FAX

Date: May 19, 2008

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Subject: June 3, 2008 Lease Sale Protest

Attached is the Theodore Roosevelt Conservation Partnership's June 3, 2008 Lease Sale Protest with Exhibits. This fax constitutes a legal and acceptable protest filed at least 15 days prior to the lease sale.

36 pp including cover

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OIL AND GAS LEASE SALE PROTEST
(Filed Pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3)

June 3, 2008 Lease Sale (State of Wyoming)

The Theodore Roosevelt Conservation Partnership ("TRCP") hereby protests the inclusion of certain parcels in the above referenced lease sale as advertised by the Bureau of Land Management ("BLM") on April 18, 2008. TRCP requests the following parcels be withdrawn from sale because they: 1) Contain designated big game crucial winter range or migration routes; or 2) contain vital habitat for Greater sage grouse:

WY-0806-004, WY-0806-005, WY-0806-021, WY-0806-025, WY-0806-031, WY-0806-032, WY-0806-033, WY-0806-034, WY-0806-035, WY-0806-037, WY-0806-039, WY-0806-040, WY-0806-041, WY-0806-042, WY-0806-043, WY-0806-044, WY-0806-045, WY-0806-046, WY-0806-047, WY-0806-048, WY-0806-049, WY-0806-050, WY-0806-051, WY-0806-052, WY-0806-053, WY-0806-054, WY-0806-055, WY-0806-056, WY-0806-057, WY-0806-058, WY-0806-059, WY-0806-060, WY-0806-061, WY-0806-062, WY-0806-063, WY-0806-064, WY-0806-065, WY-0806-066, WY-0806-067, WY-0806-068, WY-0806-069, WY-0806-070, WY-0806-071, WY-0806-073, WY-0806-074, WY-0806-075, WY-0806-076, WY-0806-077, WY-0806-078, WY-0806-079, WY-0806-080, WY-0806-081, WY-0806-082, WY-0806-083, WY-0806-084, WY-0806-085, WY-0806-086, WY-0806-087, WY-0806-090, WY-0806-091, WY-0806-092, WY-0806-093, WY-0806-094, WY-0806-095 ,WY-0806-096, WY-0806-097, WY-0806-098, WY-0806-099, WY-0806-100, WY-0806-102, WY-0806-103, WY-0806-104, WY-0806-105, WY-0806-106, WY-0806-107, WY-0806-108, WY-0806-109, WY-0806-110, WY-0806-111, WY-0806-112, WY-0806-113, WY-0806-114, WY-0806-118, WY-0806-119, WY-0806-120, WY-0806-121, WY-0806-122, WY-0806-123, WY-0806-125, WY-0806-126, WY-0806-127, WY-0806-129, WY-0806-130, WY-0806-131, WY-0806-132, WY-0806-133, WY-0806-134, WY-0806-135, WY-0806-136, WY-0806-137, WY-0806-138, WY-0806-139, WY-0806-140, WY-0806-153, WY-0806-154, WY-0806-155, WY-0806-157, WY-0806-158, WY-0806-159, WY-0806-160, WY-0806-167, WY-0806-169, WY-0806-170, WY-0806-173, WY-0806-174, WY-0806-175, WY-0806-177, WY-0806-181, WY-0806-182, WY-0806-184, WY-0806-185, WY-0806-186, WY-0806-187, WY-0806-188, WY-0806-190, WY-0806-194, WY-0806-195, WY-0806-198, WY-0806-199, WY-0806-200, WY-0806-201, WY-0806-202,

WY-0806-203, WY-0806-204, WY-0806-205, WY-0806-206, WY-0806-207, WY-0806-208, WY-0806-209, WY-0806-210, WY-0806-211, WY-0806-210, WY-0806-211, WY-0806-214

BACKGROUND ON TRCP'S INTEREST

TRCP is a national non-profit (26 U.S.C. § 501(c)(3)) conservation organization dedicated to guaranteeing every American a place to hunt and fish, particularly on public lands. TRCP accomplishes its goal three ways: 1) Ensuring access to public lands, 2) ensuring adequate funding for natural resource agencies, and 3) helping to conserve fish and wildlife habitats. TRCP has formed, with various partners, a Fish, Wildlife, and Energy Working Group, comprised of some of the country's oldest and most respected hunting, fishing, and conservation organizations. TRCP is working hard to ensure that energy development on public lands is balanced with the needs of fish and wildlife resources, but is concerned that the rapid pace of development is precluding BLM from managing these resources as required by the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.*

TRCP is especially concerned with the fate of big game and Greater sage grouse and the recreational opportunities they provide tens of thousands of sportsmen each fall in Wyoming. Without comprehensive habitat management planning, closely coordinated with the Wyoming Game and Fish Department ("WFGD"), leasing and development of energy resources within crucial mule deer winter range and migration routes, or within sage grouse habitat, can have a devastating impact on those wildlife resources and the hunting opportunities they afford.

THE IMPORTANCE OF KEY HABITATS

Crucial big game winter range and migration routes are identified by WGFD policy as "vital" to the survival and sustainability of big game. WGFD *Recommendations for Development of Oil and Gas Resources Within Crucial and Important Wildlife Habitats (December 6, 2004)* ("WGFD Recommendations") at 9. This means that these habitats and features are essential to big game population survival. *White et al., Effect of Density Reduction on Overwinter Survival of Free-ranging Mule Deer Fawns, Journal of Wildlife Management 62:214-225* (1997); and *Sweeney, et al., Snow Depths Influencing Winter Movements of Elk, Journal of Mammalogy*, Vol. 65, No. 3 (Aug. 1984), pp. 524-526. WGFD recommends no loss in habitat function, meaning these habitats should retain their capability to sustain populations, species or diversity over time. WGFD Recommendations at 9. BLM generally has identified big game as an important resource in its Resource Management Plans ("RMP"), recognized the sensitive nature of winter ranges and migration routes, and subsequently has applied lease stipulations and activity restrictions to prevent loss of these areas for these purposes.

"Sage-grouse historically inhabited much of the sagebrush-dominated ecosystems of North America. Today, sage-grouse population abundance and extent have declined throughout most of their historical range." BLM National Sage-Grouse Habitat Conservation Strategy (Nov. 2004) at 6. "Large-scale modification of sagebrush habitats associated with energy development may have important impacts on habitat use or vital rates of sagebrush-dependent wildlife species." Naugle et al., *Sage-grouse Population Response to Coal-bed Natural Gas Development in the Powder River Basin: Interim Progress Report on Region-wide Lek-count Analyses* (May 26, 2006). Additional information has shown the importance of winter habitat use by sage

grouse. *Naugle et al, Sage-Grouse Winter Habitat Selection And Energy Development In The Powder River Basin: Completion Report* (June 24, 2006). "Knowledge that sage-grouse avoid energy development in breeding (Naugle et al. 2006) and wintering seasons (this report) shows that conservation strategies to date to protect the species have been largely ineffective." *Id.* at 1.

LEGAL REQUIREMENTS

I. THE NATIONAL ENVIRONMENTAL POLICY ACT.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 *et seq.*, requires federal agencies to take a "hard look" at new information or circumstances concerning the environmental effects of a federal action even after an initial environmental analysis has been prepared. Agencies must supplement existing environmental analyses if new circumstances "raise[ ] significant new information relevant to environmental concerns[.]" *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708-709 (9th Cir. 2000). Moreover, an "agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 374 (1989).

NEPA's implementing regulations further underscore this obligation. An agency "shall prepare supplements to either draft or final environmental impact statements if ... there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(1)(ii). Even where an environmental impact statement ("EIS") has been previously prepared, "[i]f there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851, 1859 (1989).

The Council on Environmental Quality's ("CEQ") NEPA guidance states that "if the proposal has not yet been implemented, EISs that are more than 5 years old should be carefully reexamined to determine if [new circumstances or information] compel preparation of an EIS supplement." *See* 46 Fed. Reg. 18026 (1981) (Question 32). This caution was reiterated by earlier BLM Instruction Memoranda ("IM") Nos. 2000-034 (expired September 30, 2001) and 2001-062 (expired September 30, 2002).

A. Existing Analyses Are Not Sufficient in Light of Significant New Information Concerning the Needs of Big Game and Sage Grouse.

TRCP understands the resource management plans ("RMP") on which BLM relies to support the proposed leasing action are the Casper RMP (2007), Great Divide RMP (1990), Cody RMP (1990), Grass Creek RMP (1998), Buffalo RMP (2001), Kemmerer RMP (1986), Green River RMP (1997), and the Lander RMP (1987). As a preliminary matter, TRCP notes the majority of these RMPs are several years (and in some cases decades) old, clearly triggering the need for heightened scrutiny under CEQ guidance and BLM's earlier IM Nos. 2000-034 and 2001-062. Because no additional information has been provided, TRCP assumes BLM has

determined that these RMPs and the NEPA analyses conducted to support their adoption decades ago have been deemed adequate for purposes of supporting the proposed lease sale.

In summary, TRCP submits that BLM has not evaluated fully the impact of habitat fragmentation, loss, and other factors (both indirect and cumulative) associated with development of the offered parcels on big game and sage grouse. BLM's RMPs made, at best, a determination that leasing was suitable at the planning level and deferred specific analysis to the project level. Now, BLM – at the project level – relies on the RMPs and outdated NEPA analysis conducted at the planning level to support leasing the offered parcels. This circular construct avoids the "hard look" NEPA requires BLM to take when evaluating the impact of oil and gas leasing on big game and upland bird habitats. Since BLM has determined that leasing confers a "right" to develop the parcel and therefore a leasee may develop lands once a lease is awarded, the action that sets into motion the development of the lease is the leasing stage – where no specific analysis has been done.

In light of the significant new information discussed below, the agency's decision to lease parcels that could significantly impact crucial mule deer winter range and migration routes and grouse habitat without further evaluating the impacts of leasing is unsupportable. Any Documentation of NEPA Adequacy ("DNA") prepared for the proposed lease sale is arbitrary, capricious, contrary to law, and an abuse of discretion.

1. New Information on Big Game Needs.

Since the majority of the RMPs were originally developed, BLM has acquired significant new information about oil and gas development, and important wildlife habitats like crucial winter range and migration routes. This has led BLM to adjust, and in some instances significantly change, winter range boundaries for mule deer and other big game species, as well as boundaries for sage grouse breeding areas. BLM has also learned much more about the impacts of oil and gas development on mule deer. BLM has funded and advised on specific research to evaluate impacts on mule deer from development in winter range. The most recent findings, including published literature, report significant impacts to mule deer use of winter range, with 27% being attributed to energy development. Sawyer, H. et al., 2006 ANNUAL REPORT. SUBLETTE MULE DEER STUDY (PHASE II): LONG-TERM MONITORING PLAN TO ASSESS POTENTIAL IMPACTS OF ENERGY DEVELOPMENT ON MULE DEER IN THE PINEDALE ANTICLINE PROJECT, Cheyenne, Wyoming, USA (2006) and Sawyer, H. et al., 2006. WINTER HABITAT SELECTION OF MULE DEER BEFORE AND DURING DEVELOPMENT OF A NATURAL GAS FIELD, Journal of Wildlife Management 70:396-403 (2006). The mule deer research from Sublette County, Wyoming paints a "seriously different picture of the likely environmental consequences of the proposed action" that has never been discussed in an environmental assessment or impact statement. *State of Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984); *accord, Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956 (1st Cir. 1976).

In addition, recent studies have concluded that protection of migration corridors is critical to sustaining migratory mule deer populations in key areas. *See generally* Western Ecosystems Technology, Final Report for the Atlantic Rim Mule Deer Study (April 2007). "Prior to 2000 [when nearly all the RMPs at issue here were adopted], conserving migration routes had not been a top management concern for agencies" in areas where development was relatively minor. Hall

Sawyer and Matthew Kauffman, *Identifying Mule Deer Migration Routes in the Atlantic Rim Project Area* (April 1, 2008) at 1.

Finally, through the use of radio and satellite telemetry, scientists from WGFD and other big game researchers have been able to identify migration routes used by big game in their seasonal movements. These materials constitute inventories and evaluations of the areas using vastly improved techniques and methods - including compilation of comprehensive on-the-ground data, photographs, mapping, and extensive documentation of land conditions and values collected during extended visits, and research conducted subsequent to the BLM's RMP development. This information was not available at the time the relevant RMPs were developed and cannot be said to have been considered for NEPA purposes.

TRCP notes BLM Wyoming's sister offices are rethinking the continued viability of existing NEPA analysis. Montana BLM recently pulled 73,000 acres from a proposed sale based on concerns over impacts to mule deer and sage grouse. Albright G., *BLM Defers Acres from July Oil and Gas Lease Sale,* Montana/Dakota BLM Newroom (19 July 2007). Similarly, Utah BLM has acknowledged that more analysis is needed concerning the effects of oil and gas development on wildlife before leasing certain lands in that state. Catlin, T., *November Competitive Oil and Gas Lease Sale Cancelled,* Utah BLM Newsroom (28 September 2007). These actions were consistent with Wyoming BLM's decision to pull two parcels from its December 2006 Oil and Gas Lease Sale based on concerns expressed by WGFD. Lewis, P., *Information Notice-Protest Filed Parcels WY-0612-160 and WY-0612-161 Withdrawn,* Wyoming BLM Newsroom (28 November 2006). They are also consistent with Wyoming BLM's decision to pull 13 parcels from the November 2007 lease sale at the request of Governor Freudenthal and the Wyoming Game and Fish Commission. Wertz, C., *BLM Defers Offering 13 Parcels in Upcoming Oil and Gas Sale* (30 November 2007).

Uniformity of action among BLM offices is something BLM has identified as critical in wildlife management. BLM's National Sage Grouse Habitat Conservation Strategy provides:

> FLPMA gave BLM the legal authority and mandate to manage and regulate the uses on the public lands "so that their various resource values are utilized in a combination that will best meet the present and future needs of the American people" (Section 103 (c)). *Consistency and coordination* in identifying and addressing threats to sage-grouse and sagebrush habitat in context of the multitude of programs that BLM manages *is required.* Addressing these threats throughout the range of the sage-grouse is *critical* to achieving the mandate of FLPMA and threat reduction, mitigation, and elimination to sage-grouse and sagebrush habitats.

Id. at 4 (Emphasis supplied).

2. New Information on Sage Grouse Needs.

Biologists from the Western Association of Fish and Wildlife Agencies ("WAFWA") recently presented to WGFD a memorandum entitled: *Using the Best Available Science to Coordinate Conservation Actions that Benefit Sage-Grouse Across States Affected by Oil and*

Gas Development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming) (29 January 2008) (Copy attached as Exhibit A). The memorandum states:

> Full field energy development appears to have negative impacts on sage-grouse populations under current lease stipulations (Lyon and Anderson 2003, Holloran 2005, Kaiser 2006, Holloran et al. 2007, Aldridge and Buyce 2007, Walker et al. 2007, Doherty et al. 2008). Much of greater sage-grouse habitat in MZ 1 and 2 has already been leased for oil and gas development. These leases carry stipulations that have been *shown to be inadequate* for protecting breeding and wintering sage-grouse populations during full field development. (Holloran 2005, Walker et al. 2007, Doherty et al. 2008). New leases continue to be issued using the same stipulations. To ensure the long term persistence of populations and meet goals set by the states for sage-grouse, *identifying and implementing greater protection within core areas from impacts of oil and gas development is a high priority.*
>
> ... ...
>
> Research indicates that oil and gas development exceeding approximately 1 well pad per square mile with associated infrastructure, results in calculable impacts on breeding populations, as measured by the number of male sage-grouse attending leks (Holloran 2005, Naugle et al. 2006). Because breeding, summer, and winter habitats are essential to populations, development within these areas should be avoided.

(Emphasis supplied).

WAFWA's critique was directed at current stipulations BLM places on oil and gas leases (and also applies as a condition of approval on Applications for Permits to Drill and Right of Ways). Those stipulations are not based on science, but instead on a traditional consensual agreement from the "late 1960's" as stated in the attached Affidavit by BLM Biologist David A. Roberts (July 20, 1998) in Laramie County, Wyoming. (*See* Exhibit B). As WAFWA correctly notes, those stipulations have been determined to be ineffective in accomplishing their purpose. The U.S. Fish and Wildlife Service ("FWS") agrees. In commenting on the use of these stipulations in the Atlantic Rim, FWS stated that it "does not support a 0.25 mile protective buffer around sage-grouse leks as a mitigation measure, nor does [FWS] support a 2-mile [seasonal] buffer to protect nesting habitat." Rather, FWS "strongly recommend[] minimum protection measures as described by Connelly et al. (2000)." *See* Letter from FWS to BLM dated January 26, 2006. Those measures include precluding surface disturbance within two miles of an active lek. Connelly et al., *Guidelines to Manage Sage Grouse Population and Their Habitats*, Wildlife Society Bulletin 2000, 28(4): 967-985.

The Wyoming Sage Grouse Implementation Team's recommendation is to protect core population areas and is developing a state-wide strategy for the conservation of sage grouse and their habitats (Core Population Strategy). *See* Exhibit C attached. This approach has been backed by FWS. *See* Exhibit D attached. According to the Team a very cautious approach should be undertaken when proposing or planning for activities within the core areas:

"Development within Core Population Areas should occur only when it can be demonstrated that the activity will have no negative effects on Sage-grouse, using a case-by-case localized approach and appropriate ground-truthing." BLM's proposal is to deal with any impacts after the leases have been issued and at the well permitting phase, an approach that limits the ability to manage for the benefit of sage grouse and is contrary to the recommendations from the Core Population Strategy. The majority of the parcels TRCP is protesting fall within these identified "Core Population Areas".

In addition, on December 4, 2007, the Federal District Court for the District of Idaho rebuked the FWS for failing to consider the best available science when it refused to list greater sage grouse as "threatened" or "endangered" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq. Western Watersheds Project v. U.S. Forest Service* ___ F. Supp. 2d ____, 2007 WL 4287476 (D. Idaho Dec. 4, 2007). The court reversed and remanded the agency's 12-month "not warranted" decision issued in 2005. The court explained the perilous condition of the sage grouse and the impact suffered by its habitats to date. *Id.* at *1. Further, elaborating on the current state of grouse habitat according to the experts, the court noted: "Nowhere is sage-grouse habitat described as stable. By all accounts, it is deteriorating, and that deterioration is caused by factors that are on the increase." *Id.* at *12. The court specifically focused on the impact of oil and gas development on grouse habitat as identified by an independent expert team. *Id.* at *5. The court noted "a singular lack of data on measures taken by the BLM to protect the sage grouse from energy development, the single largest risk in the eastern region." *Id.* at *14.

In light of the obvious concerns expressed by the court about the state of sage grouse and grouse habitat, as well as the acute recognition of the impact of oil and gas development on grouse and the inadequacy of information concerning BLM efforts to mitigate the same, TRCP contends it is simply not prudent to lease lands containing documented sage grouse habitat pending further study of the grouse's status and completion of agreements between the State of Wyoming and the BLM for implementation of the Core Population Strategy or any other state-wide conservation strategies for sage grouse and their habitats. This includes the "Core Population Areas" identified by the Wyoming Sage Grouse Implementation Team. Indeed, if the species were listed and protected under the ESA, that law requires that certain "critical habitats" also be defined. 16 U.S.C. § 1533. It is very probable that the very lands BLM now intends to lease will be so designated. At a minimum, regardless of FWS' obligations, the court's findings certainly warrant additional NEPA review by BLM prior to leasing.

Finally, this species already is listed as a "Status 2 Species of Special Concern" in Wyoming, which means "[p]opulations are declining" and experiencing "[o]n-going significant loss of habitat." http://gf.state.wy.us/wildlife/nongame/SpeciesofSpecialConcern/index.asp. Section 6840.06.D of the BLM Manual (Special Status Species Management) explains with respect to "State Listed Species" that "BLM *shall carry out management* for the conservation of State listed plants and animals." (Emphasis supplied). In this context, the term "conservation" means "the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted." BLM Manual § 6840.01. The Manual further directs "[a]ctions authorized by BLM *shall further the conservation of* federally listed species and other *special status species* and *shall not contribute to the need to list any special status species under provisions of the ESA*, or designate additional sensitive species under provisions of this policy." BLM Manual §

6840.12 (emphasis supplied). *See also* BLM Manual § 6840.22.C. As demonstrated by TRCP, and as acknowledged by WAFWA and FWS, existing analyses are not adequate to ensure BLM can meet this obligation. None of the protested parcels should be sold until BLM updates its existing environmental analyses and demonstrates coordination and compliance with the State's goals for this sensitive species.

B. BLM Must Conduct the Required NEPA Analysis Before Leasing or Impose "No-Surface Occupancy" Stipulations.

CEQ regulations make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. NEPA analyses must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after BLM has bound itself to a particular outcome (such as surface occupation within sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e., no leasing or No Surface Occupancy (NSO) stipulations).

An oil and gas lease conveys "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. §3101.1-2. This right is qualified only by "[s]tipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed." 43 C.F.R. § 3101.1-2. Unless drilling would violate an existing lease stipulation or a specific nondiscretionary legal requirement, BLM argues lease development must be permitted subject only to limited discretionary measures imposed by the surface-managing agency.[1]

Accordingly, the appropriate time to evaluate the impact of leasing on crucial winter range or grouse habitat is *before* an oil and gas lease is granted. *Sierra Club v. Peterson,* 717 F.2d 1409, 1414-1415 (D.C. Cir. 1983) *citing Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)). The court in *Sierra Club* specifically rejected the contention that leasing was a mere paper transaction not requiring NEPA compliance. Rather, it concluded where the agency could no longer completely preclude surface disturbance through the issuance of NSO leases, the "critical time" before which NEPA analysis must occur is "the point of leasing." 717 F.2d at

[1] That said, BLM has broad discretion in leasing federal lands in the first instance. The Mineral Leasing Act ("MLA") "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 85 S.Ct. 792, 795 (1965) *reh. den.* 85 S.Ct. 1325. "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) ("[R]efusing to issue [certain petroleum] leases ... would constitute a legitimate exercise of the discretion granted to the Secretary of the Interior"); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [MLA] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory").

1414. Thus, unless BLM is prepared to withdraw the protested parcels or incorporate NSO stipulations into leases on the protested parcels, BLM must analyze the impacts of subsequent development prior to leasing. BLM cannot defer all site-specific analysis to later stages such as submission of Applications for Permit to Drill ("APDs") or proposals for full-field development.

In this case, BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbance. None of the environmental documents previously prepared by BLM examines the site-specific or cumulative impacts of mineral leasing and development on crucial big game winter range and migration routes. BLM has not analyzed the new information cited herein, nor has it assessed what stipulations, other than timing restrictions, might protect special surface values. *See, e.g.*, Casper RMP at 2-25, 2-26 and supporting Appendix 1, page 1-2, 1-3, 1-4 and supporting EIS, page 3-56 and 3-61 (2007). This violates federal law by approving leasing absent environmental analysis as to whether NSO stipulations should be attached to the crucial big game winter ranges and migration routes lands in efforts to maintain the vital habitat function these lands provide.

BLM, at a minimum, must analyze whether or not leasing is appropriate for these parcels given the significant resources to be affected and/or analyze whether or not NSO restrictions are appropriate beyond what was done at the RMP level. TRCP contends the proposed parcels cannot lawfully be sold unless NSO stipulations are considered in a site specific analysis for each parcel and are added for all parcels within these sensitive areas, where appropriate, to maintain the function of these habitats. However, whether BLM agrees with TRCP as to the appropriate outcome of the analysis is not the point. BLM's failure to perform an alternatives analysis to determine the appropriateness of such restrictions in advance of leasing is arbitrary, capricious, and an abuse of discretion.

Indeed, in an effort to prevent further loss of crucial big game habitats and migration corridors, the Western Governor's Association ("WGA") in 2007 issued a resolution calling for better identification and cooperation to protect these important habitats for the future. *See* WGA Resolution 07-01, *Protecting Wildlife Migration Corridors and Crucial Wildlife Habitat in the West.* In the associated follow-up report made to the WGA from the Oil and Gas Working Group (December 2007), problems with the current leasing process and recommendations for better management and coordination were made. Recommendation #1-D states: "Western Governors should request the Secretaries of the Interior and Agriculture to assess, and implement where appropriate, *a policy of site-specific NEPA analysis before offering new federal lease parcels* in the areas that the states deem to be wildlife corridors and crucial habitats." (Emphasis supplied).

II. FEDERAL LANDS POLICY AND MANAGEMENT ACT ("FLPMA")

FLPMA requires BLM to prepare and maintain a current inventory of all public lands and their resources. 43 U.S.C. § 1711(a). This systematic inventory forms the basis of the land use planning process. 43 U.S.C. § 1701(a)(2). "Th[e] inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." 43 U.S.C. § 1711(a). As noted above, BLM is relying on outdated RMPs and corresponding inventories for this lease sale. A decision by BLM to hold the lease sale as scheduled without taking into account the new information cited above would be arbitrary and capricious. *Compare Center for*

Biological Diversity v. Bureau of Land Management, 422 F. Supp. 2d 1115, 1167-68 (N.D. Cal. 2006) ("The Court concludes it was arbitrary and capricious to approve the RAMP with such obviously outdated and inadequate inventories.").

"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). In the context of FLPMA, by using the imperative language "shall", "Congress [leaves] the Secretary no discretion" in how to administer the Act. *NRDC v. Jamison*, 815 F. Supp. 454, 468 (D.D.C. 1992). BLM's duty to prevent unnecessary or undue degradation ("UUD") under FLPMA is mandatory, and BLM must, at a minimum, demonstrate compliance with the UUD standard. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (the UUD standard provides the "law to apply" and "imposes a definite standard on the BLM.").

In this case, BLM is required to demonstrate compliance with the UUD standard by showing that future impacts from development will be mitigated and thus avoid undue or unnecessary degradation of big game crucial winter ranges and migration routes and grouse habitat. *See e.g., Kendall's Concerned Area Residents*, 129 IBLA 130, 138 ("If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan."). *See also Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 40 (D.D.C. 2003) ("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.").[2]

In this instance, BLM has a statutory obligation to demonstrate that leasing in or adjacent to crucial big game winter ranges and migration routes and within grouse habitat will not result in UUD. Specifically, BLM must demonstrate that leasing will not lead to future development that causes UUD by irreparably damaging the habitat function of crucial big game winter ranges and migration routes and sage grouse habitat that could lead to population decline. Existing analysis has not satisfied BLM's obligation to comply with the UUD standard and prevent permanent impairment of the function of crucial winter ranges and migration routes and sage grouse habitat of these public lands. Proceeding with leasing would be arbitrary, capricious, and an abuse of discretion.

III. EXECUTIVE ORDER 13443: FACILITATION OF HUNTING HERITAGE AND WILDLIFE CONSERVATION

On August 16, 2007, President Bush signed Executive Order ("EO") 13443, the purpose of which is "to direct Federal agencies that have programs and activities that have a measurable effect on public land management, outdoor recreation, and wildlife management, including the Department of the Interior ..., to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat." *See* EO 13443 reprinted at 72 Fed. Reg. 46,537 (Aug. 20, 2007). Among other things, EO 13443 requires BLM to:

[2] Further, the agency is required to manage the public's resources "without permanent impairment of the productivity of the land and the quality of the environment..." 43 U.S.C. §1702(c); *Mineral Policy Center v. Norton*, 292 F. Supp. 2d at 49.

- Evaluate the effect of agency actions on trends in hunting participation and, where appropriate to address declining trends, implement actions that expand and enhance hunting opportunities for the public;
- Manage wildlife and wildlife habitats on public lands in a manner that expands and enhances hunting opportunities, including through the use of hunting in wildlife management planning; and
- Establish short and long term goals, in cooperation with State and tribal governments, and consistent with agency missions, to foster healthy and productive populations of game species and appropriate opportunities for the public to hunt those species.

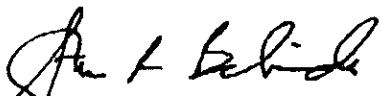
Current RMPs, on which the proposed leasing action is based, do not account for the duties imposed on BLM by virtue of EO 13443. Leasing of the protested parcels will directly adversely impact the very resources and recreational and hunting interests EO 13443 is intended to protect. Yet, BLM has provided no explanation of whether or how the proposed lease sale will comply with EO 13443. While TRCP understands EO 13443 purports not to create an independent right of judicial review, proceeding to lease the protested parcels without consideration of the goals and objectives of EO 13443 would be arbitrary and capricious and without observance of procedures required by EO 13443. *See* 5 U.S.C. § 706(2)(a) and (d).

CONCLUSION

For the reasons stated above, parcels containing disputed big game crucial winter range and migration routes, and sage grouse habitat are inappropriate for mineral leasing and development at this time. Existing pre-leasing analysis does not comply with NEPA, FLPMA or other applicable law. Leasing will preclude the consideration and implementation of activities to conserve "core populations" of sage grouse and inhibit the already underway development of a state-wide conservation strategy for sage grouse and their habitats. Wyoming citizens have raised substantial concerns about impacts to big game and upland game bird resources and the need for additional actions to protect these resources.

TRCP respectfully requests that the Wyoming State Director withdraw these disputed parcels from the June 3, 2008 competitive lease sale. In the event BLM proceeds to offer these parcels, all prospective bidders should be informed of the pending protest.

Respectfully submitted,



Steven R. Belinda
Theodore Roosevelt Conservation
Partnership
PO Box 295
Boulder, Wyoming 82923
307-231-3128

Exhibit A

Memo to WY Game And Fish Director
"Multi-State Sage-Grouse Coordination and Research –based Recommendations"

WYOMING GAME AND FISH DEPARTMENT

5400 Bishop Blvd. Cheyenne, WY 82006
Phone: (307) 777-4600 Fax: (307) 777-4610
Web site: http://gf.state.wy.us

January 29, 2008

MEMORANDUM

TO: Terry Cleveland and John Emmerich

FROM: Tom Christiansen and Joe Bohne

COPY TO: Jay Lawson, Bill Rudd, Reg Rothwell, Bob Oakleaf

SUBJECT: Multi-State Sage-Grouse Coordination and Research-based Recommendations

As assigned by Assistant Director Emmerich, we have been working with other state fish and wildlife agencies in WAFWA Sage-Grouse Management Zones 1 and 2 (MT, CO, UT, SD, ND, WY) in order to coordinate interpretation of recent sage-grouse research related to oil and gas development.

Attached for your review, please find the latest and final document capturing the multi-state interpretation of the recent science related to sage-grouse conservation and oil and gas development. It has been well scrutinized by staff from MT, WY, CO, ND and UT and there is consensus on the content by the participants. South Dakota was unable to attend the initial meeting in Salt Lake City on January 8-9, but they have been provided with meeting notes and the resulting document.

It is our recommendation that WGFD acknowledge this document as the correct interpretation of the recently published sage-grouse research and use this information to update and augment department documents and policies. It should be used in the forthcoming discussions with the BLM regarding their update to their sage-grouse Instruction Memorandum. In addition, we suggest that in order for this document to serve the broadest purpose for sage-grouse conservation four additional actions are needed. First, the document should be shared with Governor Freudenthal's staff. Second, we recommend that the Director's Office enter into discussions with MT FWP Director Jeff Hagener to ensure consistency in the application of these recommendations between our border states, and especially with the WY and MT BLM State Field Offices. Third, we recommend the document be submitted to WAFWA's Sage-Grouse Technical Committee as well as the WAFWA Executive Committee for their consideration and use. Finally, we recommend this document be included with other materials sent to the USFWS for consideration in their review of the status of sage-grouse and measures in place to conserve those populations.

We look forward to your direction on how to proceed.

Using the Best Available Science to Coordinate Conservation Actions that Benefit Greater Sage-Grouse Across States Affected by Oil & Gas Development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)

Background

Greater Sage-grouse are widely considered in scientific and public policy arenas to be a species of significant conservation concern. Loss, degradation and fragmentation of important sagebrush grassland habitats have negatively impacted sage-grouse populations. Much of this loss of habitat function is occurring in Sage-grouse Management Zones (MZ) 1 and 2 (Stiver et al. 2006) in Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming as a result of oil and gas development (Connelly et al. 2004). Oil and gas development is rapidly increasing within these areas. In response to those concerns, states and provinces are in various stages of completing or updating management plans in order to provide for long-term sage-grouse conservation. Special emphasis is being placed on oil and gas development as it rapidly spreads across much of the eastern range of sage-grouse.

The recent decision by B. Lynn Winmill, Chief U.S. District Judge (2007), which remands the original 2005 not warranted decision back to the USFWS for reconsideration, has highlighted the need for States to coordinate their application of best available science. Representatives from the state agencies with authority for managing fish and wildlife from the major sage-grouse and energy producing states comprising MZ 1 and 2 and sage-grouse researchers who have published new findings, met on January 8 and 9, 2008 in Salt Lake City. The objectives of the meeting were to better understand the application of most recent peer-reviewed science within the context of oil and gas development and coordinate and compare implementation of conservation actions utilizing that information.

Review Process

The participants at this meeting represented technical science and management advisors from each of the states. Researchers having the most recently peer reviewed and published articles concerning sage grouse and oil and gas development were invited to present their findings and answer questions. State agency participants agreed that the goal was not to establish state or regional policy or to determine the management actions that will be implemented in any or all states within MZ 1 or 2. Rather, the goal was to reach agreement on the conservation concepts and strategies related to oil and gas development that are supported by current published peer-reviewed and unpublished literature. If implemented, these concepts and strategies likely will not eliminate impacts to sage-grouse populations that result from energy development. However, when used in combination with other conservation measures, these actions may enhance the likelihood that sage-grouse populations will persist at levels that allow historical uses such as grazing and agriculture and maintain their current distribution and abundance, thereby avoiding the need to list sage-grouse under the federal Endangered Species Act.

Each researcher was invited to present their findings and to answer questions posed by the states. Following this, each state provided an overview of their review of the science and their resulting management actions and recommendations. The group then collectively reviewed, debated and agreed on the concepts and strategies supported by that science. The focus of the meeting was on five key issues: core areas, no-surface-occupancy zones, phased development, timing stipulations, well-pad densities, and restoration. Scientific data are available to inform many other issues related to sage-grouse management and conservation that were not reviewed (e.g., BMPs).

Core Areas

Identification and protection of core areas, sometimes also referred to as crucial areas, will help maintain or achieve target goals for populations including distribution and abundance.

Full field energy development appears to have severe negative impacts on sage-grouse populations under current lease stipulations (Lyon and Anderson 2003, Holloran 2005, Kaiser 2006, Holloran et al. 2007, Aldridge and Boyce 2007, Walker et al 2007, Doherty et al. 2008). Much of greater sage-grouse habitat in MZ 1 and 2 has already been leased for oil and gas development. These leases carry stipulations that have been shown to be inadequate for protecting breeding and wintering sage-grouse populations during full field development. (Holloran 2005, Walker et. al. 2007, Doherty et al. 2008) New leases continue to be issued utilizing these same stipulations. To ensure long-term persistence of populations and meet goals set by the states for sage-grouse, identifying and implementing greater protection within core areas from impacts of oil and gas development is a high priority.

In order to conserve core areas it is essential that they be identified and delineated. Sage-grouse populations occur over large landscapes comprising a series of leks and lek complexes with associated seasonal habitats. Therefore, core areas should capture the range required by a defined population to maintain itself. This concept is consistent with Crucial Wildlife Habitats recently endorsed by the Western Governor's Association (2007). Criteria that could be used to identify and map core areas include, but are not limited to: (1) lek densities, (2) displaying male densities, (3) sagebrush patch sizes, (4) seasonal habitats (breeding, summering, wintering areas), (5) seasonal linkages, or (6) appropriate buffers around important seasonal habitats.

Research indicates that oil or gas development exceeding approximately 1 well pad per square mile with the associated infrastructure, results in calculable impacts on breeding populations, as measured by the number of male sage-grouse attending leks (Holloran 2005, Naugle et al. 2006). Because breeding, summer, and winter habitats are essential to populations, development within these areas should be avoided. If development cannot be avoided within core areas, infrastructure should be minimized and the area should be managed in a manner that effectively conserves sagebrush habitats within that area.

No Surface Occupancy (NSO)

At the scale that NSOs are established, they alone will not conserve sage-grouse populations without being used in combination with core areas. The intent of NSOs is to maintain sage-grouse distribution and a semblance of habitat integrity as an area is developed.

Breeding Habitat - Leks

Research in Montana and Wyoming in coal-bed methane natural gas (CBNG) and deep-well fields suggests that impacts to leks from energy development are discernable out to a minimum of 4 miles, and that some leks within this radius have been extirpated as a direct result of energy development (Holloran 2005, Walker et al. 2007). Walker et al. (2007) indicates that the current 0.25-mile buffer lease stipulation is insufficient to adequately conserve breeding sage-grouse populations in areas having full CBNG development. A 0.25-mi. buffer leaves 98% of the landscape within 2 miles open to full-scale energy development. In a typical landscape in the Powder River Basin, 98% CBNG development within 2 miles of leks is projected to reduce the average probability of lek persistence from 87% to 5% (Walker et al. 2007). Only 38% of 26 leks inside of CBNG development remained active compared to 84% of 250 leks outside of development (Walker et al. 2007). Of leks that persisted, the numbers of attending males were reduced by approximately 50% when compared to those outside of CBNG development (Walker et al. 2007).

The impact analyses provided in Walker et al. (2007) are based on a 7-year dataset where probability of lek persistence is strongly related to extent of sagebrush habitat and the extent of energy development within 4 miles of the lek and the extent of agricultural tillage in the surrounding landscape. The estimated probabilities of lek persistence are only reliable for the length of the dataset, and it is not understood how other stressors (e.g., West Nile virus [Naugle et al. 2004], invasive weeds [Bergquist et al. 2007]) will cumulatively impact sage-grouse over longer time periods. While increased NSO buffers alone are unlikely to conserve sage-grouse populations, results from Walker et al. 2007 suggest they will increase the likelihood of maintaining the distribution and abundance of grouse and should increase the likelihood of successful restoration following energy development.

Additional information provided in Walker et al. (2007) allows managers and policy makers to estimate trade-offs associated with allowing development within a range of different distances from leks (Figures 1a and 1b). These probabilities will also need to be applied over larger landscapes in future analyses to better understand projected region- and state-wide population impacts under current and future development scenarios. Walker et al. (2007) studied lek persistence from 1997-2005 in relation to coal bed natural gas (CBNG) development in the Powder River Basin. These models are based on projected impacts of full-field development within (a) 2 miles and (b) 4 miles of the lek. We present results from these models (rather than models with impacts at smaller scales)

because development within 2 and 4 miles of leks are known to decrease breeding populations as measured by the number of displaying males (Holloran et al. 2005, Walker et al. 2007), and 52% and 74-80% of hens are known to nest within 2 and 4 miles of leks, respectively (Holloran and Anderson 2005, Colorado Greater Sage-Grouse Conservation Plan Steering Committee 2008). Sizes of NSO buffers required to protect breeding populations may be underestimated because leks in CBNG fields have fewer males per lek and a time lag occurs (avg. 3-4 years) between development and when leks go inactive. As a result, it is expected that not only will lek persistence decline, the number of males per lek will also decline. In contrast, sizes may be overestimated where high lek densities cause buffers from adjacent leks to overlap. Additional time is required to develop models demonstrating the probabilities of lek persistence at well-pad densities less than full development.

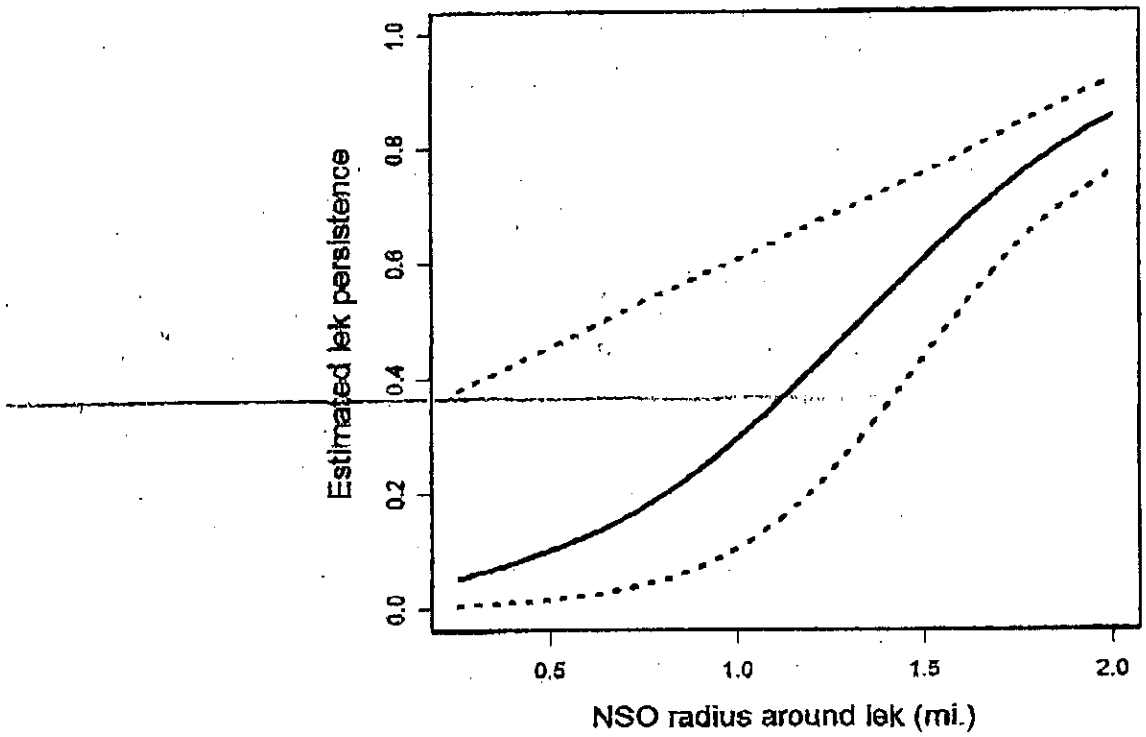


Figure 1a. Estimated probability of lek persistence (dashed lines represent 95% CIs) in fully-developed[1] coal-bed natural gas fields within an average landscape in the Powder River Basin (74% sagebrush habitat, 26% other habitats types) with different sizes of no-surface-occupancy (NSO) buffers around leks, assuming that only CBNG within 2 miles of the lek affects persistence. Buffer sizes of 0.25 mi., 0.5 mi., 0.6 mi., and 1.0 mi. result in estimated lek persistence of 5%, 11%, 14%, and 30%. Lek persistence in the absence of CBNG averages ~85%.

[1] Defined as entire area outside the NSO buffer, but within 2 miles, being within 350 meters of a well.

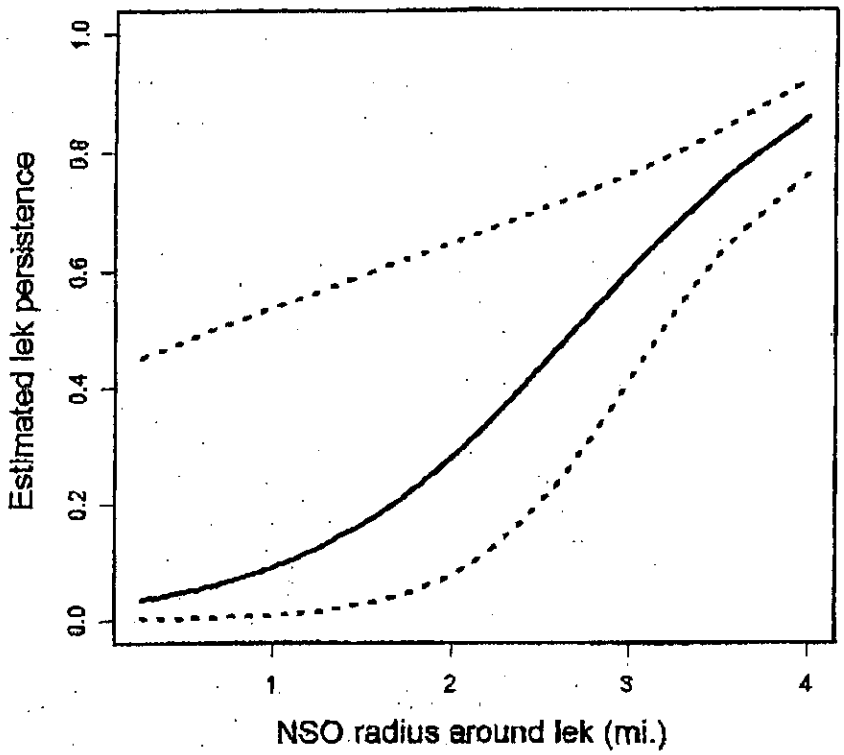


Figure 1b. Estimated probability of lek persistence (dashed lines represent 95% CIs) in fully-developed[2] coal-bed natural gas fields within an average landscape in the Powder River Basin (74% sagebrush habitat, 26% other habitats types) with different sizes of no-surface-occupancy (NSO) buffers around leks, assuming that only CBNG within 4 miles of the lek affects persistence. Buffer sizes of 0.25 mi., 0.5 mi., 0.6 mi., 1.0 mi., and 2.0 mi. result in estimated lek persistence of 4%, 5%, 6%, 10%, and 28%. Lek persistence in the absence of CBNG averages ~85%.

Figures 1a and 1b provide an illustration of the trade-offs between differing NSO buffers in relation to lek persistence in developing CBNG fields. The group does not offer a specific NSO recommendation but provides these graphs to guide decision-making.

Breeding Habitat - Nesting and Early Brood-rearing

Yearling female greater sage-grouse avoid nesting in areas within 0.6 miles of producing well pads (Holloran et al. 2007), and brood-rearing females avoid areas within 0.6 miles of producing wells (Aldridge and Boyce 2007). This suggests a 0.6-mile NSO around all suitable nesting and brood-rearing habitats is required to minimize impacts to females during these seasonal periods. In areas where nesting habitats have not been delineated, research suggests that greater sage-grouse nests are not randomly distributed. Rather, they are spatially associated with lek location within 3.1 miles in Wyoming (Holloran and Anderson 2005). However, a 4-mile buffer is needed to encompass 74-80% (Moynahan

[2] Defined as entire area outside the NSO buffer, but within 4 miles, being within 350 meters of a well.

2004, Holloran and Anderson 2005, Colorado Greater Sage-Grouse Conservation Plan Steering Committee 2008). These suggest that all areas within at least 4-miles of a lek should be considered nesting and brood-rearing habitats in the absence of mapping.

Winter Habitat

NSO or other protections may also need to be considered for crucial winter range. Survival of juvenile, yearling, and adult females are the three most important vital rates that drive population growth in greater sage-grouse (Holloran 2005, Colorado Greater Sage-Grouse Conservation Plan Steering Committee 2008). Although overwinter survival in sage-grouse is typically high, severe winter conditions can decrease hen survival (Moynahan et al 2006). Crucial wintering habitats can constitute a small part of the overall landscape (Beck 1977, Hupp and Braun 1989). Doherty et al. (2008) demonstrated that sage-grouse avoided otherwise suitable wintering habitats once they have been developed for energy production, even after timing and lek buffer stipulations had been applied (Doherty et al. 2008). For this reason, increased levels of protection may need to be considered in crucial winter habitats.

Phased Development

Population-level impacts and avoidance associated with energy development have been documented (Braun et al. 2002, Lyon and Anderson 2003, Holloran 2005, Kaiser 2006, Holloran et al. 2007, Aldridge and Boyce 2007, Walker et al 2007, Doherty et al. 2008). Phased development maximizes the amount of area within a landscape that is not being impacted by development at any one time, and can occur at multiple spatial scales (e.g., phased development of separate fields in a landscape, phased development of infrastructure within a single unit or field, or phased development within a single lease). Unitization, clustering, and geographically staggered development are all forms of phased development. As a tool to minimize impacts to sage-grouse, developing oil and gas resources by employing one of these phased methods may help maintain large, functional blocks of sage-grouse habitat.

Timing Stipulations

As with NSOs, at the scale that timing stipulations are established, they alone will not conserve sage-grouse populations without being used in combination with core areas. The intent of timing stipulations is to help maintain sage-grouse distribution and a semblance of habitat integrity as an area is developed. Timing stipulations are of lesser value at the scale of full-field development.

Breeding Habitat - Leks

Traffic during the strutting period when males are on a lek results in declines in male attendance when road-related disturbance is within 0.8 miles (Holloran 2005). The distance traveled by males from the lek during the breeding season has been reported in varying ways but generally averages 0.6 miles from a lek (Colorado Greater Sage-Grouse

Conservation Plan Steering Committee 2008 - see Appendix B). Additionally, females breeding on leks within 1.9 miles of natural gas development had lower nest initiation rates and nested farther from the lek compared to non-impacted individuals (Lyon and Anderson 2003), suggesting disturbance to leks influence females as well. Local variations may influence the application of specific dates, which are typically within a window of March 1 and May 31.

Breeding Habitat - Nesting and Early Brood-rearing

Often, timing stipulations (periods where no activity that creates disturbance are allowed) for breeding habitat have been applied using a radius around a lek. However, nesting and brood-rearing habitat is not uniformly distributed around the lek. Mapping of habitat would allow for more accurate application of this stipulation. Research on the distribution of nests relative to leks and on the timing of nesting indicates that timing stipulations to protect nesting hens and their habitat should be in place from March through June in mapped breeding habitat or (when nesting habitat has not been mapped) within 4 miles of active lek sites (Moynahan 2004, Holloran et al. 2005, Colorado Greater Sage-Grouse Conservation Plan Steering Committee 2008).

Winter Habitat

Research suggests that no surface occupancy should also be applied to important wintering habitats (Doherty et al. 2008), but if development occurs, impacts would be reduced if development activities were avoided between December 1 and March 15.

Well-Pad Densities

Leks tend to remain active when well-pad densities within 1.9 miles of leks are less than 1 pad per square mile (Holloran 2005) but leks tend to go inactive at higher pad densities (Holloran 2005, Naugle et al. 2006).

Restoration

The purpose of restoration in sage-grouse habitat should be the removal of infrastructure associated with energy development from the land surface and subsequent re-establishment of native grasses, forbs, and shrubs, including sagebrush, to promote natural ecological function. Restoration should reestablish functionality of seasonal habitats for sage-grouse. Thus a field should not be considered restored until sagebrush-grassland habitats have been reestablished.

Future Needs

Time did not allow for a detailed discussion of specific Best Management Practices for oil and gas development and restoration, seasonal habitat mapping, or future research. These topics are all recognized as needing action in the immediate future.

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Appendix 1.

Participants (Alphabetical)

Dr. Tony Apa, Colorado Division of Wildlife
Mr. Joe Bohne, Wyoming Game and Fish Department
Mr. Tom Christiansen, Wyoming Game and Fish Department
Mr. Jeff Herbert, Montana Department of Fish, Wildlife and Parks
Mr. Bill James, Utah Division of Wildlife Resources
Mr. Rick Northrup, Montana Department of Fish, Wildlife and Parks
Mr. Dave Olsen, Utah Division of Wildlife Resources
Mr. Aaron Robinson, North Dakota Game and Fish
Ms. Pam Schnurr, Colorado Division of Wildlife
Mr. T.O. Smith, Montana Department of Fish, Wildlife and Parks
Mr. Brett Walker, Colorado Division of Wildlife

Invited Guests

Dr. Matt Holloran, Wyoming Wildlife Consultants, LLC
Dr. David Naugle, University of Montana

Exhibit B

Affidavit of David A. Roberts

AFFIDAVIT OF DAVID A. ROBERTS

DAVID A. ROBERTS, being first duly sworn, deposes and states of his own knowledge:

1. I am a U.S. citizen and a resident of Laramie County, Wyoming. I reside at 7126 Cordova Drive, Cheyenne, Wyoming 82009-2615. My home phone # is (307) 637-3848.

2. I am of sufficient age (DOB: 12/19/46, = 51 1/2 yrs.) to testify, and to the best of my knowledge, I have no physical or psychological dysfunctions that affect my mental capacity.

3. I received a Bachelors of Science degree in Fish and Wildlife Management from Montana State University (MSU) in Bozeman, Montana, in June, 1968. I also received a Masters of Science degree in Fish and Wildlife Management from MSU in June, 1970. The focus of my Master's field work was pronghorn antelope range use and food habits in the Yellowwater Triangle of east-central Montana. Prior to coming to work for the BLM, I worked in temporary biological positions for the USDA-Forest Service and the Montana Fish and Game Department. I also worked in a permanent biologist position for a consulting firm (Ecological Consulting Service of Helena, Montana) for two+ years in eastern Montana before hiring on with the Bureau of Land Management.

4. I am currently a wildlife biologist (wildlife program leader) for the U.S. Department of the Interior-Bureau of Land Management (BLM), Wyoming State Office, in Cheyenne, Wyoming. My work address is: 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003-1828. My work phone # is: (307) 775-6099. I have been employed in this capacity since July 5, 1985. I was first employed by the BLM in the Miles City District, Miles City, Montana, in December, 1974. I served in 3 biologist/ecologist positions in Miles City, then moved to the Worland BLM District in Worland, Wyoming, in December, 1978 (1 biologist position), prior to moving to Cheyenne in July of 1985. I have nearly 24 years of professional, biological experience with the BLM, much of it in the areas of question.

5. I am aware Wyoming Audubon and Linda B. Rawlins have appealed the Record of Decision (ROD) for the Jonah II Field Natural Gas Development Project Environmental Impact Statement (EIS) in southwestern Wyoming to the Interior Board of Land Appeals (IBLA). I have read the appellants' Statement Of Reasons and Request For Stay, and I am generally familiar with the stated grounds for their action. In summary, it seems to me the appellants have two major contentions: 1.) they believe the BLM has not complied with its own land use plan decisions, and 2.) they believe the BLM's sage grouse protective stipulations/restrictions on development activities on the public lands are too lax and scientifically unsupportable.

6. The purpose of this affidavit is for me to state my professional knowledge, experience, and opinion as a wildlife biologist routinely dealing with wildlife resource management issues and policy. Most specifically, I will address the matter of the origin and use of the 1/4 mile surface use restriction around sage grouse breeding grounds (variously termed strutting grounds, or leks).

7. The sage grouse strutting ground has been recognized for many years as a key habitat component of the species. The species survival strategies and behavior have evolved over the eons to incorporate the strutting ground as the central focus of the breeding activities. For this reason, the BLM has long felt that special protection from habitat loss and human disturbance should be provided to the leks for the welfare of the sage grouse.

   Several questions have existed for a long time. What kinds of impacts result to sage grouse as a result of various kinds of development activities? and, What kind of protection can be provided to sage grouse to protect them from these other impacts? Neither one of these questions have been very well investigated from a scientific standpoint, in my opinion, nor have they been definitively resolved. Setback distances and/or timing restrictions have been commonly used to protect leks from disturbance, but their real effectiveness is largely unknown.

   In a review of the readily available literature, I have been able to find very little reference to a 1/4 mile buffer guideline for protection of sage grouse leks from disturbance. The one reference that I have been able to locate came out of an early (draft) edition (circa 1965) of the sagebrush management guidelines. The final guidelines did not contain the 1/4 mile reference. In checking with a number of other biologists, both in Wyoming and in other neighboring states, they also were unable to tell me of any *scientific* origin for the 1/4 mile buffer. Yet, Wyoming and most of the other states BLM offices I checked, have used the 1/4 mile buffer now or at one time or another in the past. I have enclosed some responses that show this.

   Though this was before my time, I suspect this is the way the 1/4 mile distance came into use:

   > During the late 1950's and early 1960's, the land management agencies of the Federal government (especially the BLM and FS) were doing a lot of sagebrush eradication (vegetation control) as a form of "range improvement". Most biologists at that time recognized this practice could be quite detrimental to sage grouse populations. As a result, the Western States Sage Grouse Committee was formed to address some of these impact issues. By the mid 1960's, the committee had developed some initial sagebrush management guidelines. The amount of impacts information was small at that point, however, so the initial guidelines were largely a guess at what would be appropriate protection for sage grouse. The 1/4 mile distance was mutually,

though not scientifically, accepted as a buffer distance from sage grouse leks to protect them from vegetation manipulations. Several editions of the guidelines were created from their initiation in the mid 1960's until their final publication in The Wildlife Society Bulletin in 1977. The 1/4 mile distance dropped out somewhere along the way. The BLM started using the 1/4 mile distance, for lack of anything better, along with the rest of the guidelines, back in the late 1960's. Over a period of time (now, 3 decades) the 1/4 mile distance just evolved into a de facto "guideline" or "standard" through routine, everyday usage, even though there was not any real, empirical, scientific evidence to either support or refute its usage.

The 1/4 mile setback around leks has been used in Wyoming at least since the late 1970's, and maybe before. I do know that a statewide BLM standard stipulation for sage grouse protection in oil fields was developed and officially adopted in 1980-1981 (see attachments). While I have not been able to establish a scientific basis for the 1/4 mile setback around leks, I believe the memos corroborate that a number of people in several offices were consulted, and that this guideline was at least acceptable, if not entirely 100% consensual at that time.

8. While there is very little or no empirical, scientific data out there to either support or refute the 1/4 mile no surface disturbance standard, there does seem to be an increasingly larger "pile" of anecdotal data accumulating to suggest a 1/4 mile setback may not be adequate. Some more recent (within the last 5-8 years) studies and anecdotal observations would suggest that a greater distance (possibly 1/2 mile) would be a more appropriate protective buffer around sage grouse leks. Even these more recent studies, however, have not really been designed to empirically ascertain an appropriate setback distance. I personally believe it would be inappropriate, however, to leap to some other guideline/standard until this whole impacts situation is scientifically investigated further.

FURTHER AFFIANT SAYS NOT.

Dated this 20th day of July, 1998.

David A. Roberts

David A. Roberts

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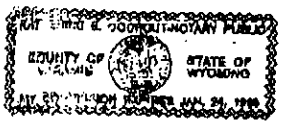
Subscribed and sworn to before me by David A. Roberts this 20th day of July, 1998.

Witness my hand and official seal.

SEAL



Katherine E. Godbout
Notary Public

My Commission Expires: Jan. 24, 1999

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Exhibit C

Letter from Bob Budd to WY Governor Freudenthal

Sage Grouse Implementation Team

SAGE GROUSE IMPLEMENTATION TEAM

Tuesday, 25 March 2008

Governor Dave Freudenthal
Wyoming State Capitol
Cheyenne, WY 82002

Dear Governor Freudenthal,

On behalf of the Implementation Team you asked to identify actions and strategies which will effectively manage Sage-grouse and their habitats in Wyoming, we would like to recommend that you take the appropriate steps to formally adopt a process for conservation that includes the following:

Wyoming should develop a "Core Population Area" strategy to maintain habitats and viable populations of Sage-grouse in areas where they are most abundant. This approach is similar to the highly successful "Core Native Herd" approach used to manage Bighorn sheep in the state.

Wyoming will adopt a "statewide" approach to management of Sage-grouse in the state. While we recognize zonal recommendations within the region, we will work within our area of jurisdiction.

Core Population Areas will include habitats and existing populations for no less than two-thirds of the Sage-grouse in Wyoming. Based on initial evaluations, it is estimated there will be approximately 40 Core Population Areas, varying in size. Core Population Areas will reflect geographic and genetic distribution of Sage-grouse in Wyoming. Flexibility to adjust Core Population Area boundaries to adapt to emerging conditions and information is essential to future management.

Management within Core Population Areas will focus on maintenance and enhancement of grouse habitats and populations. Current management and existing land uses within Core Population Areas should be recognized and continued. Sage-grouse have clearly selected those areas based on existing conditions, and changes to those conditions should be carefully evaluated.

Development within Core Population Areas should occur only when it can be demonstrated that the activity will have no negative effects on Sage-grouse, using a case-by-case localized approach and appropriate ground-truthing.

Core Population Areas will be used to focus funding, assurances (including Candidate Conservation Agreements and Candidate Conservation Agreements

with Assurances), habitat enhancement, reclamation efforts, mapping, and other associated efforts to assure viability of Sage-grouse in Wyoming.

A non-regulatory approach will be used as much as possible to influence management within Core Population Areas. It is imperative that management alternatives reflect unique localized conditions, including soils, vegetation, types of development, climate, and other local realities.

Incentives to defer, reduce, or preclude development of all types in Core Population Areas will be necessary, but should follow a Controlled Surface Use (CSU) framework, rather than a No Surface Occupancy (NSO) approach.

Incentives to enable development of all types outside Core Population Areas will be necessary. These should include stipulation waivers, enhanced permitting processes, density bonuses, and other incentives. Development scenarios should attempt to maintain populations, habitats and essential migration routes outside Core Population Areas wherever possible.

Development of alternative strategies for maintenance of habitat, or proven enhancement strategies within Core Population Areas will be a priority. This will include such strategies as habitat leasing, conservation easements, and management plans (including CCAAs AND CCAs).

Incentives to accelerate or expand on required reclamation in habitats adjacent to Core Population Areas should be developed. These may include stipulation waivers, assistive funding for reclamation, and other strategies.

Existing rights should be recognized and may require compensation to facilitate management in Core Population Areas.

On-the-ground enhancements, monitoring, and ongoing planning should be facilitated by local working groups (LWGs) as much as possible.

Initial Core Population Areas were recommended jointly by technical experts from the oil and gas industry, Game and Fish, conservation organizations, and agriculture. Those recommendations were acted on by the Implementation Team in March, and the recommended boundaries are shown on the attached map.

Core Population Areas will be further evaluated and refined by the recently initiated and funded mapping process headed by Wyoming Geographic Information System Center (WyGISC). Those results and associated ground-truthing are expected by the end of 2008.

It is the belief of the Implementation Team that this process is responsible, and will have a permanently beneficial effect on Sage-grouse in Wyoming. We would encourage you to engage the U.S. Fish and Wildlife Service, Bureau of Land Management, Forest Service and appropriate state agencies in implementation of this process as soon as possible.

Finally, the group discussed the means of implementing these actions, and it would appear that your use of an Executive Order to direct Wyoming government may be the most expedient and effective at this time. However, the group will defer to and support your judgment in that regard.

Thank you for your attention to these matters.

Sincerely,

Bob Budd, Chairman
SAGE-GROUSE IMPLEMENTATION TEAM

Exhibit D

Letter from Brian T. Kelly (FWS) Ryan Lance

Sage Grouse "Core Population" Strategy

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
5353 Yellowstone Road, Suite 308A
Cheyenne, Wyoming 82009

In Reply Refer To:
ES-61411/WY.36/WY10523

Mr. Ryan M. Lance
Deputy Chief of Staff
Office of the Governor
State Capitol
Cheyenne, Wyoming 82002

MAY - 7 2008

Dear Mr. Lance: RYAN:

Thank you for your letter of April 17, 2008, regarding the proposed strategy developed by the Governor's Sage Grouse Implementation Team (Implementation Team) for the conservation of the greater sage-grouse in Wyoming. Specifically you requested of us: (1) whether the "core population area strategy" was a sound policy that should move forward, and (2) whether or not the core population areas currently identified for Wyoming are consistent with the U.S. Fish and Wildlife Service's (Service) understanding of the most important sage-grouse habitats in the State.

The Service does indeed believe the "core population area strategy", as outlined in the Implementation Team's correspondence to the Governor, is a sound framework for a policy by which to conserve greater sage-grouse in Wyoming. The Service commends the State for its leadership role in developing this long-term, science-based vision for the conservation of greater sage-grouse. In the 10 months since the Governor convened his sage-grouse summit, and during which time the Implementation Team conducted its work, the Service believes Wyoming has led by example. We have recently become aware of other states and agencies pursuing approaches similar to that developed in Wyoming.

Your request to the Service was, in part, cast under the auspices of our recently signed Memorandum of Agreement to ensure the necessary conservation to preclude the need to list species of greatest conservation need. The Service believes the "core population area strategy" can achieve this goal for greater sage-grouse. However, as you know and as the Implementation Team discussed, for the strategy to be effective, the state, federal and private landowners in the state must implement this strategy. To this end, the Service is poised to assist the State in the development of a state-wide programmatic Candidate Conservation Agreement with Assurances for private landowners, which, although voluntary, could incent landowners to adopt the strategy. Likewise, if federal agencies are willing, the state-wide

Conservation Agreement approach can also integrate federal properties. As you know federal properties in Wyoming contain a good share of the key habitat in the State and the inclusion of those properties in the proposed strategy will be a key to its success.

The Service agrees that the core areas as currently defined by the Implementation Team are among the most important sage-grouse habitats in the State. Our only reservation is that the core population areas reflect breeding areas only. Core population areas need to include all seasonal habitats for those key populations, including migratory corridors, and must be identified and appropriately managed. The Implementation Team discussed this at length and implicitly acknowledged it in their recommendations to the Governor. In this regard, the Service again commends the State's leadership to fund and conduct the appropriate state-wide mapping in order to complete this important phase of the strategy. Thus, we strongly encourage the Implementation Team to ensure that all seasonal habitats to sustain the core population areas are identified and incorporated into the strategy, and associated maps, once the State's mapping project is complete.

Thank you for the opportunity to provide feedback on the proposed core population approach for greater sage-grouse in Wyoming. The effective implementation of the proposed strategy should help ensure the long-term viability of state-managed populations of greater sage-grouse in Wyoming. We look forward to continuing in our participation with Wyoming in greater sage-grouse conservation. If you have any questions regarding the information provided here please do not hesitate to contact me at 307-772-2374, extension 234, or Pat Deibert of my staff at extension 226.

Sincerely,

Brian T. Kelly
Field Supervisor
Wyoming Field Office

cc: BLM, Acting State Director, Cheyenne, WY (D. Simpson)
USFS, Regional Forester (H. Forsgren)
USFS, Regional Forester (R. Cables)
WGFD, Director, Cheyenne, WY (T. Cleveland)
Governor's Sage Grouse Implementation Team, Chair, Lander, WY (B.Budd)
Office of State Lands, Director, Cheyenne, WY (L. Boomgaarden)