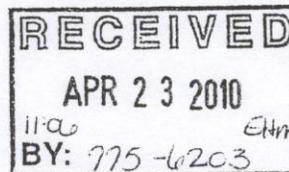


ax - Biodiversity Conservation Alliance to BLM Wyoming State Office (775-6203) 11-0  
**BIODIVERSITY CONSERVATION ALLIANCE**

April 23, 2010



VIA FAX

Don Simpson, State Director  
Bureau of Land Management  
5353 Yellowstone Road  
Cheyenne, WY 82003

**RE: PROTEST OF CERTAIN PARCELS TO BE OFFERED AT  
BLM'S MAY 2010 COMPETITIVE OIL & GAS LEASE SALE**

Dear Mr. Simpson:

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, Biodiversity Conservation Alliance protests certain parcels being offered at the Bureau of Land Management's (BLM) May 2010 competitive oil and gas lease sale.

This protest is based on three areas of concern: (A) protections for greater sage-grouse and the species' habitat, (B) protections for Wyoming pocket gopher and the species' habitat, and (C) protections for citizens' proposed wilderness.

This Protest incorporates by reference all Exhibits provided to BLM with the protest of the October 2008 lease sale by Biodiversity Conservation Alliance, et al. As BLM is already in possession of these documents, we have not attached them hereto.

**I. THE PARTY**

**Biodiversity Conservation Alliance** (BCA) is a non-profit conservation group with hundreds of members in Wyoming and other states. BCA is dedicated to protecting Wyoming's wildlife and wild places, particularly on public lands. BCA's members live in all of the Field Office areas where lease parcels would be offered in the May 2010 lease sale. Members of BCA utilize land and water resources within and near these areas for hiking, fishing, camping, recreational, scientific study, photography, and aesthetic uses. BCA and its members are actively involved in BLM oil and gas activities in this region and participate in all National Environmental Policy Act (NEPA) stages of BLM oil and gas projects by submitting comments and attending public meetings. BCA has a long record of advocating for environmentally sound oil and gas development in Wyoming and throughout the West. As a consequence, BCA and its

members would be adversely affected by the sale of the lease parcels being protested here and they have an interest in this matter.

## II. THE ISSUES

### AT RISK: WILDLIFE, OPEN SPACES, AND CLEAN AIR AND WATER

Oil and gas activities on the public lands at issue herein are quickly escalating. BLM is approving record numbers of large oil and gas development projects in Wyoming. The lands at issue here are mostly federal lands managed by BLM. Many of these lands provide critical habitat for a number of species, ranging from sage grouse, to mule deer, to severely imperiled species, such as fish species in the Green/Colorado River Basin and Platte River Basin, and sage grouse on the sagebrush country. Many of the BLM lands at issue serve as quiet, serene places of natural beauty and solitude, and as such, they provide excellent recreational opportunities for hiking, birding, wildlife viewing, hunting, fishing, backpacking, and enjoyment of open spaces.

Explosive oil and gas development on these lands threatens all of the above resources, for which BLM has a mandatory duty to protect for "multiple use." Oil and gas development has and will lead to fragmented habitat and surface disturbances through well pad construction, oil and gas well rigs, increased vehicular traffic, miles of roads, pipelines and power lines, and noise from generators and compressor stations. All of these associated activities serve to disrupt habitat, destroy nesting and brooding grounds, and disturb wildlife. These activities can significantly impact elk, mule deer, pronghorn antelope, and sage grouse, as well as many other species that live there. Many of these lands serve as crucial winter range and parturition areas for elk, pronghorn antelope and mule deer, as well as critical breeding and nesting habitat near sage grouse leks. Many rare species find some of their last secure refuges on these lands.

In addition, many of these lands have been used by ranchers and farmers for generations, yet BLM would allow mineral development without having taken steps to fully protect the rights and interests of surface owners. While policies such as BLM IM 2003-131 provides instruction on how protections for surface owners are to be afforded *after* a lease is granted, there is nothing which would prevent BLM from ensuring even greater protection of surface owner interests *before* leasing. That has not even been considered here. Consequently, Wyoming's rural heritage and lifestyle are threatened by the sale of the lease parcels protested here.

BCA realizes, of course, that a lease itself does not necessarily create immediate disturbances, but as BLM well knows, if a lease is not subject to a "No Surface Occupancy" (NSO) stipulation, the lessee receives contractually-enforceable surface use rights. 43 C.F.R. § 3101.1-2. In other words, once a lease is sold, the cat is out of the bag, putting sensitive resources which have yet to be properly considered through site-specific NEPA analysis at risk of significant and potentially unacceptable harm. Because it represents an irretrievable and irreversible commitment of resources, the leasing stage is extremely critical. We are deeply concerned that the BLM has exploited the leasing stage by disparaging it as little more than a paper transaction when, in reality, it is an important, legally consequential event that commits lands to a particular use.

In January of 2010, Secretary of the Interior Ken Salazar announced that the Department would reform its oil and gas leasing policy. In a chart comparing process changes resulting from the leasing reforms, the Department of the Interior said at the competitive oil and gas sale stage that "Field offices will prepare an environmental review document to evaluate existing, revised, and/or new stipulations."<sup>1</sup> Such site-specific environmental review should be undertaken prior to the Application for Permit to Drill stage, as indicated by this chart, to give the BLM the most information before it issues a lease and has less opportunity to require modifications or mitigation measures to prevent further adverse impacts to sage-grouse. The Department of Interior and BLM have not adhered to this promised leasing reform. Deferring site-specific analysis to the drilling stage presents only the illusion of proper process because, unless a lease is subject to an NSO stipulation, BLM has already surrendered surface use rights and thus BLM's ability to protect lands and resources is hamstrung. Given this level of importance, and particularly due to the many legal violations that will occur on the date of the sale of the parcels protested here, BCA is filing this Protest.

#### A. LEASE PARCELS WITH SAGE-GROUSE AND SAGE-GROUSE HABITAT

BCA protests lease parcels WY-1005-010, 011, 012, 014, 015, 022, 034, 035, 038, 039, 041, 042, 045, 051, 054, 056, 057, 063, 064, 065, 066, 068, 069, 070, 071, 072, 075, 077, 078, 079, 080, 081, 082, and 083. These parcels contain important sage-grouse nesting habitats and/or wintering habitats. Furthermore, parcels WY-1005-014, 037, 041, 042, 045, 046, 047, 051, 052, 054, 055, 056, 057, 070, 071, and 072 lie within designated Core Population Areas which Governor Dave Freudenthal of Wyoming has declared priority protection areas for greater sage-grouse.<sup>2</sup> BCA protests these parcels as well. The discrepancy between the parcels BLM itself identified as containing sage-grouse habitat and those found within Governor Core Areas indicates the flawed Core Area strategy the State of Wyoming employs to theoretically prevent sage-grouse population declines while catering to the oil and gas industry. Regardless, BLM Instruction Memorandum No. WY-2010-012, dated January 4, 2010, says that "Wyoming BLM sage-grouse Key Habitat Areas correspond to the State of Wyoming's Core Population Areas (Core Areas),"<sup>3</sup> yet the BLM is still issuing leases for sale in these parcels.

We request that all parcels listed above be withdrawn from the lease sale. Wyoming sage-grouse populations are some of the largest left in the nation and were relatively stable until the last decade, when sage-grouse populations experienced major declines range-wide. The Wyoming Game and Fish Department reported that since 1952, there has been a 20% decline in the overall Wyoming sage-grouse population, with some fragmented populations declining more than 80%;<sup>4</sup> one of WGFD's biologists reported a 40% statewide decline over the last 20 years.<sup>5</sup>

<sup>1</sup> [http://www.doi.gov/documents/Leasing\\_Reform\\_Side-by-Side\\_Comparison.pdf](http://www.doi.gov/documents/Leasing_Reform_Side-by-Side_Comparison.pdf)

<sup>2</sup> Executive Order 2008-2, Greater Sage-Grouse Core Area Protection, August 1, 2008, available at [http://gf.state.wy.us/wildlife/wildlife\\_management/sagegrouse/sagegrouseExecOrder2008-2%5B1%5D.pdf](http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/sagegrouseExecOrder2008-2%5B1%5D.pdf).

<sup>3</sup> Instruction Memorandum No. WY-2010-012, available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/resources/efoia/IMs/2010.Par.61358.File.dat/wy2010-012.pdf>.

<sup>4</sup> WGFD. 2000. Minutes of the Sage-Grouse Conservation Plan meeting, June 21, 2000, Casper, WY. Cheyenne: Wyoming Game and Fish Department. A copy is attached to the BCA June 2008 Lease Protest as Exhibit 32.

<sup>5</sup> Christiansen, T. 2000. Sage-grouse in Wyoming: What happened to all the sage-grouse? Wyoming Wildlife News 9(5), Cheyenne: Wyoming Game and Fish Department. A copy is attached to the BCA June 2008 Lease Protest as Exhibit 33.

These declines are attributable at least in part to habitat loss due to mining and energy development and associated roads, and to habitat fragmentation due to roads and well fields. Oil and gas development poses perhaps the greatest threat to sage-grouse viability in the region. The area within 2 to 3 miles of a sage-grouse lek is crucial to both the breeding activities and nesting success of local sage-grouse populations. In a study near Pinedale, sage-grouse from disturbed leks where gas development occurred within 3 km of the lek site showed lower nesting rates (and hence lower reproduction), traveled farther to nest, and selected greater shrub cover than grouse from undisturbed leks.<sup>6</sup> According to this study, impacts of oil and gas development to sage-grouse include (1) direct habitat loss from new construction, (2) increased human activity and pumping noise causing displacement, (3) increased legal and illegal harvest, (4) direct mortality associated with reserve pits, and (5) lowered water tables resulting in herbaceous vegetation loss. These impacts have not been thoroughly evaluated with full NEPA analysis.

Because leks sites are used traditionally year after year and represent selection for optimal breeding and nesting habitat, it is crucially important to protect the area surrounding lek sites from impacts. In his University of Wyoming dissertation on the impacts of oil and gas development on sage grouse, Matthew Holloran stated, "current development stipulations are inadequate to maintain greater sage-grouse breeding populations in natural gas fields."<sup>7</sup> The area within 2 or 3 miles of a sage-grouse lek is crucial to both the breeding activities and nesting success of local sage-grouse populations. Dr. Clait Braun, the world's most eminent expert on sage-grouse, has recommended NSO buffers of 3 miles from lek sites, based on the uncertainty of protecting sage-grouse nesting habitat with smaller buffers.<sup>8</sup> Thus, the prohibition of surface disturbance within 3 miles of a sage-grouse lek is the absolute minimum starting point for sage-grouse conservation.

Other important findings on the negative impacts of oil and gas operations on sage-grouse and their implications for the species are contained in three studies recently accepted for publication.<sup>9</sup> Sage-grouse mitigation measures have been demonstrated to be ineffective at maintaining this species at pre-development levels in the face of oil and gas development by Holloran (2005) and Naugle et al. (2006). Naugle found an 85% decline of sage-grouse populations in the Powder River Basin of northeastern Wyoming since the onset of coalbed methane development there. BLM has repeatedly failed to provide any analysis, through field

<sup>6</sup> Lyon, A.G. 2000. The potential effects of natural gas development on sage-grouse (*Centrocercus urophasianus*) near Pinedale, Wyoming. M.S. Thesis, Univ. of Wyoming, 121 pp. A copy is attached to the BCA June 2008 Lease Protest as Exhibit 34.

<sup>7</sup> M. Holloran. Dec. 2005. Greater Sage-Grouse Population Response to Natural Gas Field Development in Western Wyoming, at 57. This study is attached to the BCA June 2008 Lease Protest as Exhibit 35.

<sup>8</sup> C. Braun. May 2006. A Blueprint for Sage-grouse Conservation and Recovery. Grouse, Inc. This study is attached to the BCA June 2008 Lease Protest as Exhibit 36.

<sup>9</sup> Doherty, K.E., D.E. Naugle, B.L. Walker, and J.M. Graham. Greater sage-grouse winter habitat selection and energy development. *Journal of Wildlife Management*: In Press. Attached to the BCA June 2008 Lease Protest as Exhibit 37.

Walker, B.L., D.E. Naugle, and K.E. Doherty. Greater sage-grouse population response to energy development and habitat loss. *Journal of Wildlife Management*: In Press. Attached to the BCA June 2008 Lease Protest as Exhibit 38.

Walker, B.L., D.E. Naugle, K.E. Doherty, and T.E. Cornish. 2007. West Nile virus and greater sage-grouse: estimating infection rate in a wild bird population. *Avian Diseases* 51:In Press. Attached to the BCA June 2008 Lease Protest as Exhibit 39.

experiments or literature reviews, examining the effectiveness of the standard quarter-mile buffers where disturbance would be "avoided." There is substantial new information in recent studies to warrant supplemental NEPA analysis of the impacts of oil and gas development to sage-grouse. It is incumbent upon BLM to consider the most recent scientific evidence regarding the status of this species and to develop mitigation measures which will ensure the species is not moved toward listing under the Endangered Species Act. It is clear from the scientific evidence that the current protections are inadequate and are contributing to the further decline of the bird's populations. This information constitutes significant new information that requires amendment of the Resource Management Plans before additional oil and gas leasing can move forward.

Wyoming Game and Fish department biologists have reached a consensus that the Timing Limitation Stipulations proposed for sage-grouse in this lease sale are ineffective in the face of standard oil and gas development practices. These stipulations have likewise been condemned as inadequate by the U.S. Fish and Wildlife Service and renowned sage-grouse expert Dr. Clait Braun. The BLM itself has been forced to admit that "New information from monitoring and studies indicate that current RMP decisions/actions may move the species toward listing...conflicts with current BLM decision to implement BLM's sensitive species policy" and "New information and science indicate 1985 RMP Decisions, as amended, may not be adequate for sage grouse."<sup>10</sup> Continued application of stipulations known to be ineffective in the face of strong evidence that they do not work, and continuing to drive the sage-grouse toward ESA listing in violation of BLM Sensitive Species policy, is arbitrary and capricious and an abuse of discretion under the Administrative Procedures Act.

The restrictions contained in IM No. WY-2010-012 come nowhere close to offering sufficient on-the-ground protection to sage-grouse leks. Within Core Areas, the IM allows surface disturbing activity and surface occupancy just six tenths (0.6) of a mile from "occupied or undetermined" leks,<sup>11</sup> a far cry from the science-based 3-mile buffer recommended by field biologists. Even less protective, restrictions outside Core Areas allow surface disturbing activities and surface occupancy as close as one quarter (0.25) of a mile from leks.<sup>12</sup> BLM has too great an abundance of data to the contrary to continue with scientifically unsound stipulations as used in IM WY-2010-012 and the current Notice of Competitive Oil and Gas Lease Sale. This is especially clear in light of the U.S. Fish and Wildlife Service's recent finding that listing the greater sage-grouse as endangered or threatened under the Endangered Species Act is warranted, but precluded by other priorities. If the BLM and other federal agencies intend to keep the sage-grouse from accelerating beyond other listing priorities, more protective measures, in adherence with the scientific recommendations of Hollaran, Braun, and others, must be undertaken now.

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<sup>10</sup> Sage-grouse plan amendment land user information meeting PowerPoint, available online at [http://www.blm.gov/pgdata/etc/medialib/blm/wy/information/NEPA/bfdocs/sagegrouse.Par.94571.File.dat/May28\\_InfoMtg.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wy/information/NEPA/bfdocs/sagegrouse.Par.94571.File.dat/May28_InfoMtg.pdf). Site last visited 7/16/2008.

<sup>11</sup> Instruction Memorandum No. WY-2010-012, available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/resources/eoia/IMs/2010.Par.61358.File.dat/wy2010-012.pdf>.

<sup>12</sup> *Id.*

The vague stipulations included in BLM's Notice of Competitive Oil and Gas Lease Sale for particular parcels do little to clarify to the interested public or potential lessees what restrictions might actually apply to protect sage-grouse populations. For example, in describing parcel WY-1005-070, BLM imposes a Timing Limitation Stipulation and a Controlled Surface Use Stipulation within ¼ mile of a Greater sage-grouse strutting/dancing ground "*unless the operator and surface managing agency arrive at an acceptable plan for mitigation of anticipated impacts*" to protect breeding habitat.<sup>13</sup> Such acceptable plans for mitigation of anticipated impacts must be prepared prior to issuing the lease in order to give the public full opportunity to comment, and to abide by the Department of Interior's stated new policy to complete site-specific environmental review at the leasing stage, not the APD stage. Without site-specific review and opportunity for comment, neither the public nor potential lessees can clearly gauge how restrictive or lax "acceptable plans for mitigation" might be, and whether they comply with federal laws, regulations, and agency guidelines and policies. Thus, absent such review, the leases should not issue at all.

The Notice also states that for parcel WY-1005-070 and others, BLM imposes a Controlled Surface Use Stipulation stating that

[t]he lease area may now or hereafter contain plants, animals, or their habitats determined to be threatened, endangered, or other special status species. BLM may recommend modifications to exploration and development proposals to further its conservation and management objective to avoid BLM-approved activity that will contribute to a need to list such a species or their habitat. BLM may require modifications to disapprove proposed activity that is likely to result in jeopardy to the continued existence of a proposed or listed threatened or endangered species or result in the destruction or adverse modification of a designated or proposed critical habitat. BLM will not approve any ground-disturbing activity that may affect any such species or critical habitat until it completes its obligations under applicable requirements of the Endangered Species Act.<sup>14</sup>

Here, the BLM already knows that the greater sage-grouse, with its "warranted but precluded" status under the Endangered Species Act, inhabits the parcels at issue. No amount of stipulations or mitigation measures can eliminate all disturbances to sage-grouse within their habitat if any surface occupancy is allowed. BLM has the scientific information needed to recognize that any use of these parcels will result in further population declines, propelling the sage-grouse ahead of other "priorities" on the ESA "candidate list." Again, it is in all interested parties favor (conservation groups, potential lessees, BLM and other federal agencies) for BLM to determine specific "modifications" prior to issuing leases, such as NSO restrictions. If the BLM fails to do so through site-specific environmental review before the APD stage, the agency will violate the "jeopardy" prohibition in the Endangered Species Act and will not adhere to the directive of Secretary Salazar and the Department of Interior's announced leasing reforms.

BCA protests the sale of all lease parcels which contain sage-grouse leks, nesting habitat, breeding habitat, wintering habitat and brood-rearing habitat. We request that these parcels be

<sup>13</sup> Notice of Competitive Oil and Gas Lease Sale, May 11, 2010, available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/programs/energy/og/leasing/2010.Par.23383.File.dat/05list.pdf>.

<sup>14</sup> *Id.*

withdrawn from the lease sale. Failing withdrawal of the parcels, parcel-by-parcel NEPA analysis should occur, and NSO stipulations must be placed on all lease parcels with sage-grouse leks. In addition, three-mile buffers must be placed around all leks. It is critical that these stipulations be attached at the leasing stage, when BLM has the maximum authority to restrict activities on these crucial habitats for the protection of the species, and that no exceptions to the stipulations be granted. BLM's failure to do so will permit oil and gas development activities which will contribute to declining sage-grouse populations and ultimately listing by the U.S. Fish and Wildlife Service as a threatened or endangered species, in violation of BLM's duty to take all actions necessary to prevent listing.

## B. LEASE PARCELS WITH WYOMING POCKET GOPHER AND WYOMING POCKET GOPHER HABITAT

The Notice for the May 2010 lease sale lists the following parcels as potentially conflicting with Wyoming pocket gopher habitat: WY-1005-050, 051, 052, 053, 054, 061, 062, 063, 064, 066, 068, 069, and 075. As BLM is no doubt aware, BCA authored a petition to list the Wyoming pocket gopher as Threatened or Endangered under the Endangered Species Act.<sup>15</sup> The U.S. Fish and Wildlife Service's recently released finding that the Wyoming pocket gopher is not warranted for Endangered Species Act protections<sup>16</sup> only heightens the fact that this incredibly rare species faces a grim long-term prognosis due to direct conflicts in its limited range with oil and gas development. As a BLM Sensitive Species, the BLM should refrain from approving or conducting any activity that could harm Wyoming pocket gophers or their habitat. Stipulations and mitigation measures cannot guarantee adequate protection for the species, as so little data has been collected to establish its breeding patterns and habitat continuity, among other variables.

We protest these parcels and request that these leases not issue. Wyoming pocket gophers are one of the rarest mammals in North America, if not the rarest. This naturally uncommon species is extremely vulnerable to habitat loss due to mining and energy development and associated roads, and to habitat fragmentation due to roads and well fields. Oil and gas development poses perhaps the greatest threat to Wyoming pocket gopher viability. Both breeding and foraging activities of Wyoming pocket gopher populations are impacted by above and below ground disturbances associated with oil and gas exploration, drilling and associated activities. Impacts of oil and gas development to Wyoming pocket gopher include (1) direct habitat loss from new construction, (2) increased human activity and pumping noise causing generally known and unknown behavioral changes, (3) direct mortality associated with reserve pits, crushing due to vehicular movements and construction activities, and (4) lowered water tables resulting in herbaceous vegetation loss. These impacts have not been thoroughly evaluated with full NEPA analysis.

More information is needed about Wyoming pocket gophers to confidently assess the spatial dynamics of populations. Factors such as low dispersal ability, high inbreeding, and high variation over small geographic areas suggest that Wyoming pocket gopher meta-population

<sup>15</sup> See <http://www.voiceforthewild.org/petitions/Final%20WPG%20Listng%20Petition.pdf>.

<sup>16</sup> See <http://edocket.access.gpo.gov/2010/pdf/2010-8578.pdf>.

structures could easily be disrupted when local populations are isolated over relatively short distances.<sup>17</sup> The continuity of suitable habitat thus becomes an important component in the conservation of Wyoming pocket gopher populations. Very little is known regarding survivorship and mortality in Wyoming pocket gophers.<sup>18</sup> Most do not live more than two breeding seasons, but they are capable of living longer under favorable circumstances.<sup>19</sup> Climate may be a factor in *T. clusius* survival and recruitment.<sup>20</sup> Researchers also stated that sub-adult pocket gophers appeared to experience unusually heavy mortality when forced to live in marginal habitats.<sup>21</sup>

Mammalogists and other wildlife and soil scientists recognize pocket gophers for their positive impacts on the ecosystems they inhabit. These effects primarily result from extensive tunneling activity, which can affect soil formation, hydrology, and nutrient flows. In addition, pocket gophers' consumption of below-ground plant biomass can alter the competitive interactions of plants and thereby influence above-ground vegetation.<sup>22</sup> Like other "ecosystem engineers" (e.g., ants, beavers, prairie dogs), pocket gopher activities can drive ecosystem function, making them important to native ecosystems. The extensive burrow systems provide habitat for numerous other burrowing and opportunistic species. Abandoned pocket gopher burrows provide habitat for salamanders, snakes, insects, and other rodents.<sup>23</sup>

In addition, pocket gophers serve as prey for a number of birds and mammals, but it is suspected that natural predation is not a factor limiting pocket gopher distribution and abundance.<sup>24</sup> Since gophers evolved with natural predators, it is unlikely such predation would play a role in population declines unless accompanied by other extenuating circumstances.<sup>25</sup> Such extenuating circumstances might include increased predation from generalist predators whose distributional expansion has been facilitated by human alteration of the landscape (e.g.,

<sup>17</sup> Patton, J.L. and R.E. Dingman. 1968. Chromosome studies of pocket gophers, genus *Thomomys*. I. The specific status of *Thomomys umbrinus* (Richardson) in Arizona. *Journal of Mammalogy* 49:1-13.

<sup>18</sup> Keinath, D.A. and G.P. Beauvais. 2006. Wyoming pocket gopher (*Thomomys clusius*): a technical conservation assessment. USDA Forest Service, Rocky Mountain Region, available online at <http://www.fs.fed.us/r2/projects/scp/assessments/wyomingpocketgopher.pdf>.

<sup>19</sup> Reid 1973. "Population biology of the northern pocket gopher." In *Pocket Gophers and Colorado Mountain Rangeland*. Experiment Station Bulletin. Fort Collins, CO:Colorado State University. Pp. 21-41.

Clark, T.W. and M.R. Stromberg. 1987. *Mammals in Wyoming*. University Press of Kansas, Lawrence, KS.

<sup>20</sup> Vaughan, T.A. 1967. Food habits of the northern pocket gopher on shortgrass prairie. *The American Midland Naturalist* 77:176-189.

<sup>21</sup> Howard, W.E. and H.E. Childs. 1959. Ecology of pocket gophers with emphasis on *Thomomys bottae mewa*. *Hilgardia* 29:277-358.

<sup>22</sup> Keinath, D.A. and G.P. Beauvais. 2006. Wyoming pocket gopher (*Thomomys clusius*): a technical conservation assessment. USDA Forest Service, Rocky Mountain Region, available online at <http://www.fs.fed.us/r2/projects/scp/assessments/wyomingpocketgopher.pdf>.

<sup>23</sup> Center for Native Ecosystems, Forest Guardians, Michael C. McGowan, and Jacob Smith. 2003. Petition for a Rule to List *Thomomys talpoides macrotis* (Northern Pocket Gopher, subspecies *macrotis*) as Threatened or Endangered under the Endangered Species Act, 16 U.S.C. § 1531 et seq. (1973 as amended) and for the Designation of Critical Habitat. March 20, 2003; Armstrong, D.M. 1987. *Rocky Mountain Mammals*. Colorado Associated University Press.

<sup>24</sup> Chase, J.D., W.E. Howard, and J.T. Roseberry. 1982. Pocket Gophers. In: *Wild Mammals of North America*. Johns Hopkins University Press, Baltimore, MD.

<sup>25</sup> Keinath, D.A. and G.P. Beauvais. 2006. Wyoming pocket gopher (*Thomomys clusius*): a technical conservation assessment. USDA Forest Service, Rocky Mountain Region, available online at <http://www.fs.fed.us/r2/projects/scp/assessments/wyomingpocketgopher.pdf>.

feral cats, coyotes, raccoons).<sup>26</sup> Three-dimensional structures associated with oil and gas development, like power lines and buildings, create raptor perches.<sup>27</sup> Such development has transformed pocket gopher habitat from a largely flat plane to a world with increased opportunities for raptor predation. In the event that Wyoming pocket gopher populations become small and/or isolated, even natural predation events could cause a marked population decline.<sup>28</sup>

Pocket gophers are strongly fossorial, living most of their lives in burrow systems and underground tunnels.<sup>29</sup> Based on the very limited information base, the Wyoming pocket gopher appears to segregate from northern pocket gophers by preferentially occupying dry, gravelly, shallow-soil ridge tops rather than deeper soiled swales and valley bottoms,<sup>30</sup> but this information is tenuous and useful mainly to inform further investigation. The long distance movement and dispersal capabilities of Wyoming pocket gophers are limited since they stay underground most of the time, foraging above-ground only at night or on overcast days.<sup>31</sup> Plus, the energetic costs of burrowing are high enough to be a physiological limitation to movement.<sup>32</sup>

Other species of pocket gophers may have longer-distance dispersals beneath snow, but this is unlikely for Wyoming pocket gophers because the species' preferred habitat is presumed to be dry ridges with low snow accumulation and wind scouring that tends to deposit existing snow in depressions.

A suitable landscape for Wyoming pocket gophers may be loosely defined as a dry upland with gravelly, yet still tractable, soils and relatively high productivity of grasses and forbs (high food availability). Given the species' small home ranges, the continuous area of such habitat capable of supporting a local population of Wyoming pocket gophers may be relatively small. However, long-term persistence of the gophers would likely depend on larger areas of such habitat arranged in patches of sufficient proximity to allow dispersal between patches. Other than coarse scale habitat availability, it is unclear what limits the structure and growth of populations. The extremely varied diets of various pocket gopher species have led to the conclusion that food is seldom a limiting factor in pocket gopher distribution, but the nature and amount of vegetation may affect local population densities.<sup>33</sup>

The Wyoming pocket gopher is known to occur only in Sweetwater and Carbon Counties in Wyoming. As its range is currently defined, the Wyoming pocket gopher appears to occur

<sup>26</sup> *Id.*

<sup>27</sup> Bureau of Land Management. 2006. Scoping Notice, Continental Divide - Creston, Carbon County, Wyoming..

<sup>28</sup> Wilcove, D.S. 1985. Nest predation in forest tracts and the decline of migratory songbirds. *Ecology* 66:1211-1214; Sinclair, A.R.E., R.P. Pech, C.R. Dickman, D. Hik, P. Mahon, and A.E. Newsome. 1998. Predicting Effects of Predation on Conservation of Endangered Prey. *Conservation Biology* 12:564.

<sup>29</sup> Keinath, D.A. and G.P. Beauvais. 2006. Wyoming pocket gopher (*Thomomys clusius*): a technical conservation assessment. USDA Forest Service, Rocky Mountain Region, available online at <http://www.fs.fed.us/r2/projects/scp/assessments/wyomingpocketgopher.pdf>.

<sup>30</sup> Clark, T.W. and M.R. Stromberg. 1987. *Mammals in Wyoming*. University Press of Kansas, Lawrence, KS.

<sup>31</sup> Verts, B.J. and L.N. Carraway. 1999. *Thomomys talpoides*. *Mammalian Species* 618:1-11.

<sup>32</sup> Vleck, D. 1979. The energy cost of burrowing by the pocket gopher *Thomomys bottae*. *Physiological Zoology* 52:122-136.

<sup>33</sup> Miller, R.S. and R.A. Ward. 1964. Ectoparasites of pocket gophers from Colorado. *The American Midland Naturalist* 64:382-391.

primarily on multiple-use lands managed by the BLM. These lands are extensively intermixed with parcels of private land. A variety of biological factors can make animals intrinsically susceptible to disturbance, including narrow distribution, habitat specificity, restrictive territoriality and area requirements, susceptibility to disease, low dispersal capability, high site fidelity, and low reproductive capability. After reviewing available information, researchers considered the intrinsic vulnerability of Wyoming pocket gophers to be moderate due to highly limited distribution, limited dispersal ability, and the uncertainty surrounding many aspects of their biology.<sup>34</sup>

Small mammals with restricted distributions and/or narrow habitat requirements are more vulnerable than others to habitat loss.<sup>35</sup> The paucity of information regarding Wyoming pocket gophers requires extreme caution when proposing to disturb potential habitat. Habitat destruction is the primary threat to *T. clusius*. Habitat fragmentation and isolation also threaten *T. clusius*. Continued oil and gas development creates increasingly dense road networks, diminishes corridors for dispersal, and further separates populations. Roads act as barriers to finding mates, leading to inbreeding and loss of gene flow within individual populations. Habitat fragmentation results in shrinking islands of intact habitat with increased exposure to edge effects. The impacts of disturbances associated with oil and gas development will only increase under the February sale of parcels containing Wyoming pocket gophers and habitat.

Development is not just destroying and fragmenting habitat, it is also degrading it. Soil disturbances typical of oil and gas development projects, motorized vehicle impacts, and other activities are known to exacerbate the introduction and subsequent spread of noxious weeds. Noxious weeds limit population density in fossorial mammals.<sup>36</sup> In addition, herbicide use that invariably precedes and follows most forms of development also degrades pocket gopher habitat.<sup>37</sup> Finally, individual pocket gophers are killed in the pursuit of commercial and industrial development.

<sup>34</sup> Keinath, D.A. and G.P. Beauvais. 2006. Wyoming pocket gopher (*Thomomys clusius*): a technical conservation assessment. USDA Forest Service, Rocky Mountain Region. Available online: <http://www.fs.fed.us/r2/projects/scp/assessments/wyomingpocketgopher.pdf>

<sup>35</sup> Hafner, D.J. 1998. Rodents of Southwestern North America. In: D.J. Hafner, E. Yensen, and G.L. Kirkland, Jr., editors. North American rodents: status survey and conservation action plan. IUCN/SSC Rodent Specialist Group, IUCN, Gland, Switzerland and Cambridge, U.K.

Hafner, David J., Eric Yensen, Gordon L. Kirkland, Jr., Joseph G. Hall, Joseph A. Cook, and David W. Nagorsen. 1998. "Executive Summary." In North American rodents: status survey and conservation action plan. D. J. Hafner, E. Yensen, and G. L. Kirkland, Jr., eds. IUCN/SSC Rodent Specialist Group, IUCN, Gland, Switzerland and Cambridge, U.K., x + 171 pp. Pp. 66-67. Pp.vii.

Hafner, David J. 1998. "Rodents of Southwestern North America." Ch. 3. In North American rodents: status survey and conservation action plan. D. J. Hafner, E. Yensen, and G. L. Kirkland, Jr., eds. IUCN/SSC Rodent Specialist Group, IUCN, Gland, Switzerland and Cambridge, U.K., x + 171 pp. Pp. 66-67. Pp. 10-17.

Hafner, David J. 2001. New Mexico Natural Heritage Program, pers. comm., 5 December 2001.

<sup>36</sup> Slobodchikoff, C.N., A. Robinson, and C. Schaack. 1988. Habitat use by Gunnison's prairie dogs. Pp. 403-408 in R.C. Szaro, K.E. Severson, and D.R. Patton, technical coordinators. Management of amphibians, reptiles, and small mammals in North America. Proceedings of the symposium. 19-21 July 1988, Flagstaff, Arizona. USDA Forest Service General Technical Report RM-166. November 1988. USDA Forest Service, Rocky Mountain Forest and Range Experiment Station, Fort Collins. 458.

<sup>37</sup> Reid 1973. "Population biology of the northern pocket gopher." In Pocket Gophers and Colorado Mountain Rangeland. Experiment Station Bulletin. Fort Collins, CO:Colorado State University. Pp. 21-41; Hansen, R.M. and

The Wyoming BLM assigned the Wyoming pocket gopher to its sensitive species list. The BLM developed the list to “ensure that any actions on public lands consider the overall welfare of these sensitive species and do not contribute to their decline”. In addition, the Wyoming Game and Fish Department includes the Wyoming pocket gopher on a long list of species of concern under Wyoming’s Comprehensive Wildlife Conservation Strategy.<sup>38</sup> The BLM’s sensitive species management includes “developing conservation strategies” and “prioritizing what conservation work is needed.” BLM’s inclusion of parcels with Wyoming pocket gophers and habitat in the February 2010 lease sale does not indicate the agency is adhering to its own management standards.

The Wyoming Natural Diversity Database has assigned the Wyoming pocket gopher a rank of G2/S2.<sup>39</sup> The G2 refers to a relatively high probability of global extinction, based primarily on the species’ extremely small global range. The S2 refers to a relatively high probability of extinction from Wyoming, based largely on range restriction, but also considering apparently low range occupation, uncertain abundance trends, and moderate biological vulnerability. Further, the Database assigned a Wyoming Significance Rank of Very High to the Wyoming pocket gopher, which reflects the extremely high contribution of Wyoming population segments to continental persistence of the species.<sup>40</sup>

To date, there are no management plans or conservation strategies pertaining explicitly to the Wyoming pocket gopher, although one status assessment has been drafted with support of the Wyoming BLM State Office and the Wyoming Natural Diversity Database.<sup>41</sup> There appear to be insufficiently described mechanisms by which conservation of Wyoming pocket gophers could be achieved should oil and gas development occur within their known and potential range. However, the primary concern stated by most studies of the species is the lack of information on its biology and ecology. Without gathering the needed information, conservation mechanisms’ efficacy cannot be determined. Biodiversity Conservation Alliance asks the Wyoming BLM

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A.L. Ward. 1966. Some relations of pocket gophers to rangelands on Grand Mesa, Colorado. Colorado Agricultural Experiment Station Technical Bulletin 88:1-22; Tietjen, H.P. 1973 Control of pocket gophers. Pp. 73-81 in Pocket Gophers and Colorado Mountain Rangeland; Chase, J.D., W.E. Howard, and J.T. Roseberry. 1982. Pocket Gophers. *In: Wild Mammals of North America*. Johns Hopkins University Press, Baltimore, MD; Miller, R.S. 1964. Ecology and distribution of pocket gophers (Geomyidae) in Colorado. *Ecology* 45:256-272; Tietjen, H.P., C.H. Halvoran, P.L. Hegdal, and A.M. Johnson. 1967. 2,4-D herbicide, vegetation, and pocket gopher relationships: Black Mesa, Colorado. *Ecology* 48(4):634-643.

<sup>38</sup> Wyoming Game and Fish Department. 2005. A Comprehensive Wildlife Conservation Strategy for Wyoming. Wyoming Game and Fish Department, Cheyenne, WY. Approved July 12, 2005.<sup>32</sup>

S.P. 1958. The bobcat of North America: its history, life habitats, economic status and control, with lists of currently recognized subspecies. The Stackpole Company Harrisburg, Pennsylvania and The Wildlife Management Institute, Washington, D.C., 193 pp.

<sup>39</sup> <http://uwadmnweb.uwyo.edu/wyndd/>; Keinath et al. 2003.

<sup>40</sup> Keinath, D.A. and G.P. Beauvais. 2003<sup>a</sup>. Wyoming Animal Element Ranking Guidelines. The Wyoming Natural Diversity Database, University of Wyoming, Laramie, WY.

Keinath, D.A., B.H. Heidel, and G.P. Beauvais. 2003<sup>b</sup>. Wyoming Plant and Animal Species of Concern: November 2003. The Wyoming Natural Diversity Database, University of Wyoming, Laramie, WY.

<sup>41</sup> Beauvais, G.P. and D. Dark-Smiley. 2005. Species assessment for Wyoming Pocket Gopher (*Thomomys clusius*) in Wyoming. Report prepared for the Wyoming State Bureau of Land Management, Cheyenne, Wyoming by the Wyoming Natural Diversity Database, Laramie, WY.

State Office to withdraw parcels containing known and potential Wyoming pocket gophers and habitat while adequate information is gathered and evaluated and the USFWS completes its review of our petition for listing under the ESA.

Negative impacts of oil and gas operations on Wyoming pocket gopher and their implications for the species are named in virtually every scientific Wyoming pocket gopher (*Thomomys clusius*) conservation assessment and survey. Wyoming pocket gopher mitigation measures are essentially non-existent due to their extremely limited range and a paucity of scientific knowledge concerning its ability or inability to adapt to changing habitat conditions. BLM has failed to provide any analysis, whether field experiments or literature reviews, that describes if and how disturbance to *T. clusius* habitat would be "avoided." There is substantial new information in recent studies to warrant supplemental NEPA analysis of the impacts of oil and gas development to Wyoming pocket gopher. It is incumbent upon BLM to consider the most recent scientific evidence regarding the status of this species and to develop mitigation measures, if possible, which will ensure the species is not moved toward listing under the Endangered Species Act. It is clear from the scientific evidence and a total absence of meaningful BLM (state and federal levels), Wyoming Game and Fish, and U.S. Fish and Wildlife Service conservation measures for the Wyoming pocket gopher that current protections are non-existent, thereby allowing if not encouraging habitat degradation and destruction. New and continuing Wyoming pocket gopher survey information constitutes significant new information that requires amendment of the Resource Management Plans before additional oil and gas leasing can move forward.<sup>42</sup>

For example, the BLM itself has been forced to admit that "New information from monitoring and studies indicate that current RMP decisions/actions may move the species [greater sage grouse] toward listing... conflicts with current BLM decision to implement BLM's sensitive species policy" and "New information and science indicate 1985 RMP Decisions, as amended, may not be adequate for greater sage grouse." Continued application of stipulations known to be ineffective in the face of strong evidence that they do not work, and continuing to drive the greater sage grouse toward ESA listing in violation of BLM Sensitive Species policy, is arbitrary and capricious and an abuse of discretion under the Administrative Procedures Act. We hold that, in the case of the Wyoming pocket gopher, relevant stipulations do not exist. Further, we hold that a total absence of stipulations serves to drive the Wyoming pocket gopher toward ESA listing in violation of BLM Sensitive Species policy, is arbitrary and capricious, and is an abuse of discretion under the Administrative Procedure Act.

We protest the sale of all lease parcels which contain known and potential Wyoming pocket gopher habitat. We request that these parcels be withdrawn from the lease sale. Failing withdrawal of the parcels, it is critical that NEPA analysis occur on each parcel before leasing,

<sup>42</sup> Keinath, D.A. and G.P. Beauvais. 2006. Wyoming pocket gopher (*Thomomys clusius*): a technical conservation assessment. USDA Forest Service, Rocky Mountain Region, available online at <http://www.fs.fed.us/r2/projects/scp/assessments/wyomingpocketgopher.pdf>.

Keinath, D.A., H. Griscom, and A. Redder. 2008. Survey for Wyoming pocket gopher (*Thomomys clusius*) in central Wyoming. Report prepared for The Nature Conservancy - Wyoming Field Office by the Wyoming Natural Diversity Database - University of Wyoming, Laramie, Wyoming, available online at [ftp://ftp.wyisc.uwo.edu/pub/gis/wyndd/THCLReport07\\_15Feb07.pdf](ftp://ftp.wyisc.uwo.edu/pub/gis/wyndd/THCLReport07_15Feb07.pdf).

and NSO stipulations be placed on all lease parcels containing known and potential Wyoming pocket gopher habitat. These stipulations should be attached at the leasing stage, when BLM has the maximum authority to restrict activities on these crucial habitats for the protection of the species, and that no exceptions to the stipulations be granted. BLM's failure to do so will permit oil and gas development activities which will directly and indirectly negatively impact Wyoming pocket gopher populations and habitat and increase the potential for listing by USFWS as a Threatened or Endangered species, in violation of BLM's duty to take all actions necessary to prevent listing.

The following information represents Wyoming pocket gopher survey data collected in 2008 by consulting firm, Hayden-Wing Associates, LLC.<sup>43</sup>

The Wyoming pocket gopher (*Thomomys clusius*) is the only known vertebrate species endemic to Wyoming—apparently only in south-central Wyoming and in specifically Sweetwater and Carbon counties.<sup>44</sup> One of our petitions primary rationales for the species' listing under the Endangered Species Act is the potential negative effects of energy development taking place within their known range.<sup>45</sup> Energy development is also named as a "more likely" threat than even agriculture to the Wyoming pocket gopher in the Wyoming Natural Diversity Database Wyoming pocket gopher Conservation Assessments.<sup>46</sup>

#### **Anthropogenic impacts, in addition to oil and gas development and related activities**

Livestock over-grazing also reduces the abundance of pocket gophers while some studies suggested increased gopher abundance with grazing until grazing became heavy, whereupon gophers virtually disappeared (Phillips 1936).<sup>47,48,49,50,51,52,53</sup> The weight of evidence suggests that heavy grazing pressure is likely to reduce the prevalence of pocket gophers.

<sup>43</sup> Wyoming (*Thomomys clusius*) Surveys in South-Central Wyoming Prepared for Petroleum Association of Wyoming 951 Werner Court Suite 100 Casper, Wyoming 82601 Prepared by Hayden-Wing Associates, LLC P.O. Box 1689 Laramie, Wyoming 82073 November 2008.

<sup>44</sup> Clark, T.W. and M.R. Stromberg. 1987. Mammals in Wyoming. University Press of Kansas, Lawrence, Kansas.

<sup>45</sup> Biodiversity Conservation Alliance. Petition to List Wyoming Pocket Gopher as Threatened or Endangered under the Endangered Species Act. Submitted to U.S. Fish & Wildlife Service: August 7, 2007.

<sup>46</sup> Wyoming Pocket Gopher (*Thomomys clusius*): \*A Technical Conservation Assessment. Prepared for the USDA Forest Service, Rocky Mountain Region, Species Conservation Project August 31, 2006 Douglas A. Keinath and Gary P. Beauvais, Ph.D. Wyoming Natural Diversity Database, University of Wyoming, 1000 E. University Ave. — Dept. 3381, Laramie, Wyoming 82071. \*Peer Review Administered by Society for Conservation Biology

<sup>47</sup> Hansen, R.M. 1965. Pocket gopher density in an enclosure of native habitat. *Journal of Mammalogy* 46:508-509.

<sup>48</sup> Hansen, R.M. and A.L. Ward. 1966. Some relations of pocket gophers to rangelands on Grand Mesa, Colorado. *Colorado Agricultural Experiment Station Technical Bulletin* 88:1-22.

<sup>49</sup> Hansen, Richard M. and Vincent H. Reid 1973. "Distribution and adaptations of pocket gophers." In *Pocket Gophers and Colorado Mountain Rangeland*. Experiment Station Bulletin. Fort Collins, CO: Colorado State University.

<sup>50</sup> Turner, G.T., R.M. Hansen, V.H. Reid, H.D. Tietjen, and A.L. Ward. 1973. Pocket gophers and Colorado mountain rangeland. *Colorado State University Experiment Station Bulletin* 544S:1-90.31

<sup>51</sup> Stromberg, M.R. and J.R. Griffin. 1996. Long term patterns in coastal California grasslands in relation to cultivation, gophers and grazing. *Ecological Applications* 6:1189-1211.

<sup>52</sup> Richens, V.B. 1965b. An evaluation of control of the Wasatch pocket gopher. *Journal of Wildlife Management* 29:413-425.

Other agricultural practices that adversely impact pocket gophers, generally, are “pest” control measures including poisoning and trapping of gophers and other wildlife.<sup>54</sup> Herbicides used to control weeds have also been shown to negatively impact populations of northern pocket gophers through their effect on the species’ natural food sources.<sup>55,56,57</sup>

“A more likely threat is soil disturbance and compaction due to increased petroleum exploration and extraction. In this context, increased road density that accompanies petroleum development may be more of a threat than the construction of well pads and pipelines, since it would fragment habitat, which could impede population persistence. Fragmentation due to road construction has been cited as a factor in a petition to list a subspecies of northern pocket gopher (*Thomomys talpoides macrotis*), as threatened under the Endangered Species Act (CNE et al. 2003). Authors of the (*Thomomys talpoides macrotis*) petition claim road construction from municipal development reduces dispersal corridors, creates barriers to finding mates, and increases exposure to edge effects, thereby separating populations and leading to inbreeding and loss of gene flow within individual populations. Given the already noted propensity of pocket gopher populations to become isolated and inbred, this is not an unreasonable scenario and could become a concern if road construction increases within populations of Wyoming pocket gophers.”<sup>58</sup>

Invasion of noxious weeds is generally enhanced by human disturbance of native landscapes such as overgrazing, road construction, recreation, land development. Introduction of non-native plants and even disturbances to native vegetation has been shown to limit populations of other burrowing herbivores such as prairie dogs.<sup>59</sup> According to Hayden Wing Associates, LLC P.O., “studies have not explicitly investigated effects on pocket gophers, but it is likely that non-native vegetation could alter or restrict their populations, particularly if the invasive species are not palatable to gophers. The authors do not see this situation as likely to be a current threat to Wyoming pocket gophers, but there is no information to support this hypothesis and it is

<sup>53</sup> Phillips, P. 1936. The distribution of rodents in overgrazed and normal grasslands of central Oklahoma. *Ecology* 17:673-679.

<sup>54</sup> Tietjen, H.P. 1973 Control of pocket gophers. Pp. 73-81 in *Pocket Gophers and Colorado Mountain Rangeland*.

<sup>55</sup> Miller, R.S. 1964. Ecology and distribution of pocket gophers (Geomyidae) in Colorado. *Ecology* 45:256-272.

<sup>56</sup> Tietjen, H.P., C.H. Halvoran, P.L. Hegdal, and A.M. Johnson. 1967. 2,4-D herbicide, vegetation, and pocket gopher relationships: Black Mesa, Colorado. *Ecology* 48(4):634-643.

<sup>57</sup> Reid 1973. “Population biology of the northern pocket gopher.” In *Pocket Gophers and Colorado Mountain Rangeland*. Experiment Station Bulletin. Fort Collins, CO: Colorado State University. Pp. 21-41.

<sup>58</sup> Wyoming Pocket Gopher (*Thomomys clusius*): \*A Technical Conservation Assessment. Prepared for the USDA Forest Service, Rocky Mountain Region, Species Conservation Project August 31, 2006 Douglas A. Keimath and Gary P. Beauvais, Ph.D. Wyoming Natural Diversity Database, University of Wyoming, 1000 E. University Ave.

— Dept. 3381, Laramie, Wyoming 82071. \*Peer Review Administered by Society for Conservation Biology

<sup>59</sup> Slobodchikoff, C.N., A. Robinson, and C. Schaack. 1988. Habitat use by Gunnison’s prairie dogs. Pp. 403-408 in R.C. Szaro, K.E. Severson, and D.R. Patton, technical coordinators. *Management of amphibians, reptiles, and small mammals in North America*. Proceedings of the symposium. 19-21 July 1988, Flagstaff, Arizona. USDA Forest Service General Technical Report RM-166. November 1988. USDA Forest Service, Rocky Mountain Forest and Range Experiment Station, Fort Collins. 458 pp.

therefore something to keep in mind as the status and ecological relationships of this species are clarified.”

We protest this lease sale because BLM has failed to consider “cumulative effects” of oil and gas development in a context that includes livestock grazing and other agricultural activities on the very land included in this proposed lease sale.

Hayden-Wing Associates reported in 2008 that “trapping success was similar to previous recent effort within the WPGSA but was well below reported values from other pocket gopher studies. Lower capture rates in the WPGSA may be caused by low *Thomomys* densities brought about by reduced resource availability or interspecific competition among species. Species of pocket gopher are thought to exclude one another from particular environments, but sympatry could occur between northern and Wyoming pocket gophers. For example, northern pocket gophers capture sites were located 114, 262 and 269 m from three of the 10 Wyoming pocket gopher capture sites, and with all capture sites exhibiting little difference in environmental conditions. The potential interaction, if any, between these two species is an area that deserves further attention.”<sup>60</sup>

## Genetics

According to Hayden-Wing Associates and Wyoming Natural Diversity Database, the genetic results from the University of Wyoming suggested that the field assessment of phenotype is a reliable indicator of genotype. According to Dr. Dave McDonald (personal communication), specimens identified as *T. clusius* had distinctive chromosome counts ( $2N = 46$ ) and represented a monophyletic clade based on genetic analysis (i.e., Amplified Fragment Polymorphism, or AFLP analysis).<sup>61</sup> Questions regarding the taxonomy of (*T. clusius*) have been answered conclusively. The Wyoming pocket gopher has been assigned taxonomic identifiers as follows:

*Thomomys clusius* - Coues, 1875  
Wyoming Pocket Gopher  
Related ITIS Name(s): *Thomomys clusius* Coues, 1875 (TSN 180224)  
Unique Identifier: ELEMENT\_GLOBAL.2.103243  
Element Code: AMAFC01050

According to the Wyoming Natural Diversity Database model, all Wyoming pocket gopher captures were located within the predicted distribution of the species. The objective of the survey was not to test the model. The WYNDD survey concluded, “the capture locations from the present and future studies may be beneficial for refining and validating its predictive

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<sup>60</sup> Wyoming (*Thomomys clusius*) Surveys in South-Central Wyoming Prepared for Petroleum Association of Wyoming 951 Werner Court Suite 100 Casper, Wyoming 82601 Prepared by Hayden-Wing Associates, LLC P.O. Box 1689 Laramie, Wyoming 82073 November 2008

<sup>61</sup> Pocket Gopher Surveys in Southwestern Wyoming. 2008 Progress Report December 15, 2008. Prepared By Doug Keinath and Hannah Griscom, Wyoming Natural Diversity Database, University of Wyoming, 1000 E. University Ave., Dept. 3381 Laramie, Wyoming 82071. Prepared For Wyoming Game and Fish Department, 5400 Bishop Boulevard Cheyenne, WY 82006, Agreement 000605 PPCAS: CWC - Orgn: 601A.

capacity.” Currently no reliable predictive model exists that could be applied to proposed mitigation measures.

The lack of knowledge regarding Wyoming pocket gopher abundance, morphology, habitat use, distribution, and potential threats demands additional field studies that encompass larger spatial and temporal scales. We ask the Wyoming BLM State Office to withdraw parcels containing known and potential Wyoming pocket gopher habitat from the lease sale while adequate information is gathered and evaluated and the U.S. Fish and Wildlife Service listing concerns reach a final legal resolution.

### C. LEASE PARCELS IN CITIZENS’ PROPOSED WILDERNESS

BCA protests lease parcels WY-1005-058, 062, 063, 064, 065, 066, and 069, because they lie within the boundaries of citizens’ proposed wilderness (CWP). Lease parcel WY-1005-058 lies in the Fuller Peak CWP. Lease parcels WY-1005-062, 063, 064, 065, 066, and 069 lie with the Kinney Rim South CWP. BCA submitted to the BLM *A Citizens’ Wilderness Inventory of Adobe Town* in 2002 documenting wilderness qualities in the Kinney Rim area. In January of 2004, Wyoming Wilderness Association submitted the list of CWPs in the state, with the GIS shape files of the locations, to the Wyoming State Office of the BLM. This information was resubmitted to the Wyoming State Office by the Governor’s Office within the last two years. BLM has chosen to offer for sale a total of seven parcels in the Notice of Competitive Oil and Gas Lease Sale for May 2010.

The BLM needs to consider whether these lands should be protected as wilderness study areas rather than leased in relevant Resource Management Plans (RMPs) and with site-specific NEPA analysis. Under Section 202 of the Federal Lands Policy and Management Act (FLPMA), BLM has the authority and the responsibility to adopt new WSAs. BCA has informed BLM of this obligation previously in comments on the Draft Rawlins RMP and in its Protest of the Proposed Rawlins RMP.

NEPA requires consideration of alternatives “that are practical or feasible” and not just based on “whether the proponent or applicant likes or is itself capable of carrying out a particular alternative”; in fact, “[a]n alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable.”<sup>62</sup> The BLM’s failure to consider an alternative to designate WSAs for the CWP lands in Kinney Rim and Fuller Peak violates NEPA.

The BLM has not sufficiently evaluated the wilderness qualities of these lands, nor has it considered an alternative to protect them. Pursuant to FLPMA, “[t]he Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.”<sup>63</sup>

<sup>62</sup> Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, Questions 2A and 2B*, available at <http://ceq.hss.doc.gov/nepa/regs/40/40p3.htm>; 40 C.F.R. §§ 1502.14, 1506.2(d).

<sup>63</sup> 43 U.S.C. § 1711(a).

Wilderness character is a resource for which BLM must keep a current inventory. The analysis of the wilderness qualities of these lands in the relevant RMPs did not adequately value these resources and relied upon a misunderstanding of the multiple-use mandate when assessing management options. The Rawlins RMP failed to acknowledge the Kinney Rim CWP's wilderness values. The mere presence of oil and gas leases does not prevent the agency from managing these areas to protect their wilderness characteristics. BLM can manage these lands to protect and enhance their wilderness characteristics without designating a WSA. "Wilderness characteristics" include naturalness and providing opportunities for solitude or primitive recreation.<sup>64</sup> BLM's national guidance provides for management that emphasizes "the protection of *some or all* of the wilderness characteristics as a priority" over other multiple uses. This guidance therefore does not limit its application to lands suitable for designation of WSAs; for instance, the guidance does not include a requirement for the lands at issue to generally comprise 5,000-acre parcels or a requirement that the lands have *all* of the potential wilderness characteristics in order to merit protection.

Further, the BLM's original Wilderness Inventory Handbook acknowledges that larger potential units can have more evidence of human impacts and still justify protection of their wilderness values as a whole. In addition, the Handbook specifically provides for protection of an entire unit where the unit (or portions of it) where "human imprints are substantially noticeable" but "otherwise contains wilderness characteristics" and those imprints "will return or can be returned to a substantially unnoticeable level either by natural processes or by hand labor."<sup>65</sup> While the Handbook is not currently in effect for ongoing inventory of wilderness, the agency's interpretation of the meaning of wilderness characteristics remains relevant and instructive, and highlights the opportunities for managing the lands within the Fuller Peak and Kinney Rim CWPs to protect and enhance their wilderness values.

The regulations implementing NEPA provide that federal agencies shall, to the fullest extent possible, "[u]se 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."<sup>66</sup> Such 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.<sup>67</sup> The purpose of NEPA's alternatives requirement is to ensure agencies do not undertake projects "without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means."<sup>68</sup>

In the relevant RMPs, the BLM has improperly limited the range of alternatives for protecting the wilderness values of the Fuller Peak and Kinney Rim South CWPs, based on its

<sup>64</sup> See Instruction Memoranda Nos. 2003-274, 2003-275, Change 1.

<sup>65</sup> H-6310-1.13.D.

<sup>66</sup> 40 C.F.R. § 1500.2(e).

<sup>67</sup> *Id.*; *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9<sup>th</sup> Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466-67 (10<sup>th</sup> Cir. 1984).

<sup>68</sup> *Envnt'l Defense Fund, Inc. v. U.S. Army Corps of Eng'rs*, 492 F.2d 1123, 1135 (5<sup>th</sup> Cir. 1974); see also *Or. Envtl. 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).

understanding that “multiple use” somehow required making these lands available for leasing. The recent decision from the U.S. Court of Appeals for the Tenth Circuit is instructive on the agency’s obligations here. In *State of New Mexico v. Bureau of Land Management*, the BLM refused to consider an alternative that would have closed Otero Mesa (a substantial portion of the planning area) to oil and gas development altogether, focusing on the fact that the agency was preparing an RMP Amendment for the purpose of addressing oil and gas development. The court found that the BLM’s multiple use mandate encompassed both development and protection, and that the BLM was required to consider this “conservation” alternative even in the context of a NEPA process addressing only oil and gas development. The court concluded:

**It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses. . . Development is a possible use, which BLM must weigh against other possible uses—including conservation to protect environmental values, which are best assessed through the NEPA process.<sup>69</sup>**

The Tenth Circuit further found that “a management alternative closing the Otero Mesa would have been fully consistent with the objectives of the RMPA” and that failing to consider the alternative “prevented BLM from taking a hard look at all reasonable options before it.”<sup>70</sup> The court, applying the “rule of reason” held that evaluation of this conservation alternative was “compelled.”<sup>71</sup>

BLM is similarly “compelled” to consider alternatives that would protect wilderness characteristics prior to making the irreversible and irretrievable commitment of resources of leasing. Since the relevant RMPs did not adequately consider any alternatives to protect the wilderness characteristics of the Fuller Peak and Kinney Rim South CWP, as WSAs or through other management tools, that analysis must be completed before leasing. The protested parcels in CWP lands must be withdrawn from the lease sale until such time as BLM has met its legal obligations under FLPMA to re-inventory and re-evaluate the wilderness characteristics of these lands and consider a reasonable range of alternatives, including a no leasing alternative. BLM must prepare a pre-leasing NEPA document that fully considers and analyzes the no leasing alternative *before* the agency engages in an irretrievable commitment of resources, i.e., the sale of non-no surface occupancy oil and gas leases.<sup>72</sup>

In addition, the BLM has not sufficiently analyzed the benefit to other resources from protection of lands with wilderness characteristics. NEPA requires BLM to consider the beneficial effects of proposed actions.<sup>73</sup> Yet, BLM did not consider an alternative protecting wilderness values in relevant RMPs. The agency must examine such alternative prior to leasing the protested parcels without NSO stipulations. BLM must consider a reasonable range of

<sup>69</sup> *State of New Mexico v. Bureau of Land Management*, 565 F.3d 683, 710 (10<sup>th</sup> Cir. 2009) (emphasis added).

<sup>70</sup> 565 F.3d at 711.

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> See *S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1262-1264 (D. Utah 2006); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-30 (9<sup>th</sup> Cir. 1988) (requiring full analysis of no leasing alternative even if an environmental impact statement (EIS) not required); *Mont. Wilderness Ass’n. v. Fry*, 310 F. Supp. 2d 1127, 1145-46 (D. Mont. 2004); *S. Utah Wilderness Alliance*, 164 IBLA 118, 124 (2004) (quoting *Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1162 (10<sup>th</sup> Cir. 2004)).

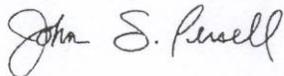
<sup>73</sup> See, e.g., 40 C.F.R. § 1508.8.

alternatives to protect the Fuller Peak and Kinney Rim South CWP's prior to leasing. These alternatives should include a no-leasing alternative. By complying with its NEPA and FLPMA obligations, BLM would preserve its ability to preclude surface use of these parcels and thereby preserve its ability to properly account for wilderness values through site-specific NEPA analysis.

### III. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, BCA requests that the protested parcels not be offered for sale at the May 2010 competitive oil and gas lease sale. If BLM declines to withdraw the protested parcels, then we request that at the minimum, full NEPA analysis be conducted parcel-by-parcel on the impacts of oil and gas development on greater sage-grouse, Wyoming pocket gophers, and citizens' proposal wilderness, *before* the leasing stage, and that *adequate* protective stipulations be placed on the leases before the lease sale in order to provide protection for wildlife, air quality, water quality, and other special resources.

Respectfully submitted,



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