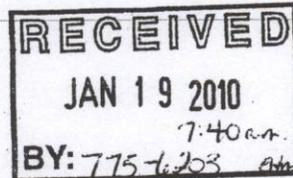




CENTER FOR NATIVE ECOSYSTEMS

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



Don Simpson
State Director
Bureau of Land Management
Wyoming State Office
5353 Yellowstone Road
Cheyenne, WY 82009

January 18, 2010

Re: Protest of the Bureau of Land Management's Notice of Competitive Oil and Gas Lease Sale of Parcels with High Conservation Value

Dear Director Simpson:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Center for Native Ecosystems ("CNE") and Biodiversity Conservation Alliance ("BCA") protest the February 2, 2010 sale of the following parcels:

I. PROTESTED PARCELS

- | | | |
|-------------|-------------|-------------|
| WY-1002-001 | WY-1002-020 | WY-1002-033 |
| WY-1002-002 | WY-1002-021 | WY-1002-034 |
| WY-1002-003 | WY-1002-022 | WY-1002-035 |
| WY-1002-004 | WY-1002-023 | WY-1002-038 |
| WY-1002-005 | WY-1002-024 | WY-1002-039 |
| WY-1002-012 | WY-1002-025 | WY-1002-040 |
| WY-1002-013 | WY-1002-026 | WY-1002-041 |
| WY-1002-014 | WY-1002-027 | WY-1002-045 |
| WY-1002-015 | WY-1002-028 | WY-1002-047 |
| WY-1002-016 | WY-1002-029 | WY-1002-049 |
| WY-1002-017 | WY-1002-030 | WY-1002-050 |
| WY-1002-018 | WY-1002-031 | WY-1002-051 |
| WY-1002-019 | WY-1002-032 | |

II. PROTESTING PARTIES

Center for Native Ecosystems has a well-established history of participation in Bureau of Land Management ("BLM") planning and management activities, including

participation in Wyoming BLM oil and gas leasing decisions and the planning processes for the various Wyoming BLM Field Offices. CNE's mission is to use the best available science to participate in policy and administrative processes, legal actions, and public outreach and education to protect and restore native plants and animals in the Greater Southern Rockies.

Biodiversity Conservation Alliance's mission is to protect and restore biological diversity, habitat for wildlife and fish, rare plants, and roadless lands in Wyoming and surrounding states.

CNE and BCAs members visit, recreate on, and use lands on or near the parcels proposed for leasing. The staff and members of CNE and BCA enjoy various activities on or near land proposed for leasing, including viewing and studying rare and imperiled wildlife and native ecosystems, hiking, camping, taking photographs, and experiencing solitude. CNE and BCAs staff and members plan to return to the subject lands in the future to engage in these activities, and to observe and monitor rare and imperiled species and native ecosystems. We are collectively committed to ensuring that federal agencies properly manage rare and imperiled species and native ecosystems. Members and professional staff of CNE and BCA are conducting research and advocacy to protect the populations and habitat of rare and imperiled species discussed herein. CNE and BCAs members and staff value the important role that areas of high conservation value, should play in safeguarding rare species and communities and other unique resources on public land. Our members' interests in rare and imperiled species and ecosystems on BLM lands will be adversely affected if the sale of these parcels proceeds as proposed. Oil and gas leasing and subsequent mineral development on the protested parcels, if approved without adequate environmental analysis under the National Environmental Policy Act, consultation under the Endangered Species Act, and appropriate safeguards to minimize negative impacts, is likely to result in a greatly increased risk of significant harm to rare and imperiled species and native ecosystems. Further, our staff and members have been deprived of the opportunity to publicly comment on the proposed leasing. As a result, BLM's decision to lease the protested parcels is uninformed and will result in significant harm to rare and imperiled species and native ecosystems. The proposed leasing of the protested parcels will harm our members' interests in the continued use of those public lands and the rare and imperiled species they support. Therefore protestors have legally recognizable interests that will be affected and impacted by the proposed action.

Josh Pollock, Conservation Director for Center for Native Ecosystems, is authorized to file this protest on behalf of CNE. Erik Molvar, Executive Director of Biodiversity Conservation Alliance, is authorized to file this protest on behalf of BCA.

III. AFFECTED RESOURCES

Oil and gas exploration and development authorized through the proposed leasing of the protested parcels is likely to have significant negative impacts on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor

species and other special status species. Exhibit 1 lists the protested parcels, and the special status species and habitats of concern located within each parcel. In addition, many of the protested parcels may contain habitat for species listed under the Endangered Species Act. The descriptions of the protested parcels in the sale notice discloses when species listed under the Endangered Species Act may be present in the protested parcels. Oil and gas development authorized through the proposed leasing of the protested parcels is likely to have significant impacts on the species and habitats listed above and in Exhibit 1. The issues raised in the statement of reasons apply to these species and areas of high conservation value. In this section, we have provided additional background on greater sage-grouse, white-tailed prairie dog and raptors.

greater sage-grouse

Oil and gas development authorized by the leasing of the protested parcels will have significant impacts on greater sage-grouse. A number of the protested parcels are located within a four mile buffer around occupied greater sage-grouse leks. Some of the parcels directly overlap with greater sage-grouse leks. In addition, a number of the protested parcels are within greater sage-grouse core areas. (Information on overlap between protested parcels and the above types of sage-grouse habitat was obtained from a GIS overlay of the parcels proposed for leasing and sage-grouse habitat as mapped by the Wyoming Game and Fish Department). Please see Exhibit 1 for details on the overlap between protested parcels and key greater sage-grouse habitat.

We request that all lease parcels with sage grouse leks, nesting habitat, breeding habitat, wintering habitat and brood-rearing habitat contain stipulations which fully comply with and adhere to the Sage-Grouse Habitat Management Guidelines for Wyoming adopted July 24, 2007. Many if not most of the leases are in sage grouse core areas under the Governor's executive order, yet stipulations that would conform to the state's policy are not applied. We further request that all lease parcels with sage grouse leks, nesting habitats, breeding habitat, wintering habitat and brood-rearing habitat conform to the recommendations offered in the Wyoming Game and Fish Department's "Recommendations for Development of Oil and Gas Resources within Important Wildlife Habitats" (included in the list of relevant documents below).

The BLM has recently issued its own guidelines for the management of sage-grouse in Wyoming, and while these updated guidelines are an improvement over the preexisting management scheme, they contain multiple exemptions, exceptions, and loopholes that will render them ineffective at stopping further population declines due to disturbance from oil and gas development. For example, Lease Notice 3, which applies to all parcels in this sale and seems to be designed to implement BLM's policies for sage-grouse conservation, simply states that parcels in the sale "may... contain important sage-grouse habitats" and that the operator "may be required to implement specific measures to reduce impacts of oil and gas operations" which will be developed during the APD(Application for Permit to Drill) process. Thus, such measures will be constrained by the requirement that they be consistent with the lease rights already granted at an earlier stage of the process. In addition, the provisional language of stipulation (e.g. the

BLM *may* issue additional requirements) raises significant doubt that the stipulation can and will be applied to require significant modifications if needed.

Oil and gas development authorized by the leasing of the protested parcels is likely to have significant direct, indirect, and cumulative impacts on greater sage-grouse breeding, nesting, brood rearing and winter habitat, and result in population declines and lek abandonment. The studies listed below contain information on:

- the status of the greater sage-grouse
- the impacts of oil and gas development on greater sage-grouse
- the efficacy of application of various protective measures (including protective measures applied to the protested parcels as lease stipulations and notices) in mitigating impacts of oil and gas development on greater sage-grouse
- expert recommendations on how best to minimize and mitigate impacts of oil and gas development on greater sage-grouse
- information essential to analysis of the direct and indirect impacts of the oil and gas development on the protested parcels on greater sage-grouse
- information essential to analysis of the cumulative impacts of oil and gas development on the protested parcels, and other past, present and reasonably foreseeable activities, including grazing, climate change, fire, grazing etc., on greater sage-grouse populations

This information is essential to adequate NEPA analysis of the likely direct, indirect, and cumulative impacts of oil and gas development on the protested parcels on greater sage-grouse. In addition, this information is crucial to any effort to develop a range of alternatives for oil and gas development, and to develop and analyze the likely effectiveness of lease notices and stipulations applied to the protested parcels to mitigate impacts of oil and gas development on greater sage-grouse to insignificance. The information in these documents constitutes the best available science on greater sage-grouse, and the impacts of oil and gas development on greater sage-grouse. The BLM has not considered the information contained within these documents as part of a National Environmental Policy Act (NEPA) analysis of the impacts of oil and gas development authorized by the leasing of the protested parcels on greater sage-grouse. We hereby incorporate the following documents by reference:

Western Watersheds Project v. U.S. Forest Service, 535 F. Supp. 2d 1173 (D. Idaho 2007).

Aldridge CL, Boyce MS. 2007. Linking occurrence and fitness to persistence: habitat-based approach for endangered greater sage-grouse. *Ecological Applications* 17: 508-526.

Baxter RJ, Flinders JT, Mitchell DL. 2008. Survival, movements, and reproduction of translocated greater sage-grouse in Strawberry Valley, Utah. *Journal of Wildlife Management* 72: 179-186.

Braun CE. 2006. A blueprint for sage-grouse conservation and recovery. Tucson, AZ: Grouse Inc.

Connelly JW, Schroeder MA, Sands AR, Braun CE. 2000. Guidelines to manage sage grouse populations and their habitats. *Wildlife Society Bulletin* 28: 967-985.

Doherty KE. 2008. Sage-grouse and energy development: Integrating science with conservation planning to reduce impacts. Ph.D. Dissertation. University of Montana, Missoula.

Doherty KE, Naugle DE, Walker BL, Graham JM. 2008. Greater sage-grouse winter habitat selection and energy development. *Journal of Wildlife Management* 72: 187-195.

Holloran MJ, Anderson SH. 2005. Spatial distribution of greater sage-grouse nests in relatively contiguous sage-brush habitats. *The Condor* 107: 742-752.

Holloran MJ, Heath BJ, Lyon A, Slater SJ, Kuipers JL, Anderson SH. 2005. Greater sage-grouse nesting habitat selection and success in Wyoming. *Journal of Wildlife Management* 69: 638-649.

Moynahan BJ, Lindberg MS, Rotella JJ, Thomas JW. 2007. Factors affecting nest survival of greater sage-grouse in Northcentral Montana. *Journal of Wildlife Management* 71: 1773-1783.

Oyler-Mccance SJ, Taylor SE, Quinn W. 2005a. A multilocus population genetic survey of the greater sage-grouse across their range. *Molecular Ecology* 14: 1293-1310.

Oyler-Mccance SJ, St. John J, Taylor SE, Apa A, Quinn TW. 2005b. Population genetics of Gunnison sage-grouse: Implications for management. *Journal of Wildlife Management* 69: 630-637.

Schroeder MA, et al. 2004. Distribution of sage-grouse in North America. *The Condor* 106: 363-376.

Teddy Roosevelt Conservation Partnership, North American Grouse Partnership. 2008. Petition for rulemaking to protect greater sage-grouse on lands administered by the Bureau of Land Management. 44 pages.

Biologists from the Western Association of Wildlife Agencies ("WAFWA") recently authored a memorandum entitled: Using the best available science to coordinate conservation actions that benefit sage-grouse across states affected by oil and gas development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming) (Memorandum from Terry Cleveland and John Emmerich to Tom Christiansen and Joe Bohne, Wyoming Game and Fish Department, January 29, 2008).

Walker BL, Naugle DE, Doherty KE. 2007. Greater sage-grouse population response to energy development and habitat loss. *Journal of Wildlife Management* 71: 2644-2654.

U.S. Fish and Wildlife Service. 2008. Greater sage-grouse interim status update. 31 October 2008. Mountain Prairie Region Wyoming Ecological Services Office, 240 pp.

U.S. Geological Survey. 2009. Ecology and Conservation of Greater Sage-Grouse: A Landscape Species and its Habitat (early release of 25 chapters of the monograph accepted for publication by the University of California Press as part of the Cooper Ornithological Society's *Studies in Avian Biology* series).
<http://sagemap.wr.usgs.gov/monograph.aspx>

Wyoming Department of Game and Fish. 2009. Recommendations for development of oil and gas resources within important wildlife habitats. May 2009. Cheyenne, WY, 250 pp.

We ask that BLM consider the information contained within these documents in making a decision regarding whether to withdraw the protested parcels given the arguments outlined below in the statement of reasons.

white-tailed prairie dog

A number of the protested parcels are located within important white-tailed prairie dog habitat, including areas that CNE has nominated as white-tailed prairie dog Areas of Critical Environmental Concern (See Exhibit 1 for details). GIS data for this analysis was obtained from various sources; details on the data sources will be provided upon request. Oil and gas development authorized by the leasing of the protested parcels is likely to have significant direct, indirect, and cumulative impacts on white-tailed prairie dog and other species that rely on white-tailed prairie dogs, including black-footed ferrets. The studies listed below contain information on:

- the status of the white-tailed prairie dog
- the impacts of oil and gas development on the white-tailed prairie dogs
- the efficacy of application of various protective measures (including protective measures applied to the protested parcels as lease stipulations and notices) in mitigating impacts of oil and gas development on white-tailed prairie dogs
- expert recommendations on how best to minimize and mitigate impacts of oil and gas development on white-tailed prairie dogs
- information essential to analysis of the direct and indirect impacts of the oil and gas development on the protested parcels on white-tailed prairie dogs
- information essential to analysis of the cumulative impacts of oil and gas development on the protested parcels, and other past, present and reasonably foreseeable activities, including grazing, climate change, plague, shooting etc., on white-tailed prairie dog populations

This information is essential to adequate NEPA analysis of the likely direct, indirect, and cumulative impacts of oil and gas development on the protested parcels on the white-tailed prairie dog, and associated species, including black-footed ferret. In addition, this information is crucial to any effort to develop a range of alternatives for oil and gas development, and to develop and analyze the likely effectiveness of lease notices and stipulations applied to the protested parcels to mitigate impacts of oil and gas development on white-tailed prairie dogs to insignificance. The information in these documents constitutes the best available science on white-tailed prairie dogs, and the impacts of oil and gas development on white-tailed prairie dogs. The BLM has not considered the information contained within these documents as part of a National Environmental Policy Act (NEPA) analysis of the impacts of oil and gas development authorized by the leasing of the protested parcels on white-tailed prairie dogs or associated species, including black-footed ferrets. We hereby incorporate the following documents by reference:

Center for Native Ecosystems et al. 2002. ESA petition to list the white-tailed prairie dog, submitted to U.S. Fish and Wildlife Service on July 11, 2002.

<http://nativeecosystems.org/wp-content/uploads/wtpd-esa-listing-petition.pdf>

Center for Native Ecosystems. 2003. Nominations for the designation of Areas of Critical Environmental Concern for 25 large white-tailed prairie dog complexes. Submitted to Wyoming Bureau of Land Management on January 21, 2003

<http://nativeecosystems.org/wp-content/uploads/acec-nomination.pdf>

<http://nativeecosystems.org/wp-content/uploads/acec-map.pdf>

Wyoming BLM prepared a programmatic Biological Evaluation of the impacts of Wyoming BLM's oil and gas program on white-tailed prairie dog. The BE which can be found at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/wildlife/wt-prdog.Par.20150.File.dat/WTPDbio-eval.pdf>, concludes that the BLM's oil and gas program in Wyoming will contribute to the need to list the white-tailed prairie dog under the Endangered Species Act.

The BE makes the following determination on p. 3-14:

"Implementation of energy and mineral resource management actions may impact and is likely to contribute to the need for Federal listing of the WTPD for the Great Divide (Rawlins FO), Green River (Rock Springs FO), Kemmerer, and Pinedale RMPs. This determination is based on the limited ability for the BLM to provide minimization of direct effects of oil and gas development to the WTPD through implementation of the conservation strategies (section 4.0) and the potential to damage or destroy suitable occupied and unoccupied WTPD habitat on split estates. In addition, each of these FOs have WTPD complexes located in areas of potential mineral development."

The BE recommends the following Best Management Practices for oil and gas development to remedy this situation on p. 4-2:

"No further oil and gas exploration and development should be allowed into occupied prairie dog colonies, or the BLM should apply a Condition of Approval (COA) on all Applications for Permit to Drill (APDs) within areas containing known populations of WTPDs that protects rearing of young from April 1 through July 15. When possible, a No Surface Occupancy stipulation should be applied to all occupied and recovering prairie dog habitat for well pads or ancillary facilities (e.g. compressor stations, processing plants, etc.) within 1/8th mile of WTPD habitat. When possible, no seismic activity should be allowed in occupied or recovering prairie dog habitat."

Though BLM has prepared new RMPs since this BE was written, none of the new RMPs incorporated the above BMPs recommended in the BE.

Raptors

Oil and gas development authorized by the leasing of the protested parcels will have significant impacts on various raptor species. A number of the protested parcels are located within important raptor habitat, including, but not limited to nesting habitat. (Information on overlap between protested parcels and raptor habitat was obtained from the BLM sale notice for this oil and gas lease sale). Please see Exhibit 1 for details on the overlap between protested parcels and important raptor habitat.

Oil and gas development authorized by the leasing of the protested parcels is likely to have significant direct, indirect, and cumulative impacts on raptor nesting habitat, and other important raptor habitat and result in nest abandonment and contribute to population declines. The study listed below contain information on:

- the status of various raptor species
- the impacts of oil and gas development on raptors
- the efficacy of application of various protective measures (including protective measures applied to the protested parcels as lease stipulations and notices) in mitigating impacts of oil and gas development on raptors
- expert recommendations on how best to minimize and mitigate impacts of oil and gas development on raptors
- information essential to analysis of the direct and indirect impacts of the oil and gas development on the protested parcels on raptors
- information essential to analysis of the cumulative impacts of oil and gas development on the protested parcels, and other past, present and reasonably foreseeable activities, including grazing, climate change, fire, grazing etc., on raptor populations

This information is essential to adequate NEPA analysis of the likely direct, indirect, and cumulative impacts of oil and gas development on the protested parcels on raptors. In addition, this information is crucial to any effort to develop a range of alternatives for

oil and gas development, and to develop and analyze the likely effectiveness of lease notices and stipulations applied to the protested parcels to mitigate impacts of oil and gas development on raptors to insignificance. The information in this document constitutes the best available science on and the impacts of oil and gas development on raptors. The BLM has not considered the information contained within these documents as part of a National Environmental Policy Act (NEPA) analysis of the impacts of oil and gas development authorized by the leasing of the protested parcels on sensitive raptor species. We hereby incorporate the following documents by reference:

D. M. Whittington and G. T. Allen. 2008. Draft guidelines for raptor conservation in the Western United States. February 2008. U.S. Fish and Wildlife Service, Region 9, Washington, D.C. 156 pp.

We ask that BLM consider the information contained within these documents in making a decision regarding whether to withdraw the protested parcels given the arguments outlined below in the statement of reasons.

IV. STATEMENT OF REASONS

BLM should withdraw from the sale all protested parcels for the reasons set forth below. There is credible evidence of resource conflicts and potentially significant environmental impacts which have not been properly analyzed. Oil and gas development authorized by the leasing of the protested parcels is likely to have significant impacts on several special status species, including greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and several raptor species. The BLM should withdraw the protested parcels pending completion of pre-leasing programmatic and site-specific Environmental Assessments or Environmental Impact Statements that provide an adequate analysis of the impacts of the proposed leasing on rare and imperiled species, special status species, areas of high conservation value, and other sensitive resources; and compliance with the National Environmental Policy Act (NEPA). In addition, the BLM should withdraw the protested parcels until the BLM has met its obligations with respect to special status species. The BLM should also withdraw all protested parcels that may contain habitat for species protected under the Endangered Species Act (ESA), pending BLM compliance with the requirements of the ESA. In addition, BLM should withdraw the protested parcels until BLM can demonstrate that leasing the protested parcels will not violate the Federal Land Policy and Management Act (FLPMA). Finally, BLM should withdraw the protested parcels until the BLM has met its obligations under the Administrative Procedure Act.

A. National Environmental Policy Act

1. BLM Has Failed to Take a "Hard Look" at the Environmental Effects of the Proposed Leasing.

The National Environmental Policy Act (NEPA) requires federal agencies to prepare a statement on the environmental impacts of every major action significantly affecting the quality of the human environment. National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(C) (2009). According to the Supreme Court, agencies must take a “hard look” at the environmental effects of major federal actions in order to satisfy that requirement. *Kleppe v. Sierra Club*, 427 U.S. 390, 410n.21 (1976). While NEPA does not mandate particular results, it does prescribe a necessary process that agencies must follow during their decision-making processes. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). “Federal agencies shall use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. §1500.2(e) (2009). Agencies are required to consider alternatives to a proposed action and must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C § 4332(C). Federal regulations make clear that discussion of alternatives to the proposed action is “the heart” of the environmental impact statement. 40 C.F.R. §1502.14 (2009).

a. BLM Failed to Consider Significant New Information

None of the NEPA documents, to which the leasing is tied, address the significant new information now available on the status of the greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor species and other special status species. 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 effect of [its] planned action, even after a proposal has received initial approval.” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)).

In order to satisfy the “hard look” requirement, the BLM must supplement its existing environmental analyses when new circumstances “raise[] significant new information relevant to environmental concerns” *Portland Audubon Soc’y v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 2000). Agencies are required to “prepare supplements to either draft or final environmental impacts statements if . . . there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii) (2009). The Supreme Court has held that a supplemental EIS must be prepared if “new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered” *Marsh v. Or. Natural Res. Council*, 490 U.S. 390, 374 (1989); see 42 U.S.C. § 4332(2)(C) (2009). In a recent Utah case, the court held that the “Utah BLM ignored significant new information when it decided to lease the sixteen parcels at issue without first conducting a supplemental NEPA analysis.” *So. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1267 (D. Utah 2006). The analysis relied upon failed to reflect significant new information regarding the wilderness characteristics of the parcels at issue. *Id.* Further, in *Center for Native Ecosystems*, the Interior Board of Land Appeals held that once the BLM has identified existing NEPA documents, it is the responsibility

of the relevant field office reviewers to determine whether there were "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Center for Native Ecosystems*, 170 IBLA 331, 346 (2006) ("CNE 1").

In the present case, BLM has failed to meet the requirements of NEPA in light of the significant new information regarding greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor species and other special status species. BLM must address this new information in a NEPA analysis of the proposed leasing of the protested parcels in order to comply with NEPA. The BLM has been provided with significant new information and changed circumstances relevant to the potential impacts of the oil and gas development authorized by the proposed leasing, on a number of the special status species at issue here, including, greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and other special status species. Center for Native Ecosystems has provided BLM with significant new information on a number of these special status species, in each of our previous protests of BLM oil and gas lease sales, and in comments on Resource Management Plan Revisions and environmental analyses of proposed oil and gas developments. We hereby incorporate the significant new information section in each of our past protests of WY BLM oil and gas lease sales by reference. In addition, we hereby incorporate by reference significant new information on the aforementioned species that we have provided to BLM in our comments and protests throughout the relevant RMP revision processes, and/or as part of comments on oil and gas leasing environmental assessments. Finally, the documents and studies that we have referenced in 'Affected Resources' section of this protest contain significant new information on greater sage-grouse and white-tailed prairie dog that has not been considered in the NEPA documents to which the proposed leasing is tiered. The BLM has been provided with new information on the status of greater sage grouse, white-tailed prairie dog and sensitive raptor species, new science on the likely impacts of oil and gas development on these species, new information on the likely extent of oil and gas development likely in habitat for these species, and new science on the likely effectiveness of the standard mitigation measures proposed by BLM to mitigate the impacts of the proposed leasing on these species. In addition, some of the documents referenced in the 'Affected Resources' of this protest, provide expert recommendations regarding how to mitigate the impacts of oil and gas development on greater sage-grouse, white-tailed prairie dog and various raptor species. None of the NEPA documents, to which the proposed leasing is tiered, adequately address significant new information that bears directly on the impacts of oil and gas development on the aforementioned special status species. The BLM must address the significant new information and changed circumstances that have arisen since publication of the NEPA documents to which the proposed leasing is tiered, in order to comply with NEPA.

b. BLM Failed to Conduct Direct, Indirect, and Cumulative Impacts Analysis

None of the documents which BLM relied upon in its Determination of NEPA Adequacy consider the direct, indirect, and cumulative effects of oil and gas drilling on (x species) and its habitat. At minimum, "the agency's [Environmental Assessment] must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002). More specifically, "an environmental impact statement must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002) (citing *Custer County Action Assoc. v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001)) (internal quotation omitted); see also 40 C.F.R. § 1509.25(a)(2) (2009) (scope of EIS is influenced by cumulative actions and impact); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1149 (W.D. Wash. 2000) (management plans were unlawful for failing to consider cumulative impacts on species). *Conner v. Burford* holds that the inability at the lease sale stage to fully ascertain effects of development "is not a justification for failing to estimate what those effects might be." *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); see also *Methow Valley Citizens Council*, 490 U.S. 332 (1989).

Cumulative impact is defined as "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 other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (2009). The Tenth Circuit recently noted that the BLM's own Handbook for Fluid Mineral Resources recognizes that "BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities." *Pennaco Energy Inc., v. U.S. Dep't of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004).

The BLM must address the effects of direct, indirect and cumulative impacts of oil and gas leasing on the greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret and various raptor species, in a NEPA document in order to comply with NEPA. The BLM has issued determinations of NEPA adequacy that conclude that various existing NEPA documents contain adequate analysis of the impacts of the proposed leasing, and consideration of alternatives. The BLM also proposes to conduct further site-specific NEPA analysis at the time when a lessee applies for an Application for a Permit to Drill (APD). As discussed further below, the appropriate time to conduct site-specific NEPA analysis is at the leasing stage, not at the stage when a lessee files an APD. However, regardless of whether BLM is correct in its position that the appropriate time to conduct site-specific analysis at the APD stage rather than at the leasing stage, the BLM's existing programmatic NEPA documents do not contain adequate analysis of the environmental impacts of the proposed leasing, or adequate consideration of a range of alternatives. These programmatic NEPA documents form the basis for the decision to lease the protested parcels. The Finding of No Significant Impact in these programmatic NEPA documents and subsequent DNAs, is predicated on the application of lease stipulations that are intended to protect resources (in this case

special status species and their habitat, a Wilderness Study Area, and other sensitive resources), from significant impacts. However, most of the programmatic NEPA documents that BLM relies upon in making this FONSI (primarily Resource Management Plans (RMPs) and various RMP Amendments), are decades old, and have been rendered obsolete by, 1) new information on the rate and scale of oil and gas development on BLM lands, 2) new information on impacts of oil and gas development on special status species, 3) research demonstrating that lease stipulations outlined in these documents and applied to the protested parcels are ineffective at minimizing impacts to special status species, and 4) changes in the status (both biological and regulatory) of many special status species. Further, many of these documents did not contain an adequate analysis of impacts to special status species, or consideration of alternatives, even given the information that was available at the time they were prepared. BLM has completed revisions of some of the relevant Resource Management Plans. However, these revised Resource Management Plans fail to adequately analyze the impacts of oil and gas development on the special status species at issue here, or to consider an adequate range of alternatives. We hereby incorporate our comments on the relevant revised Resource Management Plans, by reference.

The BLM must revise its existing programmatic NEPA documents prior to a decision to apply particular lease stipulations to the protested parcels and lease them for oil and gas exploration and development. In doing so, the BLM must adequately analyze the potential direct, indirect, and cumulative impacts of the proposed leasing on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and other special status species that may occupy the protested parcels, as well as Citizen's Proposed Wilderness Areas.

For example, the NEPA documents to which the proposed leasing is tiered do not provide adequate analysis of the potential direct and indirect effects of oil and gas exploration and development on the protested parcels on greater sage-grouse. In addition, the BLM has not adequately analyzed the potential cumulative impacts of oil and gas development, grazing, climate change, oil shale and tar sands development, geothermal development, alternative energy development, off-road vehicle use, and other activities on greater sage-grouse over the life of the Resource Management Plans. BLM adopted a National Sage-Grouse Conservation Strategy in 2004 as part of an effort to ensure that greater sage-grouse populations and habitats are conserved and recovered across the range of the greater sage-grouse. The old Resource Management Plans to which much of the proposed leasing is tiered, do not include significant new information outlined in the National Sage-Grouse Habitat Conservation Policy, yet the BLM proposes to authorize leasing on the protested parcels without revising or supplementing these RMPs, or conducting a site-specific pre-leasing NEPA analysis that addresses this information. In addition, the recently revised RMPs at issue here do not undertake the analysis or management measures required by that strategy. The BLM National Sage-Grouse Habitat Conservation Strategy has failed, and BLM has contributed to significant declines in sage-grouse populations across the species' range, and has contributed to the need to list the species under the Endangered Species Act. On December 4, 2007, the Federal District Court for the District of Idaho reversed and remanded the U.S. Fish and

Wildlife Service's ("FWS") decision not to list the sage grouse as "threatened" or "endangered" under the ESA. *Western Watersheds Project v. U.S. Forest Service*, 535 F. Sup. 2d 1173 (D. Idaho 2007). The court explained the perilous condition of the sage grouse and the impact suffered by its habitats to date. *Id.* at 1173. Further elaborating on the current state of grouse habitat, the court noted: "Nowhere is sage-grouse habitat described as stable. By all accounts, it is deteriorating, and that deterioration is caused by factors that are on the increase." *Id.* at 1186. The court specifically focused on the impact of oil and gas development on grouse habitat as identified by an independent expert team. *Id.* at 1179. The court noted "a singular lack of data on measures taken by the BLM to protect the sage-grouse from energy development, the single largest risk in the eastern region." *Id.* at 1188. The BLM has failed to adequately protect greater sage-grouse from significant declines on BLM lands across its range, in large part because it has systematically failed to adequately analyze the direct, indirect and cumulative impacts of oil and gas development, and a variety of other BLM authorized activities, on the greater sage-grouse. An emerging scientific consensus amongst sage-grouse experts suggests that, in order to avoid significant continued declines of greater sage-grouse, BLM must: 1) set aside substantial areas of sage-grouse habitat as reserves free from oil and gas development, and 2) avoid development within breeding, summer and winter habitats, which are essential to the survival of populations, and 3) apply adequate mitigation measures as lease stipulations, to ensure against significant declines in response to energy development in areas outside of core reserves. In this instance the BLM is authorizing leasing of significant acreage of key greater sage-grouse habitat, including sage-grouse leks, breeding habitat, nesting habitat, and winter habitat. Experts recommend avoiding development within breeding and winter habitats, and within 4 miles of greater sage-grouse leks. BLM is authorizing oil and gas development within these key habitats, with lease stipulations that are unlikely to prevent significant declines in greater sage-grouse populations in these areas. The best available science on the greater sage-grouse suggests that BLM's lease stipulations (including those attached to the leases at issue here), are inadequate to prevent significant declines of greater sage-grouse in response to large-scale oil and gas development. Please see the references listed in the 'Affected Resources Section of this Protest for studies and research reviews that substantiate the above claims. The BLM has failed to conduct adequate programmatic analysis of the direct, indirect and cumulative impacts of the proposed leasing on greater sage-grouse. The BLM has failed to address significant new information that bears directly on the impacts of leasing the protested parcels in greater sage grouse habitat in general, and particularly in areas that are within a four mile buffer surrounding greater sage-grouse leks, within greater sage-grouse core areas identified by the Governor's greater sage-grouse working group, and winter habitat. The BLM's outdated and inadequate programmatic analysis of leasing the protested parcels in greater sage-grouse habitat has resulted in application of lease stipulations that have been repeatedly demonstrated to be ineffective at mitigating impacts of leasing and subsequent oil and gas development to insignificance. Past leasing with identical lease stipulations has resulted in significant impacts to greater sage-grouse in Wyoming, and has resulted in the BLM contributing to the need to protect the greater sage-grouse under the Endangered Species Act. The decision to lease the protested parcels in greater sage-grouse habitat with the stipulations attached in the sale notice, will result in substantially increased and unnecessary risk of

significant impacts to greater sage-grouse. Please see the documents referenced in the 'Affected Resources' section of this protest for substantiation of the above claims. BLM failed to conduct an adequate NEPA analysis of the proposed leasing. BLM's conclusion that sale of the leases at issue here, will not significantly impact the greater sage-grouse, is arbitrary and capricious.

Similarly, the BLM has not adequately consider the direct, indirect and cumulative impacts of oil and gas leasing and subsequent development on white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor species and other special status species that may rely on habitat within the protested parcels. The BLM must address the effects of direct, indirect, and cumulative impacts of oil and gas leasing on the all of these special status species, in a NEPA document in order to comply with NEPA.

c. BLM Failed to Address an Adequate Range of Alternatives

The purpose of NEPA's alternatives requirement is to ensure that agencies do not undertake projects "without intense consideration of other more ecologically sounds courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." *Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs*, 492 F.2d 1123, 1135 (5th Cir. 1974); *see also Or. Env'tl. Council v. Kunzman*, 614 F. Supp. 657, 660 (D. Or. 1985) (stating that the alternatives that must be considered under NEPA are those that would 'avoid or minimize' adverse environmental effects.) Federal agencies shall "use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e). Alternatives should include reasonable alternatives to a proposed action that will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. *Headwaters, Inc. v. BLM*, 915 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466-67 (10th Cir. 1984).

In *Pennaco Energy*, the Tenth Circuit upheld the IBLA's ruling, which overturned BLM's decision to lease a number of parcels for oil and gas development because the NEPA analysis failed to consider an adequate range of alternatives. *Pennaco Energy, Inc. v. Dept. of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004). The court stated "in order to provide 'a clear basis for choice among options by the decision maker and the public,' an agency's EIS must consider the "no action" alternative." *Id.* at 1150; 40 C.F.R. § 1502.14(d) (EIS shall "[i]nclude the alternative of no action"). The court found that "the EIS did not consider reasonable alternatives available in a leasing decision, including whether specific parcels should be leased, appropriate lease stipulations, and NSO and non-NSO areas." *Pennaco*, 377 F.3d at 1154.

In the present case BLM must consider a "reasonable range of alternatives," in a site specific NEPA analysis of leasing of each of the protested parcels. The BLM should analyze an adequate range of alternatives, including permanently suspending leasing in key habitat for rapidly declining species that may be significantly impacted by oil and gas

development at a landscape scale, applying 'no surface occupancy' stipulations to key habitat for special status species, and conducting phased leasing in key habitat for special status species. When new information suggests that existing lease stipulations are ineffective, and that alternative lease stipulations might better minimize impacts of oil and gas exploration and development on a particular special status species, the BLM should consider a range of alternatives that includes application of any such alternative lease stipulations. BLM has not considered an adequate range of alternatives to the proposed leasing of the protested parcels.

For example, none of the RMPs to which the proposed leasing is tiered, consider setting aside large core reserves for greater sage-grouse that will remain free from oil and gas development for the life of the RMPs. Nor do any of the RMPs consider an alternative in which oil and gas development activities are prohibited within 4 miles of leks and associated nesting areas, an alternative in which oil and gas development activities are prohibited within a buffer of greater than ¼ mile but less than 4 miles of sage-grouse leks, an alternative with phased development of sage-grouse habitat, an alternative that concentrates road construction and development so as to avoid key sage-grouse habitat, etc. The best available science suggests that these alternatives may better protect greater sage-grouse in the face of oil and gas development, and that adoption of more protective alternatives may be necessary in order to ensure that BLM does not continue to contribute to the need to list the greater sage-grouse under the Endangered Species Act (See documents listed in the 'Affected Resources Section of this Protest).

The BLM has failed to consider an adequate range of alternatives to explore the best ways to minimize impacts of the proposed leasing to greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and various raptor species or on sensitive lands within wilderness study areas.

2. BLM Must Conduct NEPA Analysis Prior to Making an Irretrievable and Irreversible Commitment of Resources

NEPA analysis must be conducted prior to a federal action that would result in an "irreversible and irretrievable commitment of resources." *Mobile Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2d. Cir. 1977). Doing otherwise "would frustrate the fundamental purpose of the National Environmental Policy Act . . . which is to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions, early enough so that it can serve as an important contribution to the decision making process." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007). Leasing without a No Surface Occupancy ("NSO") stipulation has on-the-ground consequences and is an "irreversible and irretrievable commitment of resource," which requires NEPA analysis. *So. Utah Wilderness Alliance*, 166 IBLA 270, 276-77 (2005). In *Conner v. Burford*, the court addressed oil and gas leasing in the Flathead and Gallatin National Forests. 848 F.2d 1441 (9th Cir. 1988). That case mandates an EIS at the lease sale stage, even though it is difficult to ascertain whether, or where, drilling activity might occur. *Id.* at 1451; see also *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004). In a more recent Tenth Circuit case the court stated that "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." *N.M. ex rel Richardson v. BLM*, 565 F.3d 683, 717-18 (10th Circuit 2009). The Court went on to conclude that the issuance of an oil and gas lease without an NSO stipulation constituted such a commitment of resources. *Id.* at 718.

In the present case, BLM has proposes to issue leases in key habitat for greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret and various raptor species, and to defer site-specific NEPA analysis of the impacts of the oil and gas development authorized by the proposed leasing to the time when an operator applies for a permit to drill. These leases do not have NSO stipulations. As a consequence, oil and gas development authorized by the proposed leasing is likely to have significant impacts on these species. The proposed leasing constitutes an irretrievable and irreversible commitment of resources.

a. Site-Specific NEPA Analysis Required Prior to Leasing

Because lease issuance is the point at which there has been an irretrievable and irreversible commitment of resources, "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 . . ." *Ctr. for Native Ecosystems*, 170 IBLA 345 (2006) (emphasis added); see also *So. Utah Wilderness Alliance (SUWA)*, 166 IBLA 270, 276-77 (2005); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (concluding that an EIS must be prepared when the lease is issued); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988). In *Park County*, the court permitted the agency to forego preparation of an EIS when it had previously prepared an extensive environmental assessment covering the leases in question. *Park County Resource Council v. U.S. Dep't of Agric.*, 817 F.2d 609, 624 (10th Cir. 1987). That holding does not preclude BLM from preparing an EIS at the pre-leasing stage. *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004). Rather, that holding is limited to cases where the agency prepared an "extensive" environmental assessment covering the leases in question. *Id.* In the present case, the only NEPA documents prepared for the protested parcels are Resource Management Plan documents that do not contain adequate consideration of the impacts of reasonably foreseeable post-leasing development, or consider an adequate range of alternatives. Thus, the BLM must consider all stages of oil and gas production in a NEPA analysis conducted prior to leasing.

Thus, BLM must conduct a site-specific analysis of the impacts of all stages of oil and gas development on the protested parcels on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and various raptor species, prior to leasing the protested parcels. BLM should: 1) conduct surveys of the protested parcels, determine and disclose whether the parcel contains habitat for rare and imperiled species (including special status species), 2) analyze the likely direct, indirect, and cumulative impacts of oil and gas exploration and development on rare and imperiled species, 3) analyze an adequate range of alternatives to the proposed leasing (e.g. no leasing, no surface occupancy, etc.), and 4) analyze any proposed mitigation measures applied as

lease stipulations or lease notices to determine their likely effectiveness; prior to leasing the protested parcels.

3. NEPA Requires Analysis of Effectiveness of Mitigation Measures

A complete discussion of steps that can be taken to mitigate adverse environmental impacts is an important ingredient of the NEPA process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Id.* In recognition of the importance of a discussion of mitigation measures, Council on Environmental Quality (CEQ) regulations "require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(e)." *Id.* at 352.

In this instance, BLM has not provided a complete discussion of steps that can be taken to mitigate adverse environmental impacts to greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and various raptor species, and neither the agency nor the public can properly evaluate the severity of the adverse effects that oil and gas development on the protested parcels will have on these species. None of the relevant NEPA documents to which the proposed leasing is tiered, contain a complete discussion of the variety of potential steps that could be taken to mitigate adverse environmental impacts to these species. The BLM has not: 1) prepared a site-specific NEPA document, 2) discussed an adequate range of site-specific alternatives (e.g. no leasing, no surface occupancy, etc.), or 3) discussed the consequences of the proposed action; and thus BLM has failed to discuss possible mitigation measures at each stage of this process. As a consequence, BLM has applied mitigation measures (as lease notices and stipulations) that are unlikely to be effective at mitigating adverse impacts to greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black footed ferret and various raptor species, and has not disclosed the severity of the adverse impacts that oil and gas development on the protested parcels will have on these species. This failure to disclose the severity of adverse impacts is especially egregious with respect to protested parcels in greater sage-grouse habitat, given that several peer reviewed studies (see 'Affected Resources' section of this protest) have demonstrated that the mitigations proposed as lease stipulations and notices to protect greater sage-grouse have been completely ineffective in existing oil and gas fields, and are likely to be ineffective in this instance. Thus, there are likely to be very severe adverse impacts on greater sage-grouse populations if the leasing of the protested parcels proceeds as proposed. BLM must provide a complete discussion of steps that could be taken to mitigate impacts to the aforementioned species, as part of a site-specific NEPA analysis of the proposed action. This analysis should include discussion of alternate mitigation measures (to be applied as lease stipulations) that have been recommended by U.S. Fish and Wildlife Service, State Wildlife Agencies, and other experts to mitigate impacts of oil and gas development on these species to insignificance. This analysis should also include alternate mitigation measures that other BLM Field Offices are applying as lease stipulations to prevent

significant impacts to these species (e.g. greater sage-grouse lease stipulations commonly applied in Utah and Colorado).

a. FONSI Must be Based on Effectiveness of Mitigation Measures

When a proposed action will result in impacts to resources, the Agency is obligated to describe what mitigating efforts it could pursue to off-set the damages that would result from the proposed action. See 40 C.F.C. § 1502.16(h) (2009) (stating that an EIS "shall include discussions of . . . [m]eans to mitigate adverse environmental impacts"). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Carmel-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997). (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). The Ninth Circuit explained that fair evaluation requires agencies to "analyze[] the mitigation measures in detail [and] explain how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988).

In *Neighbors of Cuddy Mountain*, the court found that while the U.S. Forest Service ("USFS") had acknowledged that a proposed timber sale would negatively impact the redband trout by increasing sedimentation levels, the EIS prepared by the USFS did not identify which (or whether) mitigation measures might decrease sedimentation in the creeks affected by the sale. *Id.* Further, the court noted that "it is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted, or given a reasoned explanation as to why such an estimate is not possible." *Id.* Further, the court found that "[t]he Forest Service's broad generalizations and vague references to mitigation measures . . . do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide." *Id.*

In the present case, BLM has failed to discuss mitigation measures in sufficient detail to ensure that consequences of oil and gas development authorized by the leasing have been fairly evaluated. None of the NEPA documents that the proposed leasing is tiered to contain an analysis of the likely effectiveness of mitigation measures applied as lease stipulations, lease notices, or conditions of approval of APDs, in mitigating to insignificance, impacts of oil and gas development on special status species, including greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret and various raptor species, or on sensitive lands. The BLM has failed to analyze the mitigation measures applied as lease stipulations and notices in detail, and to explain how effective the measures would be. The BLM has listed the mitigation measures that will be applied to the lease parcels (as lease stipulations and notices). However, BLM does not provide any estimate of how effective the mitigation measures would be if adopted, and does not give a reasoned discussion of why such an estimate is not possible.

With respect to the parcels in greater sage-grouse habitat, BLM has not provided any estimate of the likely effectiveness of mitigation measures (which include timing limitations on development in breeding and winter seasons, and a ¼ mile buffer around greater sage-grouse leks) despite the fact that BLM is aware of: 1) several peer reviewed studies of the impacts of oil and gas development in existing oil and gas fields that demonstrate that these mitigation measures do not prevent significant lek loss and population declines; 2) peer reviewed studies that model the likely effectiveness of application of different sized no surface occupancy buffers around leks to mitigate impacts of oil and gas development on breeding sage-grouse 3) reviews of greater sage-grouse research done by experts at state wildlife agencies that address the impacts of oil and gas development and the effectiveness of various mitigation measures, including the mitigation measures applied to the protested parcels as lease notices and stipulations, 4) alternate mitigation measures recommended by biologists at U.S. Fish and Wildlife Service and state wildlife agencies, to better mitigate impacts of oil and gas development on greater sage-grouse. (the documents cited in the 'Affected Resources' section of this protest contain the this information).

As a result, BLM's Finding of No Significant Impact (FONSI) is arbitrary and capricious. The FONSI is predicated on the assumption that mitigation measures applied to the lease parcels in sage-grouse habitat will be effective. This fundamental assumption is without factual basis, and runs directly contrary to the totality of the information in front of the BLM, including the best available science. The lease stipulations for greater sage-grouse consist of timing limitations that restrict surface disturbance during the breeding season in breeding and nesting habitat, and during winter in winter habitat. These stipulations allow surface disturbance and construction of facilities associated oil and gas development activities to occur in this habitat outside of the season during which the seasonal stipulation is applied. The resulting loss and fragmentation of habitat may make these habitats unusable in the breeding and winter seasons, in the years following development activity that takes place in previous years outside of these seasons. These timing limitations are unlikely to protect the greater sage-grouse from significant declines in response to oil and gas development in crucial breeding and winter habitat. See the documents listed in the 'Affected Resources' Section of this protest for details on the ineffectiveness of timing limitations at mitigating impacts of oil and gas development on greater sage-grouse to insignificance. The BLM also applies a restriction on surface occupancy within ¼ mile of occupied greater sage-grouse leks. Several peer reviewed studies have demonstrated that this lease stipulation will be completely ineffective at mitigating impacts to insignificance. See 'Affected Resources section of this protest for the relevant studies) For example, WAFWA (See document cited in the 'Affected Resources' section of this protest) reviewed available literature from 2003-2008 and identified the following persistence levels resulting from application of different "no surface occupancy" or "NSO" buffer sizes at full field development:

NSO Buffer Size	Lek Persistence	Lek Loss
0.25 mi.	4%	96%
0.5 mi.	5%	95%
1.0 mi.	10%	90%

2.0 mi.	28%	72%
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The notices and stipulations outlined above are likely to result in a 95-96% loss of leks across the significant amount of greater sage-grouse breeding habitat that is proposed for leasing in this sale (under a full-field development scenario). There is a scientific consensus that the mitigation measures applied to the parcels at issue here, are unlikely to be effective (see the documents referenced in the 'Affected Resources' section of this protest). Thus, the leasing of the protested parcels is likely to result in significant impacts to greater sage-grouse, and the BLM's FONSI is arbitrary and capricious.

It is also doubtful that the mitigation measures proposed to mitigate impacts to white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor species and other special status species will be effective.

Despite evidence that suggests mitigation measures may not mitigate impacts to insignificance, BLM provides little or no rationale for its assertion that assorted lease stipulations, notices and COAs will mitigate impacts to insignificance. The record is devoid of support for BLM's assertion that the lease stipulations and notices applied to the protested parcels will mitigate impacts to special status species to insignificance.

b. BLM Improperly Relied on the Possibility of Mitigation in Issuing a FONSI

In *Davis v. Mineta*, the Tenth Circuit found that federal agencies did not comply with NEPA when they relied on the possibility of mitigation measures in issuing a FONSI. According to the court, "[m]itigation measures may be relied upon to make a finding of no significant impact *only* if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the *possibility* of mitigation as an excuse to avoid the EIS requirement." *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002) (emphasis provided) (citing *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* ("Forty Questions"), 46 Fed. Reg. 18,026, 18,038 (Council on Env'tl. Quality 1981)).

Many of the lease notices and stipulations applied to protect special status species at issue here contain language that allows them to be waived, but the conditions under which they may be waived are not clearly spelled out in the lease stipulations, leaving the public with little certainty regarding whether and under what circumstances the mitigation measures will actually be implemented. It is unclear when exactly the mitigation measures will be required, and under what specific circumstances they might be waived. For example, the lease stipulations restricting or prohibiting surface occupancy in breeding and/or nesting habitat for greater sage-grouse and raptors state that

“surface occupancy or use...will be restricted or prohibited unless the operator and surface managing agency arrive at an acceptable plan for mitigation of anticipated impacts”. It is unclear what constitutes an “acceptable plan for mitigation of anticipated impacts”, or how exactly the agency and operator would arrive at such a plan. In addition, there is substantial uncertainty regarding whether the lease notices and stipulations applied to protect the species at issue here will be effective even if they are applied. The BLM is relying on the possibility of mitigation to avoid the required site-specific NEPA analysis.

c. BLM Must Appropriately Address Expert Comments

Federal regulations require that agencies “make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.” 40 C.F.R. § 1502.9(a) (2009). The agency is required consider opposing views prior to approving any proposed action, in this case the lease sale. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350n.13(1989) (EIS should reflect critical views of other to whom copies of the draft were provided and responses to opposing views); see also *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994) (“[An EIS] must also disclose responsible scientific opinions in opposition to the proposed action, and make a good faith, reasoned response to it.”). In the final environmental impact statement, BLM must assess and consider comments, respond to each comment by one or more of the provided means, and state its responses. 40 C.F.R. § 1503.4 (2009).

As a result of the fact that BLM has not conducted a site-specific NEPA analysis of oil and gas development authorized by the proposed leasing, the public has not had an opportunity to review the proposed action and alternatives, evaluate the severity of the adverse effects, or comment on the proposed action; and BLMs decision has not been informed by public comment. In addition, BLM has failed to disclose credible scientific opinions on how best to mitigate impacts to greater sage-grouse, raptors and other special status species. Experts have published papers that outline the results of research on the efficacy of mitigation measures proposed to mitigate impacts to greater sage-grouse and other species (see the papers referenced in the ‘Affected Resources’ section of this protest). In addition, experts have recommended that specific mitigation measures be applied to protect greater sage-grouse, raptors, and other species, from potential adverse effects associated with oil and gas development. Unlike the mitigation measures proposed by BLM on the lease parcels at issue here, these recommendations are based on the best available science (see the papers referenced in the ‘Affected Resources’ section of this protest). The information contained in these papers calls into question BLM’s conclusion that oil and gas development authorized by the leasing of the protested parcels will not have significant impacts. BLM has not disclosed or considered credible scientific opinions that call BLM’s conclusion into question. Failure to disclose and thoroughly respond to differing scientific views violates NEPA.

d. NEPA Analysis of Effectiveness of Mitigation Measures Must Have Scientific Integrity

The BLM must evaluate the effectiveness of the mitigation measures used in oil and gas leasing with the best available science. "The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b) (2009). "For this reason, agencies are under an affirmative mandate to 'insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements[,] identify any methodologies used and . . . make explicit reference by footnote to the scientific and other sources relied upon for conclusions[.]'" *Envtl. Def. v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 69, 78 (D.D.C. 2007) (citing 40 C.F.R. § 1502.24 (2009)). If there is scientific uncertainty NEPA imposes the mandatory duties to (1) disclose the scientific uncertainty; (2) complete independent research and gather information if no adequate information exists unless costs are exorbitant or the means of obtaining the information are not known; and (3) evaluate the potential, reasonably foreseeable impacts in the absence of relevant information. *See* 40 C.F.R. § 1502.22 (2009).

The BLM has failed to ensure the scientific integrity of the discussion and analyses contained in the NEPA documents and Determinations of NEPA Adequacy for the leasing of the protested parcels, particularly the protested parcels in greater sage-grouse habitat. BLM has not only failed to adequately evaluate the effectiveness of the mitigation measures applied to the protested parcels as lease stipulations and notices, but has seemingly deliberately avoided considering the best available science and disclosing scientific uncertainty. The BLM's Finding of No Significant Impact is predicated on the assumption that the mitigation measures applied to greater sage-grouse habitat will mitigate impacts to greater sage-grouse to insignificance. The best available science (see documents referenced in the 'Affected Resources' section of this protest) demonstrates that these mitigation measures have not been effective in areas where oil and gas development has occurred on BLM lands, and introduces substantial uncertainty as to whether these measures will mitigate impacts of oil and gas development on sage-grouse to insignificance on the parcels at issue here. BLM is (or should be) well aware of this information, yet has not disclosed it in any of the documents it relies upon in making the decision to lease the protested parcels. In addition, state wildlife agencies, U.S. Fish and Wildlife Service and independent experts have recommended specific measures that should be applied to oil and gas lease parcels to mitigate impacts of oil and gas development on greater sage-grouse, raptors and other species to insignificance (see documents referenced in the 'Affected Resources' section of this protest). BLM is (or should be) well aware of these recommendations. Yet, BLM has not considered these recommendations in any of the documents it relies upon in its decision to lease the protested parcels. Thus, BLM has failed to ensure the scientific integrity of the discussions and analysis in the documents it relies upon in its decision to lease the protested parcels, and has failed to evaluate the effectiveness of the mitigation measures (applied to the protested parcels as lease notices and stipulations) that it proposes to use to mitigate impacts to greater sage-grouse, raptors and other special status species. As a result, BLM's FONSI is arbitrary and capricious.

4. The Documents Relied Upon by BLM in its DNA are Insufficient for NEPA Analysis

The purpose of Determinations of NEPA Adequacy (“DNAs”) is to determine whether BLM can properly rely on existing NEPA documents in making its decision to lease parcels for oil and gas development. *So. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1255 (D. Utah 2006). “DNAs, unlike EAs and FONSI, are not mentioned in [] NEPA or in the regulations implementing [] NEPA’. . . Thus, DNAs are not themselves documents that may be tied to NEPA documents, *but are used to determine the sufficiency of previously issued NEPA documents.*” *So. Utah Wilderness Alliance*, 164 IBLA at 123 (quoting *Pennaco*, 377 F.3d at 1162). In “CNE 1,” the IBLA noted that “a DNA serves to identify for a BLM decision-maker the location of existing NEPA analysis. The DNA cannot supplement what is not sufficient in NEPA documentation. *Center for Native Ecosystems*, 170 IBLA 331, 345 (2006); *see also Kern v. U.S. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002)

The NEPA documents BLM outlines in its Determinations of NEPA Adequacy for the proposed leasing of the protested parcels do not constitute adequate NEPA analysis of oil and gas development that will be authorized by the lease sale.

a. Resource Management Plans Do Not Contain Adequate NEPA Analysis of Oil and Gas Development Authorized by the Proposed Leasing.

The relevant Resource Management Plans (“RMP”) do not contain adequate analysis of the impacts of oil and gas development on the protested parcels on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and various raptor species, nor do they consider an adequate range of alternatives to leasing in habitat for these species. In addition, nearly all of these RMPs were approved between 1985 and 2000, and do not contain significant new information (see previous sections of this protest for more detail) that bears directly on the likely impacts of the proposed action. The Rawlins RMP was revised more recently, and finalized in 2008. However, despite its relatively recent revision, the Rawlins RMP also fails to adequately analyze the impacts of oil and gas development on these species, nor does it consider an adequate range of alternatives. In addition, it does not consider significant new information that bears directly on the impacts of the proposed action, despite the fact that BLM was provided with this information during the comment period on the RMP revision. We hereby incorporate CNE and BCA’s comments on the Rawlins RMP by reference. Thus, these RMPs are insufficient NEPA documents for leasing in important habitat for greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret and various raptor species.

b. No Other NEPA document Contains Adequate NEPA Analysis of the Proposed Action

None of the various additional NEPA documents referenced in BLM's DNAs, contain adequate analysis of the impacts of oil and gas development on the protested parcels on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and various raptor species, or adequate consideration of a range of alternatives to leasing in habitat for these species. In addition, none of these documents contain significant new information (see previous sections of this protest for more detail) that bears directly on the likely impacts of the proposed action.

B. Federal Land Policy Management Act

1. BLM Must Prevent Unnecessary or Undue Degradation

The BLM has a duty under the Federal Land Policy and Management Act ("FLPMA") to prevent unnecessary and undue degradation to the lands under its management. "In managing the public lands the [Secretary of Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). The use of the imperative language "shall", makes clear that Congress intended to leave the Secretary no discretion in administering the Act. *NRDC v. Jamison*, 815 F. Supp. 454, 468 (D.D.C. 1992). "The court in *Mineral Policy Ctr. v. Norton* [found] that in enacting FLPMA, Congress's intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary . . . is undue or excessive." *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 43 (D.D.C. 2003). In addition, that court held that "FLPMA, by its plain terms, vests the Secretary of the Interior with the authority – and indeed the obligation – to disapprove of an otherwise permissible . . . operation because the operation though necessary . . . would unduly harm or degrade the public land." *Id.* at 49.

Oil and gas development authorized by the leasing of the protested parcels will result in unnecessary and undue degradation to special status species and their habitats, including greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor species, and other special status species; Adobe Town Wilderness Study Area and other sensitive lands.

2. BLM Must Mitigate Adverse Effects

The BLM must mitigate the adverse effects on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and various raptor species in order to comply with the "unnecessary and undue degradation" standard of FLPMA. *Kendall's Concerned Area Residents*, 129 IBLA 130, 138; see 42 C.F.R. 3809.2-1(b). "If there are significant environmental effects that cannot be mitigated, an EIS must be prepared even if there is no unnecessary or undue degradation of the public lands." *Id.*; 42 U.S.C. § 4332(2)(C) (1988). "If unnecessary or undue degradation cannot be prevented by mitigating measures, BLM is required to deny approval of the plan." *Kendall's* at 138; see 43 C.F.R. § 3809.0-3(b); *Dep't of the Navy*, 108 IBLA 334, 336 (1989); see 43 U.S.C. § 1732(b) (1988); 43 C.F.R. § 3809.0-5(k).

Negative impacts of oil and gas development on greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor species and other special status species could be mitigated through use of mitigation measures that have been recommended by experts (see documents referenced in the 'Affected Resources' section of this protest. BLM is not mitigating negative effects on these species that could be mitigated, and this will result in unnecessary degradation.

3. Consistency

The BLM is violating FLPMA because it is not being consistent with the policies of state, tribal, and other agencies in its conservation policies for greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, and various raptor species. FLPMA requires the BLM to seek to "be consistent with officially approved and adopted resource related policies and programs . . . of other federal agencies, State and local governments and Indian tribes." 43 C.F.R. § 1610.3-2; *see* 43 U.S.C. § 1712(c)(9).

For example, the Wyoming Department of Game and Fish, the Colorado Division of Wildlife, the Western Association of Fish and Wildlife Agencies, and the U.S. Fish and Wildlife Service have developed greater sage-grouse conservation plans and other documents that make recommendations regarding how to best conserve greater sage-grouse while developing oil and gas resources in and near greater sage-grouse habitat. BLM's treatment of greater sage-grouse is inconsistent with all of these plans and recommendations. Biologists at these state and federal agencies have determined that greater sage-grouse are extremely sensitive to oil and gas development, and that oil and gas development on BLM lands without adequate mitigation measures to prevent significant impacts is contributing to the ongoing decline of the greater sage-grouse. In addition, biologists from these agencies have concluded that the mitigation measures typically used by BLM to mitigate impacts of oil and gas development on greater sage-grouse (including the lease stipulations and notices at issue here) are ineffective, and have recommended mitigation measures that would be more effective at mitigating impacts to insignificance. The greater sage-grouse conservation plans and recommendations that have been made by biologists at these state and federal agencies are consistent with the federal goals mandated by FLPMA, and it is feasible for BLM to manage greater sage-grouse in a manner that is consistent with these plans and recommendations, while still developing oil and gas resources. If BLM continues to ignore the science and recommendations contained in these documents, oil and gas development on BLM managed public land (including the protested parcels) may result in loss of greater sage-grouse populations throughout much of the Eastern half of the species' range.

Similarly, the U.S. Fish and Wildlife Service has recently completed new guidelines for raptor conservation in the western United States, which include recommendations for mitigation of impacts of oil and gas development on raptors. The BLM's treatment of raptors is inconsistent with these guidelines. If BLM continues to ignore the science and recommendations in this document, oil and gas development on BLM lands (including the protested parcels) may result in unanticipated direct, indirect and cumulative impacts on various species of sensitive raptors.

4. BLM Has Failed to Protect Sensitive Species as Required

The BLM recently revised Section 6840 of the BLM Manual. The new regulations under Section 6840 of the BLM Manual are illegal, and should be revoked. The previous version should be re-instated. BLM is failing to protect special status species under the requirements outlined in both the current and previous versions of Section 6840 of the BLM Manual.

The 2008 revisions to BLM manual 6840 on special status species are inconsistent with the mandate of the Endangered Species Act. The ESA states that agencies *shall* (1) utilize their authorities in furtherance of the Act; (2) carry out programs for the conservation of listed species; and (3) insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of, or result in the destruction or adverse modification of habitat of any listed species. ESA §§ 2(c)(1), § 7(a)(1)-(2). The nondiscretionary nature of these duties is evidenced by the use of the word "shall" in all three cases. As a result of the 2008 revisions, the manual purports to give the BLM discretion in performing duties where it does not exist under the ESA. For example, the manual allows the BLM to dispose of lands providing habitat for listed species, including critical habitat under certain circumstances. Disposal of critical habitat could result in a violation of ESA § 7(a)(2), which requires agencies to insure that actions will not result in destruction or adverse modification of critical habitat of listed species.

In addition, portions of the revised manual are inconsistent with the stated objective of the special status species policy. The weakening of protections for various categories of species could result in an increased likelihood that such species will need to be listed in the future. This is in direct conflict with one of the stated policy objectives which is to "initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA." BLM Manual 6840.02(B). For example, the 2008 revisions remove state-listed species from coverage under the policy. Instead, the manual directs State Directors to apply narrow criteria in designating sensitive species. This change could result in a number of state-listed species being removed from coverage under the policy and increasing the likelihood of future listing. Such a result would be contrary to the policy objective of the special status species policy.

FLPMA provides that "nothing in the Act should be construed . . . as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife." 42 U.S.C. § 1732(b). In order to comply with FLPMA, BLM must include state-listed species in its "special status species policy." While the power over public lands is ultimately entrusted to Congress under the Property Clause, it is well established that states can act, subject to constitutional restraints, to preserve wildlife within state boundaries under the rubric of the police power. (*Hughes v. Oklahoma*, 1979). The Supreme Court has stated that a "State is free to enforce its criminal and civil laws on federal land so long as those law do not conflict with federal law." *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 580 (1987). State regulation is only pre-empted

if Congress intended to occupy a field or if state law actually conflicts with or frustrates the purpose of federal law. Here, Congress did not intend to occupy the field of wildlife preservation so comprehensively as to preclude states from enacting legislation to preserve wildlife. Also, there is no conflict between any federal law and the protection of species listed as threatened or endangered by the Colorado Division of Wildlife.

Under the previous version of Section 6840 of the BLM Manual, the BLM still fails to adequately protect Sensitive Species. Instruction Memorandum 97-118, issued by the national BLM office, governs BLM Special Status Species management and requires that actions authorized, funded, or carried out by BLM do not contribute to the need for any species to become listed as a candidate, or for any candidate species to become listed as threatened or endangered. It recognizes that early identification of BLM sensitive species is advised in efforts to prevent species endangerment, and encourages state directors to collect information on species of concern to determine if BLM sensitive species designation and special management are needed.

If Sensitive Species are designated by a State Director, the protection provided by the policy for candidate species shall be used as the minimum level of protection. BLM Manual 6840.06. The policy for candidate species states that the "BLM shall carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species as threatened/endangered." BLM Manual 6840.06. Specifically, BLM shall:

- (1) Determine the distribution, abundance, reasons for the current status, and habitat needs for candidate species occurring on lands administered by BLM, and evaluate the significance of lands administered by BLM or actions in maintaining those species.
- (2) For those species where lands administered by BLM or actions have a significant affect on their status, manage the habitat to conserve the species by:
 - a. Including candidate species as priority species in land use plans.
 - b. Developing and implementing rangewide and/or site-specific management plans for candidate species that include specific habitat and population management objectives designed for recovery, as well as the management strategies necessary to meet those objectives.
 - c. Ensuring that BLM activities affecting the habitat of candidate species are carried out in a manner that is consistent with the objectives for those species.
 - d. Monitoring populations and habitats of candidate species to determine whether management objectives are being met.
- (3) Request any technical assistance from FWS/NMFS, and any other qualified source, on any planned action that may contribute to the need to list a candidate species as threatened/endangered.

BLM Manual 6840.06. Despite this clear guidance, there is little evidence that BLM is fulfilling these obligations. Specifically, BLM failed to: 1) conduct surveys and/or inventories necessary to determine the distribution and abundance of Sensitive Species; 2) failed to assess the reasons for the current status of Sensitive Species; 3) failed to evaluate the potential impacts of leasing and subsequent oil and gas activities on Sensitive Species; 4) develop conservation strategies for Sensitive Species and ensure that the activities in question are consistent with those strategies; 5) monitor populations and habitats of Sensitive Species; and 6) request appropriate technical assistance from all other qualified sources; for any of the sensitive species at issue here. This failure has compromised BLM's NEPA analyses of the likely impacts of oil and gas development authorized by the leasing of the protested parcels, on special status species, including greater sage-grouse, Colorado butterfly plant, white-tailed prairie dog, black-tailed prairie dog, and black-footed ferret.

- a. BLM failed to adequately consider sensitive species in its NEPA documents to which the leasing is tiered

BLM Manual § 1622.1 refers to "Fish and Wildlife Habitat Management" and contains specific language requiring the BLM in the RMP process to, among other things:

- 1) Identify priority species and habitats . . .
- 2) [E]stablish objectives for habitat maintenance, improvement, and expansion for priority species and habitats. Express objectives in measurable terms that can be evaluated through monitoring.
- 3) Identify priority areas for HMPs [Habitat Management Plans] . . .
- 4) Establish priority habitat monitoring objectives . . .
- 5) Determine affirmative conservation measures to improve habitat conditions and resolve conflicts for listed, proposed, and candidate species.

BLM Manual § 1622.11(A)(1) – (A)(3). The RMPs and other NEPA documents to which this leasing is tiered do not meet these obligations, and BLM did not take appropriate steps to remedy these failings before initiating this lease sale.

As a result, oil and gas development authorized by the leasing of the protested parcels will contribute to the need to list the greater sage-grouse, white-tailed prairie dog, black-tailed prairie dog, black-footed ferret, various raptor species, and other special status species; and BLM is failing to meet its obligations with respect to special status species and wildlife in general.

C. Endangered Species Act

1. Consultation Duty and "No Jeopardy"

Before the BLM makes any “irreversible or irretrievable commitment of resources” that may have an impact on a listed species, ESA § 7 requires it to comply with consultation requirements. BLM is required to prepare a biological assessment (BA) to determine whether the listed species is “likely to be affected” by the proposed action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the species will be affected, then BLM must engage in formal consultation with FWS to determine whether the activity “is likely to jeopardize the continued existence of” the species or “result in the destruction or adverse modification of” its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14; *see also* 50 C.F.R. § 402.02 (defining “jeopardy” as lessening the likelihood of survival and recovery of a species). At the conclusion of consultation, the FWS must prepare a “biological opinion” (BO) to evaluate the potential effects of the proposed action on the species or its critical habitat. If the Service concludes that the action will have a negative effect, it must suggest “reasonably and prudent alternatives” (RPAs) that will not cause jeopardy. Otherwise, the Service issues a “no jeopardy” opinion. 16 U.S.C. § 1535(b)(4). The Tenth Circuit stated that “despite its name, consultation is more than a mere procedural requirement, as it allows FWS to impose substantive constraints on the other agency's action if necessary to limit the impact upon an endangered species.” *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009).

The consultation process is triggered by the action of leasing because it is likely to impact black-footed ferret and other species protected under the Endangered Species Act. *See Conner v. Burford*, 848 F.2d 1441, 1452 (1988). In *Connor*, the BLM could not issue oil and gas leases until the FWS analyzed consequences of all stages of the leasing plan in the Biological Opinion (“BiOp”). *Id.* at 1455. ESA’s consultation requirement is not met by “incremental steps” and by mere notification of the potential presence of endangered species. *Id.* at 1452-58. Contrary to the BLM position that relies upon *Wyo. Outdoor Council v. Bosworth*, the Tenth Circuit stated that the critical stage for environmental analysis is the leasing stage, not the APD stage. *Pennaco Energy v. U.S. Dep’t of the Interior*, 377 F.3d 1160 (10th Cir. 2004).

Under the Endangered Species Act (“ESA”), the BLM must consult with FWS before offering the protested parcels for lease because several species listed under the Endangered Species Act, including (but not limited to) black-footed ferret, may be jeopardized by oil and gas development authorized through leasing of the protested parcels. In addition, the protested parcels contain non-block cleared areas where black-footed ferrets may be present but surveys have not been done to determine whether they are present, potential black-footed ferret reintroduction sites, and important recovery habitat for black footed-ferrets within prairie dog colonies

The BLM and FWS have not conducted adequate analysis of the impacts of the proposed leasing on listed species in any programmatic biological assessment or biological opinion. As a result, the leasing of the protested parcels may jeopardize listed species.

In addition, the BLM and FWS must conduct site-specific consultation at the leasing stage that considers not only direct impacts to species on lease parcels, but also

indirect and cumulative impacts to listed species and their habitat both on lease parcels and on adjacent lands. The BLM and FWS must consider not only impacts to survival of the species, but also impacts to recovery. The BLM and FWS have failed to meet these requirements under the ESA with respect to black-footed ferret, and any other listed species that may occur within the protested parcels (See BLM's sale notice for disclosure of potential for ESA listed species within the protested parcels).

2. Duty to Conserve and Duty to Engage in Recovery Planning

In addition to consultation requirements, federal agencies are bound by two affirmative obligations under the ESA. Section 7(a)(1) states that federal agencies shall "seek to conserve [listed] species and shall utilize their authorities in furtherance of the purposes of [the] Act." 16 U.S.C. § 1536(a)(1). A number of courts have held that the duty to conserve imposes an independent duty upon agencies to give the conservation of a listed species top priority. *Carson-Truckee Water Conserv. Dist. v. Watt*, 549 F. Supp. 704 (D. Nev. 1982) citing *TVA v. Hill*, 437 U.S. 153, 184 (1978); *Bensman v. U.S. Forest Serv.*, 984 F. Supp. 1242, 1246 (D. Mont. 1997). The ESA also states that the Secretary "shall develop and implement plans for the conservation and survival [of listed species] unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C § 1533(f)(1).

The BLM's current policies with respect to oil and gas leasing prioritize oil and gas development over the survival and recovery of listed species. BLM has failed to meet its affirmative obligation to seek to conserve listed species, including black-footed ferret.

D. BLM has Discretion to not Lease

Under the statutory and regulatory provisions authorizing this lease sale, the BLM has full discretion over whether or not to offer these lease parcels for sale. The Mineral Leasing Act of 1920 ("MLA") provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil and gas deposits *may* be leased by the Secretary." 30 U.S.C. § 226(a) (2009) (emphasis added). The Supreme Court has concluded that this "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *see also Wyo. Ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory y."); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975).

Submitting a leasing application vests no rights to the applicant or potential bidders. The BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the secretary whether or not to issue leases for the lands involved." *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.*

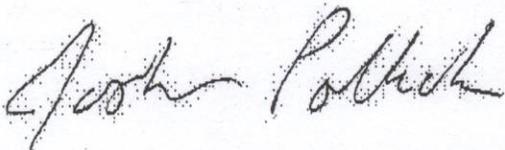
383 U.S. 912 (1966); *see also* *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Pease v. Udall*, 332 F.2d 62, 63 (9th Cir. 1964); *Geosearch v. Andrus*, 508 F. Supp. 839, 842 (D.C. Wyo. 1981).

The arguments set forth in detail above demonstrate that exercise of the discretion not to lease the protested parcels, is appropriate and necessary. Withdrawing the protested parcels from the lease sale until BLM has met its legal obligations outlined above, is a proper exercise of BLM's discretion under the MLA. The BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with the applicable law.

V. CONCLUSION & REQUEST FOR RELIEF

CNE and BCA therefore request that the BLM withdraw the protested parcels from the August Sale.

Sincerely,



Josh Pollock
Conservation Director
Center for Native Ecosystems

Erik Molvar
Executive Director
Biodiversity Conservation Alliance

Exhibit 1

Protested Parcel: Serial Number	BLM Field Office	Reason for Protest
WY-1002-001	NEWCASTLE	Grassland potential black-footed ferret reintroduction area and black-tailed prairie dog habitat
WY-1002-001	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 1
WY-1002-001	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 2
WY-1002-001	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 3
WY-1002-002	NEWCASTLE	Grassland potential black-footed ferret reintroduction area and black-tailed prairie dog habitat
WY-1002-002	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 1
WY-1002-002	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 2
WY-1002-002	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 3
WY-1002-003	NEWCASTLE	Grassland potential black-footed ferret reintroduction area and black-tailed prairie dog habitat
WY-1002-003	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 1
WY-1002-003	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 2
WY-1002-003	NEWCASTLE	Occupied greater sage-grouse lek - Highway 85 3
WY-1002-004	BUFFALO	Arvada and Recluse potential black-footed ferret reintroduction areas and black-tailed prairie dog habitat
WY-1002-005	BUFFALO	Occupied greater sage-grouse lek - Shinn
WY-1002-012	BUFFALO	Greater sage-grouse core area - Powder River
WY-1002-013	CASPER	Greater sage-grouse core area - Powder River
WY-1002-013	CASPER	Occupied greater sage-grouse lek - McClanahan Draw 2
WY-1002-013	CASPER	Occupied greater sage-grouse lek - Stinking Water 3
WY-1002-013	CASPER	White-tailed prairie dog habitat
WY-1002-014	CASPER	Occupied greater sage-grouse lek - Alkali Creek North
WY-1002-014	CASPER	Occupied greater sage-grouse lek - Alkali Creek South
WY-1002-015	CASPER	Occupied greater sage-grouse lek - Alkali Creek South
WY-1002-016	CASPER	Occupied greater sage-grouse lek - Alkali Creek North
WY-1002-016	CASPER	Occupied greater sage-grouse lek - Alkali Creek South
WY-1002-017	RAWLINS	Dad Complex nominated white-tailed prairie dog ACEC
WY-1002-017	RAWLINS	Greater sage-grouse core area - Saratoga
WY-1002-017	RAWLINS	Occupied greater sage-grouse lek - Bird Gulch 2
WY-1002-017	RAWLINS	Occupied greater sage-grouse lek - Ketchum Buttes
WY-1002-017	RAWLINS	Occupied greater sage-grouse lek - Little Savery 1
WY-1002-017	RAWLINS	Occupied greater sage-grouse lek - Little Savery 2
WY-1002-018	RAWLINS	Greater sage-grouse core area - Hanna
WY-1002-018	RAWLINS	Occupied greater sage-grouse lek - Red Ridge
WY-1002-018	RAWLINS	Occupied greater sage-grouse lek - Sandhole
WY-1002-018	RAWLINS	Pathfinder Complex and Shamrock Hills Complex nominated white-tailed prairie dog ACECs
WY-1002-019	LANDER	Greater sage-grouse core area - Lander
WY-1002-019	CASPER	Occupied greater sage-grouse lek - Alkali Creek South
WY-1002-020	RAWLINS	Greater sage-grouse core area - NE Baggs

WY-1002-020	RAWLINS	Occupied greater sage-grouse lek - Daley	Occupied greater sage-grouse lek - Daley
WY-1002-021	RAWLINS	Greater sage-grouse core area - NE Baggs	Greater sage-grouse core area - NE Baggs
WY-1002-021	RAWLINS	Occupied greater sage-grouse lek - Windy Hill	Occupied greater sage-grouse lek - Windy Hill
WY-1002-022	RAWLINS	Greater sage-grouse core area - NE Baggs	Greater sage-grouse core area - NE Baggs
WY-1002-022	RAWLINS	Occupied greater sage-grouse lek - Daley	Occupied greater sage-grouse lek - Daley
WY-1002-022	RAWLINS	Pathfinder Complex and Shamrock Hills Complex	Pathfinder Complex and Shamrock Hills Complex nominated white-tailed prairie dog ACECs
WY-1002-023	RAWLINS	Occupied greater sage-grouse lek - Benchmark	Occupied greater sage-grouse lek - Benchmark
WY-1002-023	RAWLINS	Occupied greater sage-grouse lek - Separation Creek	Occupied greater sage-grouse lek - Separation Creek
WY-1002-023	RAWLINS	Pathfinder Complex and Shamrock Hills Complex	Pathfinder Complex and Shamrock Hills Complex nominated white-tailed prairie dog ACECs
WY-1002-024	RAWLINS	Occupied greater sage-grouse lek - Mud Springs	Occupied greater sage-grouse lek - Mud Springs
WY-1002-024	RAWLINS	Pathfinder Complex and Shamrock Hills Complex	Pathfinder Complex and Shamrock Hills Complex nominated white-tailed prairie dog ACECs
WY-1002-025	RAWLINS	Greater sage-grouse core area - NE Baggs	Greater sage-grouse core area - NE Baggs
WY-1002-025	RAWLINS	Occupied greater sage-grouse lek - Mud Springs	Occupied greater sage-grouse lek - Mud Springs
WY-1002-025	RAWLINS	Occupied greater sage-grouse lek - Windy Hill	Occupied greater sage-grouse lek - Windy Hill
WY-1002-025	RAWLINS	Pathfinder Complex and Shamrock Hills Complex	Pathfinder Complex and Shamrock Hills Complex nominated white-tailed prairie dog ACECs
WY-1002-026	RAWLINS	Greater sage-grouse core area - NE Baggs	Greater sage-grouse core area - NE Baggs
WY-1002-026	RAWLINS	Occupied greater sage-grouse lek - Benchmark	Occupied greater sage-grouse lek - Benchmark
WY-1002-026	RAWLINS	Occupied greater sage-grouse lek - Daley	Occupied greater sage-grouse lek - Daley
WY-1002-026	RAWLINS	Occupied greater sage-grouse lek - Separation Creek	Occupied greater sage-grouse lek - Separation Creek
WY-1002-027	RAWLINS	Greater sage-grouse core area - NE Baggs	Greater sage-grouse core area - NE Baggs
WY-1002-027	RAWLINS	Greater sage-grouse core area - South Pass	Greater sage-grouse core area - South Pass
WY-1002-027	RAWLINS	Occupied greater sage-grouse lek - Mud Springs	Occupied greater sage-grouse lek - Mud Springs
WY-1002-027	RAWLINS	Occupied greater sage-grouse lek - Windy Hill	Occupied greater sage-grouse lek - Windy Hill
WY-1002-027	RAWLINS	Pathfinder Complex and Shamrock Hills Complex	Pathfinder Complex and Shamrock Hills Complex nominated white-tailed prairie dog ACECs
WY-1002-028	RAWLINS	Greater sage-grouse core area - NE Baggs	Greater sage-grouse core area - NE Baggs
WY-1002-028	RAWLINS	Occupied greater sage-grouse lek - Mud Springs	Occupied greater sage-grouse lek - Mud Springs
WY-1002-028	RAWLINS	Occupied greater sage-grouse lek - Windy Hill	Occupied greater sage-grouse lek - Windy Hill
WY-1002-029	RAWLINS	Greater sage-grouse core area - NE Baggs	Greater sage-grouse core area - NE Baggs
WY-1002-029	RAWLINS	Occupied greater sage-grouse lek - Mud Springs	Occupied greater sage-grouse lek - Mud Springs
WY-1002-029	RAWLINS	Occupied greater sage-grouse lek - Windy Hill	Occupied greater sage-grouse lek - Windy Hill
WY-1002-030	LANDER	Citizen's Proposed Wilderness - Lysite Badlands	Citizen's Proposed Wilderness - Lysite Badlands
WY-1002-031	RAWLINS	Occupied greater sage-grouse lek - 5 Buttes	Occupied greater sage-grouse lek - 5 Buttes
WY-1002-031	RAWLINS	Occupied greater sage-grouse lek - Hangout Ridge	Occupied greater sage-grouse lek - Hangout Ridge
WY-1002-032	RAWLINS	Occupied greater sage-grouse lek - 5 Buttes	Occupied greater sage-grouse lek - 5 Buttes
WY-1002-032	RAWLINS	Occupied greater sage-grouse lek - Hangout Ridge	Occupied greater sage-grouse lek - Hangout Ridge
WY-1002-032	RAWLINS	Occupied greater sage-grouse lek - Standard Road	Occupied greater sage-grouse lek - Standard Road
WY-1002-033	RAWLINS	Occupied greater sage-grouse lek - 5 Buttes	Occupied greater sage-grouse lek - 5 Buttes
WY-1002-033	RAWLINS	Occupied greater sage-grouse lek - Hangout Ridge	Occupied greater sage-grouse lek - Hangout Ridge
WY-1002-034	RAWLINS	Occupied greater sage-grouse lek - 5 Buttes	Occupied greater sage-grouse lek - 5 Buttes
WY-1002-034	RAWLINS	Occupied greater sage-grouse lek - Hangout Ridge	Occupied greater sage-grouse lek - Hangout Ridge

WY-1002-034	RAWLINS	Occupied greater sage-grouse lek - Standard Road
WY-1002-035	RAWLINS	Dad Complex nominated white-tailed prairie dog ACEC
WY-1002-038	LANDER	Greater sage-grouse core area - South Pass
WY-1002-038	LANDER	Occupied greater sage-grouse lek
WY-1002-039	LANDER	Greater sage-grouse core area - South Pass
WY-1002-039	LANDER	Occupied greater sage-grouse lek
WY-1002-040	LANDER	Greater sage-grouse core area - South Pass
WY-1002-040	LANDER	Occupied greater sage-grouse lek
WY-1002-041	LANDER	Greater sage-grouse core area - South Pass
WY-1002-041	LANDER	Occupied greater sage-grouse lek
WY-1002-045	ROCK SPRINGS	Greater sage-grouse core area - S Rock Springs
WY-1002-047	ROCK SPRINGS	Occupied greater sage-grouse lek
WY-1002-049	ROCK SPRINGS	Occupied greater sage-grouse lek
WY-1002-050	KEMMERER	Occupied greater sage-grouse lek
WY-1002-051	KEMMERER	Greater sage-grouse core area - Sage