WESTERN RESOURCE ADVOCATES

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July 19, 2010

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

RE: PROTEST OF 27 PARCELS TO BE OFFERED AT THE BLM'S 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 twenty-seven (27) parcels comprising approximately 25,830 acres of public land/mineral estate within identified sage-grouse core population areas. The National Audubon Society and Audubon Wyoming have determined that the sale and subsequent development of these 27 parcels (identified below) offered for sale by your office on August 3, 2010, would further jeopardize the continued viability of the Greater sage-grouse and therefore request that the protested parcels be withdrawn from sale. Specifically, in accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, the National Audubon Society and Audubon Wyoming (hereinafter "Audubon") protest the sale of twenty-seven (27) lease parcels displayed below scheduled to be offered by the BLM at the August 3, 2010, competitive oil and gas lease sale in Cheyenne, Wyoming.

WY-1008-022	WY-1008-034	WY-1008-048
WY-1008-025	WY-1008-036	WY-1008-049
WY-1008-026	WY-1008-037	WY-1008-052
WY-1008-027	WY-1008-039	WY-1008-067
WY-1008-028	WY-1008-040	WY-1008-068
WY-1008-029	WY-1008-044	WY-1008-070
WY-1008-031	WY-1008-045	WY-1008-071
WY-1008-032	WY-1008-046	WY-1008-073
WY-1008-033	WY-1008-047	WY-1008-076

The twenty-seven (27) lease parcels displayed above lie within the core population areas for Greater sage-grouse. See Exhibit A - Sage-Grouse Core Breeding Areas Map, Version 3, dated June 30, 2010. Core population areas are necessary for the protection of this candidate

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species and integral to the State of Wyoming's – and to the BLM's - sage-grouse conservation strategy. The core habitat is the nesting and early brood rearing habitat for over eighty percent of the Greater sage-grouse breeding population of the State of Wyoming. The range-wide population of the greater sage-grouse has already experienced a ninety percent decline from historic record – past, ongoing and reasonably foreseeable future intrusions into sage-grouse habitat led the USFWS to determine in March 2010, that listing of the greater sage-grouse as threatened or endangered is warranted. See 75 Fed. Reg. 13910-14014 (March 23, 2010).

PROTESTING PARTIES

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

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

Audubon's members value the conservation, sound management, and sustainable use of the public lands comprised of the lease parcels offered for sale on August 3, 2010, use and enjoy the lands in question, and frequently engage in sage-grouse viewing and hunting opportunities, and other activities that would be diminished by any further decline in the population of the species or continued destruction of sage-grouse habitat. As a consequence, Audubon and its members would be adversely affected by the sale of the twenty-seven (27) lease parcels protested herein.

BACKGROUND

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

species that depend on large intact sagebrush habitats for every aspect of their life cycle and use multiple seasonal habitats that must all be available to maintain healthy populations.

The loss of this ecosystem is a grave threat not only to sage-grouse but also to world-class populations of mule deer, elk and pronghorn, as well as the other 296 bird species, 85 mammals and 63 fish species that depend on it for habitat and survival. Proactive conservation measures to assure the sage-grouse's future will have far-reaching benefits to other species of concern that have similar habitat needs including world-class populations of mule deer, elk, pronghorn, as well as many other sagebrush obligate species of concern.

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

In response to the Court's ruling, the USFWS initiated a new status review to consider information regarding "threats, conservation measures, and population and habitat status of the greater sage-grouse" that has become available since the legally flawed decision struck down by the Idaho court. See 73 FR 10218 (February 26, 2008). The USFWS completed its status review in early 2010 and published its 12-month petition findings in the Federal Register in late March, 2010.[1] See 75 Fed. Reg. 13910- 14014 (March 23, 2010). In this finding, the USFWS concluded that "***listing the greater sage-grouse (rangewide) is warranted***, but precluded by higher priority listing actions. We will develop a proposed rule to list the greater sage-grouse as our priorities allow." Id. at 13910 (emphasis added).

THE USFWS' MARCH 23, 2010, 12-MONTH FINDINGS FOR PETITIONS TO LIST THE GREATER SAGE-GROUSE, ALONG WITH THE REFERENCE MATERIALS CITED THEREIN, ARE HEREBY INCORPORATED BY REFERENCE INTO THIS PROTEST AS IF FULLY SET FORTH BELOW.

ARGUMENT

I. NEPA VIOLATIONS

[1] The FWS also published its findings on its website on March 5, 2010, at http://www.fws.gov/mountain%2Dprairie/species/birds/sagegrouse/

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

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

Although the BLM suggests in its Determination of NEPA Adequacy (DNA) worksheets prepared for this sale that it may defer the "hard look" at environmental impacts required by NEPA to the APD stage, BLM knows better: A 1992 Information Bulletin directly addresses the subject: "[t]he simple rule coming out of the *Conner v. Burford* case is that ***we will comply with NEPA and ESA prior to leasing.*** " See U.S. DOI Information Bulletin 92-198 (1992) (emphasis added). Importantly, the approach to NEPA compliance outlined in IB 92-198 has been affirmed numerous times by the Interior Board of Land Appeals (IBLA) and is the "black letter" law of the agency.

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

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

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

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 (10th Cir. 2009).[2]

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 "law" coming out of *Park County*.[3] See, e.g., Rawlins Field Office "Worksheet Determination of NEPA Adequacy (DNA)," at 2, dated 4/12/2010 ("Filing of 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

[2] The significance of this opinion and its relevance to this protest are discussed in more detail, below.

[3] *Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987).

ignore new information and new circumstances concerning the sage-grouse, nor does is allow the BLM to completely disregard cumulative effects of projects and proposals that were not even conceived of 10-20 years ago, much less studied. The unfortunate but predictable result of BLM's distorted view of *Park County* has apparently caused the agency to not even attempt the "hard look" at environmental impacts required by NEPA, DOI policy and applicable case law.

1. The BLM violated NEPA by failing to analyze the site-specific impacts of leasing.

Statements in all of the DNAs[4] prepared by BLM's field offices show that Wyoming BLM clings to an antiquated, simplistic and, most importantly, erroneous understanding of its NEPA obligations with regard to oil and gas leasing. As noted earlier, the United States Court of Appeals for the 10th Circuit recently examined BLM's NEPA procedures in the context of oil and gas leasing on public lands in the State of New Mexico. See *New Mexico v. BLM*, 565 F.3d 683 (10th Cir. 2009). ***The Court held that NEPA requires an analysis of the site-specific impacts of oil and gas leasing prior to lease issuance.*** 565 F.3d at 716-719. The Independent Petroleum Association of New Mexico intervened in the case to press a single issue: that the 10th Circuit's decision in *Park County Resource Council* (the case cited by BLM for the proposition that site-specific environmental analysis is not required prior to leasing) established that BLM need not prepare a site-specific EIS prior to leasing. The court flatly rejected that argument, concluding that the question whether an EIS is required before leasing "necessarily requires a fact-specific inquiry." Id. at 718. The court also noted that in *Park County*, BLM did in fact prepare a site-specific NEPA document, an "extensive" EA, prior to issuing the leases, to supplement a plan level EIS. Unlike *Park County*, in this instance, there is NO site-specific NEPA analysis of any kind to support BLM's leasing decisions.

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. As noted earlier, this determination requires BLM to consider: 1) "whether the lease constitutes an irretrievable commitment of resources"; i.e., a lease allowing for surface occupancy; and 2) "whether any environmental impacts [are] reasonably foreseeable at the leasing stage." Id. at 718. Under the law of this circuit, in order to properly determine whether a pre-lease EIS is required, BLM must review each parcel to determine if "any" 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.

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

[4] For example, the Rock Springs Field Office DNA states "the filing of an Application for Permit to Drill is the first useful point at which a site-specific environmental appraisal can be undertaken." See Rock Springs DNA at unpaginated 2. Other DNAs prepared for this sale make the same baseless assertions.

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

NEPA's implementing regulations further underscore this obligation. An agency "shall prepare supplements to either draft or final environmental impact statements if … there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR §1502.9(c)(1)(ii). Even where an environmental impact statement has been previously prepared, "if there remains 'major federal action' to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851, 1859 (1989).

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

On March 23, 2010, the USFWS published its "12-Month Findings for Petitions to List the Greater Sage as Threatened or Endangered" in March, 2010. See 75 Fed. Reg. 13910 to 14014 (March 23, 2010). In the 12-Month Findings the wildlife agency explained that:

> We have carefully assessed the best scientific and commercial information available regarding the present or threatened destruction, modification, or curtailment of the greater sage-grouse's habitat or range. Based on the current and ongoing habitat issues identified here, their synergistic effects, and their likely continuation in the future, ***we conclude that this threat is significant such that it provides a basis for determining that the species warrants listing under the Act as a threatened or endangered species.***

See 75 Fed. Reg. 13910, 13962 (emphasis added).

Previous oil and gas lease sale protests filed by Audubon dating back to April 2008, describe at length the new information and circumstances affecting the sage-grouse that the BLM failed to consider in its leasing decisions, including numerous peer-reviewed scientific studies showing the BLM's lease stipulations for sage-grouse do not work.[5] Because the USFWS 12-month findings, dated March 23, 2010, discuss this information, it is not restated again here. Suffice it to say that BLM had access to and was aware of the emerging body of science that documented the downward population trends of the sage-grouse, and the role BLM's

[5] New information and changed circumstances referenced in those earlier protests is incorporated by reference herein.

management decisions -particularly oil and gas developments approved by the agency - played in the continuing destruction of sage-grouse habitats that ultimately led the USFWS to conclude that listing under the ESA was warranted in order to protect the species from extinction.

In order to determine whether its NEPA analysis was valid to support the sale of the contested parcels, BLM field offices prepared DNA Worksheets containing responses to a series of questions.[6] Question 3 of the worksheet asks:

> Is the existing analysis valid in light of any new information or circumstances (including for example ... most recent Fish and Wildlife Service lists of threatened, endangered, proposed, and candidate species...)? Can you reasonable conclude that all new information and all new circumstances are insignificant with regard to analysis of the proposed action?

For the most part, the DNAs prepared by BLM that are relevant to this protest (Buffalo, Casper, Kemmerer, Rawlins and Rock Springs) ignore the new information. For example, the Kemmerer DNA states:

> The existing analyses and conclusions in the Kemmerer RMP/EIS, and the three Environmental Assessments are sufficiently detailed, and broad enough in scope, to encompass all current information and circumstances for the lease parcels in question. It is reasonable to conclude that the few changes that have occurred between the existing analyses and the new proposed action would not substantially change the analysis of the new proposed action.

Few changes have occurred? The RMP/EIS referenced in the DNA was approved over 24 years ago, in April 1986. The most recent of the EAs cited is over 10 years old. Not only are the statements in the DNA incorrect, most reasonable people would view them as absurd. First, as noted earlier, the USFWS has determined that listing the greater sage-grouse as threatened or endangered is warranted. The DNA ignores this important fact. Second, the environmental analyses of impacts to sage-grouse referenced in the DNA are based on an assumption that the BLM's oil and gas lease stipulations for sage-grouse are effective--this assumption has been proven to be false, yet once again, the BLM ignores this fact.

In response to the same question, the Buffalo DNA answers in part: "The analysis conducted for the BRMP is still valid for oil and gas leasing. New standards or goals, changes in resource conditions, or changes in resource related plans or new designations would be considered in both a project level development and/or site-specific activity plan NEPA document." Besides being non-responsive to current sage-grouse issues, including the need for ESA listing and ineffective lease stipulations, the answer reveals a fundamental misunderstanding of the BLM's responsibilities regarding NEPA compliance and oil and gas leasing. The law is clear on this: new circumstances and information must be considered now--at the leasing stage, not deferred to some indefinite point in the future.

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[6] The following Field Offices prepared DNA worksheets in connection with the August 3, 2010 oil and gas lease sale: Buffalo (dated 4/16/10); Casper (dated 4/8/10); Kemmerer (dated 4/9/10); Lander (dated 4/7/10); Newcastle (undated); Pinedale (undated); Rawlins (dated 1/15/10); Rock Springs (dated 4/8/10) and Worland (dated 4/7/10).

The DNA prepared by the Rawlins Field Office to support the issuance of 18 of the 27 parcels protested herein is similarly deficient. Although it references a more recent RMP, one adopted in 2008, the analysis is nevertheless outdated given the series of recent actions taken by state and federal agencies to address sage-grouse, such as the March 2010 determination by the USFWS that the sage-grouse is warranted for listing as threatened or endangered, and the Governor's sage-grouse executive order.

Although the DNA prepared by the Rock Springs Field Office at least mentions the existence of IM-WY-2010-013: Oil and Gas Leasing Screen for Greater Sage-Grouse, it makes the incredulous claim that "[f]ew changes have occurred which would alter any decisions made in the RMP." Although understandable due to the timing, the DNA fails to acknowledge that Wyoming BLM has announced amendments to six Resource Management Plans, including the Rock Springs RMP, to "revise sage-grouse and sagebrush management direction in the existing ... RMPs to incorporate policies set forth in Wyoming Instruction Memorandum (IM) 2010-012 and 2010-013." In addition to the new information and changed circumstances concerning the sage-grouse, the BLM must also evaluate the impact of these new polices on its leasing recommendations.

Finally, while Casper FO's DNA acknowledges that "the Greater sage-grouse is now considered a candidate species under the act[]" the DNA fails to discuss a dominant factor causing a decline in sage-grouse populations-- BLM's outdated, ineffective and scientifically discredited oil and gas lease stipulations, including those attached to the Casper lease parcels, have failed to adequately mitigate oil and gas development impacts. And while the DNA correctly observes that the "Wyoming BLM has issued Two Instruction Memorandums (IM WY-2010-012 and IM WY-2010-013) intended to insure that Wyoming BLM has adequate regulatory mechanisms in place to protect the Greater Sage-grouse[]" it fails to acknowledge that the BLM itself has admitted that "Broad application of the new restrictions [outlined in IM 2010-012] as COAs to existing leases would likely be considered an interference with lease rights unless the lease contains language allowing for such a modification." WY IM 2010-012 (December 29, 2009) at 12. The Casper parcels contain no language expressly allowing for "such a modification" and thus there is simply no basis for BLM's conclusion that the conservation measures (including density and surface disturbance limitations) set forth in IM-2010-012 can be successfully implemented on these two parcels (or, far that matter, on any of the parcels protested herein).

Making matters worse, the DNA incorrectly concludes that the Park County decision justifies the deferral of a "hard look" at environmental impacts until the project stage. However, as Audubon has shown, the "hard look" is required at the leasing stage.

Because they fail to address the "candidate" status of the species and reasons for its decline, the NEPA analysis referenced by BLM in various DNA Worksheets to support its decision to lease the contested parcels is useless. The EISs and EAs referenced in the BLM's DNAs lack meaningful discussion of the implications of the "new" information and circumstances referenced in the USFWS notices, and fail to analyze causes of declining populations of sage-grouse or alternatives to the BLM's inadequate sage-grouse stipulations.

The CEQ's NEPA regulations require agencies to supplement their NEPA analyses when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts[]" (40 CFR 1502.9(c)) "even after the proposal has received initial approval." *Friends of the Clearwater*, 222 F.3d at 557. "If information developed after the NEPA statements was sufficiently new and significant when compared to the

information upon which the NEPA statements were based, a new NEPA statement was required." *Center for Native Ecosystems*, 170 IBLA 331, 346 (November 22, 2006). This is precisely the situation here: The law is clear - BLM must supplement its NEPA analysis before it can issue the leases protested herein. Mention of some of the new information in BLM's DNAs (e.g., Casper) is not a substitute for proper NEPA analyses and disclosure (with opportunities for public participation) in a NEPA document. See 43 CFR Part 46.

Clearly, this information about sage-grouse impacts and deficiencies in its existing stipulations was and is readily available to BLM, yet the agency chose to ignore it. There is simply no legitimate justification for BLM's failure to consider the information outlined above. BLM is obviously aware of the information and has it in its possession, and the law and BLM's policies require that it be taken into account in the environmental review for this lease sale. In this instance, however, BLM Field Managers appear to have failed to properly assess "whether there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action[]" despite having specific knowledge of the information. This blatant disregard of BLM's responsibilities under NEPA reflected by these DNA comments illustrate clearly why the Greater sage-grouse is in trouble.

3. Aware that existing oil and gas lease stipulations are inadequate, BLM violated NEPA by failing to consider alternatives that would protect the sage grouse such as new lease stipulations or not leasing parcels in core population areas.

Question 2 of the DNA worksheets prepared by BLM field offices asks:

> Is the range of alternatives analyzed in the existing NEPA document(s) appropriate with respect to the current proposed action, given current environmental concerns, interests, and resource values?

In each of the DNAs prepared for this oil and gas lease sale, BLM field offices answered question 2 in the affirmative. The response to question 2 set forth in the DNA prepared by the Kemmerer FO illustrates the problem: "The range of alternatives in the existing NEPA documents is appropriate for the current proposed action. * * * No other alternatives were warranted since there were no unresolved conflicts that could not be addressed by the mitigating measures contained in the documents." This claim is of course false, as existing sage-grouse stipulations in all of the WY BLM's RMPs have been scientifically discredited, and moreover, cannot be squared with the underlying facts, including the application of the BLM's sage-grouse leasing screen to the protested parcels which resulted in some parcels being deferred, essentially a no lease alternative developed outside the context of a legally adequate NEPA process.

The responses to this question in the DNAs prepared by Buffalo Casper, Kemmerer, Rawlins and Rock Springs field offices are more or less the same. Yet such conclusions both fly in the face of on-the-ground reality and fail to meet the basic requirements of NEPA. Further, none of the RMPs or other NEPA documents referenced in the DNAs contain the alternative(s) required by the BLM's national sage-grouse conservation strategy, as supplemented by Instruction Memorandum No. 2010-071 which expressly calls for analysis of "one or more alternatives that would exclude priority habitat from energy development." This alternative simply does not exist.

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

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

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

a) Inadequate stipulations.

The Western Association of Fish and Wildlife Agencies (WAFWA), the U.S. Fish and Wildlife Service[7], and the State of Wyoming have concluded that existing stipulations used by BLM are ineffective, including those attached to the parcels protested herein such as a 1/4 mile NSO buffer around leks and 2 mile seasonal timing limitation. As discussed above, the nation's top sage-grouse researchers, biologists and wildlife professionals have determined that existing oil and gas lease stipulations in use by BLM to protect sage-grouse simply do not work, and that much larger NSO or avoidance areas are required to protect the biological integrity of sage-grouse and their habitat. The WAFWA memo[8] explained that "[r]esearch in Montana and Wyoming in coal-bed methane natural gas (CBNG) and deep-well fields suggests that impacts to leks from energy development are discernable out to a minimum of 4 miles, and that some leks within this radius have been extirpated as a direct result of energy development." WAFWA memo at 3. The WAFWA concluded that the standard ¼ mile NSO stipulation applied to leases with strutting grounds resulted in a shocking 96% lek loss with only 4% lek persistence. Not surprisingly, lek persistence increased with the size of the buffer: 0.5 mile, 1.0 mile, and 2.0 mile buffers resulted in estimated lek persistence of 5%, 10% and 28%, respectively. In contrast, lek persistence in the absence of oil and gas development was about 85%. The WAFWA reported that:

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

[7] See, e.g., USFWS' 12-Month Findings for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 75 Fed. Reg. 13910-14014 (March 23, 2010).

[8] Attached to and discussed in previous protests filed by Audubon, on file with the WY BLM State Office.

WAFWA memo at 2.

In response to the information contained in the WAFWA memo, on March 27, 2008, Wyoming Governor Dave Freudenthal submitted a letter to Wyoming BLM specifically requesting the use of new stipulations that "effectively" protect sage-grouse: "While I am not suggesting that these leases should not be offered, ***I would submit that any leases that are offered, especially those within "core areas," both in the April sale and beyond, be subject to stipulations that effectively protect sage grouse and their habitat.***" [9]

Obviously, in light of this new information the BLM has a duty to analyze new or revised mitigation measures and stipulations that will protect the sage-grouse, including limiting development to 1 well pad per section, and expanding NSO buffers as recommended by WAFWA, and/or deferring leasing of parcels in core population areas. It is not enough for BLM to apply its new sage-grouse policies to this lease sale--the required analysis must be performed in conformance with NEPA's procedural requirements, including public participation and opportunities for comment.

Further, given the admission that "[b]road application of the new restrictions as COAs to existing leases would likely be considered an interference with lease rights..." the BLM must also evaluate whether it has the legal authority to apply the restrictions to all of the protested parcels. As discussed in IM 2010-012, this evaluation must address whether the restrictions are: 1) consistent with the governing RMP; 2) biologically based; 3) adequately supported by site-specific NEPA analysis; and 4) not an undue interference with lease rights. Given these uncertainties, it is improper for BLM to assume that the restrictions can be applied to all of the protested parcels. Because it cannot be determined whether the necessary sage-grouse conservation measures (including density and 5% surface disturbance limitations) can be applied post lease issuance, it is impossible for BLM to accurately disclose the impacts from leasing the protested parcels. Accordingly, in light of the above, the proper and legally required approach is for BLM to defer the leasing of these parcels until after the RMP amendments and revisions have been completed and effective lease stipulations have been adopted in the RMPs and attached to the parcels.

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

On August 1, 2008, the Governor of the State of Wyoming signed Executive Order 2008-2 – GREATER SAGE-GROUSE CORE AREA PROTECTION. Online at: http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/index.asp. The Governor issued Executive Order 2008-2 in response to recommendations made by his Sage Grouse Implementation Team (SGIT) for the development of "actions and strategies which will effectively manage sage-grouse and their habitats in Wyoming." The centerpiece of the Governor's sage grouse conservation plan is the identification of "core population areas" for which special protection is needed in order to "maintain habitats and viable populations of sage-grouse in areas where they are most abundant." The core population areas identified by the State

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

include habitats and existing populations for no less than two-thirds of the sage-grouse in Wyoming. The State has determined that a minimum of 40 core areas are needed to ensure geographic and genetic diversity, so the plan allows boundaries to be adjusted in response to "emerging conditions and information" that may impact sage-grouse conservation efforts.[10]

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

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

> In short, if implemented as envisioned by the State Sage-grouse Implementation Team (SGIT) and Governor's Executive Order, the Strategy is the type of action the Service looks for, both in conservation measures and regulatory process, to preclude listing a species under the ESA. However, it is important that I point out that these potential benefits of the Strategy will only be realized if the integrity of the core area approach is maintained. The Service feels that the greatest threats to the integrity of the core areas are: (1) not adhering to science-based conservation measures associated with development, and (2) allowing mitigation for impacts to core population areas as an option if the proposed development is counter to accepted conservation measures or when impacts are not known.
>
> The foundation of the Strategy from the Service point of view is that development in the most important sage-grouse habitats (core areas and associated seasonal habitats) is done only when no impact to the species can be demonstrated. In essence, ensuring the conservation of sage-grouse in the core areas is mitigation for the greater development flexibility outside core areas provided for by the Strategy. Therefore, allowing impacts within core areas, for research or other reasons, destroys the function and value of the Strategy..
>
> * * *
>
> To the Service, the recommendations of the SGIT and Executive Order 2008-2 are clear with respect to deviation from standard stipulations. That is, the burden of proof that development does not affect sage-grouse rests with the industry or

[10] The State of Wyoming modified core area boundaries on June 30, 2010. The BLM's oil and gas leasing screen for sage-grouse, IM 2010-013, should be re-applied to ensure all core parcels are properly identified.

> proponent in question, and any research they feel is necessary to convey this, should be conducted outside of core areas. ***This burden of proof to show that development in core areas can be done consistent with conserving sage-grouse underlies all forms of development—not just wind-power.*** The Strategy is clear on this point and is one of the key reasons for our endorsement.

See Letter from Brian Kelly, Wyoming ES Field Office, Field Supervisor, USFWS to Steve Ferrel, Director, WGFD, dated July 7, 2009 (emphasis added) (on file with Wyoming BLM).

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

It is clear that the above NEPA requirement was not met in this case--BLM has not demonstrated that development can take place inside core areas without harming sage-grouse populations. Because the WGFD stipulations offer more protection than the stipulations proposed by BLM for use in this lease sale, differing substantially in many key respects, a conflict exists that must be both disclosed and resolved. Accordingly, and because BLM has never considered alternatives to the stipulations described in the underlying RMP and applied to the leases contested herein, BLM must evaluate and carefully consider the environmental impacts of applying the WGFD stipulations to the leases proposed for sale August 3, 2010.

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

Aware of mounting science showing a decline of the health of the species, the Washington Office of the BLM in November 2004, issued its National Sage-Grouse Habitat Conservation Strategy. Acknowledging "the BLM manages more sage-grouse habitat than any other entity and as a result has a key role in the conservation of the species and its habitat" the agency proclaimed that *"one of BLM's highest priorities is to implement the National Sage-grouse Strategy on BLM-managed lands... All State Directors and Field Managers will take appropriate actions to ensure immediate implementation."* See BLM IM 2005-024 (emphasis added).

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

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

This method will ensure that all alternatives, including the preferred alternative, will include sagebrush and sage-grouse habitat considerations."

Id. (emphasis added).

On March 5, 2010, the BLM updated the sage-grouse conservation strategy with the issuance of Instruction Memorandum No. 2010-071 - Gunnison and Greater Sage-grouse Management Considerations for Energy Development (Supplement to *National Sage-Grouse Habitat Conservation Strategy*). As explained in the document, the BLM issued the IM in light of:

- recent peer-reviewed scientific studies addressing the impacts of oil and gas development on sage-grouse;
- the currently limited information available concerning the impacts of wind development on sage-grouse; and
- the increasing land use pressures on the public lands, including the BLM's authorization of renewable energy projects.

The IM outlines the BLM's policy and action to conserve sage-grouse: "The Gunnison sage-grouse and greater sage-grouse are BLM sensitive species that are to be managed to promote their conservation and to minimize the need for listing under the ESA, in accordance with the BLM's special status species policy (BLM Manual 6840). Therefore, when necessary to maintain sustainable sage-grouse populations across the broader landscape within the state, field managers will implement an appropriate combination of the following actions in priority habitat." The actions include--

In RMP revisions and amendments, analyze one or more alternatives that would exclude priority habitat from energy development and transmission projects.

IM No. 2010-071 at 1 (emphasis added).

Three of the ten BLM Field Offices in Wyoming are currently revising their RMPs: Lander, Buffalo, and Cody/Worland, and a fourth, Green River, is in the process of commencing that effort. Further, Wyoming BLM recently announced RMP amendments for Casper, Kemmerer, Pinedale, Rock Springs, Newcastle, and Rawlins, the purpose of which is to "revise sage-grouse and sagebrush management direction..." contained in the governing RMPs. See 75 Fed. Reg. 30055, May 28, 2010. Thus, all of the protested parcels are located within planning areas undergoing either revisions or amendments to their RMPs. The geographic area covered by these plans encompasses many millions of acres of public lands containing important sage-grouse habitat, along with very significant oil and gas fields. In circumstances such as these, where NEPA processes are underway in connection with the revision of several RMPs, the Council on Environmental Quality regulations implementing NEPA prohibit the BLM from taking any action that could "have an environmental impact" or "limit the choice of reasonable alternatives." 40 CFR § 1506.1(a). Here, this is especially true, given that the BLM's own "highest priority" polices require the agency to consider alternatives that specifically address the conservation needs of sage-grouse.

There is no evidence in any of the DNAs prepared by BLM that it considered this supplement to the sage-grouse conservation strategy. Despite the specific direction (quoted above) contained in Instruction Memorandum No. 2010-071 requiring BLM managers to "analyze one or more alternatives that would exclude priority habitat from energy development and transmission projects" in RMP revisions and amendments, the 27 lease parcels offered for sale on August 3, 2010, protested herein are in sage-grouse core population areas identified by the State, and all 27 parcels allow for surface occupancy and development activities in this key sage-grouse habitat. If BLM is allowed to move ahead now with its leasing decisions before carrying out the important actions outlined in the Sage-grouse Habitat Conservation Strategy, as supplemented by IM 2010-071, it will have precluded any opportunity to consider and implement effective alternatives and conservation options for the sage-grouse and habitat on the parcels protested herein, such as not leasing, leasing with NSO stipulations, or leasing with stipulations approved by WGFD for use in sage-grouse core population areas. Withdrawing the contested parcels from the August 3, 2010, lease sale would give the BLM the time and opportunity to update its NEPA and planning documents to incorporate the most current research and planning efforts and management actions. Only then will BLM be in a position to make a fully informed decision that balances resource extraction with the protection of this sensitive species. Given the scale and intensity of impacts occurring across its range, this may well be BLM's last chance to "get it right" with respect to sage grouse protection. Getting it right means not offering the contested parcels for lease, applying NSO to the entire parcel, or leasing with stipulations that have been scientifically proven to be effective at protecting viable populations of sage grouse and sage grouse habitat. Beside being an arbitrary and capricious exercise of agency authority, leasing the parcels now with the same old, ineffective and scientifically discredited stipulations attached with nothing more than a hope that effective COAs can be applied at the development stage is simply the wrong thing to do.

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

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

Sage-grouse face a complex array of threats to their continued survival. Housing developments, energy projects, mining, improper livestock grazing, habitat alteration and fragmentation, disease, predation, transportation and energy transmissions facilities, drought, climate change, and myriad other activities impact the sage grouse. See, e.g., USFWS 12-Month Findings for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 75 Fed. Reg. 13910-14014 (March 23, 2010). As the Western Watersheds Court found, based on a complete review of the record before it, ***"It is the cumulative impacts of the disturbances, rather than any single source, [that] may be the most significant influence on the trajectory of sagebrush ecosystems."*** *Western Watersheds*, 535 F.Supp.2d. at 1186 (emphasis added). Despite these significant and well-recognized threats to the sage-grouse, each of the DNAs

prepared by BLM Field Offices for this sale make the ludicrous claim that "[c]umulative impacts are substantially unchanged" from the date the RMPs were approved which, in the case of the 1985 Kemmerer RMP, is in excess of two decades ago. See, e.g., Kemmerer DNA at 4 (dated 4/9/10).

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

The RMPs, EISs, and other miscellaneous and inapplicable environmental documents relied upon by BLM to support its leasing decisions do not contain any discussion of these and other emerging cumulative threats to the sage-grouse. Thus the BLM's assertions in the DNAs prepared by the field offices that "the cumulative impacts are substantially unchanged" from disclosures in RMPs (some dating as far back as1985) are patently absurd.

The BLM's failure to take a hard look at actions, activities, programs, and projects that may have a cumulative impact on the sage-grouse is inexcusable—the BLM itself is responsible for authorizing a wide range of projects, activities and actions that have a cumulative impact on the sage-grouse and therefore has better, easier and faster access to this information than the public. If the agency needs a reminder, its own website would be a good place to start: the "Newsroom" at <http://www.blm.gov/wy/st/en/info/news_room.2.html> contains news releases organized by year and month, and each Field Office has a NEPA site that contains notices of proposed actions and other NEPA related information. Likewise, the State of Wyoming's website is a source of information for state programs such as oil and gas leasing (http://slf-web.state.wy.us/) and oil and gas permitting. See http://wogcc.state.wy.us/

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

Among the many consequences of BLM's failure to take a hard look at impacts, particularly the cumulative impacts noted above and new information and changed circumstances with regard to sage-grouse over the past 20 years, is its failure to recognize the need to review and verify the effectiveness of existing stipulations and to consider new stipulations designed and configured to effectively protect the sage-grouse from the impacts of oil and gas development activities. The CEQ's NEPA regulations at 40 CFR §1508.20 define mitigation to include--

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments.

Given the proven ineffectiveness of existing lease stipulations attached to leases to protect the sage-grouse and its habitat, including the TLS and CSU stipulations placed on the leases protested herein, it is incumbent upon BLM to evaluate other forms of mitigation.[11] Such measures include, for example, 1) not leasing in core population areas; 2) attaching NSO stipulations to parcels located within core areas; or 3) applying stipulations recently adopted by the Wyoming Game and Fish Department for oil and gas leases in core population areas. See "Stipulations for Development in Core Sage Grouse Population Areas, 7/31/08, online at: http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/index.asp.

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

And as discussed earlier, the assumption that the density, timing and surface disturbance measures described in IM WY 2010-012 can be applied as COAs at the project stage to effectively mitigate impacts to sage-grouse is so uncertain and so tenuous that they certainly cannot be viewed as adequate substitutes for properly designed stipulations attached to the parcel prior to lease issuance. Whether these COAs can serve as adequate substitutes for proper lease stipulations has not been determined and simply cannot be determined until after the lease has been issued and the case-by-case evaluation described in IM 2010-012 (at 12) has taken place.

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

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

[11] Internal review by BLM pursuant to the newly developed Oil and Gas Leasing Screen for Greater Sage-Grouse is not a valid substitute for the rigorous and scientific analysis of mitigation measures required by NEPA. 40 CFR 1502.14(f); 1502.16(h).

Executive Order 2008-2 contains an "action forcing" requirement that specifies "[n]ew development or land uses within Core Population Areas should be authorized or conducted ***only when it can be demonstrated by the state agency that the activity will not cause declines in Greater Sage-Grouse populations.***" Executive Order 2008-2 at ¶3 (emphasis added).

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

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

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

b. Failure to disclose and reconcile inconsistency.

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

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

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

B. Development of the BLM's Oil and Gas Leasing Screen for Greater Sage-Grouse and application to the specific parcels protested herein violates NEPA and is an arbitrary and capricious exercise of agency authority.

On December 29, 2009, the Wyoming State Director issued Instruction Memorandum No. WY-2010-013 - Oil and Gas Leasing Screen for Greater Sage-Grouse. 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; whether it contains sage-grouse habitat; whether it is within 11 square miles of manageable Federal unleased land; and identifying any drainage issue associated with the parcel. If the answer to the first three questions is "yes" and "no" to the fourth, the parcel may be deferred from leasing.

Although Audubon commends BLM for the time and effort it put into developing the oil and gas screen, we have questions about its basic terms, as well as its application to the parcels protested herein. First, because the word "habitat" is not defined in the screen, we are concerned that some core area parcels may not be receiving receive appropriate protection due to improper and/or arbitrary determinations that no "suitable habitat" exists within the parcel. For example, it appears that the Casper FO approved the leasing of parcels "that were determined not to contain ***important*** Sage-Grouse habitat..." DNA Worksheet at unpaginated 4 (emphasis added). But the leasing screen refers to "suitable habitat."

As BLM knows, habitat for greater sage-grouse varies significantly, seasonally and throughout their life cycle, and may not always be apparent or obvious to the BLM-specialist. As the USFWS noted in its March 23, 2010, 12-month findings, "Greater sage-grouse depend on a variety of shrub-steppe habitats throughout their life cycle..." 75 Fed. Reg. 13915. Habitat needs vary seasonally, "which includes breeding, nesting, brood rearing, and wintering areas." Id. "Areas of bare soil, short-grass steppe, windswept ridges, exposed knolls, or other relatively open sites typically serve as leks." Id. "All sage-grouse gradually move from sagebrush uplands to more mesic areas (moist areas such as streambeds or wet meadows) during the late brood-rearing period (3 weeks post-hatch) in response to summer desiccation of herbaceous vegetation. [internal citation omitted]. Summer use areas can include sagebrush habitats as well as riparian areas, wet meadows, and alfalfa fields. [internal citation omitted]. "[N]atural water bodies and reservoirs can provide mesic areas for succulent forb and insect production, thereby attracting sage-grouse hens with broods." Id. Without the benefit of guidance or definitions, how can BLM (and the public) be confident that sage-grouse habitat is properly identified in (and protected by) the oil and gas screening process, and that the screen is being applied uniformly across BLM field offices?

Second, BLM must explain how and why it has determined that core area parcels will not receive added protection (and thus remain subject to BLM's scientifically discredited stipulations) if they are not located within 11 square miles of "manageable" Federal unleased land. What is the agency's basis and rationale for this screen? Why 11 square miles? Suppose that an 11-square mile block of otherwise manageable federal surface contains a single 40-acre lease that is due to expire in 2 years? Will the presence of the lease prevent the parcel from being deferred from leasing? Why?

Third, because the screen provides multiple opportunities allowing BLM to lease inside core areas, it appears that the oil and gas screen may facilitate (and perhaps is intended to permit) continued significant intrusions into designated core areas. If this is the case, it is in direct conflict with the USFWS's understanding that core areas shall serve as mitigation for significant habitat disruptions outside the core. The better approach would be to simply defer any further leasing in core habitat.

Fourth, although a vast improvement over the status quo, we believe the BLM's lease screening procedure, together with its application to the parcels protested herein, must be subject to review and scrutiny in the context of the National Environmental Policy Act. The screen comprises both new policy and procedures, of which both meet the definition of "major federal action" (40 CFR § 1508.18) requiring the preparation of an environmental impact statement. Among other things, such a review will aid in determining whether application of the screen will achieve the sage-grouse conservation objectives set forth in the policy. In-house application of the sage-grouse leasing screen is not a legally-sufficient substitute for NEPA's procedures.

Finally, the DNA prepared by the Buffalo field office does not discuss, describe or even reference 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.

II. VIOLATIONS OF THE FEDERAL LAND POLICY MANAGEMENT ACT

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

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

The Wyoming BLM Sensitive Species Policy and List (updated March 31, 2010) promulgated pursuant to BLM 6840 identifies the Greater sage-grouse as a sensitive species. "The sensitive species designation is normally used for the species that occur on Bureau administered lands for which BLM has the capability to significantly affect the conservation status of the species through management." See BLM 6840 at 6. The Wyoming sensitive species policy explains that "Special Status Species include those species listed or proposed for listing under the ESA together with species designated internally as BLM sensitive in accordance with BLM Manual 6840. Actions authorized by the BLM shall further the conservation and/or recovery of federally listed species and conservation of Bureau sensitive species. Bureau sensitive species will be managed consistent with species and habitat management objectives in land use and implementation plans to promote their conservation and to minimize the likelihood and need for listing under the ESA. See Wyoming Sensitive Species Policy at 1.

With respect to the greater sage-grouse as well as other species on the sensitive species list, BLM's specific non-discretionary mandate is "to avoid or minimize adverse impacts and

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

Despite these clear directives, the administrative record for the August 3, 2010, lease sale is largely devoid of any evidence that the Field Office managers made any effort or performed any evaluation to ensure that special status species objectives were carried out. Indeed, to the contrary, the DNAs prepared for this lease sale for the most part reveal a complete and utter disregard for sensitive species management in general, and for management of the sage-grouse in particular. Claims of "no new information" and "no change in circumstances" in the various DNAs prepared by BLM to support this lease sale fly in the face of reality and on-the-ground conditions which compelled the USFWS to conclude that listing the species as threatened or endangered is warranted.

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

IV. REQUESTED RELIEF

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

Respectfully submitted,

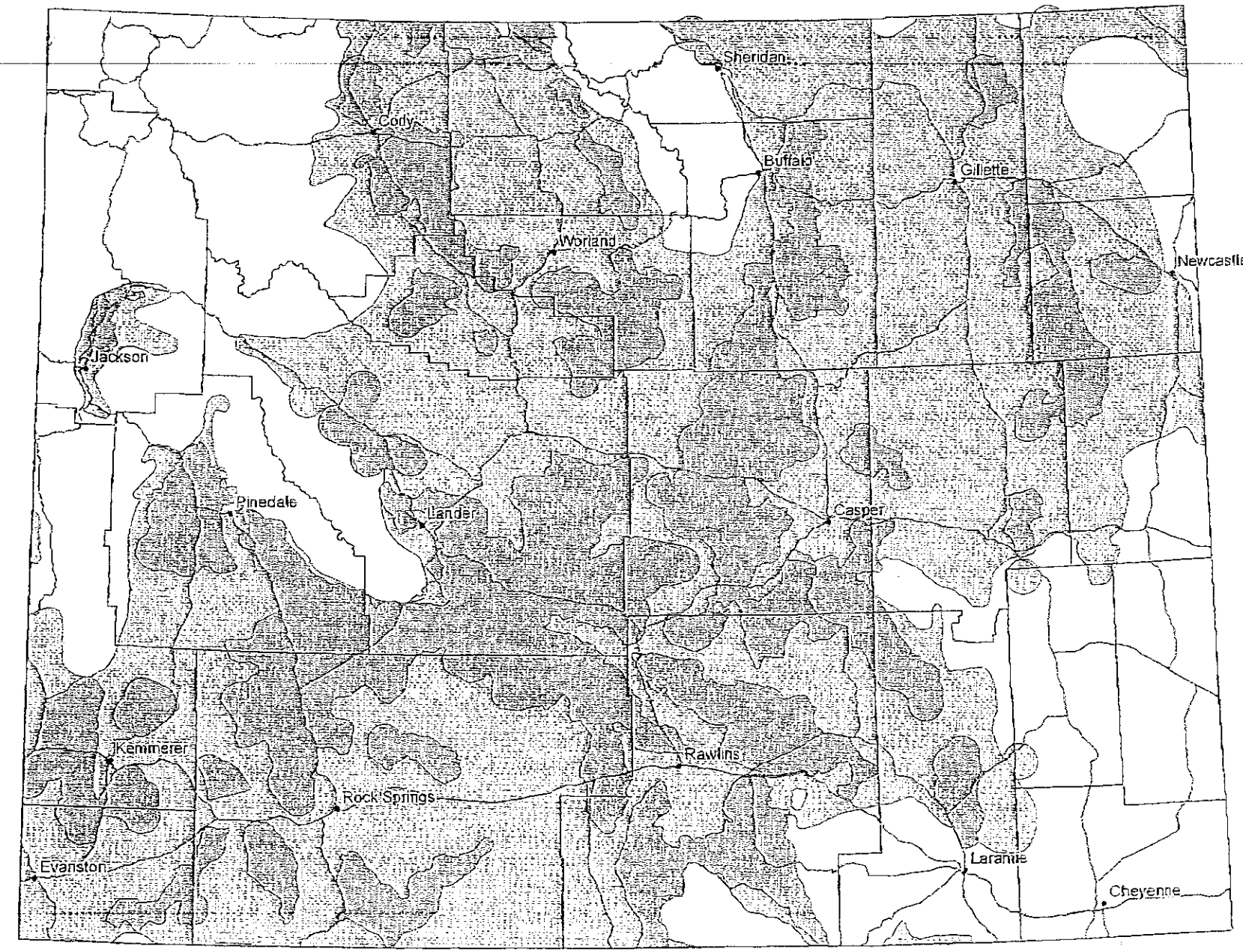
Dan Heilig
Western Resource Advocates
262 Lincoln Street
Lander, WY 82520
(307) 332-3614

Counsel for Audubon

Enclosure (Exhibit A - Sage-Grouse Core Breeding Areas Map - Version 3)

EXHIBIT

Sage-Grouse Core Management Areas Version 3



Nyssa Whitford
Sage-Grouse GIS Analyst
Lander Regional Office
06.30.10

0 15 30 60 90 120 Miles

Core Areas shown were updated from the version two core areas. The version three core areas were updated under the direction of the Governor by the Sage-Grouse Local Working Groups and the Sage-Grouse Implementation Team. The version 3 core areas were finalized on 06.29.10.

- Cities
- Roads
- Counties
- Core Areas Version 3
- Current Sage-Grouse Distribut