal lands so that the mineral assets can only be leased after following the guidelines in place to protect the resources and the surrounding environment.[128] Furthermore, BLM recognizes that some land's mineral assets should not be tapped, which is why the agency carefully reviews each proposal.[129] Established more than sixty years ago, the mission of BLM is to "sustain the health, diversity, and productivity of the public lands for the use and enjoyment of present and future generations."[130]

Regardless of BLM's expertise and despite the fact that the arbitrary and capricious standard of review under the APA is highly deferential to the agency in its decision making process, the court in *Center for Biological Diversity* was not satisfied with the agency's NEPA process.[131] Acknowledging the deference given to the agency, the district court stated that the "review is highly deferential to the agency's expertise" and that "BLM . . . is the recognized expert in this field, not the court."[132]

The court reviewed BLM's findings of fact and concluded that there was no possibility that BLM's RFD scenario was accurate.[133] The court reasoned that recent development of fracking as an alternative drilling technique would encourage developers to search for more oil if one exploratory well was unsuccessful.[134] While the court did not cite to any specific data or historical information that would suggest a possibility that this drilling technique would be used in the Monterey Shale Region, the court inferred that the increased use of fracking generally would lead to more development on the land because of increased exploration capabilities.[135] Following this reasoning, the court held that BLM failed to consider a "reasonably close causal relationship" that was a necessary requirement of adequately completing the EA under NEPA. [136]

126. *New Energy For America*, BLM (Nov. 13, 2014), http://www.blm.gov/wo/st/en/prog/energy.html (last updated Aug. 6, 2014).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Mission Statement*, BLM (Jan. 18, 2014), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/ely_field_office/energy_projects/swip_final_ea.Par.65242.File.dat/04%20FEA%20SWIP%20South%20Mission%20Statement%20NV04007048%2008152008.pdf.

131. *Id.* at 13 (citing Ranchers Cattlemen Action Legal Fund v. USDA, 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting Indep. Acceptance Co. v. Cal., 204 F.3d 1247, 1251 (9th Cir. 2000)).

132. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1151.

133. *Id.* at 1156.

134. *Id.*

135. *Id.* The court referred to the defendants' motion which briefly stated that there has been an increased use of fracking across the nation.

136. *Id.* at 1155-56. The court relied heavily on holdings from Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983). This case held that to determine whether NEPA requires an agency to consider a particular effect, courts must "look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue." *Metropolitan Edison Co.*, 460 U.S. at 776.

While the court reasoned that fracking would encourage more development than the one-well scenario BLM had considered, it focused its concern on the impact of fracking alone.[137] The court further suggests that BLM should have been aware of the potential for more exploratory wells and the potential impact of fracking on the surface area and the environment.[138] Noting that BLM was aware of the increased use of fracking on a national level, the court made reference to data contained in BLM's EA regarding this drilling technique.[139] The court used BLM's reference to increased gas production across the United States to reason that fracking would be utilized in the Monterey Shale Region.[140] However, the court's use of general information on fracking at a national level is not sufficient to overcome the deference it should have given to BLM and its local factual findings.

The court reached its holding that the EA and FONSI were insufficient to meet NEPA standards based on its unfounded belief that an increased use of fracking would lead to more exploratory wells, and therefore, the potential harmful effects of fracking would create possible environmental disturbance to the land.[141] While the court made reference to the increased use of fracking, neither it, nor the plaintiffs, provided any evidence to suggest that this method has historically been used or would be used in the Monterey Shale Formation.[142] Furthermore, the court and the plaintiffs did not provide any information on the type of surface disturbance or environmental impacts that would occur on the lands with the potential use of fracking.[143] Here, the court and the plaintiffs failed to illustrate both specific factual findings that would promote a reasonable inference of fracking or an adverse environmental impact on the land. Employing general, overarching reasoning is not sufficient to overcome the deference BLM is granted as an expert in the management of land. As such, deference should have been given to BLM's factual findings contained in the EA and the FONSI.

The court went on to suggest that the impact of fracking is widely unknown.[144] In another district court case, *Tucker v. Southwestern Energy Co*., the effects of fracking were also determined to be unknown.[145] In that case, two private parties alleged that the use of fracking by Southwestern Energy Company contaminated their wells.[146] The court determined that there was not enough information presented by the plaintiffs to show the harmful effects of fracking.[147]

However, the court does not support its position by illustrating how the BLM failed to consider a particular effect. *Id.*

137. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1155-1156.

138. *Id.*

139. *Id.* The court looked to language contained in the EA that referenced a House Report. The House Report referred to the use of which has created a spike in natural gas production across the United States. *Id.* The House Report suggested that the level of production of natural gas reached 21,577 billion cubic feet in 2010, which is a level that has not been achieved since the 1970s. *Id.*

140. *Id.* at 1156.

141. *Id.* at 1156-1157.

142. *Id.*

143. *Id.*

144. *Id.*

145. Tucker v. Sw. Energy Co., No. 1:11-CV-44, 2012 WL 528253 (E.D. Ark. Feb. 17, 2012).

146. *Id.* at *3.

147. *Id.*

The court went further to reason that the effects of fracking are widely unknown and dismissed the plaintiff's claim.[148] Relatedly, in this case, the Northern District Court further suggested that BLM failed to consider the remote potential impact of fracking on subsurface waters.[149] BLM's EA did, however, address the issue of potential water contamination: "To date, there is no direct evidence that communities where hydraulic fracturing has been allowed have had any issues with contamination of drinking water."[150]

A portion of BLM's EA also directly addressed the potential use of fracking.[151] Looking to its compiled historical data in the regional contextual analysis, as well as to the current state of the Monterey Shale Formation, BLM found that no hypothetical impact would change its RFD scenario.[152]

Again, the EA made clear that BLM would consider the impact of submitted drilling techniques on a site-specific basis.[153] Deferred site-specific analysis is appropriate under NEPA. BLM considered the effects of reasonably foreseeable development in connection with the parcels, leaving more specific analysis to the consideration of APDs and plans for field development.[154] Therefore, an EIS was not required.

## IV. CONCLUSION

The court merely assumed that increased use of alternative drilling techniques in other parts of the United States would empirically lead to fracking on the leased lands at issue, ignoring the fact that environmental consequences of fracking could have been determined and discussed at a later stage in the NEPA process. The court acknowledged that BLM did a contextual and intensity factor analysis. The court also acknowledged that BLM addressed fracking. However, the court reached the conclusion that BLM's EA was insufficient based on its own preference that *all* NEPA analysis takes place at the leasing stage. Such a holding places a burden on BLM to prepare site-specific NEPA analyses at an impracticable point, i.e., before the exploration has narrowed the range of likely drilling sites and before drilling techniques to be actually utilized are known.

BLM is a trusted expert in the sale and management of federal lands. To overturn the factual findings of BLM based on an overbroad assumption and little factual support is a failure by the court to follow the arbitrary and capricious standard of review and an unnecessary step towards micromanagement of expert agencies.

148. *Id.* The plaintiffs presented evidence that there was an actual damage from the fracking; however, even in light of such evidence, the court held that it was not enough to support a finding that fracking was the cause. *Id.* at *4.

149. *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1156-1157.

150. *Id.* at 1158-59.

151. *Id.* at 1159.

152. *Id.*

153. *Id.*

154. *Cf.* N.M. v. BLM, 565 F.3d 683, 718 (10th Cir. 2009) ("[A]n agency's failure to conduct site-specific analysis at the leasing stage may be challenged, but . . . a 'particular challenge' lacked merit when environmental impacts were unidentifiable until exploration narrowed the range of likely drilling sites.") (citing N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 973, 977-78 (9th Cir. 2006)).

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