

U.S. DEPT. OF INTERIOR  
BUREAU OF LAND MGMT  
COLORADO STATE OFFICE CENTER

2012 SEP 17 PM 3:17



## ROCKY MOUNTAIN WILD

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Helen Hankins  
State Director  
Bureau of Land Management  
Colorado State Office  
2850 Youngfield Street  
Lakewood, Colorado 80215-7093

September 7, 2012

**Re: Protest of the Bureau of Land Management's Notice of Competitive Oil and Gas Lease  
Sale of Parcels with High Conservation Value**

Dear Director Hankins:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Rocky Mountain Wild, and Audubon ("Protesting Parties") protest the November 8, 2012 sale of the following parcels.

### **I. Protested Parcels**

COC75567	COC75568	COC75569	COC75570	COC75574
COC75577	COC75578			

## **II. Protesting Parties**

### **a. Rocky Mountain Wild**

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 Colorado BLM oil and gas leasing decisions and the planning processes for the various Colorado 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 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. RMW has worked to protect the lesser prairie-chicken. We advocate for Endangered Species Act protection, strong agency regulations, public awareness, and protection of habitat. 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.

**b. Audubon:**

Audubon's interests are succinctly stated by the Society's mission: "To conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity."

Audubon members and staff visit the disputed lands for aesthetic and recreational pursuits centered on viewing, studying and appreciating the lesser prairie-chicken and the overall functioning of healthy ecosystems. Members and staff live and work near these lands, and travel to observe lesser prairie-chicken and contribute to the species' conservation. Approving leasing of the protested parcels could harm Audubon through drilling approvals resulting in permanent environmental damage, or lease issuance that could detract from conservation efforts.

Audubon is dedicated to successfully implementing conservation policies that will result in the recovery of populations and healthy habitat; and avoiding the need to list the bird under the Endangered Species Act (ESA).

**c. Authorization to File:**

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

**III. Acknowledgment**

The Protesting Parties would like to take this opportunity to thank BLM for placing more focus on environmental consequences earlier in the leasing process. We acknowledge that this shift in BLM's process has resulted in deferral of parcels prior to leasing. We hope that BLM's Colorado offices will continue to implement the mandates of Instructional Memorandum ("IM") 2010-117 to ensure that wildlife is conserved for future generations. Additional pre-leasing analysis in the Environmental Assessment ("EA") and focusing on a specific sub-region of the state in this lease sale both contribute to more informed decision-making and more efficient use of limited BLM and stakeholder resources. That said, we are concerned with the fact that BLM is not releasing a final EA with responses to public comment in a timely fashion. RMW was informed that BLM intends to release the final EA immediately prior to the lease sale. It would be beneficial to release this document and the responses to public comment prior to the protest period. The information contained in those documents could help us to determine whether or not to protest certain parcels. Without knowing BLM's response to our comments, we are forced to protest without being informed of any leasing changes in the final EA and decision documents, or justifications for leasing contained in the responses to comments. We request that BLM consider changing this practice of delayed finalization of the EA.

## **IV. Affected Resources**

Oil and gas, and geothermal exploration and development authorized through the proposed leasing of the protested parcels is likely to have significant negative impacts on the lesser prairie-chicken, black tailed prairie dog, rare plants, mountain plover, greater prairie chicken, Preble's meadow jumping mouse, swift fox, and other wildlife species. Leasing of the protested parcels is also likely to have significant impacts on lands of high conservation value. Lands of high conservation value that may be significantly impacted by the proposed leasing include CNHP Potential Conservation Areas. Exhibit 1, attached, is RMW's internal screen results for the protested parcels.

### **A. Imperiled Species**

#### **1) Lesser prairie-chicken:**

Parcels 75567 and 75569 will affect important lesser prairie-chicken habitat. A 1995 petition to list the lesser prairie-chicken under the Endangered Species Act (ESA) the U.S. Fish and Wildlife Service (USFWS) found that the species was warranted for listing as a threatened species under the ESA, but that the species listing was precluded by the need to list other higher-priority species. The "warranted, but precluded" finding established the lesser prairie-chicken as a "candidate species" under the ESA. The USFWS has continued to find the lesser prairie-chicken's listing to be warranted but precluded in every year since the 1998 petition finding. The FWS has designated the lesser prairie-chicken a listing priority number ("LPN") of 2. LPNs range from 1 to 12. A species with a listing priority of 1 would have the highest priority for listing based on threats and the imperiled status of the species. The lesser prairie-chickens LPN of 2 indicates that it is in dire need of protection.

Lek sites are traditional and are used annually, although sites can be occasionally relocated in response to disturbances such as fire or conversion to agricultural areas (Giesen 1998). Lek sites are used for display purposes and as such are typically found on a locally high area such as a hill or ridge, or a grass flat, Copelin 1963, Taylor and Guthery 1980b, USFWS 1998, Giesen 1998). Lek sites are characterized by a limited amount of low, sparse vegetation, usually grasses (Davis et al. 1981). Probably because of these characteristics, lesser prairie-chicken leks are known to be associated with prairie dog towns, as well as other disturbed areas such as roads or abandoned oil and gas well pads (Davis et al. 1981, Morrissey 1995). Habitat surveys have shown that good lesser prairie-chicken habitat can support approximately 1-2 lek sites per square mile (Morrissey 1995, Bailey 1999).

Lesser prairie-chickens select a nesting site within approximately 1.8 miles of the lek site (Giesen 1994). Because nesting occurs in early spring before the seasonal growth of bluestem, Prairie-Chickens are highly dependent on the persistence of residual grasses from the previous years for nesting cover and protection from predators (Davis et al. 1979 and 1981, Taylor and Guthery 1980b, Riley et al. 1992, USFWS 1998). Once a nesting site is selected, hens lay an average clutch of 10-12 eggs and the incubation period lasts from 24-26 days after the last egg is laid (Giesen 1998). Food sources during nesting are again primarily seeds, leaves, flowers and

buds with shinnery-oak leaf galls, catkins, leaves and acorns providing the majority of the bird's food supply (Davis et al. 1980, Taylor and Guthery 1980b, Riley et al. 1992, Giesen 1998, Peterson and Boyd 1998, USFWS 1998).

The distribution of lesser prairie-chickens has been greatly reduced since about 1920, and recent estimates suggest that the species occupies only 8-10% (28,640-35,800 km<sup>2</sup>) of its historic range (Taylor and Guthery 1980b, USFWS 1998, Bailey and Williams 1999, Bailey 2002). Lesser prairie-chickens exist today in southeastern Colorado, south-central Kansas, western Oklahoma, southeastern New Mexico and the Texas panhandle (USFWS 1998). In Colorado, lesser prairie-chickens have been extirpated from three of the six counties that they are once thought to have inhabited, and today are found only in Baca, Prowers and Kiowa Counties.

The major threats to Prairie-Chicken populations include drought, degradation of habitat caused by livestock grazing, habitat loss and habitat fragmentation, oil and gas development, rangeland conversion for other uses, and a lack of adequate protections.

One widespread land conversion phenomenon that has been taking place on public lands since the second half of the nineteenth century is the conversion of rangeland for oil and gas well pads and associated facilities, roads and pipelines. Bailey reported an average of 16,187 m<sup>2</sup> of land required for an oil or gas well pad, although the number varied widely (1999). The roads created for oil and gas activities are known to attract off road vehicle users, a factor which may lead to further habitat degradation (Bailey 1999). An extensive network of above ground power lines and other support structures has also been erected to provide power to the well pad machinery (Figure 5). The effect of this infrastructure development has been to provide nesting, roosting and foraging sites to ravens (nest predators) and other predatory birds (e.g. Red-tailed Hawk, Great Horned Owl) that would not commonly occur in the shinnery-oak-grassland community (Smith, personal communication). In addition to the effect of oil and gas development on habitat loss and predator populations, there is strong anecdotal evidence that the noise from these activities disrupts Prairie-Chicken lekking behavior, further affecting reproduction success and decreasing usable habitat (Smith et al. 1998). In one study, in the extreme southeastern portion of the historic New Mexico range, only one of 29 historic leks was found to be active, with oil pump noise being moderate to high at 45% of the sites and low at 28% of the sites (Smith et al. 1998). The authors concluded that significant noise pollution from oil and gas well pad operations may be playing a role in extirpating the lesser prairie-chickens from areas south of 33°N through interference with the male vocalizations and attraction of mates during the lekking season. A recent report by researcher Best (2001) recommended the removal of restrictions on oil and gas development in the Carlsbad Resource Area, in part based on the misconception that lesser prairie-chickens never consistently occupied the area south of highway 380. The report contains a number of faulty assumptions too lengthy to review here, but the purpose of the report is clearly to endorse the position of the petroleum industry, that areas where lesser prairie-chickens have been extirpated should be opened to oil and gas activities. This critique has been supported by a number of independent reviewers, including reviewers from the New Mexico Natural Heritage Program and the Wildlife Management Institute (Johnson 2001 unpublished, Carpenter and Riley 2001 unpublished). The study fails to recommend sound habitat management procedures that would allow for the recovery and re-colonization of birds back into areas of historical occupancy. A few important critiques of the document include; 1) a failure to

review the majority of lesser prairie-chicken grey literature, a significant source of information for this species, 2) a failure to consult recognized historical reports from widely cited ornithologists, including F.M. Bailey and J. Ligon 3) an erroneous assertion that Prairie-Chickens never permanently occupied areas south of highway 380 and, 4) incorrect reporting on historical lek activity, including the number of active leks south of highway 380 discovered by BLM biologists in the years 1998-2001, historical lek records between US 82 and the Eddy-Chaves County line, and historical lek records south of US 62-180 (Johnson 2001, unpublished). In recognition of the negative impacts of oil and gas development on the lesser prairie-chicken, the BLM does not currently allow new drilling within 200 m. of a lek site, with certain exceptions. However, the Fish and Wildlife Service (2001) has reported that current restrictions on new oil and gas drilling within 200 m. of a lek site are inadequate to protect the species nesting habitat, because Prairie-Chickens are known to nest within a 3 km. radius of leks.

BLM is proposing a .25 mile buffer around Prairie-Chicken leks. This buffer is inadequate to protect these production areas. These leks and the birds that breed there will be lost without stronger protections. The Colorado Division of Wildlife's "Actions to Minimize Adverse Impacts to Wildlife Resources" published in 2008 recommends a 0.6 mile buffer around any active or inactive lesser prairie-chicken lek.<sup>1</sup> As outlined below, BLM has failed to analyze the effectiveness of these meager lesser prairie-chicken mitigation measures. BLM also failed to analyze cumulative effects of this action on the lesser prairie-chicken.

## **2) Black-tailed prairie dog:**

Parcels 75574, 75577, and 75578 are within black-tailed prairie dog overall range. In February 2000, the black-tailed prairie dog became a candidate for ESA listing.<sup>2</sup> One of the primary causes of continued prairie dog decline is habitat loss and degradation.<sup>3</sup> The opening of occupied and potential prairie dog habitat to oil and gas development will result in further habitat degradation. The FWS has since removed the black-tailed prairie dog from the candidate list, however the species is still locally imperiled. The black-tailed prairie dog is a CO BLM sensitive species and is categorized as S3, meaning it's vulnerable to extirpation or extinction within the state.

It is particularly important that prairie dogs be protected from habitat-degrading activities such as oil and gas exploration and extraction. In addition to deleterious impacts on black-tailed prairie dogs, the BLM's negligence in regard to the need to conserve and restore black-tailed prairie dogs will have broader ecosystemic repercussions. Prairie dogs are keystone species that create

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<sup>1</sup> found at: <http://www.oilandgasbmps.org/viewpub.php?id=27> (Appendix A: Species Specific Recommendations; p. 24)

<sup>2</sup> See 65 Federal Register 5476-5488 (February 4, 2000).

<sup>3</sup> Ibid.

habitat and provide a prey base for a broad array of associated species.<sup>4</sup> In fact, some 208 wildlife species have been observed on or near prairie dog colonies. While not all of these species are dependent on prairie dogs, nine species can be considered to be dependent on prairie dogs and their colonies (black-footed ferret, burrowing owl, mountain plover, ferruginous hawk, golden eagle, swift fox, horned lark, deer mouse, grasshopper mouse). In addition, twenty species benefit from opportunistic use of prairie dog colonies and 117 species have life history characteristics indicating that they benefit from prairie dogs and their colonies, but there is insufficient data about those species.<sup>5</sup>

The impacts to prairie dogs of oil and gas exploration, infrastructure, and extraction-related activities have been documented elsewhere. A list of potential impacts on prairie dogs from these operations includes:

- Fragmentation and loss of prairie dog habitat;
- Human disturbance of prairie dogs, including increased wildlife harassment, as well as general disturbance from human presence;
- Road construction, which increases potential for road mortality and shooting;
- New powerlines may increase perching opportunities for raptors, potentially increasing predation on prairie dogs;
- Crushing, burying, and degradation of vegetation;
- Noxious weed proliferation;
- Reduction in forage quality;
- Loud noises (including continuous din from compressor stations), which can lead to increased stress among prairie dogs;
- Soil compaction, with negative impacts on prairie dog burrows;
- Direct mortality from heavy equipment; and
- Contamination or degradation of habitat through wastewater, petroleum, or other spills.

Harms to prairie dogs and their towns also negatively impact prairie dog associated wildlife. Several of the species dependent on or associated with prairie dogs may be found in the Decision

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<sup>4</sup> See Kotliar, Natasha B. 2000. "Application of the new keystone-species concept to prairie dogs: how well does it work?" *Conservation Biology* 14(6): 1715-1721; Kotliar, Natasha B., Bruce W. Baker, April D. Whicker, Glenn Plumb. 1999. "A critical review of assumptions about the prairie dog as a keystone species." *Environmental Management* 24 (2): 177-192; and Miller, Brian, Rich Reading, John Hoogland, Tim Clark, Gerardo Ceballos, Rurik List, Steve Forrest, Lou Hanebury, Patricia Manzano-Fischer, Jesus Pacheco, and Dan Uresk. 2000. "The role of prairie dogs as a keystone species: response to Stapp." *Conservation Biology* 14(1):318-321.

<sup>5</sup> See Kotliar et al. 1999.

Area. These include the ferruginous hawk, black-footed ferret, burrowing owl, and swift fox, which have been identified as imperiled through a “wave of secondary extinctions”<sup>6</sup> that is resulting from the continued decline of prairie dogs.

Burrowing owls are closely associated with prairie dog colonies in the shortgrass prairie. Owls nest and rear their young in prairie dog burrows, and forage for insects in the short-cropped vegetation on prairie dog colonies. With degradation and fragmentation of the prairie dog ecosystem, the burrowing owl continues to decline. Imperilment of burrowing owls in Arizona has been linked to declines in prairie dogs.<sup>7</sup>

The ferruginous hawk is another close associate of prairie dogs. This hawk species – the largest of the buteos – depends on the abundant prey biomass, of both prairie dogs and lagomorphs, found on prairie dog towns.<sup>8</sup> Harm to prairie dogs and their habitat negatively impacts ferruginous hawks in the shortgrass prairie. In New Mexico, researchers strongly suggest that prairie dog decline ushers in ferruginous hawk decline.<sup>9</sup>

Other associates of black-tailed prairie dogs that are imperiled are the mountain plover and swift fox. Due to their federally unprotected status, we are concerned that BLM has not adequately assessed the impacts of oil and gas industrialization on these species. Oil and gas activities usually include road-building and increased vehicular traffic. Impacts from oil and gas development on plovers and swift fox include habitat fragmentation and isolation, disturbance during breeding activities, and perils from increased roads and vehicular traffic.

The Black footed ferret is one of the most endangered mammals in North America. The parcels within prairie dog colonies could be potential reintroduction sites for this species. Developing these parcels will diminish the chances of being able to successfully reintroduce black footed ferrets to this area. The loss of potential habitat for this highly endangered species will hinder its path to recovery.

## **B. Areas of High Conservation Value**

### **1). Colorado Natural Heritage Program Potential Conservation Areas**

All or portions of Parcels 75568, 75569, 75570, 75574, 75577, and 75578 are located within CNHP High Priority Potential Conservation Areas (PCA). According to the CNHP, PCAs seek to facilitate a goal to “successfully protect populations” through a “focus on capturing the ecological processes that are necessary to support the continued existence of a particular

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<sup>6</sup> See, for example, Miller, Brian, Ceballos, Gerardo, and Richard P. Reading. 1994. “The Prairie Dog and Biotic Diversity.” *Conservation Biology* 8(3):677-81.

<sup>7</sup> See Wagner, David M. 2002. “Current status and habitat use of gunnison’s prairie dogs (*Cynomys gunnisoni*) in Arizona.” Ph.D. Dissertation, Northern Arizona University. 77 pp.

<sup>8</sup> See Olendorff. 1993. “Status, Biology, and Management of Ferruginous Hawks: A Review.” Department of Interior, BLM, Raptor Research and Technical Assistance Center. Boise, ID. 84 pp.

<sup>9</sup> Cook, Rosamonde R., Jean-Luc E. Cartron, and Paul J. Polechla, Jr. 2003. “The importance of prairie dogs to nesting ferruginous hawks in grassland ecosystems.” *Wildlife Society Bulletin* 31(4): 1073-1082.

element of natural heritage significance.”<sup>10</sup> CNHP recommends that “consideration of specific activities or land use changes proposed within or adjacent to the preliminary conservation planning boundary should be carefully considered and evaluated for their consequences to the element on which the conservation unit is based.”<sup>11</sup> Higher priority PCAs are ranked by CNHP with Biodiversity Significance Ranks 1 and 2, indicating Outstanding or Very high Biodiversity Significance. Given that the proposed parcels have already been recognized as being the site of ‘ecological process that are necessary to support the continued existence of [an] element of natural heritage significance,’ the BLM should defer these parcels because “Leasing would result in unacceptable impacts to specially designated areas (whether Federal or non-Federal) and would be incompatible with the purpose of the designation.”<sup>12</sup> BLM has no stipulations aimed at protecting the nature of these PCAs. At the least, No Surface Occupancy stipulations should be attached to these lease parcels. Without stipulations that have been analyzed for effectiveness and protective of these PCAs leasing should not move forward. The PCA’s affected are the following:

**a. Big Sandy Creek at Matheson:**

Parcels 75574, 75577, and 75578 are within the Big Sandy Creek at Matheson PCA. Several playas occur within this area. These playas were dry during the first visit to the ranch on July 18 but contained water on August 14. Tadpoles were present in several of the playas (collected and awaiting identification) on August 14 and a swift fox and three Mountain Plovers were observed near the playas at this time. A little bluestem - sideoats grama community occurs on rocky outcrops and steep slopes at the highest elevations of the ranch. The boundary would protect the plant communities from direct disturbance and allow most ecological processes to function or be simulated. This would probably support most native animal communities except those which are wide ranging (such as pronghorn). Boundaries encompass the Big Sandy floodplain and a 1,000 foot buffer to protect the meandering and flashiness of this wide ephemeral stream.

**b. Central Shortgrass:**

Parcels 75568, 75569, and 75570 are within the Central Shortgrass PCA. Multiple grassland birds inhabit the site. Mountain Plover, Ferruginous Hawk, McCown's Longspur, Long-billed Curlew, and Burrowing Owl have all been documented. Black-tailed prairie dogs, an important food source for raptors and carnivores, have also been observed as have Bald Eagle, Least Tern, Snowy Plover, White-faced Ibis, swift fox, Arkansas darter, massasauga and multiple historical records of northern leopard frogs. Numerous plant communities of conservation concern are also found within the site including Great Plains Salt Meadows, Shortgrass Prairie, Northern Sandhill Prairie, Vine Mesquite-Buffaloe Grass, Great Plains Shrubland, Plains Cottonwood Riparian Forest, Bulrush Wet Meadow, Emergent Wetland, and Spike Rush. In addition, multiple populations of the vulnerable plant, plains ragweed, occupy the site.

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<sup>10</sup> Colorado Natural Heritage Program, *Data Dictionary for Potential Conservation Area Transcription Reports from the Colorado Natural Heritage Program*. July, 2005.

<sup>11</sup> *Id.*

<sup>12</sup> BLM, Instructional Memorandum No. 2010-117. Washington, D.C. May 17, 2010 at 10

## V. Statement of Reasons

The Colorado Natural Heritage Program's "The State of Colorado's Biodiversity 2011" report proclaims that "[t]he Eastern Colorado Plains have the highest number of at-risk animal species."<sup>13</sup> Oil and gas leasing in this sensitive and diminished area should avoid all further deleterious consequences. The protested parcels will have negative impacts on habitat for imperiled species and sensitive environments. BLM has failed to adequately analyze the impacts of this leasing and should withdraw the protested parcels.

### a. The Decision Fails to Adequately Analyze the Direct, Indirect, and Cumulative Affects of Leasing These Parcels:

NEPA dictates that BLM take a "hard look" at the environmental consequences of a proposed action and the requisite environmental analysis "must be appropriate to the action in question." *Metcalf v. Daley*, 214 F.3d 1135, 1151 (9th Cir. 2000); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). In order to take the "hard look" required by NEPA, BLM is required to assess impacts that include: "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, *whether direct, indirect, or cumulative.*" 40 C.F.R. § 1508.8 (emphasis added). "[C]umulative impact analysis must be timely. It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now." *Kern v. US. Bureau of Land Management*, 284 F.3d 1062, 1075 (9th Cir. 2000); *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312-1313 (9th Cir. 1990). The BLM failed to adequately analyze potential direct, indirect, and cumulative impacts of the proposed leasing on the lesser prairie-chicken, black-tailed prairiedog and other species throughout the planning area.

"In determining the scope of the required NEPA analysis, an agency must consider not only the proposed action, but also three types of related actions – 'connected actions', similar 'actions', and 'cumulative actions'. 40 C.F.R. 1508.25(a). "Cumulative actions" are those" which when viewed with other proposed actions have cumulatively significant impacts." *Id.* at 1508.25(a)(2). 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. 40 C.F.R. 1508.27 (b)(7).

Leasing parcels in lesser prairie-chicken production areas will have significant effects on the species. Leasing for oil and gas development presents a death by a thousand cuts scenario. One well will not have a significant effect on the bird, but large scale development like what is being proposed by the BLM will. This is especially true when widespread leasing is spread out over a number of lease sales. BLM must update the leasing analysis in their outdated 1996 RMP for the

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<sup>13</sup> Rondeau, R., K. Decker, J. Handwerk, J. Siemers, L. Grunau, and C. Pague. 2011. The state of Colorado's biodiversity 2011. Prepared for The Nature Conservancy. Colorado Natural Heritage Program, Colorado State University, Fort Collins, Colorado. Found at: [http://www.cnhp.colostate.edu/download/documents/2011/Scorecard\\_march1\\_2012\\_final.pdf](http://www.cnhp.colostate.edu/download/documents/2011/Scorecard_march1_2012_final.pdf)

Royal Gorge Field Office. This antiquated planning document was drafted prior to the lesser prairie-chicken's ESA candidate status. Decisions made in this RMP cannot guide current leasing decisions. The RGFO RMP states: "The reasonably foreseeable development indicates that the projected disturbance resulting from fluid mineral operations is approximately 20 acres annually or a total of about 400, which is less than .02 percent of the BLM-administered mineral estate in the planning area." *RGFO RMP/EIS at 3-7*. The Response to Comments in the RMP EIS states, "The implication that oil and gas exploration results in serious degradation of wildlife habitat, water quality, and other resource values represents an unwarranted and unjustified generality in present day oil and gas industry." *RGFO RMP/EIS 2-52*. It is clear that CO BLM and the RGFO are basing their leasing decisions on outdated planning documents which are supported by wildly inaccurate beliefs about the effects of oil and gas development.

Leasing parcels in Potential Conservation Areas with high biodiversity significance according to the Colorado Natural Heritage Program will have direct, indirect, and cumulative impacts that have not been analyzed. These areas received this designation due to the unique and sensitive ecosystems within their boundaries. Leasing this land for oil and gas development will change the character and reduce the benefit of these PCAs. BLM failed to analyze these effects in the EA for this lease sale.

**b. The BLM has failed to adequately analyze the effectiveness of the lease stipulations and other mitigation measures in the Environmental Assessment, and the determination that lease stipulations and other mitigation measures will prevent significant impacts to lesser prairie-chicken is arbitrary and capricious:**

A complete discussion of steps that can be taken to mitigate adverse environmental impacts is an important ingredient of the NEPA process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Id.* In recognition of the importance of a discussion of mitigation measures, Council on Environmental Quality (CEQ) regulations "require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c)." *Id. at 352*. When a proposed action will result in impacts to resources, the Agency is obligated to describe what mitigating efforts it could pursue to off-set the damages that would result from the proposed action. *See 40 C.F.C. § 1502.16(h) (2009)* (stating that an EIS "shall include discussions of. . . [m]eans to mitigate adverse environmental impacts").

"Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1996). (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). The Ninth Circuit explained that fair evaluation requires agencies to "analyze[] the mitigation measures in detail [and] explain how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), rev'd on other grounds, 485 U.S. 439 (1988).

In *Davis v. Mineta*, the Tenth Circuit found that federal agencies did not comply with NEPA when they relied on the possibility of mitigation measures in issuing a FONSI. According to the court, “[m]itigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.” *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002)

The BLM must evaluate the effectiveness of the mitigation measures used in leasing with the best available science. “The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b) (2009). “For this reason, agencies are under an affirmative mandate to ‘insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements[,] identify any methodologies used and . . . make explicit reference by footnote to the scientific and other sources relied upon for conclusions[.]’” *Env’tl. Def. v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 69, 78 (D.D.C. 2007) (citing 40 C.F.R. § 1502.24 (2009)). If there is scientific uncertainty NEPA imposes the mandatory duties to: (1) disclose the scientific uncertainty; (2) complete independent research and gather information if no adequate information exists unless costs are exorbitant or the means of obtaining the information are not known; and (3) evaluate the potential, reasonably foreseeable impacts in the absence of relevant information. *See* 40 C.F.R. § 1502.22 (2009). The BLM determined that the proposed action will not result in significant impacts to lesser prairie-chickens. This determination is predicated on the assumption that lease stipulations will prevent significant adverse impacts to lesser prairie-chickens. However, BLM failed to analyze if a .25 mile buffer around prairie-chicken leks will protect the species. The best available science relied on by Colorado Division of Wildlife in the 2008 report cited above found that lesser prairie chicken needed a 0.6 mile buffer around leks. BLM’s arbitrary decision to use a buffer that is less than half of what has been recommended by expert agencies required analysis. Absent analysis of this inadequate lek buffer, these parcels should be deferred from leasing.

## **VI. Federal Land Policy Management Act**

### **a. The BLM failed to Prevent Undue and Unnecessary Degradation to Lesser Prairie-Chicken Populations and Potential Conservation Areas and Has Failed to Meet its Obligations Under BLM Manual 6840:**

The BLM has a duty under the Federal Land Policy and Management Act (“FLPMA”) to prevent unnecessary and undue degradation to the lands under its management. “In managing the public lands the [Secretary of Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). The use of the imperative language “shall” makes clear that Congress intended to leave the Secretary no discretion in administering the Act. *NRDC v. Jamison*, 815 F. Supp. 454, 468 (D.D.C. 1992). “The court in *Mineral Policy Ctr. v. Norton* [found] that in enacting FLPMA, Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that,

while necessary . . . is undue or excessive.” Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 43 (D.D.C. 2003). In addition, that court held that “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority – and indeed the obligation – to disapprove of an otherwise permissible . . . operation because the operation though necessary . . . would unduly harm or degrade the public land.” Id. at 49.

The purpose of Section 6840 of the BLM Manual is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special status species are:

- (1) species listed or proposed for listing under the Endangered Species Act (ESA), and
- (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA

The objectives of the special status species policy are:

- A. To conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species.
- B. To initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.

The leasing of the protested parcels violates this section. The lesser prairie-chicken is a BLM special status species and BLM should not be leasing parcels within production areas. The protested parcels should be withdrawn from the lease sale.

#### **b. BLM Must Mitigate Adverse Effects**

The BLM must mitigate the adverse effects on the aforementioned imperiled species in order to comply with the “unnecessary and undue degradation” standard of FLPMA. BLM must also mitigate adverse effects on sensitive resources within ACEC and CNHP PCAs *Kendall’s Concerned Area Residents*, 129 IBLA 130, 138; see 42 C.F.R. 3809.2-1(b). The BLM has failed to minimize adverse impacts of oil and gas development on the aforementioned species and lands of high conservation value.

#### **c. Consistency**

The BLM is violating FLPMA because it is not being consistent with the policies of state, tribal, and other agencies in its conservation policies regarding lesser prairie-chicken, black tailed prairie-dog and other species. FLPMA requires the BLM to seek to “be consistent with officially approved and adopted resource related policies and programs . . . of other federal agencies, State and local governments and Indian tribes.” 43 C.F.R. § 1610.3-2; see 43 U.S.C. § 1712(c)(9). The proposed leasing is not consistent with CO Division of Wildlife policy, COGCC Regulations and other state, local and federal policies and programs.

### **VII. Endangered Species Act**

The U.S. Fish and Wildlife Service has announced that the lesser prairie-chicken warrants protection under the Endangered Species Act. Leasing parcels in occupied lesser prairie chicken habitat is a violation of BLM's duty to manage its land for multiple uses. One reason for the listing determination was a lack of regulatory mechanisms to protect this species. BLM's actions in leasing occupied habitat for energy development further demonstrates the agency's lack of protective mechanisms. This leasing is going to contribute to the need to list the species. Consultation with FWS should have been conducted to ensure adequate protection for this candidate species.

#### **a. Duty to Conserve and Duty to Engage in Recovery Planning**

In addition to consultation requirements, federal agencies are bound by two affirmative obligations under the ESA. Section 7(a)(1) states that federal agencies shall "seek to conserve [listed] species and shall utilize their authorities in furtherance of the purposes of [the] Act." 16 U.S.C. § 1536(a)(1). A number of courts have held that the duty to conserve imposes an independent duty upon agencies to give the conservation of a listed species top priority. *Carson-Truckee Water Conserv. Dist. v. Watt*, 549 F. Supp. 704 (D. Nev. 1982) citing *TVA v. Hill*, 437 U.S. 153, 184 (1978); *Bensman v. U.S. Forest Serv.*, 984 F. Supp. 1242, 1246 (D. Mont. 1997). The ESA also states that the Secretary "shall develop and implement plans for the conservation and survival [of listed species] unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1).

#### **VIII. BLM has Discretion to Not Lease**

Under the statutory and regulatory provisions authorizing this lease sale, the BLM has full discretion over whether or not to offer these lease parcels for sale. The Mineral Leasing Act of 1920 ("MLA") provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil and gas deposits may be leased by the Secretary." 30 U.S.C. § 226(a) (2009) (emphasis added). The Supreme Court has concluded that this "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965); see also *Wyo. Ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory y."); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975).

Submitting a leasing application vests no rights to the applicant or potential bidders. The BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the secretary whether or not to issue leases for the lands involved." *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), cert. den. 383 U.S. 912 (1966); see also *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Pease v. Udall*, 332 F.2d 62, 63 (9th Cir. 1964); *Geosearch v. Andrus*, 508 F. Supp. 839, 842 (D.C. Wyo. 1981).

The arguments set forth in detail above demonstrate that exercise of the discretion not to lease the protested parcels is appropriate and necessary. Withdrawing the protested parcels from the lease sale until BLM has met its legal obligations to conduct an adequate NEPA analysis by

responding to public comments, upheld the requirements of the Endangered Species Act, and met the requirements of IM 2010-117 and other BLM regulations is a proper exercise of BLM's discretion under the MLA. The BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with the applicable law.

### **IX. Conclusion & Request for Relief**

The Protesting Parties therefore requests that the BLM withdraw the protested parcels from the November 2012 lease sale.

Sincerely,



**MATTHEW SANDLER**

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On behalf of:

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ED Audubon Rockies  
105 W Mountain  
Fort Collins, CO 80524

### **Attachments:**

1: Rocky Mountain Wild Internal GIS Screen

# Exhibit 1

Parcel Number	Parcel Acres	Value Name	Acres Overlap	Value Overlap	Source
COC75567	43	Black-tailed Prairie Dog Overall Range CPW	43	99%	CPW
COC75567	43	Lesser Prairie-chicken Historic Range CPW	43	99%	CPW
COC75567	43	Lesser Prairie-chicken Overall Range CPW	36	83%	CPW
COC75567	43	TNC Central Shortgrass Prairie Terrestrial	43	99%	TNC
COC75567	43	Mule Deer Overall Range CPW 2011	43	99%	CPW
COC75567	43	Phasant Overall Range CPW 2011	43	99%	CPW
COC75567	43	Pronghorn Overall Range CPW 2011	43	99%	CPW
COC75567	43	Swift Fox Overall Range CPW 2011	43	99%	CPW
COC75567	43	Texas Horned Lizard Habitat Modeled	3	7%	SWREGAP
COC75567	43	White-tailed Deer Overall Range CPW 2011	43	99%	CPW
COC75567	43	Wolf Habitat Modeled SWREGAP	43	99%	SWREGAP
COC75567	43	Wood Duck Habitat Modeled SWREGAP	1	2%	SWREGAP
COC75567	43	Yellow Mud Turtle Habitat Modeled	3	7%	SWREGAP
COC75568	357	Potential Conservation Areas L4 (External) Higher Biodiversity Significance CNHP 2010	349	98%	CNHP
COC75568	357	Black-tailed Prairie Dog Overall Range CPW	357	100%	CPW
COC75568	357	Element Occurrence Low Precision Plover, mountain CNHP 2011	318	89%	CNHP
COC75568	357	Lesser Prairie-chicken Historic Range CPW	357	100%	CPW
COC75568	357	Massasauga Overall Range CPW 2011	357	100%	CPW
COC75568	357	American Wigeon Habitat Modeled	139	39%	SWREGAP
COC75568	357	Grasshopper Sparrow Habitat Modeled	1	0%	SWREGAP
COC75568	357	Greater Prairie-chicken Historic Range CPW	357	100%	CPW
COC75568	357	Mallard Habitat Modeled SWREGAP	115	32%	SWREGAP
COC75568	357	Mule Deer Overall Range CPW 2011	357	100%	CPW
COC75568	357	Northern Pintail Habitat Modeled SWREGAP	102	29%	SWREGAP
COC75568	357	Phasant Overall Range CPW 2011	357	100%	CPW
COC75568	357	Plains Leopard Frog Habitat Modeled	1	0%	SWREGAP
COC75568	357	Pronghorn Overall Range CPW 2011	357	100%	CPW
COC75568	357	Scaled Quail Overall Range CPW 2011	254	71%	CPW
COC75568	357	Sprague's Pipit Habitat Modeled SWREGAP	1	0%	SWREGAP
COC75568	357	Swift Fox Overall Range CPW 2011	357	100%	CPW
COC75568	357	Upland Sandpiper Habitat Modeled	1	0%	SWREGAP
COC75568	357	Western Snowy Plover Habitat Modeled	153	43%	SWREGAP
COC75568	357	White-tailed Deer Overall Range CPW 2011	357	100%	CPW
COC75568	357	Wolf Habitat Modeled SWREGAP	357	100%	SWREGAP
COC75568	357	Wood Duck Habitat Modeled SWREGAP	137	38%	SWREGAP
COC75568	357	Yellow Mud Turtle Habitat Modeled	36	10%	SWREGAP
COC75569	162	Lesser Prairie-chicken Production Area CPW	18	11%	CPW
COC75569	162	Potential Conservation Areas L4 (External) Higher Biodiversity Significance CNHP 2010	162	100%	CNHP
COC75569	162	Black-tailed Prairie Dog Overall Range CPW	162	100%	CPW
COC75569	162	Lesser Prairie-chicken Historic Range CPW	162	100%	CPW
COC75569	162	Lesser Prairie-chicken Overall Range CPW	162	100%	CPW

COC75569	162	Massasauga Overall Range CPW 2011	162	100%	CPW
COC75569	162	Mule Deer Severe Winter Range CPW 2011	141	87%	CPW
COC75569	162	Riparian Landcover GAP	60	37%	GAP
COC75569	162	TNC Central Shortgrass Prairie Terrestrial	162	100%	TNC
COC75569	162	Greater Prairie-chicken Historic Range CPW	162	100%	CPW
COC75569	162	Mule Deer Concentration Area CPW 2011	162	100%	CPW
COC75569	162	Mule Deer Overall Range CPW 2011	162	100%	CPW
COC75569	162	Mule Deer Winter Range CPW 2011	141	87%	CPW
COC75569	162	Pheasant Overall Range CPW 2011	67	41%	CPW
COC75569	162	Pronghorn Overall Range CPW 2011	162	100%	CPW
COC75569	162	Scaled Quail Overall Range CPW 2011	162	100%	CPW
COC75569	162	Sprague's Pipit Habitat Modeled SWREGAP	74	46%	SWREGAP
COC75569	162	Swift Fox Overall Range CPW 2011	162	100%	CPW
COC75569	162	White-tailed Deer Concentration Area CPW	141	87%	CPW
COC75569	162	White-tailed Deer Overall Range CPW 2011	162	100%	CPW
COC75569	162	Wolf Habitat Modeled SWREGAP	162	100%	SWREGAP
COC75569	162	Wood Duck Habitat Modeled SWREGAP	9	6%	SWREGAP
COC75569	162	Yellow Mud Turtle Habitat Modeled	2	1%	SWREGAP
		Potential Conservation Areas L4 (External)			
COC75570	81	Higher Biodiversity Significance CNHP 2010	81	101%	CNHP
COC75570	81	Black-tailed Prairie Dog Overall Range CPW	81	101%	CPW
COC75570	81	Lesser Prairie-chicken Historic Range CPW	81	101%	CPW
COC75570	81	Massasauga Overall Range CPW 2011	70	87%	CPW
COC75570	81	Mule Deer Severe Winter Range CPW 2011	32	40%	CPW
COC75570	81	TNC Central Shortgrass Prairie Terrestrial	81	101%	TNC
COC75570	81	Greater Prairie-chicken Historic Range CPW	81	101%	CPW
COC75570	81	Mule Deer Concentration Area CPW 2011	32	40%	CPW
COC75570	81	Mule Deer Overall Range CPW 2011	81	101%	CPW
COC75570	81	Mule Deer Winter Range CPW 2011	32	40%	CPW
COC75570	81	Pronghorn Overall Range CPW 2011	81	101%	CPW
COC75570	81	Swift Fox Overall Range CPW 2011	81	101%	CPW
COC75570	81	White-tailed Deer Concentration Area CPW	32	40%	CPW
COC75570	81	White-tailed Deer Overall Range CPW 2011	81	101%	CPW
COC75570	81	Wolf Habitat Modeled SWREGAP	81	101%	SWREGAP
COC75570	81	Wood Duck Habitat Modeled SWREGAP	75	93%	SWREGAP
COC75570	81	Yellow Mud Turtle Habitat Modeled	3	4%	SWREGAP
		Potential Conservation Areas L4 (External)			
COC75574	40	Higher Biodiversity Significance CNHP 2010	40	100%	CNHP
COC75574	40	Black-tailed Prairie Dog Overall Range CPW	40	100%	CPW
		Potential Conservation Areas L4 (External)			
COC75574	40	Lower Biodiversity Significance CNHP 2010	40	100%	CNHP
COC75574	40	Greater Prairie-chicken Historic Range CPW	40	100%	CPW
COC75574	40	Mule Deer Concentration Area CPW 2011	40	100%	CPW
COC75574	40	Mule Deer Overall Range CPW 2011	40	100%	CPW
COC75574	40	Pronghorn Overall Range CPW 2011	40	100%	CPW
COC75574	40	Swift Fox Overall Range CPW 2011	40	100%	CPW
COC75574	40	Wolf Habitat Modeled SWREGAP	40	100%	SWREGAP

		Potential Conservation Areas L4 (External)			
COC75577	40	Higher Biodiversity Significance CNHP 2010	40	101%	CNHP
COC75577	40	Black-tailed Prairie Dog Overall Range CPW	40	101%	CPW
COC75577	40	Mule Deer Critical Winter Range CPW 2011	40	101%	CPW
COC75577	40	Mule Deer Severe Winter Range CPW 2011	40	101%	CPW
COC75577	40	Mule Deer Winter Concentration CPW 2011	40	101%	CPW
		Potential Conservation Areas L4 (External)			
COC75577	40	Lower Biodiversity Significance CNHP 2010	40	101%	CNHP
COC75577	40	TNC Central Shortgrass Prairie Terrestrial	40	101%	TNC
COC75577	40	Greater Prairie-chicken Historic Range CPW	40	101%	CPW
COC75577	40	Mule Deer Concentration Area CPW 2011	40	101%	CPW
COC75577	40	Mule Deer Overall Range CPW 2011	40	101%	CPW
COC75577	40	Mule Deer Winter Range CPW 2011	40	101%	CPW
COC75577	40	Pronghorn Overall Range CPW 2011	40	101%	CPW
COC75577	40	Swift Fox Overall Range CPW 2011	40	101%	CPW
COC75577	40	Wolf Habitat Modeled SWREGAP	40	101%	SWREGAP
		Potential Conservation Areas L4 (External)			
COC75578	80	Higher Biodiversity Significance CNHP 2010	80	101%	CNHP
COC75578	80	Black-tailed Prairie Dog Overall Range CPW	80	101%	CPW
COC75578	80	Mule Deer Critical Winter Range CPW 2011	10	13%	CPW
COC75578	80	Mule Deer Severe Winter Range CPW 2011	10	13%	CPW
COC75578	80	Mule Deer Winter Concentration CPW 2011	10	13%	CPW
		Potential Conservation Areas L4 (External)			
COC75578	80	Lower Biodiversity Significance CNHP 2010	80	101%	CNHP
COC75578	80	Riparian Landcover GAP	18	23%	GAP
COC75578	80	TNC Central Shortgrass Prairie Terrestrial	40	50%	TNC
COC75578	80	Mule Deer Overall Range CPW 2011	80	101%	CPW
COC75578	80	Mule Deer Winter Range CPW 2011	10	13%	CPW
COC75578	80	Pronghorn Overall Range CPW 2011	80	101%	CPW
COC75578	80	Swift Fox Overall Range CPW 2011	80	101%	CPW
COC75578	80	White-tailed Deer Overall Range CPW 2011	24	30%	CPW
COC75578	80	Wolf Habitat Modeled SWREGAP	80	101%	SWREGAP