



ROCKY MOUNTAIN WILD

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June 3, 2016

Re: Rocky Mountain Wild Protest of August 2016 Lease Sale

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, Rocky Mountain Wild protest certain parcels being offered at the Bureau of Land Management's (BLM) August 2016 competitive oil and gas lease sale.

I. Protesting Party:

Rocky Mountain Wild is a non-profit environmental organization based in Denver, Colorado, that works to conserve and recover the native species and ecosystems of the Greater Southern Rockies using the best available science. RMW was formed in July 2011 by the merging of two organizations, Center for Native Ecosystems ("CNE") and Colorado Wild, and is the legal successor to both parties. Colorado Wild has worked for over a decade to protect, preserve, and restore the native plants and animals of the Southern Rocky Mountains.

Both CNE and Colorado Wild have a well-established history of participation in Bureau of Land Management ("BLM") planning and management activities, including participation in Wyoming BLM oil and gas leasing decisions and the planning processes for the various Wyoming BLM Field Offices ("FO"). RMW continues the work of each organization to save endangered species and preserve landscapes and critical ecosystems. It achieves these goals by working with biologists and landowners, utilizing GIS technology to promote understanding of complex land-use issues, and monitoring government agencies whose actions affect endangered and threatened species. Its members and supporters include approximately 1200 outdoor enthusiasts, wildlife conservationists, scientists, and concerned citizens across the country.

RMW's staff and members visit, recreate on, and use lands on or near the parcels proposed for leasing. Our staff and members enjoy various activities on or near land proposed for leasing, including viewing and studying rare and imperiled wildlife and native ecosystems, hiking,

camping, taking photographs, and experiencing solitude. Our staff and members plan to return to the subject lands in the future to engage in these activities, and to observe and monitor rare and imperiled species and native ecosystems. We are collectively committed to ensuring that federal agencies properly manage rare and imperiled species and native ecosystems. Members and professional staff of RMW are conducting research and advocacy to protect the populations and habitat of rare and imperiled species discussed herein. Our members and staff value the important role that areas of high conservation value should play in safeguarding rare and imperiled species and natural communities, and other unique resources on public land.

Our members' interests in rare and imperiled species and ecosystems on BLM lands will be adversely affected if the sale of these parcels proceeds as proposed. Oil and gas leasing and subsequent mineral development on the protested parcels, if approved without response to public comments made under the National Environmental Policy Act ("NEPA"), consultation required by the Endangered Species Act ("ESA"), and appropriate safeguards to minimize negative impacts, is likely to result in a greatly increased risk of significant harm to rare and imperiled species and native ecosystems. As a result, BLM's decision to lease the protested parcels is not based on the best available science and will result in significant harm to rare and imperiled species and native ecosystems. The proposed leasing of the protested parcels will harm our members' interests in the continued use of these public lands, and the rare and imperiled species they support. Therefore protestors have legally recognizable interests that will be affected by the proposed action.

Matthew Sandler, Staff Attorney for Rocky Mountain Wild, is authorized to file this protest on behalf of the Protesting Party.

II. Statement of Reasons:

a) Sage Grouse:

Parcels 040, 072, 073, 074, 085, are completely or partially within sage grouse Priority Habitat Management Areas ("PHMAs").¹ These parcels are also within core areas and should be deferred. We remain concerned that sage grouse stipulations prescribed in BLM land-use plan amendments and revisions to protect greater sage grouse are scientifically unsound, and fail to grant an adequate level of protection to allow for the survival of greater sage grouse in the context of development on oil and gas leases, and therefore protest these parcels. Under BLM's greater sage grouse plan amendments and revisions, the agency made an explicit commitment to prioritize oil and gas leasing and development outside PHMAs. Particularly relevant to this lease sale:

"Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMAs and GHMAs. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMAs and GHMAs, and subject to applicable stipulations for the conservation of GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG." Casper, Kemmerer, Newcastle, Pinedale,

¹ All references to parcels are preceded by WY-1608-

Rawlins, and Rock Springs Field Offices Approved RMP Amendment for Greater Sage-Grouse at 24.

“MR:2.3 Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMA and GHMA, and subject to applicable stipulations for the conservation of Greater Sage-Grouse, priority will be given to development in non-habitat areas first and then in the least suitable habitat for Greater Sage-Grouse.” Cody Field Office Approved RMP at 29.

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To comply with this direction, BLM should require leaseholders to diligently explore for and develop all existing fluid mineral leases, prioritizing those outside sage grouse habitats, before any new leases are offered at auction inside designated sage grouse habitats. Thus, all sage grouse parcels in this lease sale should be removed from the auction.

We agree with BLM’s recommendations to defer offering for sale a number of parcels for the August 2016 lease sale. It is a wise decision to defer the long-term commitment of mineral leases in areas that are sensitive sage grouse habitats. This is consistent with the Presidential Memorandum of November 6, 2015 titled “Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment,” which directs federal agencies “to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities... .” 80 Fed. Reg. 68743, 68744. This Presidential Memorandum also directs agencies to identify areas “where natural resource values are irreplaceable”; sage grouse habitats clearly fall into this category, as there is no demonstrated possibility of creating or restoring sage grouse habitats once they have been destroyed due to the fragility and long recovery times of the sagebrush habitats upon which the grouse depend.

We request that all parcels listed above be deferred from the lease sale. BLM should do its best to keep largely unleased areas of public land in designated sage grouse habitats unleased, regardless of mineral ownership patterns. Since 1965, grouse populations have declined significantly, and these declines continue in recent years, with the risk of sage grouse extirpation a sizeable threat over large portions of the species’ range.² These declines are attributable at least

²Garton, E.O., A.G. Wells, J.A. Baumgardt, and J.W. Connelly. 2015. Greater sage-grouse population dynamics and probability of persistence. Final Report to Pew Charitable Trusts, 90 pp. Online at <http://www.pewtrusts.org/~media/assets/2015/04/garton-et-al-2015-greater-sagegrouse-population-dynamics-and-persistence-31815.pdf>.

in part to habitat loss due to mining and energy development and associated roads, and to habitat fragmentation due to roads and well fields. Oil and gas development poses perhaps the greatest threat to sage grouse viability in the region. The area within 5.3 miles of a sage grouse lek is crucial to both the breeding activities and nesting success of local sage grouse populations. In a study near Pinedale, Wyoming, sage grouse from disturbed leks where gas development occurred within 3 km of the lek site showed lower nesting rates (and hence lower reproduction), traveled farther to nest, and selected greater shrub cover than grouse from undisturbed leks.³ According to this study, impacts of oil and gas development to sage grouse include (1) direct habitat loss from new construction, (2) increased human activity and pumping noise causing displacement, (3) increased legal and illegal harvest, (4) direct mortality associated with reserve pits, and (5) lowered water tables resulting in herbaceous vegetation loss. These impacts have not been thoroughly evaluated with full NEPA analysis.

Lease parcels should also be screened against Sage Grouse ACECs proposed in the context of the statewide Sage Grouse Plan Amendments EIS process. Many of the proposed ACECs have for proposed management withdrawal from future oil and gas leasing. Parcels in each of these areas should be deferred pending the outcome of the Sage Grouse Plan Amendments process, so that a proper decision can be made regarding whether or not to lease them and/or appropriate stipulations can be attached, per IM 2004-110 Change 1. BLM should also consider whether any parcels fall within proposed Sage Grouse ACECs. In the forthcoming RMP revisions, it is our expectation that the BLM will be considering the designation of several Core Areas as Sage Grouse ACECs, to be managed for no future leasing for oil and gas development. BLM's failure to do so will permit oil and gas development activities which will contribute to declining sage-grouse populations and ultimately listing by the U.S. Fish and Wildlife Service *as a threatened or endangered species*, in violation of BLM's duty to take all actions necessary to prevent listing.

Wyoming Game and Fish Department biologists have reached a consensus that the Timing Limitation Stipulations proposed for sage grouse in this lease sale are ineffective in the face of standard oil and gas development practices. These stipulations have likewise been condemned as inadequate by the U.S. Fish and Wildlife Service and renowned sage grouse expert Dr. Clait Braun. The BLM itself has been forced to admit that "New information from monitoring and studies indicate that current RMP decisions/actions may move the species toward listing...conflicts with current BLM decision to implement BLM's sensitive species policy" and "New information and science indicate 1985 RMP Decisions, as amended, may not be adequate for sage grouse."⁴ Continued application of stipulations known to be ineffective in the face of strong evidence that they do not work, and continuing to drive the sage grouse toward ESA listing in violation of BLM Sensitive Species policy, is arbitrary and capricious and an abuse of discretion under the Administrative Procedures Act.

³ Lyon, A.G. 2000. The potential effects of natural gas development on sage-grouse (*Centrocercus urophasianus*) near Pinedale, Wyoming. M.S. Thesis, Univ. of Wyoming, 121 pp.

⁴ Sage grouse plan amendment land user information meeting PowerPoint, available online at http://www.blm.gov/pgdata/etc/medialib/blm/wy/information/NEPA/bfodocs/sagegrouse.Par.94571.File.dat/May28_InfoMtg.pdf. Site last visited 7/16/2008.

The vague stipulations included in BLM's Notice of Competitive Oil and Gas Lease Sale for particular parcels do little to clarify to the interested public or potential lessees what restrictions might actually apply to protect sage grouse populations. For example, for some parcels, BLM imposes a Timing Limitation Stipulation and a Controlled Surface Use Stipulation. Such acceptable plans for mitigation of anticipated impacts must be prepared prior to issuing the lease in order to give the public full opportunity to comment, and to abide by the Department of Interior's stated new policy to complete site-specific environmental review at the leasing stage, not the APD stage. Without site-specific review and opportunity for comment, neither the public nor potential lessees can clearly gauge how restrictive or lax "acceptable plans for mitigation" might be, and whether they comply with federal laws, regulations, and agency guidelines and policies. Thus, absent such review, the leases should not issue at all.

BLM has the scientific information needed to recognize that any use of these parcels will result in further population declines. Again, it is in all interested parties favor (conservation groups, potential lessees, BLM and other federal agencies) for BLM to determine specific "modifications" prior to issuing leases, such as NSO restrictions.

We recommend against the sale of any lease parcels which contain sage grouse leks, nesting habitat, breeding habitat, wintering habitat and brood-rearing habitat. We request that these parcels be withdrawn from the lease sale. Failing withdrawal of the parcels, parcel-by-parcel NEPA analysis should occur, and NSO stipulations must be placed on all lease parcels with sage grouse leks. In addition, three-mile buffers must be placed around all leks. It is critical that these stipulations be attached at the leasing stage, when BLM has the maximum authority to restrict activities on these crucial habitats for the protection of the species, and that no exceptions to the stipulations be granted. BLM's failure to do so will permit oil and gas development activities which will contribute to declining sage grouse populations and ultimately could result in listing by the U.S. Fish and Wildlife Service as a threatened or endangered species, in violation of BLM's duty to take all actions necessary to prevent listing under its Sensitive Species Manual.

We remain concerned that development activities on the sage grouse parcels noted above will result in significant impacts to sage grouse occupying these parcels and/or the habitats nearby, and the BLM's programmatic NEPA underlying this lease sale does not adequately address these significant impacts in light of new information. Therefore, the requisite NEPA analysis to support the leasing of the sage grouse parcels listed above in the absence of an Environmental Impact Statement does not exist.

b) Areas of Critical Environmental Concern:

BLM should not lease parcels that are within Areas of Critical Environmental Concern ("ACEC"). Parcels 43 and 44 are within the Green Mountain ACEC and parcels 59 and 61 are within the Sheep Mountain ACEC. Even with NSO stipulations for the Green Mountain ACEC, accessing and developing this parcel will impact the ACEC. However, the Sheep Mountain ACEC would not receive this same level of protection. The stipulation attached to parcels 59 and 61 states:

NSO No surface occupancy is permitted (1) within the center of the Sheep Mountain Anticline ACEC (2) protection of geologic resources CSU Surface occupancy or use will be restricted or prohibited within the Northern and southern portion of the Sheep Mountain Anticline ACEC (1) unless the operator and surface managing agency arrive at an acceptable plan for mitigation of anticipated impacts; (2) as mapped on the Cody Field Office GIS database; (3) protecting Special Designations (Geologic Resources).

This limited NSO stipulation will not ensure the ACEC's values are protected. The plan to "mitigate" anticipated impacts is uncertain and any such mitigation should have been analyzed in this NEPA process. The resource values warrant and deserve better protection than that being afforded.

The Green Mountain ACEC was established in 1987 in an effort to protect unique local elk herds. The ACEC follows the boundary of designated elk crucial winter range on Green and Crooks Mountains which constitutes most of the winter range for the Green Mountain elk herd. This herd is predominantly non-migratory and spends the summer and winter on the same mountain.⁵ Due to this atypical dynamic, if the herd was to be disturbed it would cause the animals to move off the Green and Crooks Mountains and onto private land causing conflicts with local grazing operations due to reduced forage. While standard seasonal protections prohibiting surface disturbance on crucial winter range would protect animals from disturbance during the winter months, it would not prevent surface disturbance to the habitat during the remainder of the year that would thereafter fragment habitat and facilitate motorized vehicle entry into the area.⁶ Further, according to the BLM's own report on the Green Mountain ACEC, "Energy development activity could result in the loss or significant alteration of the elk crucial winter range that could threaten the viability of the Green Mountain herd."⁷ For these reasons, BLM should defer the Green Mountain ACEC parcels.

The leasing of parcels in the Sheep Mountain ACEC is improper due to the limited stipulations that fail to afford the area's resources adequate protection. The Sheep Mountain ACEC contains several unique geological features including caves, bats that hibernate in the caves, and an unusual exposure of a topographically expressed anticline where both the constructive and destructive forces that shape the earth can be observed.⁸ Geologists and spelunkers alike from all over the world come to Sheep Mountain to observe these geographical wonders which have been featured in textbooks and classrooms. Under the current stipulation, an accepted mitigation plan could allow for oil and gas exploration in this highly sensitive area. Drilling may cause the area to be too dangerous for visitors not only from structural damage to the caves, but also due to the release of highly poisonous radon gas that is concentrated in caves in the area.⁹ If irreparable damage were to occur to the geological resources in the Sheep Mountain ACEC, future

⁵ Bureau of Land Management, Lander Field Office, Areas of Critical Environmental Concern Report, <http://www.blm.gov/style/medialib/blm/wy/programs/planning/rmps/lander.Par.74315.File.dat/ACEC.pdf>

⁶ Id.

⁷ Id.

⁸ Areas of Critical Environmental Concern, Cody and Worland Field Offices, BLM, http://www.blm.gov/style/medialib/blm/wy/programs/planning/rmps/bighorn/docs/acec.Par.64447.File.dat/acec_report.pdf

⁹ Id.

generations of geologists would be deprived of experiencing the caves and important geologic formations. For these reasons, BLM should defer leasing in the Sheep Mountain ACEC.

With low demand for resource extraction, it would be wise and proper to defer these parcels. The EA fails to adequately analyze the impacts of accessing the resources below these parcels or an alternative that would defer these parcels. Failure to conduct this analysis is arbitrary and capricious.

c) Hydraulic Fracturing

The EA fails to consider the impacts of hydraulically fracturing these oil and gas wells. There is not adequate analysis of wildlife impacts, seismic activity, health impacts, or many of the other known impacts of hydraulic fracturing. Around 90 percent of wells have used hydraulic fracturing to get more gas flowing, according to the drilling industry.¹⁰ With the very high probability that this practice will occur on the specific parcels, it is arbitrary and capricious of BLM to neglect this highly controversial and impactful practice in its environmental analysis.

At a minimum, “the agency’s [Environmental Assessment] must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.” *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002). More specifically, “an environmental impact statement must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts.” *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002) (citing *Custer County Action Assoc. v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001)) (internal quotation omitted); *see also* 40 C.F.R. § 1509.25(a)(2) (2009) (scope of EIS is influenced by cumulative actions and impact); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1149 (W.D. Wash. 2000) (management plans were unlawful for failing to consider cumulative impacts on species). *Conner v. Burford* holds that the inability at the lease sale stage to fully ascertain effects of development “is not a justification for failing to estimate what those effects might be.” *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *see also Methow Valley Citizens Council*, 490 U.S. 332 (1989).

Cumulative impact is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7 (2009). The Tenth Circuit recently noted that the BLM’s own Handbook for Fluid Mineral Resources recognizes that “BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities.” *Pennaco Energy Inc., v. U.S. Dep’t of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004).

The National Environmental Policy Act, 42 U.S.C. § 4332(C), requires the BLM to take a “hard look” at the environmental consequences of their proposed actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). When offering oil and gas leases for sale without stipulations

¹⁰ http://www.nytimes.com/2011/02/27/us/27gas.html?_r=2&pagewanted=all&

prohibiting surface occupancy the agencies must assess the environmental impacts of reasonably foreseeable post-leasing oil and gas development prior to issuance of the lease. *See, e.g., Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-43 (2003); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147 (10th Cir. 2004); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983). The BLM cannot legally avoid analysis of environmental consequences by insisting that lease issuance is a mere paper transaction without on-the-ground consequences. Regardless of the fact that additional federal actions will precede commercial drilling, the issuance of a lease (particularly without stipulations allowing the BLM to preclude surface disturbance) commits the leased parcel to development and conveys legal rights to the purchaser. *See* 43 C.F.R. § 3101.1-2. Following lease, land management agencies' ability to prevent impacts to other resources is limited to those "reasonable measures" that are "consistent with lease rights granted." *Id.* Where, as here, the lease right allows surface occupancy, a significant commitment of resources is made at the time of lease issuance. This is an action with readily foreseeable on-the-ground consequences. *See Conner*, 848 F.2d 1441; *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983). As the Tenth Circuit Court of Appeals recently clarified, *Park County Resource Council v. United States Dept. of Agriculture*, 817 F.2d 609 (10th Cir. 1987) does not excuse the BLM from its obligation to analyze these consequences prior to leasing. *Pennaco Energy, Inc. v. United States Dept. of the Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004).

BLM must conduct a thorough analysis of hydraulic fracturing to comply with its NEPA responsibilities. The analysis of hydraulic fracturing should require an Environmental Impact Statement due to its significant environmental impacts that have heretofore never been analyzed in the programmatic EISs underlying oil and gas leasing in these Field Offices. The failure to analyze this anticipated future action is arbitrary and capricious.

III. CONCLUSION

Please consider the issues raised concerning greater sage-grouse, ACECs, the inadequate analysis of hydraulic fracturing, and NEPA violations in this Protest.. We thank you for the parcels you have deferred in consideration of sage-grouse management; but ask that at this crucial junction you defer the protested parcels in an effort to strongly conserve this species. It is also necessary for BLM to defer the parcels identified as ACECs, and take a significant 'hard look' at hydraulic fracturing as part of the oil and gas leasing process.

Sincerely,



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