



ENCOURAGING RESPONSIBLE DEVELOPMENT TODAY - FOR TOMORROW

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To: BLM From: Shannon Anderson

Fax: 307-775-6203 Date: 7/19/10

Phone: \_\_\_\_\_ Pages: 10 (Including Cover Sheet)

Re: O+G Lease Protest CC: \_\_\_\_\_

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**POWDER RIVER BASIN**  
*Resource Council*

Submitted via facsimile to 307-775-6203

July 19, 2010

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

RE: PROTEST OF PARCELS TO BE OFFERED AT THE BLM'S AUGUST 3, 2010  
COMPETITIVE OIL & GAS LEASE SALE

Dear State Director:

The Bureau of Land Management's August 3, 2010, oil and gas lease sale notice offers parcels of public land/mineral estate within identified sage-grouse core population areas and identified sage-grouse quality habitat and connectivity areas. Powder River Basin Resource Council protests the following parcels on three major grounds: 1) some parcels are included in sage-grouse core areas or connectivity areas that are needed for the preservation of the greater sage-grouse species and approval of the parcels for sale was not done in accordance with Wyoming BLM's sage-grouse policy; 2) approval of the parcels prior to the BLM's RMP Amendment for sage-grouse for the Newcastle Field Office will foreclose options for that RMP Amendment in violation of NEPA mandates; and 3) approval of the parcels for sale violates guidance from the national BLM regarding lease reform measures, including pre-leasing NEPA analysis, implemented in May 2010.

Specifically, in accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, Powder River Basin Resource Council ("the Council") protests the sale of twenty-one (21) lease parcels displayed below scheduled to be offered by the BLM at the August 3, 2010 competitive oil and gas lease sale in Cheyenne, Wyoming.

- |             |             |             |
|-------------|-------------|-------------|
| WY-1008-001 | WY-1008-011 | WY-1008-019 |
| WY-1008-002 | WY-1008-012 | WY-1008-020 |
| WY-1008-004 | WY-1008-013 | WY-1008-021 |
| WY-1008-005 | WY-1008-014 | WY-1008-022 |
| WY-1008-007 | WY-1008-015 | WY-1008-023 |
| WY-1008-008 | WY-1008-016 |             |
| WY-1008-010 | WY-1008-017 |             |
| WY-1008-009 | WY-1008-018 |             |

## COUNCIL INTEREST

The Council is a nonprofit citizens group headquartered in Northeast Wyoming. We have members who live in the Newcastle and Buffalo Field Office areas that will be negatively impacted by the sale of these lease parcels. Additionally, the Council's rancher and farmer members will be negatively impacted by a listing of the greater sage-grouse as threatened or endangered under the Endangered Species Act and therefore are working to ensure that the sage-grouse and its habitat are protected to a sufficient degree such that a listing is not warranted under the ESA.

## STATEMENT OF REASONS

### I. The BLM violated NEPA by failing to take a hard look at the environmental impacts of leasing and foreseeable oil and gas development resulting from leasing actions

NEPA emphasizes "coherent and comprehensive up-front environmental analysis" to ensure an agency "will not act on incomplete information, only to regret its decision after it is too late to correct." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir.1998) quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); see also *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original) ("The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur."). With respect to oil and gas lease sales, Federal courts have held that the issuance of an oil and gas lease that allows surface occupancy and development is a major federal action requiring the preparation of an environmental impact statement. *Sierra Club v. Petersen*, 717 F.2d 1409 (D.C. Cir. 1983); *Conner v. Burford*, 848 F.2d 1441 (9th Cir.1988).

A 1992 Information Bulletin directly addresses the subject: "[t]he simple rule coming out of the *Conner v. Burford* case is that we will comply with NEPA and ESA prior to leasing." See U.S. DOI Information Bulletin 92-198 (1992) (emphasis added). The IBLA reiterated the well-established rule in a 2006 decision involving a challenge by environmental organizations to the sale of oil and gas leases in sensitive species habitat:

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

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

The requirement for pre-lease, site-specific NEPA analysis in the context of BLM's oil and gas leasing program was affirmed in a recently decided 10th Circuit Court of Appeals case, *State of New Mexico v. BLM*, 565 F.3d 683, 716-719 (10th Cir. 2009). The law of the 10th Circuit - set forth in *New Mexico v. BLM* - holds that NEPA requires an analysis of the site-specific impacts of oil and gas leasing prior to issuance of the lease if "any environmental impacts are reasonably

foreseeable at the leasing stage.” *Id.* Therefore, in order to properly determine whether pre-lease NEPA analysis is required, BLM must review each parcel to determine if environmental impacts are reasonably foreseeable at the lease stage. Factors relevant to this analysis may include the existence of development plans for the lease, nearby exploration activities, actual development in the area and the presence of oil or gas deposits within the lease. Because there is no evidence anywhere in the record demonstrating that BLM undertook this inquiry, or prepared any site-specific pre-lease environmental analysis, the BLM’s leasing decisions are illegal and in violation of NEPA and the law of this circuit.

Despite the unambiguous and unequivocal duty to take a hard look at impacts before leasing, the BLM has decided to postpone this analysis for another day, apparently based on an incorrect understanding of the state of the law and flawed reliance on *Park County*.<sup>1</sup> See, e.g., Newcastle Field Office Worksheet, “Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA),” (“Filing an Application for Permit to Drill is the first useful point at which a site specific environmental appraisal can be undertaken.”). Regardless of whatever *Park County* may mean with respect to BLM’s duty to analyze site-specific impacts, *Park County* certainly does not permit the BLM to ignore new information and new circumstances concerning the sage-grouse, nor does it allow the BLM to completely disregard cumulative effects of projects and proposals that were not disclosed at the time the Buffalo and Newcastle RMPs were adopted.<sup>2</sup>

Significant new policies regarding sage-grouse and scientific literature regarding impacts of oil and gas development on sage-grouse habitat and population have been developed since the time of adoption of the RMPs. The Buffalo Field Office has acknowledged the IBLA’s March 16, 2009 decision “rejected arguments that the BLM could rely on existing NEPA analysis under the 1985 Buffalo Resource Management Plan (RMP) and 2003 Powder River Basin Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) until further research provides better guidance regarding appropriate sage-grouse protection measures.” Carr Draw III East Remand EA at 1. In light of the recent sage-grouse research documenting significant impacts resulting from BLM oil and gas permitting actions, BLM has said that they “need to prepare additional National Environmental Policy Act (NEPA) and/or planning documents to integrate this information into our future decisions.” Letter from BLM Wyoming State Director to oil and gas operators and other parties with operations in sage grouse habitat, August 10, 2007.

In addition to sage-grouse, other conditions have changed since the adoption of the RMPs that warrant additional NEPA analysis. For instance, our understanding of global climate change – and how oil and gas operations contribute to climate change – has greatly improved. Global climate change impacts were not considered in the adoption of the Buffalo and Newcastle RMP and have been hardly mentioned in any of the NEPA documents following these RMPs, including the 2003 Powder River Basin programmatic EIS for CBM development. BLM

<sup>1</sup> *Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987).

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

guidance dictates that climate change impacts should be considered in planning processes, such as leasing. *See, e.g.* Instruction Memorandum (IM) 2008-171.

Moreover, air quality, water quality, land use and other planning considerations must be addressed through pre-leasing NEPA analysis.

Importantly, BLM's failure to conduct pre-leasing NEPA analysis also violates the Onshore Oil & Gas Leasing Reforms that were adopted nationally in May 2010. The Newcastle Field Office's DNA worksheets for the August lease sale are the same as the ones used for the May lease sale. As a result, Newcastle completely ignores these new reform measures. The new reforms provide that ensuring adequacy of pre-leasing NEPA analysis is an important part of the leasing process.<sup>3</sup> For this lease sale, the Newcastle and Buffalo Field Offices have not conducted the proper analysis to verify that existing NEPA analysis is sufficient to disclose foreseeable impacts to sage-grouse populations and habitat. As discussed above, it would most likely be impossible for them to do so because of circumstances that have changed since the adoption of the RMPs. BLM itself has acknowledged the need for new NEPA analysis – and RMP Amendments specific to sage-grouse – because new science and policy is not reflected in the existing RMPs.

## **II. The Newcastle and Buffalo Field Offices failed to consider Instruction Memorandum No. WY-2010-013 - Oil and Gas Leasing Screen for Greater Sage-Grouse**

In the DNA worksheets, there is no indication that the BLM Newcastle and Buffalo Field Offices went through the leasing screens established in Instruction Memorandum No. Wy-2010-013, adopted Dec. 29, 2009. As explained in the document, the Instruction Memorandum (IM) "transmits the oil and gas leasing screen for Greater Sage-grouse and guidance for its use in the Bureau of Land Management (BLM) Wyoming Field Offices." The oil and gas leasing screen contains a flow chart with a series of questions about the parcel, including its location in, or outside, a core area and whether it contains sage-grouse habitat.

The DNAs and associated materials prepared by the Buffalo and Newcastle field offices do not discuss or describe the BLM's new oil and gas leasing screen for sage-grouse. Thus, it is impossible to determine whether, in fact, the screens were applied and, if they were, what the results were. The parcels offered by these field offices should not be offered for sale until they are put through the leasing screen. Otherwise, BLM will be violating its own internal policies and procedures specifically designed for the leasing stage.

## **III. Leasing within sage-grouse habitat prior to RMP Amendments & Revisions to develop land use planning level sage-grouse policy violates NEPA**

NEPA prescribes limitations on the actions that agencies may take while preparing environmental documents. The regulations implementing NEPA require that "[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision . . . ."

<sup>3</sup> The new rules provide that "BLM will use the environmental and public review processes to address important resource values . . . and to identify appropriate lease stipulations . . ." [http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS\\_REALTY\\_AND\\_RESOURCE\\_PROTECTION/energy/leasing\\_reform.Par.50770.File.dat/Energy\\_Reform\\_Side-by-Side\\_04-22-2010.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS_REALTY_AND_RESOURCE_PROTECTION/energy/leasing_reform.Par.50770.File.dat/Energy_Reform_Side-by-Side_04-22-2010.pdf)

and that until a record of decision is issued no action concerning the project can be taken which will "[h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives." 40 C.F.R. §§ 1502.2(f), 1506.1(a)(1)-(2). BLM must abide by these restrictions in this case. The BLM's approval of oil and gas leasing within important sage-grouse habitat will set in motion *de facto* decisions for the RMP Amendments & Revisions related to sage-grouse and will eliminate management options prior to the analysis, release of the draft document, and involvement of the public. "Like the inquiry into whether an agency has taken a 'hard look,' the question of whether particular activities will in fact '[l]imit the choice of reasonable alternatives,' 40 C.F.R. § 1506.1(a)(2), is context-specific." *National Audubon Society v. Department of Navy*, 422 F.3d 174, 202 (4th Cir. 2005). Therefore, it is necessary to explore some of the history and context of the proposed RMP Amendment related to sage-grouse.

On May 28, 2010, BLM Wyoming published a Notice of Intent to prepare an EIS and RMP Amendment for the Casper, Kemmerer, Pinedale, Rock Springs, Newcastle, and Rawlins Field Offices to revise sage-grouse and sagebrush management direction to incorporate policies set forth in BLM Wyoming Instruction Memoranda (IM) 2010-012 and 2010-013. 75 Fed. Reg. 30054 (May 28, 2010). The scoping process for these RMP Amendments has just begun. No BLM office, including Newcastle, has started – yet alone finalized – its alternatives for the RMP Amendment. Additional leasing in sage-grouse habitat may foreclose alternatives that would have been available had leasing not occurred.

Additionally, the Buffalo Field Office is carrying out a RMP Revision. Expanded from its original focus solely on sage-grouse, the revision is still in the beginning stages and a draft EIS and RMP revision has yet to be released to the public for comment. Significantly, Dr. Dave Naugle is conducting important research about sage-grouse viability across the Buffalo Field Office area and completion of this research is needed in order for BLM to make decisions based on the best available scientific information.

### REQUESTED RELIEF

The Council requests that the lease parcels protested herein be withdrawn from the sale pending a detailed review of the arguments presented herein and completion of NEPA analysis of environmental impacts and environmental screens (such as the sage-grouse screening process developed by the state office).

Respectfully submitted,



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