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fax

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Please see attached Protest to the May 2014 lease sale. Please confirm receipt to matt@rockymountainwild.org



ROCKY MOUNTAIN WILD

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Juan Palma
Bureau of Land Management
Utah State Office
PO Box 45155
Salt Lake City, Utah 84145

March 13, 2014

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 Palma:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Rocky Mountain Wild and WildEarth Guardians protest the May, 2014 sale of the following parcels.

I. Protested Parcels

UTU90339
UTU90346

II. Protesting Party

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 Utah BLM oil and gas leasing decisions and the planning processes for the various Utah 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. 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. WildEarth Guardians

WildEarth Guardians (Guardians) is a non-profit conservation group with thousands of members in Utah and other states. With the merger of WildEarth Guardians and Utah Environmental Congress, WildEarth Guardians acquired a significant membership in Utah and a long history of work on oil and gas issues in the state. Guardians is dedicated to protecting wildlife, wild rivers, and wild places throughout the American West. Members of Guardians utilize land and water resources within and near these areas for hiking, camping, recreational,

scientific study, photography, and aesthetic uses. Guardians and its members are actively involved in BLM oil and gas activities in this region and participate in National Environmental Policy Act (NEPA) stages of BLM oil and gas leasing and projects by submitting comments. Guardians has a long record of advocating for preventing the impacts of oil and gas development from destroying lands and wildlife in Wyoming and throughout the West. As a consequence, Guardians and its members would be adversely affected by the sale of the lease parcels being protested here and they have an interest in this matter.

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. Affected Resources:

Oil and gas development authorized through the proposed leasing of the protested parcels is likely to have significant negative impacts on the greater sage-grouse. Rocky Mountain Wild and WildEarth Guardians submitted comments to the Environmental Assessment for leasing these parcels. We hereby incorporate in this Protest the information and attachments contained in that document.

A. Greater Sage-Grouse:

Parcels UTU90330 and UTU90346 are within 2011 Utah Division of Wildlife Resources Preliminary Priority Habitat (PPH). Neither of these parcels has stipulations aimed at minimizing the impacts of leasing on greater sage-grouse.

Instructional Memorandum 2012-043 says this about PPH:

I. Interim Conservation Policies and Procedures for "Preliminary Priority Habitat"

Through these policies and procedures, you should seek to maintain, enhance, or restore conditions for Greater Sage-Grouse and its habitat. These policies and procedures apply to PPH only.

- Fluid Mineral Leasing (i.e., oil, gas, and geothermal)

It is BLM policy that where a field office determines that it is appropriate to authorize a proposed leasing decision, the following process must be followed:

- The BLM will document the reasons for its determination and require the lessee to implement measures to minimize impacts to sage-grouse habitat.
- In addition to considering opportunities for onsite mitigation, the BLM will consider whether it is appropriate to condition the lease with a requirement for offsite mitigation that the BLM, coordinating with the respective state wildlife agency, determines would avoid or minimize habitat and population-level effects (refer to WO-IM-2008-204, Off-Site Mitigation).
- Unless the BLM determines, in coordination with the respective state wildlife agency, that the proposed lease and mitigation measures would cumulatively maintain or enhance Greater Sage-Grouse habitat, the proposed lease decision must be forwarded to the appropriate BLM State Director, State Wildlife Agency Director, and FWS representative

for their review. If this group is unable to agree on the appropriate mitigation for the proposed lease, then the proposed decision must be forwarded to the Greater Sage-Grouse National Policy Team with the addition of the State Wildlife Agency Director, when appropriate, for its review. If the National Policy Team and the State Wildlife Agency Director are unable to agree on the appropriate mitigation for the proposed lease, the National Policy Team will coordinate with and brief the BLM Director for a final decision in absence of consensus.

- Exception: Where drainage is likely or the lands are designated as No Surface Occupancy (NSO) in the existing LUP, the BLM may issue new leases with an NSO stipulation. The NSO stipulation will also have appropriate exception, waiver, and modification criteria. **Note:** A Controlled Surface Use stipulation is not an appropriate substitution for an NSO stipulation.
- Field offices retain the discretion to not move forward with a nomination or defer making a final decision on a leasing decision until the completion of the LUP process described in the *National Greater Sage-Grouse Planning Strategy* for the affected area

BLM has failed to follow the mandates of IM 2012-043. BLM should not be leasing these parcels in PPH. As outlined later in this protest, the National Environmental Policy Act (NEPA) analysis supporting this decision does not adequately consider the impacts on the greater sage-grouse. Further, BLM has failed to ensure that protective stipulations are attached to these parcels.

A letter was sent to Secretary Ken Salazar by eighteen conservation groups dedicated to sage-grouse recovery. The letter states:

As our nation's energy demands fuel the continued push for development on western lands, we are concerned that BLM field offices will continue to make decisions that could further degrade remaining sage-grouse crucial habitat. We ask that the agency follow the precautionary principle of **developing conservative interim guidelines** for all field offices that clearly specify actions that are appropriate and inappropriate in sage-grouse habitat. Furthermore, **decisions that could push the species closer to a full listing should be avoided.**

The action of BLM through leasing the protested parcels in sage-grouse habitat highlights these conservation groups' fears. Leasing and developing these protested parcels will contribute to the need to list the greater sage-grouse under the Endangered Species Act.

The greater sage-grouse (*Centrocercus urophasianus*) is a unique species of grouse found only in sagebrush-dominated habits of western North America. This species, first described by Meriwether Lewis near the confluence of the Marias and Missouri rivers in Montana in 1805 (Schroeder et al. 2004, Exhibit 2), is the largest grouse in North America, and the second largest grouse in the world. Greater sage-grouse were once widely distributed across western U.S. and Canada, numbering in the hundreds of thousands. Greater sage-grouse have long been the subject of fascination because of their elaborate courtship displays, in which large numbers of males gather on display grounds (known as leks) to perform a "strutting display" for watching females. Males lift and fan their pointed tail feathers, erect their head plumes, inflate air sacs on their chests, strut about, and produce a series of interesting sounds including "wing swishes", "air sac plops" and a whistle. Females observe these displays and select the most attractive

males to mate with. Only a small number of males are selected by most of the females for breeding. The same lek may be used by grouse for decades. Observing the courtship ritual of the greater sage-grouse is one of the most captivating wildlife watching experiences in North America. The greater sage-grouse is also one of 19 upland game birds in the United States, which bring in significant hunting revenue and provide recreation for millions of licensed hunters. Finally, the greater sage-grouse has become the symbol for conserving sagebrush ecosystems, increasingly valued for their wide-open spaces, abundant wildlife, opportunities for recreation and hunting, and central place in defining the character of western landscapes and people. The greater sage-grouse is an icon of a vanishing western landscape.

Over the past century, human activities have caused heavy loss, fragmentation and degradation of sagebrush, such that sagebrush ecosystems are among the most threatened habitats in North America (*see* Knick et al. 2003, Ecology and Conservation of Greater Sage-Grouse: A Landscape Species and Its Habitats, Monograph chapters for publication in *Studies in Avian Biology*, Cooper Ornithological Society, 2009, at <http://sagemap.wr.usgs.gov/monograph.aspx>). Loss and degradation of native habitats has impacted much of the sagebrush ecosystem and its associated wildlife (*see* Knick et al. 2003, Exhibit 3; and Connelly et al. 2004). Greater sage-grouse have declined dramatically as a result of loss of suitable sagebrush habitat to meet seasonal requirements for food, cover and nesting (*see* Ecology and Conservation of Greater Sage-Grouse: A Landscape Species and Its Habitats, Monograph chapters for publication in *Studies in Avian Biology*, Cooper Ornithological Society, 2009, at <http://sagemap.wr.usgs.gov/monograph.aspx>)

The underlying cause of greater sage-grouse population declines is the loss of suitable sagebrush habitat from a variety of causes (*see* Ecology and Conservation of Greater Sage-Grouse: A Landscape Species and Its Habitats, Monograph chapters for publication in *Studies in Avian Biology*, Cooper Ornithological Society, 2011, at <http://sagemap.wr.usgs.gov/monograph.aspx>). Human land use has altered landscapes used by greater sage-grouse in most parts of their range (Knick et al. 2003, Connelly et al. 2004, Connelly and Knick 2009, Chapter 1 in: Ecology and Conservation of Greater Sage-Grouse: A Landscape Species and Its Habitats, Monograph chapters for publication in *Studies in Avian Biology*, Cooper Ornithological Society, 2011, at <http://sagemap.wr.usgs.gov/monograph.aspx>). Loss and degradation of sagebrush habitat and concomitant declines in greater sage-grouse populations have been attributed primarily to agriculture, human development, altered fire regimes, and exotic plant invasions.

Oil and gas development is widespread and increasing across the eastern portion of the sage-grouse range, (including Wyoming, Utah and Colorado). Oil and gas development currently impacts 8% of sagebrush habitats (*see* Chapter 21 in Ecology and Conservation of Greater Sage-Grouse: A Landscape Species and Its Habitats, Monograph chapters for publication in *Studies in Avian Biology*, Cooper Ornithological Society, 2009, at <http://sagemap.wr.usgs.gov/monograph.aspx>). In addition, exploration and development of wind, solar and geothermal energy is increasing rapidly in many parts of the sage-grouse range. For example, new corridors proposed for energy transmission would affect another 2% of the current sagebrush distribution.

Nearly all of the threats to sagebrush habitat and greater sage-grouse populations are likely to continue to increase into the foreseeable future. Given that greater sage-grouse have been extirpated from half of their historic range and experienced rangewide population declines of 65% or more (Garton et al. 2009), the future survival of the greater sage-grouse as a viable species in the wild is very much in doubt.

In early 2010 the U.S. Fish and Wildlife Service made a determination that greater sage-grouse did meet the definition of a threatened or endangered species (i.e. the species is threatened with extinction throughout all or a significant portion of its range within the foreseeable future) but elected to place the species on the Candidate list instead of proceeding with formal threatened or endangered species listing immediately. The acknowledged inadequacy of sage grouse conservation measures in current BLM RMPs by the U.S. Fish and Wildlife Service in its 2010 "warranted, but precluded" rule on the greater sage grouse, and the major problems with the NEPA analyses for sage grouse for these plans in particular (failure to examine a range of reasonable alternatives on sage grouse conservation, failure to take a hard look at the efficacy of proposed sage grouse conservation measures) places BLM in a legally problematic position.¹ This rule, which added the greater sage grouse to the candidate species list, constitutes significant new information that was not considered in BLM NEPA regarding Resource Management Plans or Management Framework Plans that underlie the lease parcels in question. Simply put, with either a sage grouse Plan Amendment or Resource Management Plan revision underway in many Field Offices in Utah to address the deficiencies in the current Plans, the BLM should defer all leasing in Priority Habitats (which in Utah is synonymous with occupied habitat) until the completion of the RMP Amendment process, under which BLM will determine whether and under what conditions oil and gas leasing will occur (if at all) inside Core Areas.

As the BLM is currently undertaking a series of Sage Grouse Plan Amendments and Plan revisions for the Field Offices covered by this Lease Protest, and the issuance of these leases absent the measures recommended by the National Technical Team could foreclose on options for greater protection of sage grouse habitats within the plan amendments and/or revisions, the leases included in this Protest should at minimum be deferred pending completion of the planning processes.

It is now widely agreed that the most effective way to ensure against further declines of greater sage-grouse is to establish large greater sage-grouse refuges set aside from energy development. Expert comments recommend that BLM establish large greater sage-grouse refuges through the RMP planning process, either through use of phased development to allow for long-term deferral of energy development across areas of key habitat, or through designation of ACECs (*See* expert comments to the Little Snake Field Office RMP from CDOW, USFWS, Clait Braun and Environmental Protection Agency (EPA)). The BLM Washington Office recently issued greater sage-grouse interim management policies and procedures in Instructional

¹ BLM has commented voluminously on the deficiencies of these RMPs during the EIS processes, and as we are already on record, we will not repeat these problems here but rather incorporate our comments on the RMP EISs by reference into this lease protest.

Memorandum 2012-043.² The Interim Management Policies and Procedures call for more protections for the greater sage-grouse. The policies and procedures in the interim management document are based on "A Report on National Greater Sage-Grouse Conservation Measures" dated December 21, 2011, and produced by the Sage-grouse National Technical Team.³ This document represents the best available science on greater sage-grouse management and conservation.

Oil and gas development authorized by the leasing of the protested parcels will have significant impacts on greater sage-grouse. Leasing the protested parcels would (1) undermine the RMP sage-grouse amendment process currently proceeding within Utah, (2) violate existing BLM sage-grouse policies and Instruction Memoranda, (3) violate NEPA (specifically the "hard look", new information and cumulative impacts provisions), (4) violate Federal Land Policy Management Act provisions, including the multiple-use, sustained-yield mandate and unnecessary and undue degradation provisions (*see* 43 U.S.C. §§ 1712(c)(1), 1732(a) and (b); and 43 C.F.R. § 1601.0-2); and (5) risk undermining the public's trust in the Department of Interior's stewardship responsibility of the nation's public lands and wildlife resources.

Relying on hypothetical or not-yet-determined post-leasing mitigation measures cannot justify leasing the disputed parcels. At this point, respecting the range-wide planning effort and the NTT Report requires deferral. Utah and neighboring states already contain hundreds of thousands of acres of valid leases in sage-grouse habitat. It would be irresponsible and reckless to compound the problem by authorizing even more leasing of important habitat at this time.

Premature leasing decisions will inhibit BLM's ability to ensure full and adequate protections. These policies must be informed by the best available and most recent scientific literature, and subject to comment and suggestions by interested public, private, other agency, and NGO stakeholders.

The Disputed Parcels must be removed or deferred. The Protesting Parties looks forward to working collaboratively on future planning efforts regarding the recovery of the greater sage-grouse and its habitat across Utah and neighboring states. The pendency of range-wide planning, and the inadequacy of the existing NEPA documents for this auction fail to consider the National Technical Team Report, the FWS 12-month Finding, and other more recent information requires granting this protest. BLM has not sufficiently considered new information, taken a hard look at the potential impacts of leasing on sage-grouse conservation, or analyzed the cumulative impacts to these avian populations and habitat of leasing in addition to other proposals and valid existing rights.

IV. Statement of Reasons

² Found at:
http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-043.html

³ Found at:
http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2012.Par.52415.File.dat/IM%202012-044%20Att%201.pdf

Violations of the National Environmental Policy Act:

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 greater sage-grouse 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 greater sage-grouse habitat will have significant effects on the species. Leasing for oil and gas development presents a death by a thousand cuts scenario. *Ctr. For Native Ecosystems v. U.S. Fish & Wildlife Serv.*, 795 F. Supp. 2d 1199, 1207 (D. Colo. 2011). One well may have a significant effect on birds using a single lek, and large scale development of the type frequently seen in Utah will have major impacts. Significant impacts to sage grouse from oil and gas development are as follows:

- Drilling activity located within 3 miles of a lek site during the breeding season has a significant negative impact on lek populations (Holloran 2005).
- Producing wells sited within 1.9 miles of a lek site have a significant negative impact on lek populations (Holloran 2005).
- Main haul roads (defined as serving 5 or more wellsites) sited within 1.9 miles of a lek have a significant negative effect on lek populations (Holloran 2005).
- Well densities exceeding one well per 699 acres (Holloran 2005) or one well per square mile (Walker et al. 2007, Tack 2009, Copeland et al. 2013) have a significant negative effect on sage grouse populations.

- o Noise levels exceeding 10 dBA above ambient (defined as 20-22 dBA) at the edge of the lek cause significant negative impacts on breeding sage grouse and displace them from the lek (Particelli et al. 2012).
- o Road densities exceeding 0.7 linear mile per square mile result in significant negative impacts on sage grouse lek populations.

Each one of these potentially significant impacts is a possible result of oil and gas development on a single lease. Cumulative effects among multiple leases result in even greater impacts when considering widespread leasing is spread out over a number of lease sales.

BLM has failed to analyze direct and cumulative impacts on the greater sage-grouse. The EA does not analyze the impacts of leasing these parcels for oil and gas development compounded by past mineral development. Sage-grouse using this habitat are already being impacted by this past action and will be stressed further by this new authorized development. An analysis of this cumulative impact must be completed prior to leasing these parcels.

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 greater sage-grouse 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).

BLM has failed to consider new information about greater sage-grouse. The Report on National Greater Sage-Grouse Conservation Measures dated December 21, 2011, and produced by the Sage-grouse National Technical Team represents the best available science on the species. This leasing decision does not consider the recommendations made by the technical team in the report and is contrary to many of its findings. BLM’s failure to even discuss mitigation measures for these parcels is a violation of NEPA.

C. BLM fails to consider the best available science:

The Report on National Greater Sage-Grouse Conservation Measures (Sage-Grouse National Technical Team 2011), the FWS 12-month Finding, the BLM’s Baseline Environmental Report on sage grouse (Manier et al. 2013) and other more recent reports and studies represent the best available information on greater sage-grouse protection. The NEPA analysis that BLM is tiering to in issuing the FONSI could not have considered the information in these documents as it was created before they existed. Failure to analyze this leasing decision in light of this new information is a violation of NEPA.

D. BLM violated NEPA by issuing a FONSI for this leasing decision:

BLM cannot tier to the outdated 2008 NEPA analysis for the RMP in issuing a FONSI for this leasing decision. The leasing of the parcels in question will result in significant impacts to greater sage grouse. New science that has been brought to BLM’s attention through the comments submitted by the Protesting Parties has not been adequately considered. The 2010 decision by the U.S. Fish and Wildlife Service proclaiming that listing of the greater sage grouse is warranted constitutes new information about this species that must be fully analyzed through NEPA. In *Wyoming Outdoor Council*, IBLA 2006-184, at 10 (July 10, 2006), appellants had demonstrated likely success on the merits of their claims under the National Environmental

Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., because the BLM’s Documentation of Land Use Plan Conformance and NEPA Adequacy (“DNA”) for the lease failed to establish that the agency had adequately considered significant new information concerning environmental impacts that are likely to result from the leasing. We are presented with a similar situation. BLM has avoided this analysis by stating “*These opportunity areas are areas that are adjacent to sage grouse habitat that could be transformed into habitat or non-habitat based upon natural events or management choices. EA at 101.*” However, the Utah Division of Wildlife Resources has designated the proposed leasing area as Preliminary Priority Habitat, which they claim is synonymous with occupied habitat.

Violations of the Federal Land Policy Management Act

a. The BLM failed to Prevent Undue and Unnecessary Degradation to Greater Sage-Grouse 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 greater sage-grouse is a BLM special status species and BLM should not be leasing parcels within important habitat. 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.

Violations of the Endangered Species Act

The greater sage-grouse is a candidate species for Endangered Species Act listing. Leasing parcels in greater sage-grouse 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 agencies lack of protective mechanisms. This leasing is going to contribute to the need to list the species. This violates BLM's own direction in its Sensitive Species Manual. Consultation with FWS should have been conducted to ensure adequate protection for this 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). Although the greater sage-grouse is not fully listed, the warranted finding by the FWS still imposes a duty on BLM to work towards conservation. Protecting habitat for population expansion is consistent with this duty.

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.

V. Conclusion & Request for Relief

The Protesting Parties therefore requests that the BLM withdraw the protested parcels from the May 2014 lease sale.

Sincerely,



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