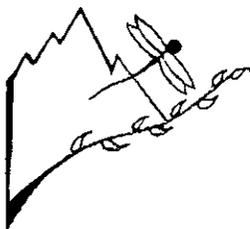




Copy



CENTER FOR NATIVE ECOSYSTEMS

1536 Wynkoop, Suite 303
Denver, Colorado 80202
303.546.0214
cne@nativeecosystems.org
www.nativeecosystems.org

Bob Bennett
State Director
Bureau of Land Management
Wyoming State Office
5353 Yellowstone Road
Cheyenne, WY 82009

19 May 2008

BY FAX

**Re: Protest of BLM's Notice of Competitive Oil and Gas Lease Sale of
Parcels with High Conservation Value**

Dear Mr. Bennett:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Center for Native Ecosystems (CNE) and Biodiversity Conservation Alliance (BCA) protest the June 3, 2008 sale of the following parcels:

- WY-0806-112 Heart of the West Core # 99; Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-113 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-116 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-117 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-118 Heart of the West Core # 99
- WY-0806-119 Heart of the West Core # 99
- WY-0806-121 White-tailed prairie dog habitat
- WY-0806-122 Heart of the West Core # 99
- WY-0806-124 Heart of the West Core # 99
- WY-0806-129 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-139 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-140 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-151 Heart of the West Corridor # 79
- WY-0806-155 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-157 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-158 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-159 Manderson Complex nominated white-tailed prairie dog ACEC
- WY-0806-163 Dad Complex nominated white-tailed prairie dog ACEC
- WY-0806-164 Dad Complex nominated white-tailed prairie dog ACEC

WY-0806-169	Heart of the West Core - Bobcat Draw # 21
WY-0806-173	Heart of the West Core - Bobcat Draw # 21
WY-0806-175	Heart of the West Core - Bobcat Draw # 21; Red Butte BLM WSA, Citizen Proposed Wilderness
WY-0806-176	Heart of the West Core - Bobcat Draw # 21
WY-0806-178	Manderson Complex nominated white-tailed prairie dog ACEC
WY-0806-179	Heart of the West Core - Bobcat Draw # 21; Manderson Complex nominated white-tailed prairie dog ACEC
WY-0806-180	Heart of the West Core - Bobcat Draw # 21; Manderson Complex nominated white-tailed prairie dog ACEC
WY-0806-181	Manderson Complex nominated white-tailed prairie dog ACEC
WY-0806-184	15 Mile Complex nominated white-tailed prairie dog ACEC
WY-0806-188	15 Mile Complex nominated white-tailed prairie dog ACEC
WY-0806-189	Heart of the West Core - Bobcat Draw # 21; Red Butte BLM WSA, Citizen Proposed Wilderness
WY-0806-190	Heart of the West Core - Bobcat Draw # 21; Red Butte BLM WSA, Citizen Proposed Wilderness
WY-0806-193	White-tailed prairie dog habitat
WY-0806-197	Heart of the West Core - Adobe/Vermillion # 4
WY-0806-198	Heart of the West Core - Absaroka Front # 20; Meeteetse Complex nominated white-tailed prairie dog ACEC
WY-0806-199	Heart of the West Core - Absaroka Front # 20; Meeteetse Complex nominated white-tailed prairie dog ACEC
WY-0806-200	Heart of the West Core - Absaroka Front # 20
WY-0806-201	Heart of the West Core - McCullough Peaks # 26
WY-0806-203	Baxter Basin Complex nominated white-tailed prairie dog ACEC; ACEC 301
WY-0806-205	Carter Complex and Cumberland Complex nominated white-tailed prairie dog ACECs
WY-0806-206	Carter Complex and Cumberland Complex nominated white-tailed prairie dog ACECs
WY-0806-207	Heart of the West Core - Upper Bear River # 10; Carter Complex and Cumberland Complex nominated white-tailed prairie dog ACECs
WY-0806-208	Heart of the West Core - Upper Bear River # 10; Carter Complex and Cumberland Complex nominated white-tailed prairie dog ACECs
WY-0806-209	Carter Complex and Cumberland Complex nominated white-tailed prairie dog ACECs
WY-0806-210	Heart of the West Core - Upper Bear River # 10
WY-0806-212	Heart of the West Core - Ham's Fork # 11
WY-0806-213	Heart of the West Core - Ham's Fork # 11

The grounds for the protest follow.

I. PROTESTING PARTIES

Center for Native Ecosystems (CNE) and Biodiversity Conservation Alliance (BCA) have a longstanding record of involvement in management decisions and public participation opportunities on public lands including federal lands managed by the Bureau of Land Management (BLM). CNE's mission is to use the best available science

to participate in policy and administrative processes, legal actions, and public outreach and education to protect and restore native plants and animals in the Greater Southern Rockies. Biodiversity Conservation Alliance's mission is to protect and restore biological diversity, habitat for wildlife and fish, rare plants, and roadless lands in Wyoming and surrounding states.

The protesters have well-established histories of participation in BLM planning and management activities, including participation on Wyoming oil and gas lease planning decisions, and the planning processes for the relevant BLM Field Offices. Members of visit, recreate on, and use lands on or near the parcels proposed for leasing. The staff and members of both organizations 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. Staff and members of these organizations 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, as well as other lands of high conservation value. Members and professional staff of CNE and BCA are conducting research and advocacy to protect the populations and habitat of prairie dogs, greater sage-grouse, black-footed ferret, and other imperiled species within the sale parcels. Members and staff of both organizations support the Wyoming citizens' wilderness proposal. We value the important role that Areas of Critical Environmental Concern should play in safeguarding rare species and communities on BLM land. Our members' interests in these public lands and the rare and imperiled species that depend on these lands for habitat will be adversely affected if the sale of these parcels proceeds, as proposed, without adequate environmental analysis or safeguards to protect the functionality of habitat for imperiled species, or other important conservation values. Oil and gas leasing and subsequent mineral development on the protested parcels, if approved without adequate environmental analysis and appropriate safeguards to minimize negative impacts, is likely to result in significant, unnecessary and undue harm to rare and imperiled species, native ecosystems, and other conservation values. The proposed leasing of the protested parcels will harm our members' interests in the continued use of those public lands and the rare and imperiled species they support. Therefore protesters have legally recognizable interests that will be affected and impacted by the proposed action.

II. STATEMENT OF REASONS

For the reasons set forth below, the Bureau of Land Management (BLM) should withdraw all of the protested parcels pending completion of an adequate NEPA analysis of the environmental impacts of the proposed leasing. BLM should withdraw from the sale all protested parcels because there is credible evidence of resource conflicts and potentially significant environmental impacts which have not been properly analyzed. The BLM should withdraw the protested parcels pending completion of a pre-leasing Environmental Assessment or Environmental Impact Statement that contains the following:

- adequate analysis of the potential direct, indirect, and cumulative impacts of reasonably foreseeable post-leasing development on Areas of Critical Environmental Concern (both nominated and designated), Citizen's Proposed Wilderness Areas, BLM Wilderness Study Areas, and rare and imperiled species including greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses.
- adequate consideration of a range of alternatives to ensure that impacts to the aforementioned lands and species are minimized, including no-leasing, no-surface occupancy, and a range of mitigation measures that could be applied as lease stipulations to minimize and mitigate impacts to special status species, including greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses.
- adequate analysis of the mitigation measures proposed to be applied as lease stipulations under each alternative, including an assessment of how effective mitigation measures are likely to be at mitigating impacts to insignificance (this assessment should consider both the best available science on the effectiveness of any proposed mitigation measures, and BLM's ability to require, monitor and enforce proposed mitigation measures given funding and personnel constraints)
- a record that demonstrates that BLM has adequately analyzed any potential direct, indirect, and cumulative impacts of reasonably foreseeable post-leasing oil and gas development on threatened, endangered, and candidate species, including greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses; and has met the consultation requirements under Section 7 of the Endangered Species Act for all of the aforementioned species.

In addition, BLM should withdraw all of the protested parcels in Field Offices that are currently revising their Resource Management Plans, pending completion of ongoing RMP revision. BLM should also withdraw all of the protested parcels in Field Offices that are (or should be) considering ACEC nominations submitted by CNE or Citizens' Wilderness Proposals.

Whether to lease these lands, and if so, subject to what lease stipulations and mitigation measures, are decisions properly made after the BLM has conducted an adequate NEPA

analysis of environmental impacts of reasonably foreseeable post-leasing oil and gas development, and after ongoing RMP revisions have been completed and finalized.

A. The leasing of the protested parcels absent full examination of the environmental consequences will violate the National Environmental Policy Act.

- 1. The existing NEPA documents that the proposed leasing is tiered to, do not contain adequate programmatic analysis of the environmental consequences of oil and gas leasing and development on the protested parcels.**

The RMPs and programmatic EIS's that this leasing is tiered to are outdated and do not consider significant new developments and information that bears directly on the type and magnitude of environmental impacts that are likely to result from the leasing of the lands in question for oil and gas development. In the time since the relevant RMPs were published, Wyoming has experienced greatly increased levels of mineral development. The level of mineral development currently occurring was not anticipated in the programmatic NEPA documents that this leasing was tiered to. This level of mineral development is likely to result in environmental impacts that are much more significant than those analyzed in ten to fifteen year old programmatic NEPA documents. In addition, the biological status of greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses has changed significantly since the completion of the relevant programmatic NEPA documents. Some of these species have undergone significant population declines in Wyoming and across their range since the relevant programmatic NEPA documents were completed. New scientific evidence also suggests that increasing levels of oil and gas development pose a major threat to these species, and that lease stipulations currently relied upon by BLM to mitigate impacts to insignificance are ineffective. In addition, the regulatory status of some of these species has changed. The programmatic analysis of environmental impacts of opening the lands in question to oil and gas development that the proposed leasing is tiered to, does not consider any of this substantial new information, and thus do not contain an adequate programmatic NEPA analysis of the direct, indirect and cumulative impacts of leasing of the protested parcels on any of the following resources: Areas of Critical Environmental Concern, Citizen's Proposed Wilderness Areas, BLM Wilderness Study Areas, Citizen's Proposed Wilderness Areas, greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses. We have provide BLM with new information on several of these species in the past, including greater sage-grouse, black-footed ferret, black-tailed prairie dog, and white-tailed prairie dog in our previous protests of WY BLM oil and gas lease sales, and hereby incorporate the significant new information outlined in all of our previous protests by reference.

II. The BLM has not conducted the required site-specific NEPA analysis of the reasonably foreseeable post-leasing oil and gas development, prior to issuing leases on the protested parcels.

Further, the BLM has not conducted the required site-specific NEPA analysis of reasonably foreseeable post-leasing oil and gas exploration and development, prior to issuing leases on the protested parcels. Programmatic NEPA analysis may be used to conduct broad scale analysis of the impacts of opening lands to oil and gas development, in order to inform and define the scope of subsequent site-specific NEPA analysis. However, it is not appropriate to use the vague, general NEPA analysis contained in RMPs as a substitute for site-specific NEPA analysis at the point when a decision is made to allow surface disturbance in sensitive habitat. The National Environmental Policy Act, 42 U.S.C. § 4332(C), requires the BLM to take a "hard look" at the environmental consequences of their proposed actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). When offering oil and gas leases for sale without stipulations prohibiting surface occupancy, the agencies must assess the environmental impacts of reasonably foreseeable post-leasing oil and gas development prior to issuance of the lease. See, e.g., *Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-43 (2003); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147 (10th Cir. 2004); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

The BLM recognizes the need for site-specific analysis of the environmental impacts of oil and gas development on the protested parcels, but intends to defer this analysis to later stages, such as submission of Applications for Permit to Drill (APDs) or proposals for full field development. The BLM justifies the decision to defer site-specific analysis to a later stage of the process, by arguing that lease issuance is a mere paper transaction, without on-the-ground consequences. However, the issuance of a federal oil and gas lease, without stipulations allowing BLM to preclude any surface disturbance, commits the leased parcel to development and conveys legal rights to the purchaser, regardless of the fact that additional federal actions will precede commercial drilling. See 43 C.F.R. § 3101.1-2. 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. Following lease, unless drilling would violate an existing lease stipulation or a specific nondiscretionary legal requirement, land management agencies' ability to prevent impacts to other resources is limited to those "reasonable measures" that are "consistent with lease rights granted." *Id.*

Moreover, BLM has taken the position that any stipulations to protect resources must be attached to the lease itself. BLM Land Use Planning Handbook, App. C at 16 (2000) ("A determination that lands are available for leasing represents a commitment to allow surface use under standard lease terms and conditions unless stipulations constraining

development are attached to leases"). Absent protective stipulations at the lease stage, the "reasonable measures" BLM believes that it may take to protect other resources from development are extremely limited. According to BLM regulations governing surface use rights conveyed with a lease, such reasonable measures are "consistent with lease rights granted" only if "they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year." 43 C.F.R. § 3101.1-2.

The Forest Service's position mirrors that of the BLM; surface exploration and development generally must be allowed, if requested by the leaseholder, once the lease is issued. *See Oil and Gas Resources*, 55 Fed. Reg. 10,423, 10,430 (Mar. 21, 1990) (preamble to final Forest Service leasing regulations, stating "[t]his Department has determined that leases that are issued for National Forest System lands should vest the lessee with the right to conduct oil and gas operations somewhere on the lease").

The significance of this basic development right conveyed through oil and gas leasing, and federal agencies' positions on their limited ability to attach further conditions to that right, are well established in federal court precedent. In *Sierra Club v. Peterson*, the United States Court of Appeals for the District of Columbia Circuit addressed a Forest Service decision to authorize oil and gas leasing in the Bridger-Teton National Forest. 717 F.2d 1409 (D.C. Cir. 1983). The court specifically rejected the Forest Service's contention "that leasing is a discrete transaction which will not result in any physical or biological impacts." *Id.* at 1413 (internal quotations and citation omitted).

The Forest Service's position that leasing constitutes an irreversible decision whether to allow development is further confirmed by the agency's statements regarding proposed leasing in the context of approving applications to drill on existing leases on National Forest System lands. In addressing such drilling proposals, the Forest Service has steadfastly maintained that oil and gas lease rights severely constrain the agency's options to limit or prohibit development on an existing lease in the interest of other values.

The Forest Service has made its position clear that complete denial of operations on an existing federal oil and gas lease is permissible only in the extraordinary situation where the impacts from such operations would be so severe as to violate a substantive environmental law, by, for example, threatening the extinction of wildlife species in violation of the Endangered Species Act. 16 U.S.C. § 1536(a)(2). This reflects 43 C.F.R. § 3101.1-2's provision subjecting lease rights to "restrictions deriving from specific, nondiscretionary statutes."

It is highly likely that situations will arise where oil and gas development will result in environmental impacts that, although significant, would not violate lease stipulations or any substantive statutory prohibition. In such instances, it may often be the case that requiring that proposed roads or wellpads be moved 200 meters, or that surface disturbance be postponed for 60 days, may not mitigate environmental impacts to

insignificance. For example, recent research (which we have described in detail in our previous protests of leasing of parcels containing greater sage-grouse habitat) suggests that oil and gas leasing and subsequent development on BLM lands has resulted in significant declines of greater sage-grouse populations, despite mitigation measures aimed at protecting greater sage-grouse that were applied as lease stipulations and 'reasonable measures' at the APD stage. However, since the greater sage-grouse is not yet listed under the Endangered Species Act, no substantive statute was violated.

Thus, it is clear that where, as here, the lease right allows surface occupancy, a significant commitment of resources is made at the time of lease issuance. This is an action with readily foreseeable on-the-ground consequences. See *Conner*, 848 F.2d 1441; *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983). Accordingly, the appropriate time to analyze the need for protecting site-specific resource values is before a lease is granted.

As the Tenth Circuit Court of Appeals recently clarified, *Park County Resource Council v. United States Dept. of Agriculture*, 817 F.2d 609 (10th Cir. 1987) does not excuse the BLM from its obligation to analyze these consequences prior to leasing. *Pennaco Energy, Inc. v. United States Dept. of the Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004). Park County may allow the agency to forego preparation of an Environmental Impact Statement if and when it has prepared an extensive environmental assessment covering the leases in question. This however, is not the case. The protested parcels have had no NEPA documentation prepared for them save MFP and RMP documents that clearly do not constitute adequate NEPA analysis of the environmental consequences of reasonably foreseeable post-leasing development.

Nor does reliance on RMP documents alone suffice for the core NEPA function of adequate consideration of alternatives. See *Pennaco Energy*, 377 F.3d at 1162 (explaining that documents such as "Determinations of NEPA Adequacy" cannot satisfy NEPA's "hard look" standard). Because none of the protested lease parcels are entirely non-waivable No Surface Occupancy ("NSO") leases, leasing, which confers specific rights to develop that the BLM and Forest Service cannot readily deny, is a concrete federal action with readily foreseeable environmental effects, and cannot legally go forward without NEPA analysis. See 43 C.F.R. § 3101.1-2.

Agencies are required to consider alternatives to a proposed action and must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C. §4332(C). CEQ regulations implementing NEPA and the courts make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. Environmental analysis must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after agency officials have bound themselves to a particular outcome (such as surface disturbance and occupation within these sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e. no leasing or NSO stipulations).

Sierra Club v. Peterson established the requirement that a land management agency undertake appropriate environmental analysis prior to the issuance of mineral leases, and not forgo its ability to give due consideration to the "no action alternative." 717 F.2d 1409 (D.C. Cir. 1983). This case challenged the decision of the Forest Service ("FS") and BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without preparing an EIS. The FS had conducted a programmatic NEPA analysis, then recommended granting the lease applications with various stipulations based upon broad characterizations as to whether the subject lands were considered environmentally sensitive. Because the FS determined that issuing leases subject to the recommended stipulations would not result in significant adverse impacts to the environment, it decided that no EIS was required at the leasing stage of the proposed development. *Id.* at 1410. The court held that the FS decision violated NEPA:

Even assuming, arguendo, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to *preclude* surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee . . . Thus, with respect to the [leases allowing surface occupancy] the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

Id. at 1414 (emphasis added). The appropriate time for preparing an EIS is prior to a decision "when the decision-maker retains a maximum range of options" prior to an action which constitutes an "irreversible and irretrievable commitment of resources[.]" *Id.* (citing *Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)).

Wyoming Outdoor Council held that challenged oil and gas leases were void because BLM did not consider reasonable alternatives prior to leasing, including whether specific parcels should be leased, appropriate lease stipulations, and NSO stipulations. The Board ruled that the leasing "document's failure to consider reasonable alternatives relevant to a pre-leasing environmental analysis fatally impairs its ability to serve as the requisite pre-leasing NEPA document for these parcels." Wyoming Outdoor Council, 156 IBLA 347, 357 (2002) *rev'd on other grounds by Pennaco Energy, Inc. v. US Dep't of Interior*, 266 F.Supp.2d 1323 (D. Wyo. 2003). The reasonable alternatives requirement applies to the preparation of an EA even if an EIS is ultimately unnecessary. See Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 US 1066 (1989). Therefore, the BLM must analyze reasonable alternatives under NEPA prior to leasing.

Further, though Determinations of NEPA Adequacy (DNAs), can be used to assist the BLM in determining whether it can rely on existing documents for a current proposed action, DNAs are not NEPA documents, and cannot be used to supplement existing programmatic NEPA documents, or as a substitute for the required site-specific pre-leasing NEPA analysis. The BLM's DNAs for the leasing of the parcels at issue here,

conclude that existing NEPA documents contain an adequate analysis of the environmental impacts of leasing of the protested parcels. The record demonstrates that this conclusion is arbitrary and capricious.

In the present case, the BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbances. The BLM has not conducted an adequate site-specific NEPA analysis of the direct, indirect and cumulative impacts of reasonably foreseeable post-leasing oil and gas development on any of the following resources: nominated ACECs, designated ACECs, Citizens proposed wilderness areas, BLM wilderness study areas, greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses. Further, the BLM does not consider an adequate range of alternatives to the proposed leasing in its programmatic NEPA analyses, and must conduct site-specific NEPA that analyzes an adequate range of alternatives, including no-leasing and no surface occupancy alternatives, and alternatives that analyze a range of various protective stipulations aimed at minimizing and mitigating the impacts to habitat for special status species within the protested parcels. Federal agencies must, to the fullest extent possible, use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. 40 C.F.R. § 1500.2(e). "For all alternatives which were eliminated from detailed study," the agencies must "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

The BLM must also analyze the effectiveness of lease stipulations and other mitigation measures that are aimed at mitigating the impacts of the proposed action to insignificance. This is particularly important given common sense and the best available science suggests that the lease stipulations attached to the parcels will not prevent significant impacts to the following resources: nominated ACECs, designated ACECs, Citizens proposed wilderness areas, BLM wilderness study areas, greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses. The BLM must analyze the likely effectiveness of the lease stipulations and other proposed mitigation measures on all of the aforementioned resources.

Significant impacts on special status species and lands of high conservation value may result from leasing of the protested parcels. The proposed lease stipulations are unlikely to prevent significant impacts to the special status species and lands of high conservation value within the protested parcels. Leasing absent NEPA analysis and application of stipulations that adequately minimize impacts violates NEPA.

C. Leasing the Protested Parcels Violates the ESA

1. General ESA duties

Endangered Species Act ("ESA") listed species are present in many of the parcels we are protesting. The BLM is violating the ESA by offering the parcels we are protesting with inadequate stipulations.

Section 7 consultations must be made prior to the lease sale of these parcels due to the presence of black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies'-trresses. See, *Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir. 1988) (the ESA consultation process is triggered when the surface agency is notified of a pending lease sale).

Courts have recognized that oil and gas leases are federal actions that may affect listed species or critical habitat, and that they therefore may not proceed without completion of the consultation process. See 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Conner v. Burford*, 848 F.2d 1441, 1455 (9th Cir. 1988) (BLM could not issue oil and gas leases until FWS analyzed consequences of all stages of leasing plan in Biological Opinion).

Alternatively, the parcels must be sold with NSO stipulations over the entirety of the parcels in order to insure and guarantee that the agency's action does not result in jeopardy to the existence of any endangered species or threatened species or result in the destruction or adverse modification of such species' habitat. See e.g., *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43, 49-50 (D.C. Cir. 1999) (where an agency does not retain its authority to preclude all surface-disturbing activities after lease issuance, it constitutes an irreversible and irretrievable commitment of agency resources); *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) ("[U]nless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irreversible commitment of resources by selling non-NSO leases.").

It is unlawful for the BLM to lease the parcels absent consultation with the USFWS or with NSO stipulations where the BLM acknowledges the presence of endangered or threatened species. *Conner*, 848 F.2d 1441, 1452-58 (ESA's consultation requirement is not met by "incremental steps" and by mere notification of the potential presence of endangered species). Analyzing the impacts to endangered species at the exploration and development stage after the BLM has already issued a lease allowing oil and gas development is insufficient for purposes of complying with the ESA.

Through consultation with USFWS, the BLM must determine whether the potential exploration, development, and/or production of oil and gas related activities will jeopardize endangered and threatened species in these parcels. This consultation must be conducted prior to making an irreversible commitment of resources by selling non-NSO leases. Failure to do otherwise is arbitrary, capricious, and an abuse of discretion. See, *Conner*, 848 F.2d 1441, 1453 ("we hold that agency action [for purposes of developing a biological opinion]... entails not only leasing but leasing and all post-leasing activities through production and abandonment.").

By ignoring FWS's recommendations regarding necessary stipulations and by leasing large tracts of important black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies'-tresses habitat prior to RMP revision, the BLM is contributing to the need to list this species. The BLM's NEPA analysis has not taken into account FWS's assessment of the impacts of oil and gas leasing and development on these species.

We are not aware of the BLM having solicited or received comments from FWS on the proposed leasing. The BLM must therefore withdraw the parcels that we are protesting that contain ESA-listed species and/or habitat until it meets its Section 7 consultation requirements, or impose NSO stipulations on the entirety of the protested parcels. Some of the listed species/habitat that occur in these parcels were protected under the ESA after the relevant RMPs/oil and gas EISs were issued, which makes Section 7 consultation prior to leasing even more critical.

D. NEPA Prohibits Interim Actions that have adverse effects and/or limit the choice of reasonable alternatives

NEPA regulations require that, while BLM is in the process of an EIS, such as during revision or amendment of a RMP, the agency must not take any action concerning a proposal that would "[l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1. *See also* 40 C.F.R. § 1502.2(f) (while preparing environmental impact statements, federal agencies "shall not commit resources prejudicing selection of alternatives before making a final decision"). BLM has historically interpreted this NEPA regulation to require that proposed actions that could prejudice selection of any alternatives under consideration "should be postponed or denied" in order to comply with 40 C.F.R. § 1506.1, and the Land Use Planning Handbook previously contained this direction. Another section of this same regulation directs that while BLM is preparing a required EIS "and the [proposed] action is not covered by an existing program statement," then BLM must not take any actions that may "prejudice the ultimate decision on the program." 40 C.F.R. § 1506.1(c). The regulation continues that "[i]nterim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives." *Id.* (emphasis added).

The official position of the Department of Interior ("DOI"), which comports with federal caselaw, is that the BLM must consider impacts arising from oil and gas exploration and development on these leases before leasing. *See, e.g., Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-43 (2003) ("SUWA"); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147 (10th Cir. 2004); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983). Leasing these parcels now, while ACEC nominations for the area in question are being considered and while RMPs are being revised, violates NEPA's prohibition on interim actions. According to 40 C.F.R. § 1506.1(a):

Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

1. Granting valid rights may prejudice management prescriptions for nominated ACECs

Granting valid and existing rights in these parcels before ACEC designation is fully considered and management prescriptions are developed could both adversely impact the environment and limit the choice of reasonable alternatives for the management of these areas. These parcels should be withdrawn until the nominated ACECs are evaluated and management prescriptions are developed.

ACECs may be nominated even when plan revision is not in progress, and a preliminary evaluation should take place after receiving such a nomination. The District Manager may determine that either a plan amendment or temporary management are required.

If an area is identified for consideration as an ACEC and a planning effort is not underway or imminent, the District Manager or Area Manager must make a preliminary evaluation on a timely basis to determine if the relevance and importance criteria are met. If so, the District Manager **must** initiate either a plan amendment to further evaluate the potential ACEC or provide temporary management until an evaluation is completed through resource management planning. Temporary management includes those reasonable measures necessary to protect human life and safety or significant resource values from degradation until the area is fully evaluated through the resource management planning process. BLM Manual 1613.21.E (emphasis added).

The public has an opportunity to submit nominations or recommendations for areas to be considered for ACEC designation. Such recommendations are actively solicited at the beginning of a planning effort. However, nominations may be made at any time and must receive a preliminary evaluation to determine if they meet the relevance and importance criteria, and, therefore, warrant further consideration in the planning process....BLM Manual 1613.41 (emphasis added).

The presence of oil and gas leases should have no bearing on whether an area meets the criteria for ACEC designation, but may prejudice the development of ACEC management prescriptions. BLM Manual 1613.22.A states:

Identify Factors Which Influence Management Prescriptions.... These factors are important to the development of management prescriptions for potential ACEC's. Factors to consider include, but are not limited to, the following:....

8. Relationship to existing rights. What is the status of existing mining claims or pre-FLPMA leases? How will existing rights affect management of the resource or hazard?

CNE strongly believes that temporary management is required to preserve the values of these areas as potential ACECs. Instead of approving leasing of key wildlife habitat -- and opening the floodgates for a wave of new APDs on these sensitive lands, the BLM should focus on evaluating our ACEC nominations in a timely fashion and managing exploration and development under existing leases.

It simply makes no sense for the BLM to waste its opportunity to designate ACECs that could help conserve white-tailed prairie dog habitat and the species associated with them. Not only is this poor judgment, it is also a violation of NEPA, FLPMA, and the BLM Manual.

BLM presently has the opportunity to plan for rational, environmentally sound development of energy resources in the nominated ACECs while protecting other uses of these lands—as required by law. Allowing leasing prior to ACEC evaluation and RMP revision will sacrifice this opportunity – without taking a hard look at the consequences. BLM and the public will have lost the chance to prevent the haphazard, poorly planned development that has characterized other federal lands in the Rockies. As an irretrievable commitment of resources, leasing will severely limit the range of management prescriptions.

2. Leasing the parcels at this time would undermine the RMP revision process

The BLM routinely cites recent Instruction Memoranda (“IM”) in its assertion that leasing should continue under existing RMPs whether or not they have expired, and whether or not the public has submitted new information suggesting that the RMP’s allocation of certain lands for leasing will result in unacceptable environmental consequences. Even though the BLM’s internal guidance takes the misguided position that there are very few triggers for additional NEPA analysis before leasing, the BLM is still compelled to comply with NEPA and its implementing regulations. Many of these IMs have been released recently, and often the next one tweaks the position of the last – it’s highly possible that the BLM’s current position will be overturned either by the courts or internally in the future. The statutes that apply to leasing must trump a flawed internal interpretation.

RMP revision will be a waste of taxpayers’ money and participants’ time if the BLM approves leasing in the planning areas prior to RMP revision. Past agency directives correctly recognized that *any* leasing will constrain the choice of reasonable alternatives. Therefore, the agency followed a policy of no new leasing – even of lands designated open – for areas undergoing RMP revisions focused on oil and gas development. Absent such policy, any new leasing must be conditioned on findings that adequate NEPA analysis has been performed.

Under no circumstances should BLM approve new leasing of sensitive lands while the RMP revisions go forward. Offering sensitive lands without adequate NEPA analysis cannot proceed independently of the RMP revisions.

The Federal Land Policy and Management Act ("FLPMA") requires that land management actions be "in accordance with the land use plans developed" by the Secretary of the Interior. 43 U.S.C. § 1732(a). The regulations provide that "resource management action[s] shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." 43 C.F.R. § 1601.0-5(b). "All resource management authorizations and actions and detailed and specific planning undertaken subsequent to the RMP must conform to the RMP. . . BLM is required to manage . . . as outlined in the RMP, until or unless the RMP is amended pursuant to 43 CFR 1610.5-5." Marvin Hutchings, 116 IBLA 55, 62 (1990).

One of the critical issues the BLM addresses during RMP amendment is whether and which areas should be open to leasing in the first place. BLM Handbook 1624, Planning For Fluid Mineral Resources (or H-1624-1). H-1624-1, for instance, requires BLM in the amendment and revision process to look at areas open to leasing in any capacity, open to leasing with restrictions, open to leasing with NSO and areas open to leasing with special stipulations of conditions of approval. H-1624-1, Ch. IV. B., C.2. "During the amendment or revision process, the BLM should review all proposed implementation actions [this includes oil and gas leasing] through the NEPA process to determine whether approval of a proposed action would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined." H-1601-1 at V.I.E.

Leasing *prior* to the RMP revisions will undermine the planning process. As an irrevocable commitment of resources, leasing will severely limit the range of alternatives. This violates the amendment process and agency policy.

NEPA §102(2)(C)(v) was intended to ensure that environmental impacts would "not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "The appropriate time for considering the potential environmental impacts of oil and gas exploration and development under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), is when BLM proposes to lease public lands for oil and gas purposes because leasing, at least without NSO stipulations, constitutes an irreversible and irrevocable commitment of resources by permitting surface disturbing activities in some form and to some extent." Wyoming Outdoor Council, 156 IBLA 347 (2002). See also Colorado Environmental Coalition, 149 IBLA 154, 156 (1999); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); Wyoming Outdoor Council, 153 IBLA 379 (2000) (emphasis added).

The BLM has the opportunity to learn from the planning mistakes and resulting environmental damage occurring in federally managed oil and gas fields elsewhere in the Rockies. In the Powder River Basin in Wyoming and Montana, the Upper Green Country in Wyoming, and Farmington, New Mexico, the BLM leased out practically all mineral lands under its jurisdiction *before* conducting required analyses of the impacts of such a blanket leasing program. When a high percentage of lands are under lease, the BLM has severely limited its ability to limit environmental impacts.

BLM needs to comply with NEPA, FLPMA and other applicable law through the RMP revisions *before* leasing more lands for oil and gas development. At the post-leasing phase, the BLM has already made an irretrievable commitment of resources. Leasing ties the BLM's hands and it loses the opportunity to consider such alternatives as no leasing, leasing subject to NSO, phased development, baseline data collection, and mitigation measures identified through the NEPA process. See *Doing It Right, A Blueprint for Responsible Coal Bed Methane Development in Montana* -- http://www.northernplains.org/files/Doing_It_Right.pdf/view.

The existing RMPs are inadequate and outdated for current and reasonably anticipated levels of oil and gas development. There is an urgent need for comprehensive planning and consistent management direction. It appears that the existing RMPs and EISs are largely useless to agency professionals charged with managing the impacts of oil and gas development and protecting other uses on these public lands.

The environmental community is committed to working with the BLM constructively on the RMP revision process. The BLM needs to acknowledge that new leasing – while the revision process is ongoing – will render the RMP revisions largely moot.

- D. BLM cannot rely on the proposed stipulations and conditions of approval to mitigate impacts to insignificance

NEPA allows the agency to institute mitigating measures in order to render the action “insignificant,” however the BLM has wholly failed to do so. Before the BLM can rely on the relevant lease stipulations as mitigation measures, it is “required to adequately study any measure identified as having a reasonable chance of mitigating a potentially significant impact of a proposed action and reasonably assess the likelihood that the impact will be mitigated to insignificance by the adoption of that measure.” Klamath Siskiyou Wildlands Ctr., 157 IBLA 332, 338 (2002). “NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance.” *Id.* (quoting Powder River Basin Resource Council, 120 IBLA 47, 60 (1991)).

The record is completely devoid of any support for the agency's conclusion that assorted stipulations will effectively mitigate impacts on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses, and other special status species and lands of high conservation value from oil and gas development. Nor does it address how such measures will preserve

ACEC (nominated or designated), CWP or WSA values. The record itself establishes that the BLM failed to analyze the proposed measures and their effectiveness, as required under NEPA.

For example, the CSU that the BLM has chosen to use to supposedly mitigate impacts only requires modifications to activities "likely to result in jeopardy to the continued existence of a proposed or listed threatened or endangered species or result in the destruction or adverse modification of a designated or proposed critical habitat." The ESA already requires these protections, and non-listed special status species are not guaranteed any protections based on this stipulation.

The special stipulations do not provide the BLM with the necessary authority to protect nominated ACECs, designated ACECs, Citizens proposed wilderness areas, BLM wilderness study areas, greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, grizzly bear, blowout penstemon, and Ute ladies-tresses. Nor do the Lease Notices satisfy match the recommendations for lease stipulations to protect these species made by FWS and Wyoming Department of Game and Fish.

The conclusion that the proposed lease stipulations mitigate the impacts to the aforementioned special status species and lands of high conservation value to insignificance is unsupported by the record, and the resulting decision to lease the protested parcels is arbitrary and capricious.

E. The BLM has the discretion not to lease the protested parcels

Under the statutory and regulatory provisions authorizing this lease sale, the BLM has full discretion whether or not to offer these lease parcels for sale. The Mineral Leasing Act, 30 U.S.C. § 226(a), 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." (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 *Wyoming 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."); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975).

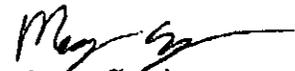
Submitting a leasing application vests no rights to the applicant or potential bidders. The BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in 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 (9th Cir. 1964); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839 (D.C. Wyo. 1981).

The arguments laid out 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 and adequate NEPA analysis etc. 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 applicable law.

III. CONCLUSION & REQUEST FOR RELIEF

CNE therefore requests that the BLM withdraw the protested parcels from the June Sale.

Sincerely,



Megan Corrigan
Staff Biologist
Center for Native Ecosystems