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To: Don Simpson, State Director BLM

Fax Number: 307.775.6203 Telephone Number:

From: WWF + NWF

Fax Number: 307. 335.8690 Telephone Number: 307.335.8633

Memo: Thank you for processing this Protest of 19 lease parcels in the June 2, 2009 Competitive Oil + Gas Lease Sale.

Joy

WYOMING WILDLIFE FEDERATION

NATIONAL WILDLIFE FEDERATION

May 18, 2009

Via Facsimile 307-775-6203

Don Simpson, State Director
Bureau of Land Management (BLM)
Wyoming State Office
5353 Yellowstone Road
Cheyenne, Wyoming 82003-1828

Re: Protest of June 2, 2009 Competitive Oil and Gas Lease Sale

Parcels WY-906-11, WY-906-26, WY-906-32, WY-906-39, WY-906-46, WY-906-52, WY-906-54, WY-906-58, WY-906-62, WY-906-63, WY-906-64, WY-906-65, WY-906-69, WY-906-70, WY-906-75, WY-906-76, WY-906-82, WY-906-83, WY-906-84 (19 parcels)

Dear Director Simpson:

The Wyoming Wildlife Federation and the National Wildlife Federation protest, pursuant to 43 C.F.R. §§ 4.450-2 and 3120.1-3, the Bureau of Land Management's lease sale offerings of the above-listed parcels in Wyoming scheduled to be offered at the June 2, 2009 Competitive Oil and Gas Lease Sale. The WWF and NWF request that the protested parcels be withdrawn from sale at this time pending the BLM's completion of adequate analysis of the effects of leasing in greater sage-grouse habitat, big game winter ranges, wildlife crucial ranges, hunting and wildlife-associated recreation areas in Wyoming, and the addition of lease stipulations adequate to address these impacts. Members of WWF and NWF visit, hunt, and otherwise use lands on or near the parcels proposed for leasing. Our members' interests in the public lands and the wildlife resources that depend on those lands for habitat will be adversely affected if the sale of these parcels proceed, as proposed, without adequate environmental analysis or safeguards to protect the functionality of critical wildlife habitat.

Offering the protested parcels for lease at this time would be contrary to both Federal law and the policy of the State of Wyoming. Because no separate

environmental analysis has been undertaken or completed for the effects of the proposed lease sale, the BLM's leasing decision relies on planning and NEPA documents, of which don't address pertinent and significant new information regarding effects of oil and gas development on wildlife, particularly greater sage-grouse and mule deer.

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).

As discussed in detail below, exercise of the discretion not to lease lands that support greater sage-grouse habitat, big game crucial ranges and migration corridors, and sensitive species pending adequate environmental analysis is appropriate and necessary:

- Demand for wildlife recreation is increasing and certain wildlife populations, particularly greater sage-grouse and mule deer, are declining;

- Existing BLM land use plans and proposed lease stipulations and notices are inadequate to address substantial new information and direction regarding greater sage-grouse conservation, including the September 2007 recommendations identified by the Wyoming statewide Sage-Grouse Implementation Team and the recent decision by the United States District Court for the District of Idaho overturning the United States Fish and Wildlife Service's conclusion that listing of the species under the Endangered Species Act is not warranted.

- BLM has received substantial, new material information regarding sage-grouse populations and habitat conditions, the effects of oil and gas development on sage-grouse and mule deer, and best management practices for minimizing the effects of development on wildlife. Existing NEPA documents, including the

Bighorn Basin RMP, which include both the Cody RMP and Worland RMP, Lander RMP, the Green River RMP is said to start its revision process starting in 2010, and Kemmerer RMP, are currently undergoing revision, do not take into account any of this material new information, and are an inadequate basis for new non-NSO leasing.

Both organizations express concern over the number of parcels being offered in these sensitive areas. BLM has consistently been unable or unwilling to assess landscape-scale impacts that are already have occurred and will continue to occur to these unique landscapes when acreages are being sold off at this fast pace and include such high rates of energy development activity. This is especially relevant in light of the Government Accounting Office (GAO) report that took issue with the number of leases sold against the number of wells actually permitted and drilled. This report (GAO October 2008) presented numerous case examples of the BLM basically selling off more leases than they could manage. With all due respect, WWF and NWF feel the BLM should withdraw these lease parcels from the June sale until a more accountable inventory of the number of leases and drilling activity is conducted.

About the Protesters

The Wyoming Wildlife Federation (WWF), established in 1937 and with current standing membership of approximately 5,000, is Wyoming's oldest and largest statewide sportsmen and conservation organization. Our mission is to work for hunters, anglers, and other wildlife enthusiasts to protect and enhance habitat, to perpetuate quality hunting and fishing, to protect citizen's right to use public lands and waters, and to promote ethical hunting and fishing.

The National Wildlife Federation (NWF) is a national member-supported non-profit conservation, education, and advocacy organization. NWF is associated with conservation organizations in 47 states and territories, including WWF in Wyoming. NWF is dedicated to conserving wildlife and other natural resources, and believes that hunting, fishing, and trapping are legitimate recreational pursuits and useful wildlife management practices. NWF works to promote responsible management of wildlife on public lands.

The protesters have well-established histories of participation in BLM planning and management activities. Members of WWF and NWF have visited and used BLM public lands throughout Wyoming for fishing, hunting, wildlife viewing, and other activities, and will continue to use these areas in the future. Mineral development of

Greater sage-grouse habitat and big game crucial winter range will harm our members' interests in their continued use of those areas and the wildlife they support, especially if development is allowed to proceed, as proposed, absent adequate study and safeguards against loss of wildlife resources.

I. DESCRIPTION OF AFFECTED RESOURCES

A. Greater Sage-Grouse Leks and Occupied Habitat:

Parcels WY-906-39, WY-906-26, WY-906-46, WY-906-65, WY-906-70, WY-906-75, WY-906-76, WY-906-82 through WY-906-84 (10 parcels)

According to BLM Competitive Lease Sale notice data and analysis of sage grouse density data by the Wyoming Game and Fish Department, 10 lease parcels fall within occupied greater sage-grouse habitat (nesting and/or winter habitat) and are of particular concern for grouse population viability due to proximity of lease sale parcels to areas of high sage-grouse lek density. These parcels are subject to timing limitation stipulations which restrict (subject to site-specific exceptions) the timing of initial drilling operations, restricting surface use (excluding "operation and maintenance of production facilities") from March 1 through July 15 to protect nesting sage grouse and from November 15 through March 14 to protect wintering sage-grouse. Unfortunately, these standard stipulations have been repeatedly demonstrated through scientific studies to be ineffective in protecting greater sage-grouse leks (dancing grounds) and nesting success, are not supported by any peer-reviewed scientific studies, and reliance solely on these timing stipulations is inconsistent with the conservation strategies identified in the recommendations of the Wyoming Sage-Grouse Implementation Team

We request the BLM modify or defer the leasing of specified parcels containing significant greater sage-grouse habitat that would be affected by the proposed lease sale. Because mapping and planning efforts to document and protect this species are currently incomplete, the BLM should refrain from issuing leases that will complicate conservation efforts until such time as it has adequately addressed newly-available scientific and conservation policy data and recommendations.

B. Big Game Crucial Winter Range and Migration Corridors:

Parcels WY-906-11, WY-906-32, WY-906-46, WY-906-52, WY-906-54, WY-906-58, WY-906-62, WY-906-63, WY-906-64, WY-906-69, WY-906-70, WY-906-75, WY-906-76, WY-906-82, WY-906-83, WY-906-84 (16 parcels)

According to the BLM Competitive Lease Sale Notice data and our review of mule deer, elk and pronghorn range data from WGFD, the 16 parcels listed above fall within or adjacent to elk, mule deer, and pronghorn migration routes and crucial ranges of particular importance for wildlife populations. BLM has specified for these parcels a Timing Limitation Stipulation, which allows no surface use from November 15 through April 30 (subject to site-specific exceptions) to protect big game winter range, but allows operation and maintenance of production facilities during the winter once initial drilling has been completed. These standard timing stipulations, while they may help to alleviate disruption of winter big game activity during the year of initial drilling, do not address loss and degradation of habitat caused by development, and recent research, discussed below, suggests they are ineffective at protecting mule deer populations impacted by development.

Winter is a critical time for wild ungulates; therefore, crucial winter range for the most abundant big game species (pronghorn, mule deer, and elk) is often the focus of management and a criterion for analyzing the impacts of resources management on big game. Research has shown that timing limitations may not be achieving their desired results.[1] The lease parcels noted above contain big game crucial winter ranges and migration corridors with timing limitations. These lease parcels, if sold, will be subjected to mineral development that will inevitably have a negative impact on the big game and their crucial ranges. This is of particular concern as associated human activity may negate the effectiveness of timing restrictions on drilling activities as a means of mitigation (Sawyer *et al.* 2006).[2] Sawyer *et al.* (2006) recommends that mitigation measures seeking to minimize disturbance to mule deer on winter range consider all human activity across the entire project area and not be restricted to the development of wells or to crucial winter ranges. The BLM should not focus solely on timing limitations in crucial winter ranges as the primary mitigation measure for big game.

In addition to skepticism that timing limitations alone are sufficient to conserve big game populations once energy development exceeds a certain level, their effectiveness further decreases when exceptions are granted to industry, allowing them

[1] The Wyoming Game and Fish Department considers anything more than four pads per section in crucial ranges for both mule deer and pronghorn to constitute "high" or "extreme" impacts to these habitats requiring mitigation measures in addition to seasonal restrictions. WGFD Recommendations at 11.

[2] The RFD projects that spacing in the Moxa Arch/Green River Basin geologic area will range from 4 to 8 wells per section. Spacing for coalbed methane production will be 4 to 6 wells per section. Other unconventional gas resources would require 40-acres spacing (8 wells per section). Kemmerer RFD at 7-10 to 7-11.

to enter and conduct activities on these crucial lands during restricted seasons. Because BLM regularly grants exceptions to winter stipulations, the effectiveness of timing limitations to mitigate impacts from surface disturbing activities is unknown.[3]

C. **Adobe Town Area:**

Parcels WY-906-54, WY-906-58, WY-906-62, WY-906-63

The Adobe Town area encompasses townships within the Green River and Rawlins Resource Management Plans (RMPs) and is located southeast of Rock Springs in Wyoming's Greater Red Desert. The lease parcels in this section are directly adjacent to or near BLM's Adobe Town and Encampment River Canyon Wilderness Study Areas as well as within or adjacent to the Adobe Town Citizen's Proposed Wilderness (CWP), the Kinney Rim North CWP, and the Kinney Rim South CWP. With the expansion of energy development in south-central and southwestern Wyoming, these areas are particularly valuable for wildlife and wildlife-associated recreation.

According to the Rawlins RMP, the desired future condition of the Adobe Town Dispersed Use Area Recreation Opportunity Spectrum is "primitive" with the surrounding area classified as middle country (primitive roads) (Map 2-59). If oil and gas development is allowed in the "middle country" classification, those areas will likely be modified into "front country" landscapes with established roads. As that occurs, the wilderness quality or primitive landscape has a high probability of diminishing in rank reducing the wilderness experience. Thus, to abide by the Rawlins RMP these lease parcels should be removed from the June 2, 2009 Competitive Oil and Gas Lease Sale to maintain the landscapes desired future condition.

Wildlife, such as big game, including antelope, mule deer, and elk migrate through these lands. Big game crucial ranges are scattered throughout these lease parcels, which is critical to maintaining population numbers. This habitat has the vegetation, cover, and contiguous landscape that big game need for survival. If these lease parcels are sold, habitat quality will be diminished, not to mention the loss in habitat connectivity and crucial range viability.

A variety of other wildlife inhabits this landscape as well. Among them birds of

[3] Moreover, timing limitations impose no limit on human disturbances once oil and gas development enters the production phase. This further undermines their effectiveness. *See* comments of A. William Alldredge, Ph.D. on the Pinedale RMP DEIS

prey, including burrowing owls, golden eagles, and other raptors such as prairie falcons and ferruginous hawks. Great Basin gopher snakes and mountain plovers are among the rare species found in the Adobe Town area.

The lease parcels in this section are either within or near lands classified as Class II Visual Resource Management Areas. Under the Clean Air Act, 42 U.S.C. § visibility impairment must be prevented and current visibility impairment must be remedied. The lease parcels should be withdrawn to avoid any potential air quality reduction, which is likely to occur as the leases are being bought for mineral extraction that has been known to emit semi-volatile organic compounds, volatile organic compounds, nitrogen oxides, sulfur dioxide, carbon monoxide, fine particles, and air toxics. Such gases and particulates will degrade the air quality.

Our members enjoy the Adobe Town area for its big game hunting opportunities, unique non-game wildlife, scenic values, and historic and geologic properties. The wildlife values associated with this area extremely important to outdoor enthusiasts and critical for our tourism industry. Hunting and wildlife watching are economically significant for Wyoming and Adobe Town area is a major contributor to these activities in Sweetwater County. The social and wildlife impacts associated with losing these public lands to oil and gas development will be significant.

D. Little Mountain Area

Parcels WY-906-76

The Greater Little Mountain Area (GLMA) is a region of Sweetwater County, WY that includes the boundaries of Wyoming Game and Fish Deer Hunt Area 102. WWF and NWF are 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.*

Many of our southwest Wyoming members participate in some level of outdoor activity within the GLMA, either as hunters, anglers, hikers, outfitters, or in other outdoor recreational pursuits. The economic value of hunting in Wyoming and the western United States is profound. Last year the Western Governors' Association recognized this important contribution when they passed the following resolution:

> Wildlife-associated recreation brings important economic benefits to communities throughout the West. Small communities in particular benefit from the revenue that comes with tourism, hunting and fishing, and other forms of outdoor recreation. Retail tax revenue for many small towns is provided to a large degree during the key hunting and fishing seasons. In the contiguous Western states, more than 43.6 million people participated in hunting, fishing or wildlife watching in 2006, spending almost $33.6 billion. This revenue is dependent on significant, reliable wildlife populations, which in turn depend on quality habitat and corridor movement. (Western Governors' Association, *Wildlife Corridors Initiative, Oil and Gas Working Group Report* (May 2008).

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

The BLM's did not properly or thoroughly consider the direct, indirect and associated impacts that occur within the area this parcel is located in as well as within the parcel itself.

II. NEW INFORMATION REGARDING CLIMATE CHANGE REQUIRES ADDITIONAL NEPA ANALYSIS

As applicable federal law, implementing regulations and memoranda, and court precedent make clear, the BLM must analyze the impacts arising out of new information not previously available when original NEPA documents were drafted. With respect to the June 2, 2009 lease sale, new information has become available regarding the impacts of climate change on fish and wildlife and their habitats that was not included in the BLM's previous analyses of impacts from oil and gas development on the sale parcels. The existing NEPA documents that BLM relied upon in conjunction with this lease sale do not address impacts from climate change and specifically do not account for the severe drought encountered in Wyoming during the past decade. The BLM's reliance upon land use plans that authorize leasing but do not analyze the cumulative impacts of climate change represents a NEPA violation and additional NEPA analysis is required before the irretrievable commitment of leasing is made.

III. NEW INFORMATION REGARDING ECONOMIC IMPACTS REQUIRES ADDITIONAL NEPA ANALYSIS

The importance of hunting and fishing to residents and nonresidents of Wyoming cannot be overestimated. Hunting and fishing continue to provide a valuable and sustainable economic return to the state of Wyoming. Many retail businesses would not be able to survive without the income from hunters, anglers, snowmobilers, hikers, outfitters, etc. Counties and communities have vested interests in the renewable economic opportunities these resources supply.

Significant new information exists regarding the economic benefits of hunting and fishing since individual BLM resource areas' analysis in their management plans. In the latest national survey of fishing, hunting and wildlife-associated recreation for activities in 2006, expenditures from fishing and hunting significantly increased. In Wyoming, more than 320,000 people participated in fishing and hunting activities in 2006. Additionally, 716,000 people participated in some form of wildlife watching activity (USFWS 2006 National Survey of Fishing, Hunting, and Wildlife Associated Recreation). A total of 3,358,523 hunting and fishing recreation days were provided to the public. Based on the number of recreation days and average expenditure per day, hunters, anglers and trappers expended approximately $350 million in pursuit of their sport (WGFD, 2005).

Numerous polls suggest that Wyoming residents are concerned about protection for special places from the impacts of oil and gas development. In a Rocky Mountain survey conducted by the Theodore Roosevelt Conservation Partnership (2007) 86 percent of the public surveyed favored limiting or banning energy development on certain public lands that are unique and have special fish and wildlife management resources or that offered unique opportunities for sportsmen.

Potential loss of this revenue affects not only the state but each county, town and the local businesses that depend on these industries for their source of income. For many communities, these revenues are the major source of income. In addition, the Wyoming Game and Fish Department is funded by revenues from the sale of hunting and fishing licenses. It is not difficult to imagine what would happen to local communities and the state's wildlife management agency should the loss of revenue from these hunting, fishing, and tourism activities occur. WWF and NWF believe that the BLM must update its economic analysis of hunting and fishing revenue and the potential loss of this revenue in light of the known impacts that will be experienced by big game.

IV. THE LEASING OF SAGE-GROUSE AND MULE DEER HABITAT ABSENT FULL EXAMINATION OF THE ENVIRONMENTAL CONSEQUENCES WILL VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT

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—leases such the April 2009 protested leases—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).

Moreover, NEPA regulations require that an agency must undertake supplemental analysis when new information is available: "If there remains a 'major federal action to occur, and if . . . new information is sufficient to show that the remaining action will 'affect the quality of the human environment' . . . to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

Current RMPs (Bighorn Basin RMP, which include both the Cody RMP and Worland RMP, Lander RMP, the Green River RMP is said to start its revision process starting in 2010, and Kemmerer RMP,) do not adequately address substantial new relevant information regarding sage-grouse, mule deer, and the effects on those species from levels of oil and gas development currently being proposed for those areas.

The BLM cannot legally avoid analysis of environmental consequences by asserting that lease issuance is a mere paper transaction without on-the-ground consequences. Regardless of the fact that additional federal actions will precede commercial drilling, the issuance of a lease (particularly without stipulations allowing the BLM to preclude surface disturbance) commits the leased parcel to development and conveys legal rights to the purchaser. *See* 43 C.F.R. § 3101.1-2. Following lease, land management agencies' ability to prevent impacts to other resources is limited to those "reasonable measures" that are "consistent with lease rights granted." *Id.* Where, as here, the lease right allows surface occupancy, a significant commitment of resources is made at the time of lease issuance. This is an action with readily foreseeable on-the-ground consequences. *See Conner*, 848 F.2d 1441; *Sierra Club v. Peterson*, 717 F.2d 1409,

1413 (D.C. Cir. 1983).

As the Tenth Circuit Court of Appeals has now repeatedly 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; some of the June 2009 parcels have had no NEPA documentation prepared for them save the RMP documents that do not (and cannot) account for significant new developments and information since the date of their respective RMPs, including increased recreational demand, greatly increased levels of mineral development, and declining populations of greater sage-grouse and other sensitive species and, especially, new scientific information regarding the species' vulnerability to adverse effects from mineral development.

The most recent Tenth Circuit case law makes clear beyond any doubt that, whenever practicable, assessment of all reasonably foreseeable impacts must occur prior to issuance of oil and gas leases permitting surface disturbance. "Looking to the standards set out by regulation and by statute, assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made." *New Mexico ex rel. Richardson v. Bureau of Land Management*, Nos. 06-2352, 06-2353, 06-2354 (10th Cir. April 28, 2009), 2009 WL 1119662 at *26 (citations omitted). The Court of Appeals for the Tenth Circuit plainly concluded in *New Mexico v. BLM*, that "issuing an oil and gas lease without a NSO stipulation constitutes such a commitment." *Id.* Under such circumstances, NEPA requires an analysis of the site-specific impacts of an oil and gas lease prior to its issuance. *Id.*

With respect to sage-grouse and mule deer, BLM is in possession of new and substantial material information about the current condition of habitat and wildlife populations, the impacts of oil and gas drilling on the habitat, and recommended management measures for reducing the adverse effects of development on wildlife populations. It is key that the BLM take this information into account before leasing parcels, as the agency has recently acknowledged in Colorado, by withdrawing sage-grouse habitat within the White River resource area from the February 7, 2007 lease sale for further analysis,[4] and by amending the November lease sale to defer Gunnison Sage

[4] Bureau of Land Management Colorado State Office, Decision: February 8, 2007 Competitive Oil &Gas Lease Sale Protest of Parcels COC70761 and COC70762 Is Upheld.

Grouse occupied habitat from leasing, see Colorado BLM Lease Sale Notice of Addendum, October 5, 2007. Most recently, the Colorado BLM deferred substantial portions of its proposed November 2007 lease sale for additional consultation with the Colorado Division of Wildlife, and added additional stipulations to preserve management flexibility with regard to sage-grouse conservation on additional parcels containing grouse habitat. BLM Colorado State Office, Notice of Addendum, October 30, 2007. As discussed below, given the availability of new information, such deferral and consultation is required for sage-grouse habitat in Wyoming as well.

Independent consideration of new information is vital where the data was not taken into account when BLM completed the environmental analysis for the current RMPs. The recent decision of the Interior Board of Land Appeals in Center for Native Ecosystems, has confirmed the need to complete additional analysis before leasing, stating that "whether more NEPA analysis based on new information is required depends on the nature of the NEPA analysis already completed, and the nature of the information available at the time of the agency action." 170 IBLA 331, 346 (2006). Based on the lack of analysis of new information on protection of white-tailed prairie dogs and their role as prey for black-footed ferret reintroduction in the existing RMPs, the IBLA found that the BLM was required to complete NEPA analysis prior to issuing leases.

The EISs for the existing RMPs do not contain any analysis of the substantial post-2000 research and thinking regarding effects of energy development on greater sage-grouse. The various RMP EISs should be updated to take account of new factual developments and new scientific information. Moreover, BLM should analyze the relationship between levels of oil and gas development that have substantially increased since the issuance of documents such as the 1997 Green River RMP, and increased levels of demand for wildlife recreation. NEPA also requires BLM, however, to take into account the substantial new scientific and professional information available regarding energy development impacts to wildlife habitat and effective measures for mitigating those impacts.

A. The BLM Must Analyze New Scientific Information and Legal Developments Not Available at the Time of RMP Adoption or Revision

Mule Deer

The current lease sale is being proposed under RMPs that fail to take into account, or consider alternatives based on, significant new research demonstrating the effects of natural gas development on mule deer. At the time of RMP development, the BLM lacked concrete data now available demonstrating just how significant that impact

is at even moderate levels of development. The Sublette Mule Deer Study, analyzing effects on mule deer from gas development in the area around Pinedale, Wyoming, has shown that mule deer avoid gas field development, and that mule deer abundance declined 46% (most likely due to reduced survival rates) in areas affected by development. Western Ecosystems Technology 2006 Annual Report, Sublette Mule Deer Study (Phase 2) i-ii. The results of the Sublette Mule Deer Study, assessing development under the standard timing stipulations relied on by BLM in the proposed lease sale indicate that it is inappropriate to rely on prior assumptions that timing limitation stipulations alone will prevent significant changes in big game abundance. *See* Hall Sawyer *et al., Winter Habitat Selection of Mule Deer Before and During Development of a Natural Gas Field,* Journal of Wildlife Management 70(2): 396-403 (2006).

The latest scientific research from the Sublette Mule Deer Study provides conclusive data indicating that oil and gas leasing within mule deer winter range, under the stipulations proposed in the June lease sale notice, would be contrary to the National Environmental Policy Act requirement of an informed analysis of environmental consequences.

The Sublette Mule Deer Study Phase II Final Report, prepared by Western Ecosystems Technology, Inc., and funded by Questar Exploration and Production, the BLM, Shell Exploration & Production, and Ultra Resources, Inc., furnishes several conclusions and policy implications highly relevant to continued leasing within mule deer winter range. The Sublette Mule Deer Study assesses impacts to mule deer, including habitat loss, winter habitat selection, and population performance, in the Pinedale Mesa area – an area experiencing increasing levels of natural gas development as part of the Pinedale Anticline Project. The project area provides winter range for some 3,000-5,000 deer from the Sublette mule deer herd.

The most recent Sublette final report contains three major conclusions of particular importance for the legality of continued oil and gas leasing of mule deer winter habitat. First, the studies confirm that radio-marked deer avoid well pads, "resulting in indirect habitat loss that was substantially larger than the direct habitat loss." Sublette Mule Deer Study (Phase II): Final Report 2007 at I (Jan. 10, 2009). Second, the research indicates that indirect habitat can be substantially increased depending on when and how operations are conducted: "Specifically, our results indicate that indirect habitat loss associated with producing well pads may be reduced by 38-63% with the installation of [Liquids Gathering Systems]. Conversely, indirect habitat loss associated with winter drill pads were approximately 3 to 9 x greater than producing well pads. In short, LGS appeared to be an effective long-term (i.e.,

production phase) mitigation measure for reducing indirect habitat loss to wintering mule deer, while year-round drilling in crucial winter range created a short-term (i.e., drilling phase) increase in deer disturbance and indirect habitat loss." *Id.* Finally, and perhaps most importantly, the study's data indicates that the area affected by oil and gas development experienced a 30% population decline, as compared for an only 10% decline over the same period for the larger herd unit including both disturbed and undisturbed areas, leading to the conclusion that: "mule deer numbers declined in the Mesa and there is no evidence that suggests other segments of the Sublette mule deer population declined at a comparable rate." *Id.* at II.

In light of the compelling data from the latest Sublette results regarding indirect habitat loss, population consequences, and potential measures to alleviate these effects, at this time it would be inappropriate and inconsistent with NEPA to issue further leases for mule deer winter range absent the conditional surface use stipulation proposed for certain leases within the Kemmerer and Worland Resource areas: "Surface occupancy or use within crucial big game winter range will be restricted or prohibited unless the operator and surface managing agency arrive at an acceptable plan for mitigation of anticipated impacts. This plan may include development, operations, as well as the number, location, and maintenance of facilities." Given the compelling new information available from the Pinedale experience, absent the inclusion of such a stipulation conditioning development on an acceptable mitigation plan, continued leasing of winter range is unsupported by an reasoned analysis of environmental consequences and alternatives.

In addition, we note that the Sublette study concludes: "Our results suggest that efforts to minimize direct and indirect habitat loss should focus on technology and planning that reduce the number of well pads and the human activity associated with them. Specifically, our results indicate that indirect habitat loss associated with producing well pads may be reduced by 38-63% with the installation of [Liquids Gathering Systems]." The proposed lease sale does not address the use of such technology and planning measures, resource management plans and other analyses underlying the current lease sale do not analyze the potential use and benefit of liquids gathering systems. New leasing within mule deer winter range should be deferred until such time as the BLM has analyzed the implications of the Sublette study and considered a range of alternatives including stipulating the use of liquids gathering systems where appropriate.

Greater Sage Grouse

The BLM should take into account recent scientific research regarding impacts of oil

and gas development on greater sage-grouse behavior, nesting success, and population viability. A variety of sources – academic researchers, state agencies, interagency task forces and working groups, and wildlife and conservation organizations - have provided BLM with extensive information regarding, and analysis of, the recent scientific literature on sage-grouse conservation and its implications for land management and energy development. In particular, we note the following policy recommendations from the Wyoming Statewide Sage-Grouse Implementation Team, submitted to the Governor in September 2007:

> 3. Identify undeveloped lands that have high biological value for sage grouse. Protect identified areas through repurchase of valid existing rights, use of No Surface Occupancy lease stipulations, preclusion of leasing, or other appropriate measures as a means to insure high-quality habitat retention in the short-term, until reclamation or mitigation within the home range of the affected population is able to meet the needs of sage grouse in the immediate area.
>
> PRIMARY RESPONSIBILITY: BLM/USFS, State Lands
> SECONDARY RESPONSIBILITY: WGFD
> START DATE: immediate
> COMPLETION DATE: ongoing
>
> RATIONALE: Restoring sagebrush habitats is extremely difficult and expensive. Retaining high quality areas that are important to sage-grouse (as identified by mapping) will contribute to persistence of sage-grouse while allowing for development activities in other areas.
>
> 4. Minimize the footprint for energy development, recognizing that all developments are unique, by implementing techniques recommended by local SG working groups, science advisory group, and industry that achieve this objective (e.g. mat drilling, multiple wells). Develop incentives to minimize footprints that may include tax exemptions, streamlined permitting, bond reductions, stipulation exceptions, and other innovative means to achieve conservation of Sage-grouse and their habitats.
>
> PRIMARY RESPONSIBILITY: BLM/USFS, State Lands
> SECONDARY RESPONSIBILITY: WGFD, OGCC
> START DATE: immediate

COMPLETION DATE: ongoing

RATIONALE: Restoring sagebrush habitats is extremely difficult and expensive. Reducing the footprint of energy development will facilitate retention of local sage-grouse populations, which is critical in re-establishing the birds once development is complete, and will minimize reclamation expenses. Minimization techniques that are appropriate for each ecological area should be implemented.

Sage Grouse Strategies Identified by Implementation Team, Sept. 24, 2007, are available at http://governor.wy.gov/documents/sage-grouse-strategies.html. Not only have these policy recommendations not been analyzed in any applicable NEPA document, but issuance of the protested leases with their current stipulations (timing stipulations for nesting and winter habitat only), will substantially foreclose the BLM's ability to adopt or even consider these recommendations in resource management plans under revision now or in the future.

The greater sage-grouse is classified as a sensitive species by the Wyoming BLM. BLM sensitive species policy requires the agency to "provide policy and guidance ... for the conservation of [sage grouse] and the ecosystems upon which [it] depend[s]." BLM Manual § 6840.01. The Manual requires "conservation" of sensitive species, where "conservation" is defined as "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." Manual § 6840.01. Based on current sage-grouse research the proposed April sage-grouse habitat leasing, with only limited timing stipulations and no consideration of comprehensive conservation techniques for high-value habitats, represents a clear failure to use all such methods and procedures.

Although sensitive species do not receive the statutory protections of the Endangered Species Act, the Manual sets the minimum level of protection for BLM sensitive species at that of candidate species. To protect candidate species, the BLM is required to implement management plans that conserve candidate species and their habitats and to ensure that actions authorized, funded, or carried out by the BLM do not contribute to the need for the species to become listed. Manual at .12. Therefore, the minimum requirement for the greater sage-grouse is to ensure that they do not become listed under the ESA. Furthermore, the BLM's goal is to improve the status of such species to the point where their special status recognition is no longer warranted. Taking conservation actions before listing is warranted or designation of critical habitat

is necessary is considered to be "in the interest of the public." Manual at 6840.22.

Extensive post-1991 research demonstrates the inadequacy of the scientifically-unjustified standard mitigation measures (.25-mile no surface occupancy, limited seasonal avoidance of nesting habitat) proposed for the April lease sale to protect breeding sage-grouse populations. *See* Matthew J. Holloran, Greater Sage-Grouse Population Response to Natural Gas Field Development in Western Wyoming 73 (2005); ("Results from scientific research demonstrates that approximately 80% of greater sage-grouse nest within 4 miles of active leks. Gas development within 4 miles of leks may affect sage-grouse nesting success.") In particular, as the U.S. Fish and Wildlife Service has repeatedly noted, Holloran's research indicates that the standard stipulations BLM relies on (0.25 mile no surface occupancy around leks, seasonal limitations on initial drilling within 2 miles of leks) are insufficient to maintain sage-grouse breeding populations within gas fields. This new scientific information must be considered both in pre-leasing analysis (and the development of effective mitigation measures) and in the RMP revision process. As the Governor has cautioned "[a]s we struggle to address areas in the Powder River Basin that have been identified as having key sage grouse habitat values but have already been leased, it would seem prudent to save ourselves from similar difficulties in the area by simply pulling these parcels from the sale block."

The Wyoming BLM, analyzing effects on sage-grouse from coalbed methane development in the Atlantic Rim area of the Rawlins Resource Area, has acknowledged the significance of some of this new research:

> Naugle et al. (2006) found that leks along the edge of CBNG development had higher lek attendance than leks within the developed area. The hypothesis that sage-grouse avoid developed areas is supported by the finding that active leks and leks with moderate to large numbers of males were often found adjacent to CBNG fields but rarely within CBNG. In contrast, inactive leks and leks with few males were often found within CBNG fields. One of the most striking patterns discovered was that, of leks counted in either 2004 or 2005, no medium or large-sized leks occurred within CBNG development; all remaining leks in CBNG fields have 20 or fewer males. Summary statistics for well and power line variables calculated from GIS layers around active and inactive leks indicate that active leks typically are twice as far from wells, one-half times as far from power lines, have one-third the density of wells, one-half the density of power lines, and generally have less development (wells and power lines) within 3.2 kilometers (km) of the lek complex. In

addition, a significantly higher proportion of lek complexes are inactive in CBNG areas compared to areas on the edge of or outside CBNG (excluding lek complexes of unknown status and those destroyed by agriculture or mining).

BLM Rawlins Field Office, Atlantic Rim Coalbed Methane Development FEIS at 4-76; *see also* David E. 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 8-9 (2006). Further analysis of the Powder River Basin sage-grouse study, makes clear that the standard BLM sage-grouse measures (prohibiting surface infrastructure within 0.25 miles of leks, timing restrictions on drilling during the breeding season) adopted in the Atlantic Rim ROD are insufficient to protect breeding populations. Brett L. Walker *et al.*, Greater sage-grouse population response to energy development and habitat loss, *Journal of Wildlife Management* (In Press) at 18.

Lease Notice No. 3 provides as follows:

> Greater Sage-Grouse Habitat: The lease may in part, or in total, contain important Greater sage-grouse habitats as identified by the BLM, either currently or prospectively. The operator may be required to implement specific measures to reduce impacts of oil and gas operations on the Greater sage-grouse populations and habitat quality. Such measures shall be developed during the Application for Permit to Drill (APD) on-site and environmental review process and will be consistent with the lease rights granted.

The Interior Board of Land Appeals' ("IBLA's") recent decision in *William P. Maycock*, 177 IBLA 1 (March 16, 2009), makes clear that leasing of parcels containing greater sage-grouse habitat is premature. Under the IBLA's reasoning in *Maycock*, absent site-specific analysis of the specific grouse habitat at issue, and of recent scientific studies and policy prescriptions regarding sage-grouse and oil and gas development, BLM lacks adequate information to authorize development within 3.1 miles of greater sage-grouse leks. Although Lease Notice No. 3 puts lessees on notice that they may be subject to an apparently broad range of "specific measures to reduce impacts," to be applied following additional environmental review during the permitting process, the qualifier that these measures "will be consistent with the lease rights granted" creates potential ambiguity whether BLM retains sufficient rights to adopt effective measures to protect sage-grouse habitat.

As mentioned above, greater sage-grouse are a Wyoming BLM sensitive species, and in decline both in Wyoming and throughout their range. The U.S. Fish and Wildlife Service is currently reviewing the species' eligibility for listing under the Endangered Species Act, pursuant to a federal court order striking down the Service's earlier decision not to list the species. Although specific patterns and habitat needs for the species vary with vegetation and topography, an increasing body of recent research and policy consensus indicates negative effects to sage-grouse population viability from oil and gas development within 3.1 miles or more of grouse leks, and that standard BLM practices (0.25-mile no surface occupancy stipulations and 2-mile seasonal activity limitations) are inadequate to prevent population decline and extirpation. As the Board noted, "The further research and studies subsequent to the [2003 Powder River Basin] FEIS have demonstrated—as BLM has acknowledged—that the mitigation measures prescribed in the [PRB] EIS are not as effective as the BLM contemplated at the time." *Maycock*, 177 IBLA 17.

In *Maycock*, the IBLA contrasted a State Director decision endorsing 2-mile seasonal buffers for grouse habitat and discounting recent peer-reviewed articles, Western Association of Fish and Wildlife Agencies ("WAFWA") and Wyoming Game and Fish Department ("WGFD") recommendations, with a 2006 decision approving 3-mile buffers approving 3-mile buffers affirmed in *Yates Petroleum Corp.*, 176 IBLA 144 (2008). Tellingly, the Board in *Maycock* noted that the Carr Draw wells at issue before it did not, unlike those at issue in *Yates*, have the benefit of site-specific analysis of grouse habitat, and that the BLM had failed to offer "any explanation or analysis of why . . . the more recent WAFWA guidelines were highly relevant in *Yates* but are not relevant here." *Maycock*, 177 IBLA 18.

The Board in *Maycock* expressly rejected BLM reliance on outdated and discredited mitigation measures prescribed in the 1985 Buffalo Resource Management Plan and 2003 Powder River Basin FEIS and Record of Decision, stating that "[i]t is contradictory for BLM to rely solely on those mitigation measures in issuing and EA and FONSI at the same time it acknowledges the validity of the more recent research that demonstrates that those mitigation measures are not as effective as originally anticipated, and, indeed, has acted on the basis of the more recent research in another comparable situation to impose more stringent mitigation measures in two EAs. . . . [Powder River Basin Resource Council] is correct in asserting . . . that the BLM has not shown any 'conflicting' scientific research. The more recent scientific studies uniformly indicate that the current measures are less effective than BLM believed they would be." *Maycock*, 177 IBLA 19.

Until such time as site-specific analysis has been completed regarding sage-grouse habitat and patterns of use for potential lease parcels, the issuance of leases with only the highly general and open-ended potential for protective conditions of Lease Notice No. 3 is inconsistent with NEPA, FLPMA, the sensitive species policy, and the Board's reasoning in *Maycock*.

B. The BLM Must Take Into Account New Information Regarding Greater Sage-Grouse

Based on the governing resource management plans and stipulations to be attached to the proposed leases, we believe that issuance of the proposed leases would fall far short of the specific recommendations from the Wyoming Game and Fish Department, and the Sage-Grouse Implementation Team regarding development in sage-grouse habitat within Wyoming. In addition to the Governor's December 2007 recommendation that certain areas in the Saratoga region supporting high densities of sage grouse not be leased prior to completion of mapping of seasonal habitats, the Implementation Team has recommended that BLM (a) identify undeveloped lands with high biological value and protect those areas through measures including No Surface Occupancy leasing and/or lease stipulations (Policy Recommendation 3) and (b) adopt techniques and incentives to minimize the footprint of energy development (Policy Recommendation 4).

We would also draw the Wyoming BLM's attention to the recent recommendations of the neighboring State of Colorado's Division of Wildlife regarding mineral leasing within sage-grouse habitat

> Since greater sage-grouse are particularly sensitive to disturbance while attending leks, the CDOW is very concerned about impacts at those sites. These should be no surface occupancy within 0.6 mile radius from a known lek site. Most sage-grouse hens nest in close proximity to leks. For instance, recent telemetry data from Moffat County indicate that approximately 45% of nesting hens are located within 2 miles of the lek with approximately 80% of the birds occurring within 4 miles of a lek. Sage-grouse nest on the ground under sagebrush plants and are susceptible to destruction by ground disturbing construction and to nest abandonment caused by disturbance (including acoustic) during the nesting season. Activities such as timing and drilling restrictions can help

> minimize impacts to these critical areas. To protect breeding and nesting habitat, CDOW staff recommends that drilling and operation not occur within four miles of sage-grouse leks between March 1 and June 30. If low intensity pre-construction (e.g. surveying and staking) work is necessary in these areas between March 1 and June 30, CDOW recommends that these activities only occur between 10:00 in the morning and 4:00 in the afternoon.[5]

CDOW further noted that "the proposed oil and gas exploration occurs in a diversity of important wildlife habitats. Because of the high wildlife values we recommend that this area not be leased for oil and gas development." *Id.* at 4. If the area is to be leased, CDOW requested inclusion of an extensive list of generally-applicable as well as species-specific best management practices. *Id.* at 5-15. These BMPs include, for sage-grouse, consideration of the CDOW-recommended 0.6-mile NSO around leks, hour restrictions on well site visits in breeding season, and a recommendation to "retain core areas and limit disturbance to ensure sage-grouse survival." *Id.* at 13-14. We note that these measures are neither incorporated in the stipulations and lease notices that accompany the proposed Wyoming lease sale nor the governing RMPs. Not only has the BLM not adopted these recommendations, it has never even had the opportunity to consider them, under NEPA, as an alternative. The last applicable NEPA analysis for each affected resource area predates the significant new research showing that the timing and spacing measures it relies on to prevent grouse decline are demonstrably inadequate. Failure to consider this research and its implications for management, prior to leasing, violates the BLM's NEPA duty to take a "hard look" at the environmental consequences of its actions.

We would also like to draw the BLM's attention to the December 4, 2007, decision by the United States District Court for the District of Idaho overturning the United States Fish and Wildlife Service's 2005 12-Month Finding that listing of the greater sage-grouse is not warranted under Section 4 of the Endangered Species Act, 16 U.S.C. § 1533(a)(1). In Western Watersheds Project v. U.S. Forest Service, No. CV-07-277-E-BLW (Mem. Decision Dec. 4, 2007), the court invalidated the Service's January 2005 "12-month finding," under 16 U.S.C. 1533(b)(6) and implementing regulations, that the petitioned listing of the greater sage-grouse as threatened or endangered is "not warranted." As a result, the court remanded the listing decision to the Service for further consideration. In the interim, the BLM must consider the sage-grouse as a candidate species, and give due consideration to the implication of land use planning

[5] Letter from Ron D. Velarde, Colorado Division of Wildlife, to David Stout, Colorado BLM (Aug. 8, 2007), attached as Exh. 1.

and mineral leasing decisions on the likelihood of the species' extinction. We would like to draw the BLM's attention to several aspects of the District Court's decision that merit particular consideration in oil and gas leasing decisions such as the proposed lease sale at issue. The District Court found the Service's finding was arbitrary and capricious for four reasons:

First, contrary to 16 U.S.C. 1533(b)(1)(a), the Service failed to base its decision "solely on the basis of the best scientific and commercial data available." The Service convened a seven-member expert panel to assist in its listing decision—the court found that the "best science" in the process was represented by this expert panel, but that the Service failed to prepare a transcript or written report of its deliberations and conclusions, failed to preserve the "best science for the record," and excluded the expert panel from substantively recommending whether or not the species should be listed. Although the court did not specifically mandate a probability-of-extinction standard for listing, it was quite critical of the Service's decision that (what the court found to be the panel's finding of) a 36% chance of (range-wide) extinction within 100 years did not constitue a "likelihood" of "danger of extinction"—suggesting, but not ruling, that a 20% likelihood on extinction within 100 years was significant enough for a "threatened" listing.

Of particular relevance to this pending Wyoming lease sale is the court's characterization of the expert panel as finding that the risk of extinction in the eastern portion of the species' range—where the "principal threat" to the species is energy development—was a remarkable 52%. *WWP v. USFWS*, Mem. Op. at 22. Given the Service's acknowledgment that "'the rapidity of [energy] development and the persistent demand for petroleum products'" is the primary threat in the east region," Mem. Op. at 28, and the District Court's conclusion that the Service lacked adequate information regarding the efficacy of BLM measures to protect sage-grouse from energy development, Mem. Op. at 30, the BLM must consider carefully whether the current lease sale at its accompanying stipulations will contribute towards the substantial risk of sage-grouse extinction in the eastern portion of its range.

Second, the court rejected the Service's finding because of its conclusions that "service biologists determined the principal habitat-related threats are not proceeding at a rate that will threaten the continued existence of the species within the foreseeable future." The court found this conclusion flawed because it was based not on the expert panel's (unrecorded) discussions, but rather off-the record meetings by the Service Director. Of particular interest, the opinion also notes with concern the 2004 Western Association of Fish and Wildlife Agencies Conservation Assessment and its finding that

rapid energy development is the principal threat to the species in its eastern region, and finds that the Service failed to explain why it departed from the Conservation Assessment's conclusions.

Third, and of overwhelming importance here, the court found that the Service had failed to "coherently" consider the adequacy of existing regulatory mechanisms. With regard to energy development on BLM land, the Service had concluded that it had no information on (1) how many leases lacked protective stipulations, (2) how often stipulations are waived, and (3) whether BLM Best Management Practices work. Mem. Op. at 30. This, the court found, didn't justify a finding that conservation efforts will moderate the rate and extent of habitat loss. Under the circumstances, protestors believe that it is essential that the BLM conduct an informed review of the efficacy of proposed stipulations and current and pending management plan decisions in stemming sage-grouse habitat loss and population decline, and consider whether or not the proposed leases are likely to contribute to the species' risk of extinction in the region.

C. Executive Order 13443 Requires Consideration of Impacts to Wildlife and Outdoor Recreation

On August 16, 2007, President Bush signed Executive Order 13443, which directs federal agencies to "[m]anage wildlife habitats on public lands in a manner that expands and enhances hunting opportunities, including through the use of hunting in wildlife management planning." Executive Order 13443, *Facilitation of Hunting Heritage and Wildlife Conservation*, § 2(c) (Aug. 16, 2007). The Executive Order further requires that agencies "[e]valuate 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." *Id.* § 2(a). *See also* Bureau of Land Management, Memorandum from Ron Wenker, Acting Director, to State Directors Re: Review of Parcels Prior to Lease Sale (Feb. 13, 2009).

If the parcels being offered at the Lease Sale are ultimately explored or developed for fluid mineral production, wildlife, wildlife habitats, and hunting participation will be affected. Impacts associated with oil and gas development on big game habitat (including crucial winter range and parturition areas) and migration, as well as on sage grouse populations are well documented in scientific literature. The BLM has not fully analyzed these and other impacts to wild and native fish in conjunction with the Lease Sale. In fact, the Executive Order directs federal agencies not

only to evaluate and consider impacts to wildlife and habitat, but also to "facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat." *Id.* § 1. The record is absent of any evidence that the BLM considered the mandates of Executive Order 13443 in deciding to offer parcels at the Lease Sale. The BLM should nonetheless consider the requirements of the order and perform all review necessary to comply with its mandates prior to offering the parcels at the Lease Sale.

Thus, the BLM will not be upholding the Executive Order if they allow the sale of the lease parcels mentioned above. In fact, instead of expanding and enhancing hunting opportunities, the sale and inevitable development of these leases will substantially reduce the hunting opportunities in specific parts of Wyoming. This reality is happening across the west even while over 50 million U.S. citizens are known to hunt and fish, according to data from state game and fish agencies. In 2006, 87 million Americans enjoyed some variety of recreational outdoor activity relating to fish and wildlife. In Wyoming, during 2006 more than 320,000 people participated in fishing and hunting activities. One of the fastest growing outdoor activities is wildlife watching and according to a US Fish and Wildlife survey, 716,000 people participated in some variety of this (USFWS 2006 National Survey of Fishing, Hunting, and Wildlife Associated Recreation). The total of hunting and fishing recreation days in 2005 was 3,358,523. Based on the number of recreation days and average expenditure per day, hunters, anglers and trappers expended approximately $350 million in pursuit of their sport (WGFD, 2005).

The review so far by the Sporting Conservation Council, the federal advisory committee convened to address the facilitation of hunting heritage and wildlife conservation, indicates significant concerns: "With energy activities in the West increasing, concerns about maintaining game/wildlife species, populations and habitats at the wildlife-energy interface are also increasing. Given the magnitude of present and anticipated energy development in the West, it is doubtful that game/wildlife species and associated habitat values can be maintained without increased interagency collaboration, reducing on-site habitat impacts, and developing landscape-scale efforts to enhance habitats off-site." (Sporting Conservation Council, Draft White Paper: Oil and Gas Development and Wildlife Conservation, May 7, 2008). The Sporting Conservation Council identifies a number of goals to promote "improved collaboration and landscape-scale habitat efforts." The Draft White Paper recommends that federal land management agencies "use and apply landscape-scale assessment and state wildlife action plans to identify game/wildlife species needs and conservation priorities to conserve game/wildlife species, populations and habitats while assuring access to

energy resources," and that "[t]he BLM should consider temporary deferral of fluid minerals leasing to preserve options for game/wildlife species, populations and habitat conservation in specific areas . . . undergoing active land use planning with legitimate BLM-recognized resource concerns." The lease parcels identified in this protest represent areas undergoing land-use planning and significant BLM-recognized resource concerns (big game seasonal habitat and migration routes; sage-grouse conservation; the Little Mountain area).[6]

A 2006 Trout Unlimited survey in the Rocky Mountain states found that 55% of the public valued their hunting and fishing activities away from motorized vehicles and roads. In a different Rocky Mountain survey, from Theodore Roosevelt Conservation Partnership in 2007, showed that 86% of the public favored limiting or banning energy development on certain public lands that are unique and have special fish and wildlife management resources that offer different or unique hunting and fishing opportunities.

V. LEASING SAGE-GROUSE HABITAT AND MULE DEER WINTER RANGE WITHOUT A NO SURFACE OCCUPANCY STIPULATION WILL IMPROPERLY CONSTRAIN THE ALTERNATIVES AVAILABLE TO BLM IN REVISING THE KEMMERER, GREEN RIVER, BIG HORN (COMBINING WASHAKIE, GRASS CREEK, AND CODY RMPs) RESOURCE MA NAGEMENT PLANS

The BLM is currently in the process of amending the Bighorn Basin RMP (which includes both the Cody RMP and Worland RMP), the Lander RMP, the Green River RMP, and Kemmerer RMP. Council on Environmental Quality NEPA regulations dictate that when a federal agency is in the process of developing an EIS, it may not take actions that would "limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1; *see also* 40 C.F.R. § 1502.2(f). Although these regulations obviously do not prohibit any activity within a planning area during RMP revision, in this case, given new information, serious potential concerns regarding an important and un-analyzed resource, and an EIS that has not yet seen a public draft and preferred alternative, it would be entirely inappropriate to foreclose alternatives including no surface occupancy (NSO) or limited surface spacing for sage-grouse and mule deer by issuing non-NSO leases at this time. CEQ regulations explain that "[i]nterim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives." 40 C.F.R. § 1506.1(c). Leasing within the Kemmerer and Big Horn resource areas without NSO stipulations would improperly prejudice any ultimate decision on the RMP by effectively foreclosing the consideration of the

[6] United States Department of the Interior and United States Department of Agriculture, Sporting Conservation Council, Draft White Papers, pages 1 – 84, June 2008

Implementation Team's recommendations or the preservation of some or all high-value sage-grouse habitat areas and/or mule deer winter range without surface-disturbing oil and gas development.

By approving oil and gas leasing while considering their impacts on other resources, including alternatives to protect those resources from the potential damage caused by oil and gas development, the BLM will foreclose the selection of alternatives, including important mitigation measures. Such action undermines the efforts of both the agency and the public in participating in the lengthy planning process for amendment or revision of a resource management plan.

In granting a protest of the February 8, 2007 lease sale as it pertained to parcels within the Colorado White River Field Office, the BLM stated:

> BLM is currently developing management alternatives to amend the 1997 White River Resource Management Plan (RMP) to address proposed oil and gas development activity within the planning area. **The management alternatives will analyze impacts to wildlife, including sage-grouse**. The White River field Office has decided to **defer these parcels from the lease sale during the RMP Amendment process**. (emphasis added).

As confirmed by this decision, there are potential impacts to other resources, including wildlife (and specifically sage-grouse), from oil and gas development and an ongoing RMP Amendment, such as that occurring in Colorado's White River Field Office is an important opportunity to consider new information on impacts and ways to protect other resources. Similarly, revisions of RMPs, which reassess all decisions in the existing plan, consider impacts from oil and gas development and management alternatives, including mitigation measures, to protect them. These opportunities should be preserved.

We are particularly concerned that the BLM's proposed leasing of minerals underlying lands containing densely populated sage-grouse habitat, without mapping of seasonal habitats or prior analysis of what remaining habitat is of greatest value for the continued viability of the species throughout the State, will undermine BLM's ability to adopt resource management plans that could incorporate the sage-grouse conservation strategies supported by current science and recommended by the State of Wyoming and various collaborative grouse conservation efforts. Leasing under the currently-proposed stipulations could also constrain BLM's ability to take effective measures to preserve high-value grouse habitat and minimize drilling footprints in

other resource management areas. The availability of substantial new information supports not only a need for comprehensive analysis, but a need to retain management flexibility in planning and plan revision: the Interior Board of Land Appeals' ("IBLA's") recent decision in *William P. Maycock*, 177 IBLA 1 (March 16, 2009), Holloran's research demonstrating that lek attendance declines with increased development, eventually leading to lek abandonment; Naugle's research from the Powder River Basin supporting Holloran's conclusions and providing specific findings regarding lek attendance and surface density of energy development; and additional research from Naugle showing that current BLM stipulations are inadequate to protect greater sage-grouse in the Powder River Basin where wells are spaced at relatively close densities.

The BLM has a duty to protect the diversity of all native wildlife on public lands.[7] Habitat fragmentation, connectivity and other factors affecting biological diversity are inherently landscape-level considerations. Protecting biological diversity can only be dealt with appropriately at the programmatic or planning level. This is the only way to ensure biological diversity is preserved and that ecosystem attributes are not "nickel and dimed" to death by individually small but cumulatively significant site-specific projects. The project level is simply too small a scale for adequate exploration of impacts to the health of large ecosystems.

The BLM is ignoring an Executive Order, BLM Resource Management Plans, and State of Wyoming conservation plans in order to sell leases that will inevitably be developed for mineral extraction. The consequences of the BLM's actions fall on the people of Wyoming and the nation as a whole as the BLM unethically moves ahead with an agency-wide agenda of leasing away public lands for private use. In the words of a Department of Interior legend, Gifford Pinchot, "The purpose of conservation: The greatest good to the greatest number of people for the longest time." Please withdraw the lease parcels mentioned in this document so the public land can be utilized as they are today: for the wildlife, families, recreation, hunting, and fishing.

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[7] FLPMA requires public land management to protect ecological and other values, and also requires that they be managed for multiple use and sustained yield. 43 U.S.C. §§ 1701(a)(7)-(8). NEPA requires BLM to fulfill its trustee obligation for future generations, assure productive surroundings, avoid environmental degradation, preserve important natural aspects of our national heritage, and enhance the quality of renewable resources. 42 U.S.C. §§ 4331(b)(1)-(6). CWA establishes the objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251. ESA establishes the purpose of conserving the ecosystems upon which threatened and endangered species depend. 16 U.S.C. § 1531(b). BLM's livestock grazing standards and guidelines establish measures of ecological health applicable not only to livestock grazing, but to resource management generally. *See* 43 C.F.R. subpt. 4180. Read together, these and other legal standards establish that BLM must ensure the ecosystems it manages are fully protected so as to enhance biological diversity.

Wyoming Wildlife Federation and the National Wildlife Federation respectfully requests the leases mentioned in this document be withdrawn from the BLM Competitive Oil and Gas Lease Sale of June 2, 2009 indefinitely. Thank you for your consideration and time as you decide on these matters and review the public comments received.

REQUEST FOR RELIEF

For the foregoing reasons, we request that you withdraw the protested oil and gas leases located within greater sage-grouse habitat, big game crucial ranges and migration corridors, and sensitive species pending adequate environmental analysis is appropriate from the June 2, 2009 lease sale. We also request an opportunity to meet with you and agency staff to discuss this matter further.

Respectfully submitted on this 18th day of May, 2009.

On Behalf of the Wyoming Wildlife Federation and National Wildlife Federation

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