WESTERN RESOURCE ADVOCATES

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October 23, 2009

State Director
Bureau of Land Management
5353 Yellowstone Road
P.O. Box 1828
Cheyenne, WY 82003

RE: PROTEST OF 27 PARCELS TO BE OFFERED AT THE BLM'S DECEMBER 1, 2009 COMPETITIVE OIL & GAS LEASE SALE

Dear State Director:

The Bureau of Land Management's December 1, 2009, oil and gas lease sale offers twenty-seven (27) parcels comprising approximately 28,604 acres of public land/mineral estate within identified sage-grouse core population areas. The National Audubon Society and Audubon Wyoming have determined that the sale and subsequent development of these 27 parcels (identified below) offered for sale by your office on December 1, 2009, would further jeopardize the continued viability of the Greater sage-grouse and therefore request that the protested parcels be withdrawn from sale. Specifically, in accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, the National Audubon Society and Audubon Wyoming (hereinafter "Audubon") protest the sale of twenty-seven (27) lease parcels displayed below scheduled to be offered by the BLM at the December 1, 2009 competitive oil and gas lease sale in Cheyenne, Wyoming.

WY-0912-003	WY-0912-031	WY-0912-044
WY-0912-006	WY-0912-032	WY-0912-045
WY-0912-009	WY-0912-033	WY-0912-046
WY-0912-010	WY-0912-034	WY-0912-047
WY-0912-012	WY-0912-035	WY-0912-048
WY-0912-013	WY-0912-037	WY-0912-068
WY-0912-028	WY-0912-038	WY-0912-071
WY-0912-029	WY-0912-039	WY-0912-072
WY-0912-030	WY-0912-042	WY-0912-073

The twenty-seven (27) lease parcels displayed above lie within the core population areas for Greater sage-grouse. See Figure 1 (attached as Exhibit A). Core population areas are necessary for the protection of this candidate species and integral to the State of Wyoming's – and to the BLM's - sage-grouse conservation strategy. The core habitat is the nesting and early brood rearing habitat for over seventy-five percent of the Greater sage-grouse breeding

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population of the State of Wyoming. This population has already experienced a ninety percent decline from historic record – additional intrusions into core habitat of the sage-grouse may result in a determination that listing this species as threatened or endangered under the Endangered Species Act is necessary.

PROTESTING PARTIES

The National Audubon Society, founded in 1905, is a not-for-profit corporation organized under the laws of the State of New York, with its headquarters in New York. Nationwide, there are more than one million Audubon members and supporters, including approximately two thousand in Wyoming. Audubon has offices in 23 states, including a state office in Wyoming. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. Audubon carries out that mission through a variety of activities, including education, habitat conservation and public policy advocacy.

Audubon's members in all parts of the state share a deep concern for the future of Wyoming's wildlife resources, especially native birds and their habitats. Audubon's state and local organizations commit significant time and resources every year to efforts to conserve and restore wild birds and habitats. Audubon's members work cooperatively with state and federal resource agencies on a range of projects that are designed to achieve a secure environmental future for birds and other wildlife and their habitats and for the people of Wyoming and the United States.

Audubon's members value the conservation, sound management, and sustainable use of the public lands comprised of the lease parcels offered for sale on December 1, 2009, use and enjoy the lands in question, and frequently engage in sage-grouse viewing and hunting opportunities, and other activities that would be diminished by any further decline in the population of the species or continued destruction of sage grouse habitat. As a consequence, Audubon and its members would be adversely affected by the sale of the twenty-seven (27) lease parcels protested herein.

BACKGROUND

The Sagebrush Ecosystem that defines the Intermountain West and once covered much of western North America is undergoing intense change; today we hang onto less than half of its original area. Wyoming is the last stronghold for the sagebrush sea: over 60% of the state is covered by sagebrush, making it the critical area for sage-grouse and sage-grouse habitat. Over the past century, human activities have caused heavy sagebrush loss and the fragmentation of the remaining sagebrush ecosystems. Sage-grouse are native to the semi-arid sagebrush habitats of western North America. Previously widespread, this species has been extirpated from approximately half of its former range due to loss and degradation of sagebrush habitat. It has been estimated that Wyoming's sagebrush country has the highest remaining population of grouse, over 50% of these birds remaining in the world. Sage-grouse are a landscape scale species that depend on large intact sagebrush habitats for every aspect of their life cycle and use multiple seasonal habitats that must all be available to maintain healthy populations.

The loss of this ecosystem is a grave threat not only to sage-grouse but also to world-class populations of mule deer, elk and pronghorn, as well as the other 296 bird species, 85 mammals and 63 fish species that depend on it for habitat and survival. Proactive conservation

measures to assure the sage-grouse's future will have far-reaching benefits to other species of concern that have similar habitat needs including world-class populations of mule deer, elk, pronghorn, as well as many other sagebrush obligate species of concern.

The dramatic decline of the Greater sage-grouse prompted several individuals and organizations in 2002 and 2003 to petition the USFWS to list the Greater sage-grouse as endangered across its entire range. The USFWS found in response that the petitions "presented substantial information indicating that the petitioned actions may be warranted." See 69 FR 21484 (April 21, 2004). However, in early January 2005, the Service announced its 12-month finding that listing the Greater sage-grouse was not warranted. See 70 FR 2244 (January 12, 2005). In July 2006 a suit was filed seeking to overturn the Service's decision not to list the sage-grouse, and on December 4, 2007, the U.S. District Court for the District of Idaho set aside the agency's action, finding that political interference in the scientific review tainted the process to such extent that the decision not to list the sage-grouse as threatened or endangered must be deemed arbitrary and capricious under the law. *Western Watersheds Project v. U.S. Fish and Wildlife Service*, 535 F.Supp. 2d 1173 (D. Idaho Dec. 4, 2007). The Court explained the perilous condition of the sage-grouse and the damage to its habitat, noting that "[n]owhere is sage-grouse habitat described as stable. By all accounts, it is deteriorating, and that deterioration is caused by factors that are on the increase." Id. at 1186. The Court specifically focused on the impact of oil and gas development on grouse habitat and noted a ***"singular lack of data on measures taken by BLM to protect the sage grouse from energy development, the single largest risk in the eastern region."*** Id. at 1188 (emphasis added).

In response to the Court's ruling, the USFWS initiated a new status review to consider information regarding "threats, conservation measures, and population and habitat status of the greater sage-grouse" that has become available since the legally flawed decision struck down by the Idaho court. See 73 FR 10218 (February 26, 2008). The comment period on this status review closed June 27, 2008, and USFWS indicates a decision on the petition to list could be issued in early 2010.

ARGUMENT

I. NEPA VIOLATIONS

A. The BLM Failed to Take a Hard Look at the Environmental Impacts of Leasing

A fundamental purpose of the National Environmental Policy Act (NEPA) is to foster and encourage *fully informed* agency decisions by requiring the disclosure of impacts before actions are taken and before decisions are made, and by requiring agencies to consider reasonable alternatives that can achieve agency objectives with less impact to the environment. 42 USC § 4331 et seq. At its core, NEPA requires agencies to take a "hard look" at the environmental consequence of proposed actions and to broadly disseminate relevant information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). With respect to issues raised in this protest, numerous Federal courts have held that the issuance of an oil and gas lease that allows surface occupancy and development is a major federal action requiring the preparation of an environmental impact statement. *Sierra Club v. Petersen*, 717 F.2d 1409 (D.C. Cir. 1983), *Conner v. Burford*, 848 F.2d 1441 (9th Cir.1988).

Although the BLM insists in its Determination of NEPA Adequacy (DNA) worksheets prepared for this sale that it may defer the "hard look" at environmental impacts required by

NEPA to the APD stage, BLM knows better: A 1992 Information Bulletin directly addresses the subject: "[t]he simple rule coming out of the *Conner v. Burford* case is that ***we will comply with NEPA and ESA prior to leasing***." See U.S. DOI Information Bulletin 92-198 (1992) (emphasis added). Importantly, the approach to NEPA compliance outlined in IB 92-198 has been affirmed numerous times by the Interior Board of Land Appeals (IBLA) and is the "black letter" law of the agency.

The IBLA reiterated the well-established rule in a 2006 decision involving a challenge by environmental organizations to the sale of oil and gas leases in sensitive species habitat:

> ***"The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public land for oil and gas purposes, because leasing without stipulations requiring no surface occupancy constitutes an irreversible and irretrievable commitment to permit surface-disturbing activity."***

Center for Native Ecosystems, 170 IBLA 331, 345, November 22, 2006.

Despite the unambiguous and unequivocal duty to take a hard look at impacts before leasing, the BLM has decided to postpone its analysis for another day, apparently based on an incorrect understanding of the "law" coming out of *Park County*. *See, e.g.*, Rawlins Field Office Worksheet, "Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA)," dated 8/5/2009. Regardless of whatever *Park County* may mean with respect to BLM's duty to analyze site-specific impacts, *Park County* certainly does not permit the BLM to ignore new information and new circumstances concerning the sage-grouse, nor does is allow the BLM to completely disregard cumulative effects of projects and proposals that were not even conceived of 10-20 years ago, much less studied. The unfortunate but predictable result of BLM's distorted view of *Park County* has apparently caused the agency to not even attempt the "hard look" at environmental impacts required by NEPA and DOI policy.

1. The BLM violated NEPA by not considering new information and changed circumstances relevant to the decision to lease.

Agencies must supplement existing environmental analyses if new circumstances "raise significant new information relevant to environmental concerns." *Portland Audubon Soc'y v Babbitt*, 998 F.2d 705, 708-709 (9th Cir. 2000). Moreover, an "agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a "hard look" at the environmental effects of its planned action, ***even after the proposal has received initial approval***." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 374 (1989) (emphasis added).

NEPA's implementing regulations further underscore this obligation. An agency "shall prepare supplements to either draft or final environmental impact statements if … there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR §1502.9(c)(1)(ii). Even where an environmental impact statement has been previously prepared, "if there remains 'major federal action' to occur, and if the new information is sufficient to show that the remaining action will affect the quality

of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851, 1859 (1989).

In order to determine whether its NEPA analysis (in several cases dating back 20 years) was still valid to support the sale of the contested parcels, BLM field offices prepared DNA Worksheets[1] asserting, among other things, the following:

> "With the Plan amended by The Green River Resource Management Plan [sic] is current. Few changes have occurred which would alter any decisions made in the RMP." Rock Springs DNA at 3, Response #3 (Green River RMP approved August 1997).
>
> "There will be no cumulative impacts resulting from issuing oil and gas leases." Rock Springs DNA at 4, Response to question #6 (Green River RMP approved August 1997).
>
> "Filing of an Application for Permit to Drill is the first useful point at which a site-specific environmental appraisal can be undertaken." See Rawlins DNA at 2, Response to question #1 (Rawlins RMP approved December 2008); Kemmerer DNA at unpaginated 2, Response to question #1 (Kemmerer RMP approved April 1986); Rock Springs DNA at 3, Response to question #1 (Green River RMP approved August 1997); Lander DNA at 3, Response to question #1 (Lander RMP approved June 1987); and Newcastle DNA at unpaginated 2, Response to question #1 (Newcastle RMP approved August 2000).
>
> "A full range of alternatives ... were analyzed in the RMP EIS. The alternatives are still appropriate for the current proposed action. Rawlins DNA at 2, Response to question #2 (Rawlins RMP approved December 2008).
>
> "[T]here have been no observed changes in environmental concerns, interests and resource values since the signing of the FEIS, ROD 9/2/88." Worland DNA at 2, Response to question #2 (Worland RMP approved September 1988).
>
> "The direct and indirect impacts of the current proposed action are substantially unchanged from those identified in the existing NEPA documents." Kemmerer DNA at unpaginated 4, Response to question #5 (Kemmerer RMP approved April 1986).
>
> "[C]umulative impacts are substantially unchanged." Newcastle DNA at unpaginated 3, Response to question #6 (Newcastle RMP approved August 2000); Kemmerer DNA at 4, Response to question #6 (Kemmerer RMP approved April 1986).

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[1] The following Field Offices prepared DNA worksheets in connection with the December 1, 2009 oil and gas lease sale: Buffalo (dated 8/11/09); Casper (dated 8/4/09); Cody (dated 8/5/09); Kemmerer (dated 8/3/09); Lander (dated 7/29/09); Newcastle (dated 7/30/09); Rawlins (dated 8/5/09); Rock Springs (dated 7/28/09) and Worland (dated 8/6//09).

> "The issue of oil and gas leasing and subsequent development received extensive public involvement and interagency review in the [1986] Kemmerer RMP/EIS. The proposed action is well within the boundaries of analysis completed in the previous document, and therefore no additional input from other agencies or the public is required at this time." Kemmerer DNA at unpaginated 4, Response to question #7 (Kemmerer RMP approved April 1986).

Each and every one of these assertions is incorrect, and as the land management agency directly responsible (through its authorizations and land use allocations) for many of the changed circumstances and cumulative impacts, BLM surely must be aware of this.

As a result, the NEPA analysis referenced by BLM in various "DNA Worksheets" to support its decision to lease the contested parcels is useless. In the thousands of pages of analysis contained in dozens of referenced EISs and EAs, not a single sentence is devoted to considering the implications of the "new" information and circumstances referenced in the USFWS notice, analyzing causes of declining populations of sage-grouse or what to do about the BLM's inadequate sage-grouse stipulations.

In February 2008, the U.S. Fish and Wildlife Service announced in the Federal Register the initiation of a status review and solicitation of new information for the Greater sage-grouse. The Service's notice stated: ***"Since the publication in 2004 of the Conservation Assessment, a significant amount of new research has been completed and new information has become available regarding threats, conservation measures, and population and habitat status of the greater sage-grouse."*** 73 Fed.Reg. 10218, 10219 (February 26, 2008) (emphasis added).

The new information referenced by the USFWS includes a widely-circulated memorandum prepared in January 2008 by professional biologists and resource managers under the auspices of the Western Association of Fish and Wildlife Agencies ("WAFWA"): *Using the Best Available Science to Coordinate Conservation Actions that Benefit Greater Sage-Grouse Across States Affected by Oil & Gas Development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)* (January 29, 2008).[2] Based on a review of "current published peer-reviewed and unpublished literature" the "representatives from the state agencies with authority for managing fish and wildlife from the major sage-grouse and energy producing states" concluded that:

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

[2] Audubon previously provided BLM a copy of the WAFWA memo in its protest of the August 5, 2008 oil and gas lease sale (marked as Exhibit C).

implementing greater protection within core areas from impacts of oil and gas development is a high priority.

WAFWA Memo at 2 (emphasis added).

A key outcome of the WAFWA meeting was broad agreement on "concepts and strategies" which "when used in combination with other conservation measures ... may enhance the likelihood that sage grouse populations will persist at levels that ... avoid the need to list the sage-grouse under the Federal Endangered Species Act." WAFWA memo at 1. Unfortunately, despite the tremendous significance of the information and findings presented in the WAFWA memo, there is no evidence anywhere in the record that BLM considered it.

The CEQ's NEPA regulations require agencies to supplement their NEPA analyses when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts[]" (40 CFR 1502.9(c)) "even after the proposal has received initial approval." *Friends of the Clearwater*, 222 F.3d at 557. "If information developed after the NEPA statements was sufficiently new and significant when compared to the information upon which the NEPA statements were based, a new NEPA statement was required." *Center for Native Ecosystems*, 170 IBLA 331, 346 (November 22, 2006). Given the importance and gravity of the WAFWA findings, this is of course the situation here, which BLM cannot deny. The law is clear: BLM must supplement its NEPA analysis before it can issue the leases protested herein.

The significant "new" information about the sage-grouse is common knowledge within land and resource management agencies and is frequently discussed among wildlife professionals. It has been widely distributed to federal and state land and resource management agencies including the Wyoming BLM, which partially funded several of the studies, and is now moving ahead with a major revision to the Buffalo RMP in response to information gathered in these studies ("These studies indicate that BLM's current planning decisions in the Powder River Basin may not be sufficient to prevent the greater sage-grouse from becoming listed under the Endangered Species Act.") See http://www.blm.gov/wy/st/en/programs/Planning/rmps/buffalo.html. Further, the BLM's own web site, at <http://www.blm.gov/wy/st/en/programs/Planning/rmps/buffalo.html> contains a link to a page on the WGFD's website that displays a complete list of the "new" information: http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/techdocs/index.asp.

The Buffalo field office has responded to this new information and changed circumstances by proposing an amendment (now a revision)[3] to its RMP to address sage-grouse declines. According to May 16, 2008 press release issued by the Buffalo Field Office:

> BLM is proposing to prepare an amendment to the 1985 Resource Management Plan (RMP). We have reviewed new information from recent inventories and scientific studies which indicate that BLM's current planning

[3] Shortly after announcing the RMP amendment, the Buffalo FO changed its approach and decided to revise the RMP. Guidance issued August 13, 2008, by the Buffalo FO "for general management actions" during the revision process limits well pad density to 640 acres and addresses leasing on a case-by-case basis" consistent with the goal of "maintaining a viable population of sage-grouse and associated habitat needs."

decisions in the Powder River Basin may not be sufficient to prevent the greater sage-grouse from becoming listed under the Endangered Species Act.
As part of the RMP amendment process BLM is required to determine what management actions are appropriate during the preparation of the amendment. This is necessary to preserve the BLM's decision space during the analysis process - in other words, we cannot permit actions on an interim basis that would compromise the implementation of the alternatives that result from the plan amendment process. The BLM is developing an interim management strategy which considers all seasonal habitat requirements in areas large enough to meet the landscape scale requirements of the greater sage-grouse. BLM will present its preliminary interim sage-grouse management strategy at the meeting.

A "fact sheet" prepared by the BFO May 28, 2008, states that:

- Current management practices may be insufficient to sustain local sage-grouse populations.
- Large blocks of contiguous habitat may be necessary to conserve sage-grouse.
- The population has seasonal ranges – activities not centered around the lek site year-round.
- West Nile virus a new stressor was not present at the time of the PRB FEIS.
- There is a genetic linkage with population strongholds in eastern Montana and southern Wyoming.

Clearly, this information about sage-grouse impacts and deficiencies in its existing stipulations was and is readily available to BLM, yet the agency chose to ignore it. There is simply no legitimate justification for BLM's failure to consider the information outlined above. BLM is obviously aware of the information and has it in its possession, and the law and BLM's policies require that it be taken into account in the environmental review for this lease sale. In this instance, however, BLM Field Managers appear to have done nothing to assess "whether there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action[]" despite having specific knowledge of the information. This blatant disregard of BLM's responsibilities under NEPA reflected by these DNA comments illustrate clearly why the Greater sage-grouse is in trouble.

2. BLM violated NEPA by failing to consider alternatives that would protect the sage grouse such as new lease stipulations or not leasing parcels in core population areas.

The consideration of alternatives under Section 1502.14 of the CEQ's NEPA regulations is often described as the heart of the environmental impact statement. Under this section, agencies must –

- ¥ Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- ¥ Include appropriate mitigation measures not already included in the proposed action or alternatives.

There are at least three good reasons why BLM must consider additional alternatives to the proposed action: 1) existing oil and gas lease stipulations have been shown to be inadequate; 2) the State of Wyoming has adopted a sage-grouse conservation strategy that includes as a key component more restrictive oil and gas lease stipulations that have not been considered by BLM; and 3) RMP revisions that are underway must consider specific alternatives for sage grouse conservation which may not be limited or precluded by interim management actions such as leasing.

a) Inadequate stipulations.

The WAFWA, the U.S. Fish and Wildlife Service[4], and the State of Wyoming have concluded that existing stipulations used by BLM are ineffective. As discussed above, the nation's top sage-grouse researchers, biologists and wildlife professionals have determined that existing oil and gas lease stipulations in use by BLM to protect sage-grouse simply do not work, and that much larger NSO or avoidance areas are required to protect the biological integrity of sage-grouse and their habitat. The WAFWA memo explained that "[r]esearch in Montana and Wyoming in coal-bed methane natural gas (CBNG) and deep-well fields suggests that impacts to leks from energy development are discernable out to a minimum of 4 miles, and that some leks within this radius have been extirpated as a direct result of energy development." WAFWA memo at 3. The WAFWA concluded that the standard ¼ mile NSO stipulation applied to leases with strutting grounds resulted in a shocking 96% lek loss with only 4% lek persistence. Not surprisingly, lek persistence increased with the size of the buffer: 0.5 mile, 1.0 mile, and 2.0 mile buffers resulted in estimated lek persistence of 5%, 10% and 28%, respectively. In contrast, lek persistence in the absence of oil and gas development was about 85%. The WAFWA reported that:

> Research indicates that oil or gas development exceeding approximately 1 well per square mile with the associated infrastructure, results in calculable impacts on breeding populations, as measured by the number of male sage-grouse attending leks (Holloran 2005, Naugle et al. 2006). Because breeding, summer, and winter habitats are essential to populations, development within these areas should be avoided.

WAFWA memo at 2.

In response to the information contained in the WAFWA memo, on March 27, 2008, Wyoming Governor Dave Freudenthal submitted a letter to Wyoming BLM specifically requesting the use of new stipulations that "effectively" protect sage-grouse: "While I am not suggesting that these leases should not be offered, ***I would submit that any leases that are offered, especially those within "core areas," both in the April sale and beyond, be subject to stipulations that effectively protect sage grouse and their habitat.***" [5]

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[4] See, e.g., USFWS comments on Atlantic Rim Natural Gas Project Draft Environmental Impact Statement, dated January 26, 2008 (on file with Wyoming BLM).

[5] See Letter from Dave Freudenthal, Governor, State of Wyoming to Bob Bennett, Director, Bureau of Land Management Wyoming State Office, March 27, 2008 (emphasis added), on file with Wyoming BLM.

Obviously, in light of this new information the BLM has a duty to analyze new or revised mitigation measures and stipulations that will protect the sage-grouse, including limiting development to 1 well pad per section, and expanding NSO buffers as recommended by WAFWA, and/or deferring leasing of parcels in core population areas.

b) The State of Wyoming's 2008 sage-grouse conservation strategy includes a requirement for more protective stipulations on oil and gas leases.

On August 1, 2008, the Governor of the State of Wyoming signed Executive Order 2008-2 – GREATER SAGE-GROUSE CORE AREA PROTECTION. Online at: http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/index.asp. The Governor issued Executive Order 2008-2 in response to recommendations made by his Sage Grouse Implementation Team (SGIT) for the development of "actions and strategies which will effectively manage sage-grouse and their habitats in Wyoming." The centerpiece of the Governor's sage grouse conservation plan is the identification of "core population areas" for which special protection is needed in order to "maintain habitats and viable populations of sage-grouse in areas where they are most abundant." The core population areas identified by the State include habitats and existing populations for no less than two-thirds of the sage-grouse in Wyoming. The State has determined that a minimum of 40 core areas are needed to ensure geographic and genetic diversity, so the plan allows boundaries to be adjusted in response to "emerging conditions and information" that may impact sage-grouse conservation efforts.

Less than one month after the issuance of the executive order, the Wyoming Game and Fish Department promulgated new "Stipulations for Development in Core Sage Grouse Population Areas." Id. The WGFD's stipulations are specifically designed for numerous activities including wind energy, uranium mining, electricity transmission and oil and gas leasing. The stated goal for all stipulations "is to maintain existing habitat function by permitting development activities that will not cause declines in sage grouse populations." Importantly, the WGFD's oil and gas lease stipulations permit no more than "one well pad per 640 acres" and "no more than 11 well pads within 1.9 miles of the perimeter of occupied sage grouse leks with densities not to exceed 1 pad per 640 acres (Holloran 2005)." The stipulations further provide that surface disturbance is limited to less than 5% per 640 acres, and no surface occupancy is permitted within 0.6 mile of the perimeter of occupied sage grouse leks. In addition, the WGFD oil and gas leasing stipulations contain timing limitations for exploration and development activities, noise restrictions, seasonal restrictions, and provisions for set backs for electric supply lines.

Recent correspondence between the U.S. Fish and Wildlife Service and the WGFD discusses the critical importance of maintaining the integrity of core areas and reiterates actions that must be taken before development may be considered inside core areas:

> In short, if implemented as envisioned by the State Sage-grouse Implementation Team (SGIT) and Governor's Executive Order, the Strategy is the type of action the Service looks for, both in conservation measures and regulatory process, to preclude listing a species under the ESA. However, it is important that I point out that these potential benefits of the Strategy will only be realized if the integrity of the core area approach is maintained. The Service feels that the greatest threats to the integrity of the core areas are: (1) not adhering to science-based

conservation measures associated with development, and (2) allowing mitigation for impacts to core population areas as an option if the proposed development is counter to accepted conservation measures or when impacts are not known.

The foundation of the Strategy from the Service point of view is that development in the most important sage-grouse habitats (core areas and associated seasonal habitats) is done only when no impact to the species can be demonstrated. In essence, ensuring the conservation of sage-grouse in the core areas is mitigation for the greater development flexibility outside core areas provided for by the Strategy. Therefore, allowing impacts within core areas, for research or other reasons, destroys the function and value of the Strategy.

* * *

To the Service, the recommendations of the SGIT and Executive Order 2008-2 are clear with respect to deviation from standard stipulations. That is, the burden of proof that development does not affect sage-grouse rests with the industry or proponent in question, and any research they feel is necessary to convey this, should be conducted outside of core areas. ***This burden of proof to show that development in core areas can be done consistent with conserving sage-grouse underlies all forms of development—not just wind-power.*** The Strategy is clear on this point and is one of the key reasons for our endorsement.

See Letter from Brian Kelly, Wyoming ES Field Office, Field Supervisor, USFWS to Steve Ferrel, Director, WGFD, dated July 7, 2009 (emphasis added) (attached as Exhibit B) in response to a letter from Steve Ferrel, Director, WGFD, dated July 7, 2009 (attached as Exhibit C).

NEPA regulations require Federal agencies in their statements to "discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned)" and "[w]here an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." 40 CFR § 1506.2(d).

It is clear that the above NEPA requirement was not met in this case--BLM has not demonstrated that development can take place inside core areas without harming sage-grouse populations. Because the WGFD stipulations offer more protection than the stipulations proposed by BLM for use in this lease sale, differing substantially in many key respects, a conflict exists that must be both disclosed and resolved. Accordingly, and because BLM has never considered alternatives to the stipulations described in the underlying RMP and applied to the leases contested herein, BLM must evaluate and carefully consider the environmental impacts of applying the WGFD stipulations to the leases proposed for sale December 1, 2009.

c) BLM's National Sage-Grouse Conservation Strategy requires consideration of new alternatives which BLM may not prejudice or limit through management actions such as leasing.

Aware of mounting science showing a decline of the health of the species, the Washington Office of the BLM in November 2004, issued its National Sage-Grouse Habitat Conservation Strategy. Acknowledging "the BLM manages more sage-grouse habitat than any other entity and as a result has a key role in the conservation of the species and its habitat" the

agency proclaimed *"one of BLM's highest priorities is to implement the National Sage-grouse Strategy on BLM-managed lands... All State Directors and Field Managers will take appropriate actions to ensure immediate implementation."* See BLM IM 2005-024 (emphasis added).

A core element of the Strategy is the development of alternatives that must identify and evaluate reasonable, feasible and effective options for conserving sagebrush habitats and associated species in accordance with BLM's multiple-use mandate in FLPMA. Under the Strategy, at least one alternative is supposed to "maximize conservation of sagebrush habitat through objectives, land use plan decisions and management direction." Id. Further, the Strategy requires BLM to:

> ...ensure that each alternative contains considerations for sagebrush habitat conservation by (1) developing one or more goals related to sagebrush habitat with emphasis on sage-grouse habitat that will apply to all alternatives, (2) including objectives in each alternative that pertain to the goals, and (3) identifying allowable uses or management actions to achieve the objectives. *This method will ensure that all alternatives, including the preferred alternative, will include sagebrush and sage-grouse habitat considerations."*

Id. (emphasis added).

Three of the ten BLM Field Offices in Wyoming are currently revising their RMPs. The geographic area covered by these plans encompasses many millions of acres of public lands containing important sage-grouse habitat, along with very significant oil and gas fields. In circumstances such as these, where NEPA processes are underway in connection with the revision of several RMPs, the Council on Environmental Quality regulations implementing NEPA prohibit the BLM from taking any action that could "have an environmental impact" or "limit the choice of reasonable alternatives." 40 CFR § 1506.1(a). Here, this is especially true, given that the BLM's own "highest priority" polices require the agency to consider alternatives that specifically address the conservation needs of sage-grouse.

As noted above, the 27 lease parcels offered for sale on December 1, 2009, protested herein are in sage-grouse core population areas identified by the State, and all 27 parcels allow for surface occupancy and development activities in this key sage-grouse habitat. If BLM is allowed to move ahead now with its leasing decisions before carrying out the important actions outlined in the Sage-grouse Habitat Conservation Strategy, it will have precluded any opportunity to consider and implement effective alternatives and conservation options for the sage-grouse and habitat on the parcels protested herein, such as not leasing, leasing with NSO stipulations, or leasing with stipulations approved by WGFD for use in sage-grouse core population areas. Withdrawing the contested parcels from the December 1, 2009, lease sale would give the BLM the time and opportunity to update its NEPA and planning documents to incorporate the most current research and planning efforts and management actions. Only then will BLM be in a position to make a fully informed decision that balances resource extraction with the protection of this sensitive species. Given the scale and intensity of impacts occurring across its range, this may well be BLM's last chance to "get it right" with respect to sage grouse protection. Getting it right means not offering the contested parcels for lease, applying NSO to the entire parcel, or leasing with stipulations that have been scientifically proven to be effective at protecting viable populations of sage grouse and sage grouse habitat.

3. BLM violated NEPA by failing to consider the cumulative impacts of oil and gas development with past, present and reasonably foreseeable future activities that present incremental threats to sage-grouse and its habitat.

The "hard look" requirement mandated by NEPA includes an appropriate examination and disclosure of cumulative impacts. Cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR 1508.7

Sage-grouse face a complex array of threats to their continued survival. Housing developments, energy projects, mining, improper livestock grazing, habitat alteration and fragmentation, disease, predation, transportation and energy transmissions facilities, drought, climate change, and myriad other activities impact the sage grouse. See, e.g., USFWS 12-month finding, 70 Fed. Reg. 2244 (January 12, 2004). As the Western Watersheds Court found, based on a complete review of the record before it, ***"It is the cumulative impacts of the disturbances, rather than any single source, [that] may be the most significant influence on the trajectory of sagebrush ecosystems."*** Western Watersheds, 535 F.Supp.2d. at 1186 (emphasis added). Despite these well-recognized threats to the sage-grouse, the DNAs prepared by BLM Field Offices for this sale make the ridiculous claim that "[c]umulative impacts are substantially unchanged" over the past two decades. See, e.g., Lander FO DNA (signed/dated 7/29/09).

As BLM well knows, the State of Wyoming is experiencing a significant surge in both the scale and pace of energy development activities. In fact, all the major natural gas producing basins are undergoing dramatic landscape-scale alterations caused by extensive industrial developments, many of which have been authorized by the BLM itself. The change is not limited to fossil fuels development; the BLM's LR2000 database shows that BLM has approved or is presently reviewing ROW applications for as many as 20 major wind power projects, each consisting of between 3000 – 5000 turbines, which collectively will impact close to one million acres of land in Wyoming, much of it providing habitat for sage grouse. In addition, due to a significant increase in the price of yellowcake, uranium mining is also enjoying a dramatic surge in activity. Several large interstate energy transmission facilities are proposed; and several new coal plants are proposed, all of which add to the cumulative impacts not heretofore considered with respect to the offering of the contested parcels.

The RMPs, EISs, and other environmental documents relied upon by BLM to support its leasing decisions are largely devoid of any discussion of these and other cumulative threats to the sage grouse. The BLM's assertions that "the cumulative impacts ... would be substantially unchanged" (e.g., Kemmerer FO DNA, signed/dated 8/3/09) and that "[t]here will be no cumulative impacts resulting from issuing oil and gas leases[]" are patently absurd. Rock Springs FO DNA (signed/dated 7/28/09).

The BLM's failure to take a hard look at actions, activities, programs, and projects that may have a cumulative impact on the sage-grouse is inexcusable—the BLM itself is responsible for authorizing a wide range of projects, activities and actions that have a cumulative impact on the sage-grouse and therefore has better, easier and faster access to this information than the public. If the agency needs a reminder, its own website would be a good place to start: the "Newsroom" at <http://www.blm.gov/wy/st/en/info/news_room.2.html> contains news releases

organized by year and month, and each Field Office has a NEPA site that contains notices of proposed actions and other NEPA related information. Likewise, the State of Wyoming's website is a source of information for state programs such as oil and gas leasing (http://slf-web.state.wy.us/) and oil and gas permitting. See http://wogcc.state.wy.us/

4. Despite compelling new information proving the ineffectiveness of existing oil and gas stipulations attached to parcels protested herein, BLM failed to consider necessary mitigation including new or modified stipulations and/or deferral of leasing decisions.

Among the many consequences of BLM's failure to take a hard look at impacts, especially the new information and changed circumstances with regard to sage-grouse over the past 20 years, is its failure to recognize the need to review and verify the effectiveness of existing stipulations and to consider new stipulations designed and configured to effectively protect the sage-grouse from the impacts of oil and gas development activities. For example, the DNA worksheet prepared by the Rock Springs Field Office to support the sale of leases located on lands within the Green River planning area incorrectly asserts that because "[f]ew changes have occurred which would alter any decisions made in the RMP[]" there is no need to question, or reexamine, the effectiveness of stipulations applied to the parcel.

The other DNAs prepared by Wyoming BLM Field Offices offering parcels at the December 1, 2009 sale (Casper, Kemmerer, Newcastle, Rawlins, Rock Springs and Worland) make similarly unfounded claims. Audubon is confident that BLM's determination that new stipulations and other mitigation measures are unnecessary because the environment has remained unchanged during the past 10 or 20 years will eventually be overturned.

> The CEQ's NEPA regulations at 40 CFR §1508.20 define mitigation to include--
> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

Given the proven ineffectiveness of existing lease stipulations attached to leases to protect the sage grouse and its habitat, including the TLS and CSU stipulations placed on the leases protested herein, it is incumbent upon BLM to evaluate other forms of mitigation. Such measures include, for example, 1) not leasing in core population areas; 2) attaching NSO stipulations to parcels located within core areas; or 3) applying stipulations recently adopted by the Wyoming Game and Fish Department for oil and gas leases in core population areas. See "Stipulations for Development in Core Sage Grouse Population Areas, 7/31/08, online at: http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/index.asp.

When BLM discovered (or should have discovered) that existing stipulations attached to lease parcels for the protection of the sage-grouse do not work "as advertised," the agency had a duty to consider other forms of mitigation measures. "Agencies shall--[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives" (40 CFR 1502.14(f)) and NEPA documents "shall include... means to mitigate adverse environmental impacts..). 40 CFR 1502.16(h). Here, BLM failed to do so and, as a result, is unnecessarily jeopardizing the long-term viability of the Greater sage-grouse in contravention of its National sage-grouse conservation strategy as well as its sensitive species policy.

5. **BLM Violated NEPA by failing to consider and integrate the review procedures required by Executive Order 2008-2 and by failing to disclose and reconcile inconsistencies between State and Federal sage-grouse conservation measures.**

a. Failure to integrate Executive Order 2008-2 review into the NEPA process.

Executive Order 2008-2 contains an "action forcing" requirement that specifies "[n]ew development or land uses within Core Population Areas should be authorized or conducted ***only when it can be demonstrated by the state agency that the activity will not cause declines in Greater Sage-Grouse populations."*** Executive Order 2008-2 at ¶3 (emphasis added). By ignoring this and other provisions of the Executive Order, BLM has substantially interfered with the agency's ability to carry out legally-mandated duties under the Executive Order.

NEPA regulations contain measures designed to facilitate and encourage coordination of the agencies' respective environmental review responsibilities. The goal is to eliminate duplication with State and local procedures and foster expedited decision-making. In this instance, the mandatory review by WGFD required by the Executive Order should take place in the context of NEPA:

> (b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:
>
> (1) Joint planning processes.
> (2) Joint environmental research and studies.
> (3) Joint public hearings (except where otherwise provided by statute).
> (4) Joint environmental assessments.

It is clear that making this demonstration requires at a minimum a review by the state agency and a written record of that review. In this case, consistent with the requirement set forth above, the BLM should have: 1) identified in its underlying NEPA analysis that such a review was required under state law, and 2) provided an opportunity for WGFD to perform and document that review as part of the NEPA process. The WGFD was denied this opportunity, in direct violation of this important provision.

b. Failure to disclose and reconcile inconsistency.

In order to integrate the NEPA-mandated environmental reviews into state or local planning processes, such as WGFD review under Executive Order 2008-2, NEPA regulations require Federal agencies to "discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned)." In instances such as here "[w]here an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." 40 CFR §1506.2

Besides being woefully inadequate, sage-grouse stipulations attached to oil and gas leases protested herein are inconsistent with stipulations developed by the Wyoming Game and Fish Department. Id. For example, BLM stipulations prohibit surface occupancy or use within ¼ mile of a Greater sage-grouse strutting/dancing ground; the WGFD stipulation extends the NSO buffer to 0.6 mile; BLM stipulations do not specify a surface density for wells; WGFD stipulations which limit well density to one well pad per 640 acres.

In such circumstances NEPA regulations require two things: first, that the inconsistency be disclosed in a NEPA document, and two, that an attempt be made to reconcile the BLM's proposal to issue leases containing ineffective stipulations with the State's sage-grouse conservation strategy generally and with the stipulations specifically. BLM made no effort do either here, and for that reason the BLM is required to reopen the NEPA process in connection with this sale.

II. VIOLATIONS OF THE FEDERAL LAND POLICY MANAGEMENT ACT

A. The Federal Land Management and Policy Act requires affirmative action to protect sensitive species such as the Greater sage-grouse

1. BLM's proposed action is inconsistent with its sensitive species policy.

Section 102 of FLPMA sets forth broad national policy goals including a directive that "the public lands be managed in a manner that will protect the quality of ... ecological ... values" and "provide food and habitat for fish and wildlife..." 43 U.S.C. 1701(a)(8). To protect sensitive species, the BLM has drafted a Sensitive Species Manual and related BLM Instruction Memoranda that require BLM to ***"ensure that actions authorized, funded, or carried out by the BLM are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species, either under the provisions of the Endangered Species Act or other provisions of this policy."*** See BLM 6840 Special Status Species Management (1/17/01) at 1 (emphasis added).

The Wyoming BLM Sensitive Species Policy and List (dated September 20, 2002) promulgated pursuant to BLM 6840 identifies the Greater sage-grouse as a sensitive species. "The sensitive species designation is normally used for the species that occur on Bureau administered lands for which BLM has the capability to significantly affect the conservation status of the species through management." See BLM 6840 at 6. The Wyoming sensitive species policy explains that, "[b]y definition the sensitive species designation includes species that could easily become endangered or extinct in the state. Therefore, if sensitive species are designated by the State Director, the protection provided by the policy for candidate species shall be used as the minimum level of protection for BLM sensitive species." See Wyoming Sensitive Species Policy at 1. With respect to the greater sage-grouse as well as other species on the sensitive species list, BLM's specific non-discretionary mandate is "to avoid or minimize adverse impacts and

maximize potential benefits to species whose viability has been identified as a concern by reviewing programs and activities to determine their potential effect on sensitive species." (emphasis added). Moreover, under this and related policy, Field Office managers are responsible for implementing the special status species program within their jurisdiction by ***"ensuring actions are evaluated to determine if special status species objectives are being met."*** BLM 6840 at 4 (emphasis added).

Despite these clear directives, the administrative record for the December 1, 2009, lease sale is completely devoid of any evidence that the Field Office managers made any effort or performed any evaluation to ensure that special status species objectives were carried out. Indeed, to the contrary, the DNAs prepared for this lease sale reveal a complete and utter disregard for sensitive species management in general, and for management of the sage-grouse in particular. Claims of "no new information" and "no change in circumstances" in the various DNAs fly in the face of reality and on-the-ground conditions that are rapidly moving the species to a need for listing as threatened or endangered.

The predictable consequence of BLM's misplaced reliance on obsolete planning-level NEPA analyses to support its leasing decisions is that none of the documents referenced in the DNAs adequately disclose the environmental effects of the proposed lease sale in the context of the level of development now occurring in Wyoming, nor do any describe or discuss mitigation measures that could be implemented to protect the sage-grouse before making a commitment that allows for surface occupancy and use. The failure to attach effective stipulations to the contested lease parcels, along with the absence of any evidence that BLM considered other measures to mitigate the adverse effects of development on the parcels, amount to "unnecessary or undue degradation of the public lands" in contravention of FLPMA section 302(b), 43 U.S.C. §1732(b). Moreover, BLM's decision to offer the protested parcels without adequate lease stipulations or other effective mitigation measures circumvents the 4180 – Rangeland Health Standards promulgated for Wyoming. The regulations at 43 CFR 4180.1(d) require the management of rangelands so that "habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed ... and other special status species." The continued decline of the sage-grouse and relentless destruction of its habitat demonstrates that BLM is not fulfilling its duty to manage rangelands for special status species.

2. BLM's Land use authorizations must protect sage grouse habitat.

In light of the findings of the professional wildlife management community, the need to protect sage-grouse habitat from oil and gas development impacts is immediate and demonstrable; the duty to protect the species is mandatory and non-discretionary. Department of Interior regulations governing the use, occupancy and development of the public lands require that --

> (b) Each land use authorization shall contain terms and conditions which shall:
> (1) Carry out the purposes of applicable law and regulations issued thereunder;
> (2) Minimize damage to scenic, cultural and aesthetic values, fish and wildlife habitat and otherwise protect the environment;
> (3) Require compliance with air and water quality standards established pursuant to applicable Federal or State law; and

> (4) Require compliance with State standards for public health and safety, environmental protection, siting, construction, operation and maintenance of, or for, such use if those standards are more stringent than applicable Federal standards.

40 CFR §2920.7(b)(1) (emphasis added).

Under the provision underscored above, BLM must take appropriate steps to "minimize damage to ... wildlife habitat." Given the unambiguous nature of the WAFWA's findings with regard to the ineffectiveness of BLM's existing oil and gas lease stipulations, those steps must include the use of new stipulations that protect the sage-grouse and its habitat from further decline.

In addition, the duty described above is reinforced by another, equally important, set of DOI policies governing the responsibilities of the BLM concerning protection of wildlife and wildlife habitat. These regulations establish that state regulation of wildlife "remains the comprehensive backdrop" applicable to wildlife management, that the Department of the Interior will "support, to the maximum legal extent possible, the missions of the States" with regard to wildlife management. Most importantly, the regulation reaffirms "the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility." 43 C.F.R. §§ 24.1(a), 24.1(c), 24.2(a).

There is no doubt that the State of Wyoming has primary authority over the management of sage grouse as there is no overarching Federal law (yet) governing the management of these species. Under these regulations, the BLM must "institute fish and wildlife habitat management practices in cooperation with the States to assist the States in accomplishing their fish and wildlife resource plans." Id. § 24.4(i)(2). There is no question that the BLM would violate this requirement if it proceeded with sale of these parcels as currently configured without adequate protective stipulations for sage-grouse in contravention of Executive Order 2008-2. And even more clearly, the fundamental principle underlying these regulations—continuing State primacy over the wildlife within its border where there is no Federal preemption—would be violated if the BLM proceeded with the sale of these parcels without modifying stipulations to conform to those adopted and recommended by the Wyoming Game and Fish Department. Given the state's and BLM's mutual interest in sage-grouse conservation, the BLM would violate Department of Interior regulations if it proceeded with the sale of these lease parcels as currently proposed relying on inadequate and scientifically-proven ineffective lease stipulations.

3. BLM's policies conflict with State plans and policies.

The Federal Land Policy and Management Act requires BLM to "coordinate the land use inventory, planning, and management activities of or for [public lands] with the land use planning and management programs of . . . the States and local governments . . . by, among other things, considering the policies of approved State and tribal resource management programs." 43 U.S.C. § 1712(c)(9) (emphasis added). By law, BLM must give special attention to "officially approved and adopted resource related plans" of other agencies. See 43 C.F.R. § 1601.0-5(g). In addition, BLM must remain apprised of State land use plans, assure they are considered, and resolve to the extent practical inconsistencies between state and federal plans. 43 U.S.C. § 1712(c)(9).

As discussed previously, the Governor of the State of Wyoming signed Executive Order 2008-2 – Greater Sage-Grouse Core Area Protection on August 1, 2008. Shortly thereafter, the Wyoming Game and Fish Department issued new "Stipulations for Development in Core Sage Grouse Population Areas." The WGFD's oil and gas lease stipulations permit no more than "one well pad per 640 acres" and "no more than 11 well pads within 1.9 miles of the perimeter of occupied sage grouse leks with densities not to exceed 1 pad per 640 acres (Holloran 2005)." The stipulations further provide that surface disturbance is limited to less than 5% per 640 acres, and no surface occupancy is permitted within 0.6 mile of the perimeter of occupied sage grouse leks. In addition, the WGFD oil and gas leasing stipulations contain timing limitations for exploration and development activities taking place in the vicinity of leks, noise restrictions, seasonal restrictions, and provisions for set backs for electric supply lines.

There is no indication in the record that the BLM considered Governor's Freudenthal's executive order or, for that matter, any other aspect of Wyoming's sage-grouse conservation strategy such as the WGFD revised oil and gas stipulations. It is further apparent there has been no attempt to resolve inconsistencies between BLM's obsolete and ineffective stipulations and those recently developed by the Wyoming Game and Fish Department. Until the BLM has considered and attempted to resolve this inconsistency with State policy it cannot allow the sale of the protested parcels that lie in sage-grouse core population areas to go forward.

III. VIOLATIONS OF EXECUTIVE ORDER 13443

A. BLM's decision to lease the contested parcels without considering the impacts to hunting does not comply with Presidential Executive Order 13443

Hunters are justifiably concerned about the decline of a popular upland bird game species.[6] Presidential Executive Order 13443 - Facilitation of Hunting Heritage and Wildlife Conservation, directs all Federal agencies with programs and activities "that have a measurable effect on public land management, outdoor recreation, and wildlife management, including the Department of the Interior and the Department of Agriculture, to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat." To achieve this objective, the Order requires agencies to:

- Evaluate the effect of agency actions on trends in hunting participation and, where appropriate to address declining trends, implement actions that expand and enhance hunting opportunities for the public.
- Consider the economic and recreational values of hunting in agency actions.
- Manage wildlife and wildlife habitats on public lands in a manner that expands and enhances hunting opportunities.
- Foster healthy and productive populations of game species.
- Ensure that agency plans and actions consider programs and recommendations for comprehensive planning efforts ... and other range-wide management plans for big game and upland game birds.

[6] See, e.g., "Petition for Rulemaking--Greater Sage Grouse" submitted by Theodore Roosevelt Conservation Partnership to Department of Interior Secretary Kempthorne (June 27, 2008) available at http://www.trcp.org/

The issuance of oil and gas leases in core sage-grouse habitat that allow for surface occupancy and which lack adequate timing and controlled use stipulations will diminish, rather than "enhance" hunting opportunities and will complicate, rather than "facilitate" the management of game species and their habitat. Moreover, by reducing the availability of sage-grouse habitat and numbers of sage-grouse, BLM's actions will harm, rather than "foster" healthy and productive populations of sage-grouse.

Unfortunately, the record in this case lacks any evidence suggesting compliance with, or for that matter, any attention to, Executive Order 13443. Besides the shortcomings identified above, it is clear that BLM failed to consider how the issuance of the contested parcels could impact the economical and recreational values of sage-grouse hunting. Most importantly, BLM failed to "ensure" that its decision to offer the contested parcels considered "range-wide management plans for upland game birds" such as, for example, the Western Association of Fish and Wildlife Agencies (WAFWA) Guidelines for Management of Sage Grouse Populations and Habitats.

IV. REQUESTED RELIEF

The National Audubon Society and Audubon Wyoming request that all twenty-seven (27) lease parcels protested herein be indefinitely withdrawn from the sale pending a detailed review of the arguments presented herein or, in lieu of withdrawal, affixed with "NO SURFACE OCCUPANCY" (NSO) STIPULATIONS which could be modified to allow for surface occupancy and development should the BLM determine, based upon subsequent site-specific environmental review and disclosure, that occupancy and development could occur somewhere on the leasehold without further impact to the sage-grouse or its habitat consistent with the Governor of Wyoming's Executive Order 2008-2.

Respectfully submitted,

Dan Heilig
Western Resource Advocates
262 Lincoln Street
Lander, WY 82520
(307) 332-3614

Counsel for Audubon

Enclosures

Exhibit A

Figure 1. Location of 27 leases parcels totaling 28,604 acres protested by Audubon Wyoming from the Bureau of Land Management from December 2009 lease sales.

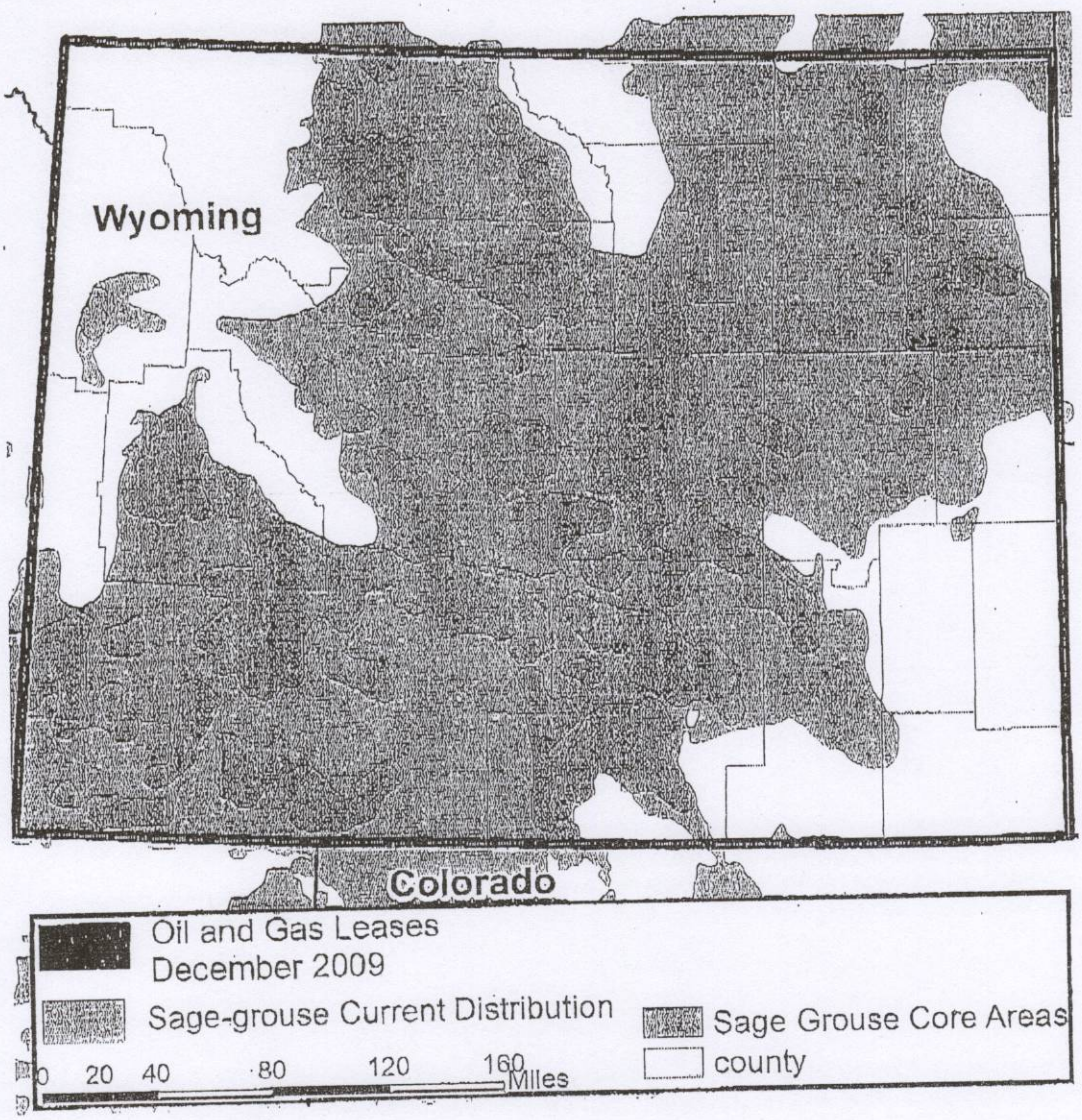

Table 1. Parcel numbers of 27 leases parcels totaling 28,604 acres protested by Audubon Wyoming from the Bureau of Land Management from December 2009 lease sales.

WY-0912-003	WY-0912-031	WY-0912-044
WY-0912-006	WY-0912-032	WY-0912-045
WY-0912-009	WY-0912-033	WY-0912-046
WY-0912-010	WY-0912-034	WY-0912-047
WY-0912-012	WY-0912-035	WY-0912-048
WY-0912-013	WY-0912-037	WY-0912-068
WY-0912-028	WY-0912-038	WY-0912-071
WY-0912-029	WY-0912-039	WY-0912-072
WY-0912-030	WY-0912-042	WY-0912-073

Exhibit B

United States Department of the Interior

FISH AND WILDLIFE SERVICE

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

JUL 07 2009

Mr. Steve Ferrell
Director, Wyoming Game and Fish Department
5400 Bishop Blvd
Cheyenne, WY 82006

STEVE
Dear Director ~~Ferrell~~:

Thank you for your letter of July 7, 2009, regarding the State of Wyoming's Greater sage-grouse "Core Population Area Strategy" (Strategy) (Executive Order 2008-2). Your letter requests clarification from the U.S. Fish and Wildlife Service (Service) regarding our endorsement of the Strategy. Specifically, you would like our view of whether wind power can be developed in core areas in a way that the Wyoming Game and Fish Department and the State of Wyoming would maintain our endorsement. This letter is responsive to your request and provides an explanation of our concern about wind development in core areas. In summary, constructing wind farms in core areas, even for research purposes, prior to demonstrating it can be done with no impact to sage-grouse, negates the usefulness of the core area concept as a conservation strategy and brings into question whether adequate regulatory mechanisms are in place to protect the species. Both of these factors are critical in the Endangered Species Act (ESA) listing decision currently facing the Service.

Following are some specific reasons why we endorsed the Strategy when asked by the Governor's Office in 2008:

A. In a general conservation context the Strategy is a science-driven, outcome-based and adaptive approach to the conservation of a species and its habitat. The Service is in the process of adopting a similar approach, currently called Strategic Habitat Conservation (SHC) for much of our conservation work. Therefore, as a general conservation paradigm we support such an approach.

B. In the context of a potential listing under the ESA, the State's sage-grouse Strategy provides a useful framework to show how the threats to the species are being managed; and if the Strategy is adopted across different land ownerships in the state, could provide an important regulatory mechanism as well. As you know, to preclude listing under ESA, we must be able to show that threats to the species are effectively addressed by science-based conservation measures, and that adequate regulatory mechanisms are in place to ensure those actions occur. In regard to the latter, the actions of the State Board of Land Commissioners to adopt a process that ensures sage-grouse conservation measures are implemented on state land within core areas, and the regulatory authority of the Department of Environmental Quality Industrial Sighting Council (ISC) are noteworthy.

C. The Strategy provides the mechanism by which the state can be the most flexible in the application of the Statewide Candidate Conservation Agreement with Assurances (CCAA) that is currently being developed. The CCAA tool is important for private landowners in the state both for the conservation of the species and its habitat, and the assurances it provides the landowner if the species is ever listed.

In short, if implemented as envisioned by the State Sage-grouse Implementation Team (SGIT) and Governor's Executive Order, the Strategy is the type of action the Service looks for, both in conservation measures and regulatory process, to preclude listing a species under the ESA. However, it is important that I point out that these potential benefits of the Strategy will only be realized if the integrity of the core area approach is maintained. The Service feels that the greatest threats to the integrity of the core areas are: (1) not adhering to science-based conservation measures associated with development, and (2) allowing mitigation for impacts to core population areas as an option if the proposed development is counter to accepted conservation measures or when impacts are not known.

The foundation of the Strategy from the Service point of view is that development in the most important sage-grouse habitats (core areas and associated seasonal habitats) is done only when no impact to the species can be demonstrated. In essence, ensuring the conservation of sage-grouse in the core areas is mitigation for the greater development flexibility outside core areas provided for by the Strategy. Therefore, allowing impacts within core areas, for research or other reasons, destroys the function and value of the Strategy.

With respect to wind power development, your letter referenced the SGIT recommendations that were adopted by the State Board of Land Commissioners. Specifically, you asked whether we thought the reference in those recommendations to a "no impact/mitigation plan" as you termed it, was possible for wind power development. Your question is an excellent one, but the context of the SGIT's recommendations is critical to our answer to this question. The SGIT's recommendations, as noted in your letter, began by stating: *"Proposals to deviate from **standard stipulations** (emphasis added) will be considered by a team..."* Your letter appropriately raises questions about whether there is a scientific basis for standard stipulations for wind development different from other road-and-pad development on which the SGIT's recommendations are based, and therefore whether the ability to develop a mitigation plan even exists. In our judgment, we agree, no such data currently exist.

To the Service, the recommendations of the SGIT and Executive Order 2008-2 are clear with respect to deviation from standard stipulations. That is, the burden of proof that development does not affect sage-grouse rests with the industry or proponent in question, and any research they feel is necessary to convey this, should be conducted outside of core areas. This burden of proof to show that development in core areas can be done consistent with conserving sage-grouse underlies <u>all</u> forms of development—not just wind-power. The Strategy is clear on this point and is one of the key reasons for our endorsement.

In assessing the threats to sage-grouse to determine whether the species warrants listing under ESA, we view the science on the impacts of wind development on sage-grouse as being clearer than is being conveyed by some in the wind industry. While there is no doubt that we have more to learn, there exists a large body of empirical, peer reviewed, and published science on the negative impacts of road-and-pad based development on the behavior, movements, survival and productivity of this species. The Service in our 2005 decision to not list the species found that these developments, their associated

infrastructure, and the fact such development enhanced the spread of invasive species were among the primary threats to the species. In the past 4 years, since our 2005 finding, we have seen no science to change this view, only more science affirming it, while at the same time witnessing a significant increase in this type of potential development.

Regarding your second specific question on development levels outside core areas, the March 25, 2008 letter from the SGIT to the Governor states development should attempt to maintain populations, habitats and essential migration routes outside core areas wherever possible. How low lek persistence or population numbers can decline outside of core areas needs to be consistent with the recommendations of the SGIT. We encourage you to direct your request for specific numbers to the Governor's SGIT (of which the Service is a member) and species experts. Having said this, the Service has been developing, and will continue to develop, means by which we can provide for more strategic conservation of our trust species (e.g., migratory birds) outside of core areas to help meet the intent of item #6 in Executive Order 2008-2. Item #6 as you note, states that incentives to develop outside of core areas are an important component of the Strategy. Some of the flexibility resulting from our efforts we feel will be helpful to the energy industry and other development in the State.

Wyoming has set a national example by signing a Memorandum of Agreement (MOA) between your department, my agency and the Governor's Office to work together to conserve species in a manner that hopefully precludes the need for Federal listing. The approach taken to develop and implement the core area Strategy to date exemplifies the vision shared among us in signing the MOA. However, constructing wind farms in core areas, even for research purposes, prior to demonstrating it can be done with no impact to sage-grouse, negates the usefulness of the core area concept as a conservation strategy and brings into question whether adequate regulatory mechanisms are in place to protect the species.

Please know that my office remains committed to playing our role in helping to implement the sage-grouse core areas strategy as envisioned by the SGIT and the Executive Order and to work within our authorities to collaborate with you and others in helping to develop an environmentally-responsible wind industry and other development in Wyoming.

Sincerely,

Brian T. Kelly
Field Supervisor
Wyoming Field Office

cc: Deputy Chief of Staff, Wyoming Governor's Office (R. Lance)
Chair, Wyoming Sage-grouse Implementation Team (B. Budd)

Exhibit C

WYOMING GAME AND FISH DEPARTMENT

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July 7, 2009

Mr. Brian Kelly
Wyoming ES Field Office
Field Supervisor
5353 Yellowstone Road, Suite 308A
Cheyenne, WY 82009

Dear Brian,

Wyoming Game and Fish Department (WGFD) is working with proponents on various renewable and non-renewable energy projects. These projects are in both sage grouse core and non-core areas. As with the implementation of any new program there are always unanticipated issues that need to be worked out. It is our hope that you would provide additional thoughts and insight on the U.S. Fish and Wildlife Service's (USFWS) endorsement of Wyoming's Greater Sage Grouse "Core Population Area Strategy" Executive Order 2008-2). In particular, how should Wyoming address the following two issues to ensure that the Service maintains their endorsement. We understand your time constraints but respectfully request a written response prior to July 15, 2009 as we have several projects that are waiting for WGFD's reply.

Wind Development in Core Areas

The Sage Grouse Implementation Team Recommendations that were adopted by the State Land Board Commission state:

> Proposals to deviate from standard stipulations will be considered by a team including the WGFD and appropriate land management agencies, with input from the USFWS. Project proponents need to demonstrate that the project area meets at least one of the following conditions:
>
> 1) No suitable habitat is present in one contiguous block of land that includes at least a 0.6-mile buffer between the project area and suitable habitat;
>
> 2) No sage grouse use occurs in one contiguous block of land that includes at least a 0.6 mile buffer between the project area and adjacent occupied habitat, as documented by total absence of sage grouse droppings and an absence of sage grouse activity for the previous ten years;

3) A project plan developed in consultation with the Wyoming Game and Fish Department that is designed to: 1) reduce habitat fragmentation; 2) minimize mortality to sage grouse; 3) minimize the project footprint; 4) demonstrate through credible monitoring data, changes in sage grouse populations as a result of project activity; and 5) provide for a mitigation plan to affect population decline on not less than a 1:1 bird basis in the event monitoring data demonstrates a decline in sage grouse populations in the core area due to project activity.

The third condition implies that it is possible to implement a mitigation plan to offset any declines in sage grouse numbers caused by development. Currently we are unaware of any peer reviewed research that definitively proves impacts or lack of impacts of wind turbine generators on sage grouse. We have found white papers, research work that is partially completed, and research based upon species other than the greater sage grouse that indicate negative impacts should be expected.

We are also unaware of any information in terms of on-site or off-site mitigation or best management practices related to greater sage grouse habitat improvement that will ensure a 1:1 replacement of sage grouse lost as a result of wind development.

With the current state of knowledge, what are the USFWS's thoughts on the probability of developing a wind turbine project in a core area with a suitable mitigation plan that would ensure no loss of sage grouse?

Non-core area levels

Our second question is related to energy development in non-core areas. Basically we are not sure of what level of impact can occur in non-core areas to provide flexibility for development but still meet the intent of point # 6 of the Executive Order 2008-2. Point 6 states 'Incentives to enable development of all types outside Core Populations Area should be established (these should include stipulation waivers, enhanced permitting processes, density bonuses, and other incentives). However, such development scenarios should be designed and managed to maintain populations, habitats and essential migration routes outside Core Population Areas.'

The current research currently indicates that 2-3 disturbance occurrences and 20-60 acres of disturbance per 640 acres will result in less than 50% probability of lek persistence. When the number of occurrences is above 3 and disturbance acreage increases above 60 per 640 acres, probability of lek persistence decreases to less than 26% which is defined as 'extreme' by our recommendations.

The question is how low can the probability of lek persistence get or sage grouse populations decline within non-core habitat, and still meet the intent of the sage grouse core area strategy as outlined in the Governor's Executive Order 2008-2?

We appreciate receiving your thoughts to these questions. Please call if you have any questions.

Sincerely,

Steve Ferrell
Director

SF/je

cc: Ryan Lance, Deputy Chief of Staff, Governor's Office
Clifford Kirk, President, Wyoming Game and Fish Commission
Ed Mignery, Vice President, Wyoming Game and Fish Commission
Clark Allan, Commissioner, Wyoming Game and Fish Commission
Aaron Clark, Commissioner, Wyoming Game and Fish Commission
Jerry Galles, Commissioner, Wyoming Game and Fish Commission
Mike Healy, Commissioner, Wyoming Game and Fish Commission
Fred Lindzey, Commissioner, Wyoming Game and Fish Commission
John Emmerich, Deputy Director, Wyoming Game and Fish Department
Mary Flanderka, Habitat Protection Coordinator, Wyoming Game and Fish Department