United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
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April 29, 2011

IBLA 2010-175	)	COC-65531
	)	
DEJOUR ENERGY (USA) CORP.	)	Oil and Gas Lease
BROWNSTONE VENTURES (US) INC.	)	
	)	Set Aside and Remanded

ORDER

Dejour Energy (USA) Corporation (Dejour) and Brownstone Ventures (US) Inc. (Brownstone) (collectively referred to as Dejour Energy or appellants) jointly appeal from a May 19, 2010, decision of the Deputy State Director, Division of Energy, Lands and Minerals, Colorado State Office, Bureau of Land Management (BLM), determining that Oil and Gas Lease COC-65531 (sometimes identified as Parcel 1386)[1] was issued in error and would be canceled unless Dejour signed amended lease stipulations, which expanded two no surface occupancy (NSO) stipulations to encompass the entire lease area, within 30 days. On June 18, 2010, Dejour signed the amended lease stipulations for COC-65531 under protest and subject to the decision by the Board. On June 21, 2010, Dejour appealed the Decision as it relates to the expansion of the two NSO stipulations to lease COC-65531.[2]

I. *Background*

On September 11, 2001, the BLM Colorado State Office issued its Notice of Competitive Oil and Gas Lease Sale for the November 8, 2001, Sale (Lease Sale Notice). Included in the parcels that BLM announced it would offer at the November

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[1] A portion of the Decision, not appealed by appellants, applies to Oil and Gas Lease COC-66370.

[2] Appellants do not contest the Decision's application of three other amended stipulations to the lease (GS-CSU-04, GS-CSU-05, and GS-TL-01). *See* Dejour Reply at 2 n.1. And although Stipulations GS-CSU-02 and GS-NSO-15 were made part of the original lease terms and also applied to only certain portions of the lands embraced by the lease, the Decision left these two stipulations intact, so they are not at issue in this appeal.

Lease Sale, subject to certain stipulations,[3] was Parcel 1386, comprised of 1,520 acres located in Garfield County, Colorado.[4] SOR, Ex. 2. BLM found authority for the Lease Sale in the Glenwood Springs Resource Area (GSRA) Oil and Gas Leasing & Development Record of Decision (ROD) and Resource Management Plan (RMP) Amendment (March 1999), which amended the 1984 GSRA RMP with regard to oil and gas leasing. The GSRA ROD approves decisions identified in the RMP Amendment, including lease stipulations provided in Appendix A, "Resource Management Decision Lease Stipulations." BLM undertook an environmental analysis for the Proposed RMP, documented in the Final Supplemental Environmental Impact Statement (FSEIS) for the GSRA ROD and RMP Amendment (January 1999), pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006).[5] The Draft SEIS considered three alternatives: a Continuation of Current Management Alternative, a Maximum Protection Alternative, and the Proposed Action. As a result of the comments received on the Draft SEIS, BLM developed a Preferred Alternative, described in the FSEIS at Chapter 2. The GSRA ROD adopts the decisions identified in Chapter 2 of the GSRA RMP Amendment, which are analyzed and described in the FSEIS Preferred Alternative. SOR, Ex. A (RMP Amendment) at 1.

The FSEIS at 2-6 through 2-23 describes the Preferred Alternative stipulations, which were adopted in the ROD for the RMP Amendment. It notes that "stipulations are applied by legal description to oil and gas leases on the basis of standard quarter-quarter sections (40 acres) or lots," but that "the lease stipulation would only apply to the resource as located on the ground." Answer, Ex. A (FSEIS) at 2-4. The first of the two stipulations at issue here is NSO-4 (identified in the RMP Amendment and Lease COC-65531 as Stipulation GS-NSO-04), "Garfield Creek, Basalt, and West Rifle Creek State Wildlife Areas [Garfield Creek SWA]," for the "[p]rotection of wildlife habitat values for which these areas were acquired by the state, including crucial big

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[3] Codes used throughout this decision identify the nature of the stipulation: LN, lease notice; CSU, controlled surface use; NSO, no surface occupancy; and TL, timing limitation.

[4] Surprisingly, the administrative record BLM provided does not include a copy of the Lease Sale Notice. As a result, when we reference the Lease Sale Notice, we refer to appellants' copy of part of that document, attached to its statement of reasons (SOR) as Exhibit (Ex.) 2. Counsel for BLM does not request that the administrative record be supplemented with this document.

[5] In BLM's Answer to the SOR, counsel for BLM requests that the administrative record be supplemented with the ROD and RMP Amendment provided by appellants, and with the FSEIS attached to the Answer as Ex. A. Answer at 2 n.2 and n.3. Those requests are granted.

game and upland game winter habitat, and concentration areas and riparian values." The second, NSO-11 (identified in the RMP Amendment and Lease COC-65531 as Stipulation GS-NSO-11), entitled "Wildlife Seclusion Areas," covers "fourteen seclusion areas that provide high wildlife value." *Id.* at 2-6 through 2-7.

Chapter 2 of the RMP Amendment points out that "[l]ease stipulation exceptions may be utilized for those lease stipulations where the option is identified as available, and the criteria for its use can be satisfied." SOR, Ex. 2 (RMP Amendment) at Ch. 2, p. 4; *see also* Ch. 3, p. 5, citing FSEIS at 2-4 ("Most stipulations are subject to exception, modification or waiver under certain conditions . . . . Even where exceptions are not identified, they may be considered on a case-by-case basis.").

NSO-4 provides for "Exception Criteria," which "include special mitigative measures developed in consultation with the Colorado Division of Wildlife [CDOW]." NSO-11 also provides "Exception Criteria," stating that "[e]xceptions may be granted based on approval by the Authorized Officer of a mitigation plan that suitably addresses the wildlife seclusion values at risk." Both NSOs state that "[a]ny changes to this stipulation will be made in accordance with the land use plan/or the regulatory provisions for such changes," referencing the "BLM Manual 1624 and 3101 or Forest Service Manual 1950 and 2820."

Appellants have provided the Board an unsigned, undated copy of the Documentation of Land Use Plan Conformance and NEPA Adequacy for the November 2001 Oil and Gas Lease Sale (CO-GSFO-01-60) (DNA). SOR, Ex. 9.[6] Appellants' copy identifies specific lands in Parcel 1386 that would be subject to each stipulation. It states that the range of alternatives analyzed in the existing NEPA documents is appropriate with respect to the current proposed action, given current environmental concerns, interests, and resource values, and that the existing analysis is valid with respect to Parcel 1386, in light of any new information or circumstances. *Id.* at 1-2, 1-3. It concludes that the proposal to offer certain of the parcels, including Parcel 1386, "conforms" with the GSRA RMP Amendment. *Id.* at 1-5.

Between September 24, 2001, and November 5, 2001, BLM issued five Notices of Addendum (addenda) to the Lease Sale Notice, making changes to the parcels that would be offered and adding additional stipulations to certain lease parcels.[7] BLM

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[6] We rely on appellants' copy of the DNA, as BLM did not provide the DNA for the Lease Sale in the administrative record.

[7] Appellants have provided copies of the signed addenda as Ex. 2 to their SOR. Hereafter, our use of the term "Lease Sale Notice" refers to the Lease Sale Notice as (continued...)

made no changes to its notice to offer Parcel 1386 (Lease COC-65531) for lease. Accordingly, at its November 8, 2001, oil and gas lease sale, the BLM Colorado State Office offered for competitive leasing the 1,520 acres identified in the Lease Sale Notice as COC-65531, subject to GS-NSO-04, GS-NSO-11, and other stipulations. BLM provided a legal description for the land for which each stipulation would apply. Only those stipulations pertaining to lease notices (LN) embraced all of the leasehold; the remaining stipulations attached to only portions of the lease sale lands.

On November 14, 2001, BLM officially issued oil and gas lease COC-65531 to Retamco Operating Inc., the high bidder at the Lease Sale.[8] During the period from 2006 to 2008, Retamco transferred 72-percent of its interest in the lease to Dejour and 28-percent of its interest to Brownstone. BLM recognized those assignments as effective September 1, 2008.

On May 19, 2010, BLM issued the decision, "*Oil and Gas Lease Amended; Additional Requirements*." The Deputy State Director recited the relevant law, stating that under section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2006), and Departmental regulations at 43 C.F.R. § 1610.5-3(a), leasing must conform to the applicable land use plan. He noted that 43 C.F.R. § 3108.3(d), provides that "leases shall be subject to cancellation if improperly issued," and reasoned that an oil and gas lease issued by BLM that does not conform to the land use plan is subject to cancellation under 43 C.F.R. § 3108.3(d). He further stated that the United States is not bound by the acts of its employees when they "cause to be done what the law does not sanction or permit," quoting 43 C.F.R. § 1810.3(b), and concluded that BLM has the authority to cancel an oil and gas lease issued contrary to the land use plans of the approved RMP due to the inadvertence of its employees. Decision at 1 (citing *High Plains Corporation*, 125 IBLA 24, 26 (1992), which cited *Boesche v. Udall*, 373 U.S. 472 (1963)).

Applying this analysis, the Deputy State Director pointed out that lease COC-65531 had been issued subject to certain stipulations.

> However, due to the inadvertence of BLM staff, the lease did not make stipulation GS-NSO-04 applicable to all 1,520 acres of the lease area that lie within the state wildlife area, as required by the [ROD] for the

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[7] (...continued)
amended by the addenda.

[8] The record shows that Retamco bid $33,440 for Lease COC-65531.

> 1999 Amendment of the Glenwood Spring RMP [].[9] Further, the lease did not make stipulations GS-NSO-11, GS-CSU-4, GS-CSU-5, and GS-TL-1 applicable to all or part of the lease area as required by the same ROD for the amended RMP. Therefore lease COC65531 was not issued in conformance with the land use plan requirements of the 1999 RMP Amendment.
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> . . . .
>
> Within 30 days from receipt of this decision, the leases will be cancelled, invalid ab initio, as void from the beginning unless all lessees of record . . . accept written amendment of the leases to add the stipulations attached to this decision to the lease[] in conformance with the approved RMP. If all of the lessees do not accept amendment of the lease, the lease[] shall be cancelled without further notice. If such cancellation[] occur[s], all rental and bonus monies paid by the lessees will be authorized for refund.

Decision at 1-2.

The following shows the areas subject to the stipulations when BLM awarded Lease COC-65531 to Retamco. It also identifies "the stipulations attached to this decision," which expanded the area covered by the stipulations that BLM required appellants to accept in order to prevent cancellation of Lease COC-65531. Decision at 2.

> [All lands are within T. 6 S., R. 91 W., Sixth Principal Meridian, Colorado.]
> *GS-NSO-04*
> Original stipulation (2001):
> Sec. 23: NE¼NE¼
> Sec. 24: W½NE¼, NW¼, NW¼SE¼
> Amended to add (2010):
> Sec. 13: W½SW¼
> Sec. 14: S½
> Sec. 15: W½NE¼, NW¼, NE¼SW¼, SE¼
> Sec. 23: W½NE¼, SE¼NE¼, N½NW¼

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[9] The entire lease area comprises 1,520 acres, some of which are outside of the Garfield SWA; the Decision imprecisely indicates that all 1,520 acres are within the SWA. We assume that BLM intended to aver that, at the time of the lease sale, "due to the inadvertence of BLM staff," BLM did not apply stipulation GS-NSO-04 to all of the lease sale lands located within the Garfield SWA.

GS-NSO-11
Original stipulation (2001):
Sec. 23: NE¼NE¼
Sec. 24: N½
Amended to add (2010):
Sec. 13: W½SW¼
Sec. 14: S½
Sec. 15: W½NE¼, NW¼, NE¼SW¼, SE¼
Sec. 23: W½NE¼, SE¼NE¼, N½NW¼
Sec. 24: NW¼SE¼

Decision, Attachments.

The master title plat for the township involved reflects that the lands embraced by the lease were conveyed under several patents that were conditioned by two Federal reservations, one, a reservation of all minerals, and the other, a reservation of oil, gas, coal, and geothermal resources. BLM reports that it mistakenly categorized each reservation of oil, gas, coal, and geothermal resources as a reservation of "other" minerals that would not be subject to stipulations regarding oil and gas leasing. Accordingly, we look at the stipulations in detail to determine where BLM, as it purports, erred in issuing the lease.

II. *Appeal*

A. *Arguments of the Parties*

Appellants contend that the lease that would result from BLM's decision applying NSO stipulations to all of COC-65531 "is not the lease that BLM sold at the 2001 lease sale, nor the lease that Retamco and Dejour obtained."[10] SOR at 2. They summarize their position challenging the Decision as follows:

> • In 2001, Lease COC-65531 was issued in accordance with the United States' reservation of minerals;
> • The 2001 Lease COC-65531 was, and is, consistent with the [RMP] and all applicable lease stipulations;

[10] Dejour "places the value of Lease COC-65531 at approximately $600 million. In the event that all of Lease COC-65531 is subject to NSO lease stipulations, Dejour places the value of Lease COC-65531 at approximately $10 million." Dejour Reply, Declaration of Harrison F. Blacker at ¶ 7. BLM notes that Dejour has not yet filed an application for a permit to drill. Answer at 3 n.5 (citing SOR Ex. 8 (Serial Register Page, dated July 18, 2010)).

- BLM's case file provides no objective proof that Lease COC-65531 was issued contrary to law;
- BLM has never provided any objective proof that additional lease stipulations should have been applied in 2001 and that the 2010 amended lease stipulations were not properly attached to Lease COC-65531;
- BLM may not now amend Lease COC-65531 to make the entire lease subject to NSO stipulations; and
- BLM may not amend or cancel Lease COC-65531 because Dejour is protected as a *bona fide* purchaser.

Id. at 3.

In its Answer, BLM asserts that the subject lease, as issued, did not conform to the RMP Amendment, and that years later, when Dejour began conferring with the CDOW regarding development of the lease, CDOW and BLM "became aware that the BLM had inadvertently omitted certain lands located within the Garfield Creek [SWA] from the legal descriptions contained in the stipulations attached to Lease COC65531." Answer at 3.

BLM describes the legal framework as it did in its Decision, stating that resource management decisions that are not "clearly consistent with the terms, conditions, and decision of the approved plan must be set aside." Answer at 6 (citing *Tom Van Sant*, 174 IBLA 78, 90-92 (2008); *Uintah Mountain Club*, 112 IBLA 287, 290-91 (1990)). BLM also reasserts that it can correct its own errors made in the course of issuing oil and gas leases, and "has the authority to cancel any oil and gas lease issued contrary to law or regulation because of the inadvertence of its subordinates." *Id.* BLM "recognized," however, that "although the issuance of the lease with the defect was improper, the defect was curable," and, in what it considered to be "a reasonable exercise of discretion," "thus conditioned the determination that the lease was 'void,' and the accompanying cancellation, on the failure to cure the defect." *Id.* at 10.[11]

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[11] BLM concedes that:

> The Board has noted in the past that "the Department has long held that an oil and gas lease, although improvidently issued in violation of regulatory requirements, but for land available for leasing, ordinarily will be permitted to stand in the absence of intervening rights or some overriding policy consideration." *Sun Exploration and Prod. Co.*, 95 IBLA 140, 142 (1987) (quoting *Merle C. Chambers*, 40 IBLA 144, 145 (1979)). This practice should not apply in this case because

(continued...)

BLM cites, with approval, the Decision's reliance on the Board's decision in *High Plains Petroleum Corp.*, 125 IBLA 24 (1992). At the time of the lease sale at issue in that case, BLM's records had not been updated to reflect that the lease area embraced lands within the Hogback Area of Critical Environmental Concern, an area closed to oil and gas leasing, under the authorizing land use plan, for the protection of several threatened and endangered plant species. Reviewing the appeal from BLM's decision to cancel the lease the Board concluded:

> [T]he issue is whether BLM properly cancelled a lease erroneously issued in contravention of the [RMP]. It did. BLM resource management actions must conform to the approved resource management plan. 43 [C.F.R. §] 1610.5-3(a).
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> . . . [W]e hold that the lease was properly cancelled. A holding to the contrary would be to hold that the unauthorized act of a subordinate official may bind the Department to follow a course inconsistent with its published policy and law. Such a result would be contrary to 43 [C.F.R. §] 1810.3 and the Board's precedents.

125 IBLA at 27.

BLM finds the present case similar to *High Plains*, because, "at the time Lease COC-65531 was issued, BLM's maps did not correctly reflect that the United States had reserved oil and gas on lands conveyed by Patent No. 05-87-0058," including the lands within Lease COC-65531. Answer at 11. BLM continues:

> Because of this categorization error, resources on those lands were not included in resource maps used to develop the stipulation maps for oil and gas leases in the area. This was an oversight, as the correct information was in BLM's possession at the time. *See* Ex. B and Attachment B-1 through B-5. As a result, the maps used by the BLM to prepare the stipulations were not complete, and the lease was issued with insufficient stipulations. The issuance of the lease therefore "violate[d] the regulatory mandate to conform resource management authorizations to the approved plan," and the lease properly could have

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[11] (...continued)

> allowing Lease COC65531 to stand would establish a precedent in direct contravention of FLPMA and its implementing regulations, and would interfere substantially with the goals of the CDOW.

Answer at 10 n.13.

> been cancelled. *High Plains*, 125 IBLA at 26, 27. *High Plains* therefore directly supports the BLM's decision to amend or cancel the lease.

Id. at 11-12.

The stipulation maps to which BLM points "reflect[] locations of resources subject to each of the stipulations, with corresponding metadata demonstrating that the data had been included in BLM's mapping database in 1999." Answer at 7. The maps are attached to the Declaration of Faith Gall, a Specialist with BLM since February 2008, who avers that she used BLM's Geographic Information Systems (GIS) to prepare the attached stipulation maps for this appeal. Answer, Ex. B at 1; Answer, Ex. B, Attachments B-1 through B-5. Gall states that BLM improperly applied this metadata due to GIS mapping errors when it prepared the stipulations it considered in development of the GSRA FSEIS, RMP, and ROD, and that these errors were carried forward during BLM's development of stipulations for the November 8, 2001 Lease Sale. BLM suggests that great weight be accorded this exhibit, asserting that the "'reasoned expert opinion, based on a firsthand knowledge of the wildlife resources in the project areas, is entitled to considerable deference.'" Answer at 7 (quoting *Wyoming Outdoor Council*, 147 IBLA 105, 110 (1998), citing *Jon Roush*, 112 IBLA 293, 302 (1990)).[12] BLM argues that

> The Plan Amendment, adopted in 1999, required that stipulations NSO-4, NSO-11, CSU-4, CSU-5, and TL-1 be applied to all

[12] It is unclear whose "reasoned expert opinion, based on a firsthand knowledge of wildlife resources in the project area[]" BLM avers is entitled to "considerable deference" here. Gall states that to the best of her knowledge the wildlife habitat data contained in the mapping database was *provided to BLM by CDOW*. Answer, Ex. B at 1. She also specifically avers that "[t]he metadata for the attached stipulation files for NSO-4, NSO-11, CSU-4, CSU-5, and TL-1 show that this [wildlife habitat] information existed in the BLM's GIS in 1999," nine years before Gall took her current position at BLM. *Id.* Further, when BLM prepared resource maps for the GSRA FSEIS, ROD, and RMP in 1999, Gall states, BLM "typically included only the resources on lands with mineral reservations of 'all minerals' or 'oil and gas,' and not 'other,' which included lands patented with a Federal reservation of oil, gas, coal and geothermal resources." *Id.* at 2. Finally, Gall posits that "[a]s a result, resources located on those lands inadvertently were omitted from most of the FSEIS maps, including those in Appendix H," and that "[t]his omission was carried forward into the stipulation maps used to prepare the legal descriptions for the stipulations attached to LEASE COC65531," with the ultimate result that "the original lease stipulations do not describe all of the Garfield Creek SWA lands that were properly subject to NSO-4, NSO-11, CSU-4, CSU-5, and TL-1." *Id.*

> lands meeting the corresponding descriptions identified in Appendix A, unless the exception criteria for one or more stipulations were satisfied. Based on its information about the resources existing within the leased parcel at the time the lease was issued, the BLM concluded that the legal descriptions for the stipulations included in the lease as issued in 2001 were not consistent with the requirements of the RMP, and that the lease therefore had been improperly issued.

Answer at 9.

BLM next addresses appellants' claim of protection from cancellation based on their asserted status as *bona fide* purchasers. BLM argues that any such protection is unavailing for appellants because the lease suffers from a "substantive defect" (violation "of statute or regulation"), not a "procedural defect" ("non-binding agency policy") (citing *Clayton V. Williams*, 103 IBLA 192, 212 (1988); *Champlin Petroleum Co.*, 99 IBLA 278 (1987)), and because appellants allegedly had constructive knowledge of *all* of "BLM's records pertaining to the lands covered by Lease COC-65531," not just of BLM's file for Lease COC-65531 or of all of the files for the November 2001 Lease Sale. *Id.* at 14-22.

In their Reply, appellants assert that "[c]ancellation of leases that are 'improperly issued' under 43 C.F.R. § 3108.4(d) applies only to leases issued where lands are unavailable for leasing," which is not the case here. Dejour Reply at 4. Furthermore, appellants maintain, the regulatory provision at 43 C.F.R. § 1601.0-5(b), requiring "conformity and consistency" of a management action with the approved RMP requires that such action "shall be specifically provided for" in the management plan, which is also not the situation at hand. *Id.* at 5.

> Under the GSRA ROD and RMP Amendment, NSO-4 only applies to those "values for which these areas were acquired" and NSO-11 applies to "areas that provide high wildlife value." Dejour SOR, Exhibit 6 at 6,7. The GSRA ROD and RMP Amendment do not specifically provide that all lands in the Garfield Creek SWA must all be subject to NSO stipulations, nor that these specific values exist on all lands for Lease COC-65531.

Dejour Reply at 5. Indeed, appellants assert, there is no record evidence that the "values for which the NSO stipulations should apply are actually on these lands." *Id.* at 4. For example, appellants note, "BLM points to no habitat survey, wildlife study, habitat delineation or any other reference in the record to support its conclusion that

NSO should have applied to all lands on Lease COC-65331." *Id.*[13] Dejour quotes BLM's argument that "'the resources existing within the leased parcel' met the stipulation descriptions in the GSRA ROD and RMP Amendment, but 'were not specifically delineated in the stipulation attached to the lease,'" and points out that "BLM cites to no document in the record for its position." *Id.* at 8 (quoting Answer at 8-9).

Finally, appellants maintain that "[e]ven if the Board finds that BLM acted properly in applying NSO lease stipulations to all lands on Lease COC-65531 eight years after issuance, Dejour is protected as a *bona fide* purchaser." Dejour Reply at 9 (citing 43 C.F.R. § 3108.4). Appellants were put on neither actual nor constructive notice that BLM had failed to properly attach lease stipulations, and, Dejour asserts, since they purchased the lease in good faith and for value (an assignment approved by BLM), they qualify as a *bona fide* purchaser. *Id.* at 1, 9, 11.[14] Dejour strenuously contests BLM's claim that a *bona fide* purchaser is deemed to have knowledge of *all* BLM documents related to all lands covered by Lease COC-65531, not just those documents related to Lease COC-65531. *Id.* at 11-12 (citing *Winkler v. Andrus*, 614 F.2d 707, 712-13 (10th Cir. 1980); *Champlin Petroleum Co.*, 99 IBLA at 280). Moreover, Dejour asserts, it was "not on notice of GIS map layers (which it has no access to), maps prepared by BLM in August 2010, or that BLM failed to properly

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[13] Dejour also objects to BLM's reliance on the Gall affidavit and exhibits as they were not part of the record and allegedly provide no support or rational basis for BLM's Decision. Dejour Reply at 6-7. Dejour points to apparent inconsistencies in BLM's explanation of error, noting that according to BLM, only those minerals labeled "all minerals" would have been protected with NSO-4 and NSO-11, but, in fact, "in 2001, BLM applied NSO-4 and NSO-11 to particular lands although these lands are classified as both 'All minerals' and 'Other minerals' on BLM's new maps." *Id.* at 8.

[14] Appellants also debunk "BLM's proposed new standard[, which] adds a confusing new element not found in the application of the *bona fide* purchase standard"—the distinction between a procedural or substantive defect. Dejour Reply at 9-10.

code mineral resources in the GIS mapping system."[15] *Id.* at 13 (citing *Winkler*, 614 F. 2d at 713-14).

Discussion

Claiming that Lease COC-65531 "was not issued in conformance with the land use plan requirements of the 1999 RMP amendment," the Deputy State Director in his Decision gives appellants a choice: accept the amendment of Lease COC-65531 with imposition of the additional stipulations attached to the Decision, or allow the lease to be declared *void ab initio*. Decision at 2. The essential foundation of BLM's position on appeal is that, at the time of the lease sale, BLM interpreted its maps as indicating that the reservation of "all minerals" included oil and gas, but that the reservation of "other" minerals did not include oil and gas, and, therefore, it attached the RMP's oil and gas stipulations only to those lease lands that had been conveyed with a reservation of "all minerals." The inescapable question arises: why did BLM interpret its maps as supporting its authorization to offer for oil and gas leasing lands conveyed with a reservation for "other minerals," but did not understand that oil and gas were among the "other minerals" for purposes of applying oil and gas stipulations? A close examination of BLM's Decision and materials presented on appeal raises other questions as well.

Appendix A of the RMP Amendment sets forth the lease stipulations to be applied under the oil and gas leasing alternative adopted by BLM in the ROD. Appendix A does not use legal descriptions of lands. GS-NSO-04 (identified in Appendix A as NSO-4) names three SWAs and the wildlife habitat values for which

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[15] It may be true that "assignees of Federal oil and gas leases who seek to qualify as *bona fide* purchasers are deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of the assignment." *Winkler v. Andrus*, 614 F.2d 707, 713 (10th Cir. 1980). But that same court recognized "that the test for imputing notice . . . is generally whether facts are sufficient to put an ordinarily prudent man on inquiry, an inquiry which, if followed with reasonable diligence, would lead to the discovery of defects . . . . The test is not what an extremely cautious person might do, but what a prudent one should do." *Southwestern Petroleum Corp. v. Udall*, 361 F.2d 650, 713 (10th Cir. 1980); *see Winkler*, 614 F.2d at 712-15. We find it astonishing that BLM argues in essence that Dejour is chargeable with knowledge of records that cannot be intelligibly explained by its career attorneys or career professionals to a Board of judges who have spent their legal careers working with public land issues. Although a purchaser with actual knowledge of a defect cannot be considered *bona fide*, mismanaged records do not impart notice. *See generally, Frank M. Youngblood*, 78 IBLA 162, 168-71 (1983) (Burski, A.J., concurring).

these areas were acquired by the State, including crucial big game and upland game winter habitat, and concentration areas and riparian values. GS-NSO-11 (Appendix A, NSO-11) provides only the names of 14 seclusion areas that provide high wildlife value.[16] Clearly, it was BLM's responsibility to identify the legal descriptions of public lands subject to the RMP stipulations at the time it prepared the Lease Sale Notice and developed the DNA for the Lease Sale, and to provide supporting documentation for its record of this Lease Sale.

We look to the record for support of BLM's assertions and explanations of error at the time of the 2001 Lease Sale. We find none. We look to the record for support of BLM's apparently confused or contradictory assertions that, at the time of the Lease Sale BLM's experts had or should have determined, from first-hand information somewhere in BLM's possession (supplied by the State), the precise location of the lands encompassed by COC-65531 that met the stipulation descriptions identified in Appendix A of the RMP Amendment, and for which the exception criteria were not satisfied.[17] Again, we find none.

Perhaps in recognition of this evidentiary chasm, BLM filed with its Answer, page after page of "metadata" that we are told existed in undisclosed BLM mapping databases in 1999.[18] Sometime prior to filing its Answer, BLM apparently located

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[16] Maps associated with the stipulations found throughout the FSEIS and at Appendix H lack the detail necessary to provide specific guidance regarding on-the-ground application of any of the stipulations. But even if the scale and detail of the maps enabled us to adequately identify the area encompassed by Lease COC-65531, they would be of little use, according to the explanation BLM provided in its Answer and affidavit.

[17] In its Answer, BLM states:

> The Plan Amendment, adopted in 1999, required that stipulations NSO-4, NSO-11, CSU-4, CSU-5, and TL-1 be applied to all lands meeting the corresponding descriptions identified in Appendix A, unless the exception criteria for one or more stipulations were satisfied. *Based on its information about the resources existing within the leased parcel at the time the lease was issued*, the BLM concluded that the legal descriptions for the stipulations included in the lease as issued in 2001 were not consistent with the requirements of the RMP, and that the lease therefore had been improperly issued.

Answer at 9 (emphasis supplied).

[18] BLM does not state that these databases were available to members of the public interested in the November 2001 Lease Sale, including appellants and their

(continued...)

this metadata and used it to produce the lease stipulation maps attached to its Answer.[19] Answer, Ex. B (Declaration of Faith Gall, Aug. 18, 2010) and Attachments (Attach.) B-1 through B-5. BLM states that these maps reflect "locations of resources subject to each of the stipulations, with corresponding metadata demonstrating that the data had been included in BLM's mapping database in 1999." Answer at 7.

However, given the technically sophisticated and, for our purposes, unintelligible, nature of this metadata, coupled with BLM's failure to offer any guidance on the proper interpretation and analysis of this data, we have no way of using those documents to reasonably evaluate BLM's claims that the Lease amendment stipulations are required for conformance with the RMP.

"The Board has, in other contexts, held," and we again state, "that it is incumbent upon technical experts to provide sound and rational explanations for their use and interpretation of raw data reports, including revealing the underlying facts and assumptions they have used in reaching the conclusions reached." *Robert Gadinski*, 177 IBLA 373, 398 (2009) (citing *Bookcliff Rattlers Motorcycle Club*, 171 IBLA 6, 20-21 (2006)), and cases cited. The Gall affidavit and BLM's Answer fall short of fulfilling this responsibility.

BLM is entitled to rely upon the technical expertise of its employees. *Thunderbird Oil Corp.*, 91 IBLA 195, 202 (1996); *Champlin Petroleum Co.*, 86 IBLA 37, 40 (1985). However, such reliance must concern matters within the realm of the employees' expertise, and the opinions must be reasonable and supported by record evidence. *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007).[20] We cannot determine whether those opinions are reasonable and supported by record evidence, and an appellant challenging such reliance cannot fulfill its burden on appeal to demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert, unless the expert opinion and evidence are comprehensible. *See id.* (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)).

Even more fundamental than BLM's failure to provide new, comprehensible evidence that the stipulations the Decision belatedly offered appellants are required for land use conformance is the clear fact that the Decision itself lacks a reasoned explanation, well-supported in the record. It is on this basis that we rule. The

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[18] (...continued)
predecessors.

[19] Each map includes a disclaimer by BLM "as to the accuracy, reliability, or completeness of these data." Exs. B-1 through B-5.

[20] As noted the source, nature, and reliability of the proffered metadata is unclear.

Decision lacks specificity, failing to identify for each stipulation the basis for imposition of the stipulations. The incompleteness of the administrative record, as evinced by examples noted above, necessarily hinders our review of the basis for BLM's Decision. Finally, and surprisingly, even without adequate information to fully evaluate the necessity of the new stipulations attached to the Decision, it appears that certain of the legal descriptions of lands subject to the stipulations contain mistakes. After so many years and with so much at stake, appellants understandably expect more, and so does this Board. We, therefore, review the original and amended stipulations and consider BLM's claims of administrative inadvertence, to the extent we are able given our limited information.[21]

GS-NSO-04 – This no-surface occupancy stipulation is for "[p]rotection of wildlife habitat values for which these [SWAs] were acquired by the state." Lease Exhibit GS-NSO-04. Most of the lands within Lease COC-65531 are within the Garfield Creek SWA, one of the named SWAs in the title of the stipulation. BLM claims that it applied this stipulation in the original lease only to lands that had been patented with a Federal reservation of "all minerals," because it did not understand that "other minerals" included oil and gas. The record, however, belies this claim because BLM applied this stipulation to the NW¼SE¼ of sec. 24 even though these lands had been conveyed under Patent 05-87-0058, with its "other" reservation. Conversely, BLM also has not explained why, in its 2010 corrective amendment, it applied stipulation GS-NSO-04 to the remaining lands conveyed under Patent 05-87-0058 within the Garfield Creek SWA with the exception of the NW¼SW¼ of sec. 15. These unexplained actions fatally undermine BLM's explanation for its purported "administrative inadvertence."

GS-NSO-11 – This no-surface occupancy stipulation is for the protection of 14 identified seclusion areas "that provide high wildlife value." Lease Exhibit GS-NSO-11. Consistent with our earlier discussion, the record contains no evidence of the high wildlife value, no legal description of any identified seclusion area on public lands in Lease COC-65531, and no evidence of consideration of exception criteria. Interestingly, the original stipulation is applied to the N½ of sec. 24, when, according to BLM's theory of error and Exhibit B-2 of Gall's Declaration, it should have been applied to the W½NE¼, NW¼ of sec. 24. The 2010 corrective amendment adds the NW¼SE¼ of sec. 24 which had been conveyed under Patent 05-87-0058, but it does not also modify or "correct" the original legal description

[21] The following observations should not be construed as our affirmation of the validity of BLM's stipulation maps and of the value and relevance of the metadata on which they rely. We review and refer to Exhibits B-1 through B-5 only to measure the internal consistency of BLM's arguments and evidence presented on appeal.

identifying the N½ of sec. 24 to conform to its Ex. B-2. We wonder whether this too is a new example of "administrative inadvertence."[22]

Conclusion

Even on appeal, BLM fails to fully explain the cause of the "administrative inadvertence" and, more importantly, in attempting to correct its mistakes, the Decision may create new ones. The Decision does not explain and the record does not provide evidence that BLM issued Lease COC-65531 contrary to the RMP with respect to the stipulations at issue, or that the RMP required imposition of each of the stipulations on Lease COC-65531 in the precise manner and at the precise locations as the new stipulations appended to BLM's Decision provide. With so little in the record, we are left to wonder whether the resources sought to be protected exist at the exact locations as specified in the new stipulations and whether differences between the original and new stipulations are attributable to some other reason, such as the consideration, in 2001, of exception criteria for one or more of the imposed stipulations.[23]

As we have stated numerous times before, it is incumbent upon an agency to ensure that its decision is supported by a rational basis which is explained in the written decision and is substantiated by the administrative record accompanying the decision. "An administrative decision is properly set aside and remanded if it is not supported by a case record providing the information necessary for an objective, independent review of the basis for the decision." *Robert Gadinski*, 177 IBLA at 394 (citing *Shell Offshore, Inc.*, 113 IBLA 226, 233, 97 I.D. 73, 77 (1990)); *The Navajo Nation*, 152 IBLA 227, 234 (2000); *Fred D. Zerfoss*, 81 IBLA 14 (1984). Appellants, as the recipients of a BLM decision, are entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. *John L. Stenger*, 175 IBLA 266, 279 (2008) (quoting *The Pittsburgh & Midway Coal Mining Co. v. OSM*, 140 IBLA 105, 109 (1997)).

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[22] As indicated, *supra*, the Decision also amends the application of three other stipulations to the lease (GS-CSU-04, GS-CSU-05, and GS-TL-01). We observe that in its 2010 corrective amendment, BLM applied GS-TL-1 (timing limitation for use of big game winter range) to the remainder of the lands within lease COC-65531 except for lands within sec. 23, without explanation. Again we wonder whether BLM would consider this omission another example of new administrative error.

[23] The record, for instance, does not include any documents pertaining to the Lease Sale, including any correspondence with the State.

BLM has failed to meet this basic standard. The Decision of the Deputy State Director, Division of Energy, Lands and Minerals, fails to provide a basis for understanding and accepting the decision. Moreover, it is not supported by a record providing the information necessary for an objective, independent review of the basis for the Decision.[24]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside and this matter is remanded to BLM for action consistent with this opinion.[25]

Christina S. Kalavritinos
Administrative Judge

I concur:

Sara B. Greenberg
Administrative Judge

[24] We, therefore, find it unnecessary at this stage to review the remaining issues raised by the parties in this appeal.

[25] Our analysis is not intended to provide an all-inclusive list of documents missing from the administrative record or of possible errors embedded in the Decision's new stipulations, but is intended to serve as a starting point for BLM's consideration on remand.

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