BIODIVERSITY CONSERVATION ALLIANCE

September 6, 2013

VIA FAX

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

RECEIVED
SEP 06 2013
BY: LB

RE: PROTEST OF CERTAIN PARCELS TO BE OFFERED AT BLM'S NOVEMBER 2013 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) November 2010 competitive oil and gas lease sale.

This protest is based on five areas of concern: (A) protections for lands adjacent to or within citizens' proposed wilderness, (B) protections for greater sage-grouse and the species' habitat, and (C) protections for big game crucial ranges.

This Protest incorporates by reference all Exhibits provided to BLM with its May 22, 2013, Comments on the Lease Sale EA. As BLM is already in possession of these documents, we have not attached them hereto.

I. THE PROTESTER

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 November 2013 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.

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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.

The explosion of 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

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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."[1] 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 WILDERNESS, VISUAL, AND RECREATION QUALITIES.

Wilderness

Parcels WY-1308-018, 019, 020, 021, 022, and 023 fall within or partially within the Kinney Rim South citizens' proposed wilderness area. Parcels WY-1308-011 and 018 fall partially or entirely within the Adobe Town citizens' proposed wilderness and the Adobe Town Very Rare or Uncommon area. Parcels WY-1308-009, 010, and 018 are on lands that the BLM has determined to possess wilderness qualities. EA at 39. Parcels WY-1308-008, 009, 010, 015, 016, 019, 020, 021, 022, and 023 also appear to fall within the Adobe Town Dispersed Recreation Use Area as outlined in the Rawlins Resource Management Plan. BCA protests these parcels for the failure to consider impacts to wilderness characteristics, visual resources, and dispersed recreation opportunities.

These citizens' proposed wilderness units, involving both the deferred parcels and the parcels not proposed for deferral, do not appear to have been field inventoried by BLM since approximately 2003 (and it is questionable whether a thorough field agency has ever been attempted by the agency), and the 2003 inventory does not follow the guidelines of the new inventory manual. There has been considerable controversy regarding BLM's disposition of these lands as regards their wilderness characteristics, and the BLM has repeatedly issued conflicting accounts of its findings in this regard. In addition, BLM has the option to manage these plans to protect the wilderness characteristics that <u>are</u> documented to occur here. We recommend all these parcels not already slated for deletion be deferred pending new wilderness inventories to be conducted pursuant to BLM IM 2011-154, or deleted from the sale.

These parcels will hereinafter be referred to as the Special Values Parcels. Because all of these parcels lie in or very near Citizens Proposed Wilderness areas or BLM Wilderness Study Areas they clearly have special values, such a wildness and remoteness characteristics and the ecological services typical of such areas (such as greater biological diversity and better water quality), even if BLM does not recommend them for wilderness designation. The fact that BLM did not recommend CWP areas for wilderness designation does not change these special and

[1] http://www.doi.gov/documents/Leasing_Reform_Side-by-Side_Comparison.pdf

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unique wilderness values. We are certain BLM is well aware of these special values, as well as the WSA areas it has recommended for wilderness designation.

The impacts to these wilderness-quality lands has not been analyzed thoroughly, either in the EA, or in RMP-level NEPA documents thus far. Leasing these parcels without No Surface Occupancy (NSO) stipulations could irretrievably destroy the wilderness character of these areas. Therefore, BLM will violate NEPA if these lands are leased in this sale. Before leasing these parcels, BLM must analyze impacts to visitors' experiences, recreation values, and scenic values. *See e.g., Pennaco Energy, Inc. v. Department of the Interior*, 377 F.3d 1147 (10th Cir. 2004). 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." 40 C.F.R. § 1500.2(e). 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. *Id.*; *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F. 2d 1457, 1466-67 (10th Cir. 1984). 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." *Envnt'l Defense Fund, Inc. v. U.S. Army Corps of Eng'rs*, 492 F.2d 1123, 1135 (5th 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).

The Green River and Rawlins RMPs were adopted substantially before BLM's latest wilderness inventory manual. The Green River RMP in particular is quite old and the NEPA analysis that was conducted is even older than the plans. The Green River plan was approved ***before*** oil and natural gas of the current scale and impact was on the BLM's radar screen. While there has been oil and gas development in Wyoming for decades, today's pace of leasing and drilling wasn't foreseen, indeed, couldn't have even been contemplated, at the time these management plans were developed. It is undeniable that BLM has been under intense pressure to lease every acre of public land which has any potential for future oil and gas development.

In its initial inventorying of the CWP proposed lands in the 1970s under the Wilderness Act of 1964, BLM determined that they did not possess wilderness qualities. Since that time, new information has been provided to BLM regarding these proposed wilderness areas. In approximately 1992 the Sierra Club submitted a citizens' wilderness proposal to BLM which included Adobe Town. In 2001 a more comprehensive citizens' proposal for wilderness areas was submitted to BLM by BCA. BLM has had an opportunity to reassess these areas for their wilderness qualities since receiving the BCA submission, and should have its own analysis on record. Many years have passed since the initial assessment and inventory by BLM in the 1970s.

Under the Federal Land Policy and Management Act (FLPMA) BLM was required to inventory all roadless areas on public lands over 5,000 acres under its jurisdiction and to identify lands which have wilderness characteristics as described in the Wilderness Act of 1964. 43 U.S.C. § 1782(a). In addition, under 43 U.S.C. 1711(a), BLM is required to maintain an inventory of all

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public lands and their resource and other values, which is to be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.

It is imperative that these parcels be withdrawn from the lease sale until such time as BLM has met its legal obligation under FLPMA to re-evaluate these lands for potential inclusion as 'Lands with Wilderness Character' ("LWCs"). At the very least, BLM should consider a "no action" alternative before selling these leases. At the lease stage, the "no action" alternative is, of course, the option of not selling the lease. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14(d). Alternatively, BLM should consider an alternative whereby BLM subjects these lease parcels to NSO stipulations. In both situations, 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.

IM 2004-110 Change 1 requires BLM to "evaluate the application of BMPs when taking leasing actions." (See also WO IM 2004-194.) The Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) prepared by the Field Offices where these parcels are located give no indication there was any evaluation of applying BMPs to the CWP and WSA parcels in order to protect their values. Because neither the DNAs nor the underlying Resource Management Plans (RMPs) evaluated the application of BMPs to these parcels, IM 2004-110 Change 1 (Change IM) was violated. No evaluation of the potential application of BMPs has occurred prior to offering the parcels for sale.

The leases at issue here contain a number of stipulations intended to protect resources. Many of them are timing limitation stipulations intended to protect big game, sage grouse, or raptors. While these stipulations may help protect these specific resources temporarily, they do not prohibit development; as IM 2004-110 Change 1 recognizes, "[O]ften BMPs, applied as either stipulations or conditions of approval, are more effective in mitigating impacts to wildlife resources than stipulations such as timing limitations or seasonal closures." Thus, the existing stipulations attached to these parcels are not enough, standing alone, to meet the requirements of the Change IM. ***BMPs*** must also be ***evaluated*** before leases are offered for sale, and there is no indication this occurred for these parcels. Without identifying and evaluating the efficacy of BMPs before leases are offered for sale, BLM has no idea whether BMPs would be able to mitigate impacts within acceptable limits. *See e.g.*, 43 U.S.C. § 1732(b) (requiring BLM to prevent unnecessary or undue degradation.). Evaluating the lease stipulations proposed against those proposed by BLM under the Lander RMP DEIS, for example, would be an instructive exercise that might lead to a better decision.

There is no indication BLM identified or evaluated the BMPs referenced in IM 2004-194 in the context of the site-specific conditions and circumstances presented by the delineated lease parcels being offered for sale. BLM did not even evaluate the application of BMPs that should be "considered in nearly all circumstances," such as requirements for camouflage painting and construction of roads to a standard "no higher than necessary." Certainly such BMPs can be identified, evaluated, and required, as effectively at the leasing stage as the application for permit to drill (APD) stage. Indeed, a front-end analysis of BMPs provides a measure of certainty for the lessee and, most importantly, may reveal that BMPs, alone, may be inadequate to mitigate impacts within acceptable limits, thus indicating the need for more robust lease stipulations.

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Moreover, it may behoove BLM to require the BMPs as a lease stipulation rather than as a condition of approval. Additionally, front-end evaluation of BMPs may indicate that BLM may be unable to mitigate impacts within acceptable limits and, therefore, the lease should either be subject to an NSO stipulation or withdrawn from sale (i.e., through selection of a "no action" alternative).

There is no doubt that IM 2004-110 Change 1 is intended to apply to leasing. The IM specifically applies to fluid minerals ***leasing*** actions. It is not the intent of the Change IM with respect to BMP evaluation, that it be applied at the APD stage. That had already been very specifically accomplished with IM 2004-194 issued on June 22, 2004. The Change IM was issued on August 16, 2004, ***after*** IM 2004-194, to fill in gaps in the ***leasing*** program guidance provided by IM 2004-110. Thus, while BLM may further consider and refine BMPs at the APD stage, it nevertheless ***must*** evaluate their application at the leasing stage. There is no indication in the Documentations this was done for any of the parcels listed in the table above, despite the clear language in the Change IM that BLM "shall also evaluate the application of BMPs" at the leasing stage.

Additionally, there is no question that BLM has ongoing authority and responsibility to consider the wilderness values of an area, especially where an area has been proposed for wilderness consideration by private citizens. IM 2003-275 recognizes this authority and that citizens' wilderness proposal areas may contain a number of values that are not protected by the above stipulations, such as providing solitude and preserving areas that do not have significant signs of human use or development. The stipulations which would be applied to these parcels do not protect these kinds of values which clearly exist in the CWP parcels. BLM's failure to evaluate BMPs as a way to protect these values violated IM 2004-110 Change 1 and IM 2003-275.

Interestingly, for the Rawlins Field Office Parcels, BLM's Appendix D states in relevant part, in response to whether parcels were within citizens' proposed wilderness, "Yes, Because the lands to be unmanageable as wilderness because of preexisting oil and gas leases, we elected to drop them from further consideration." These parcels were accorded the full slate of wilderness characteristics in BLM's Appendix D analysis. At the time that the Rawlins RMP ROD was approved, this may have been true, but many of the leases have expired having not had the due diligence of production performed on them, despite falling within the Cherokee West seismic project, which provided leaseholders with detailed geophysical data for the area. Today, the vast majority of this area is unleased, as evidenced by the unleased lands being nominated for auction in the November lease sale. This development constitutes 'significant new information' and changed circumstances under NEPA which the BLM must consider in detail; we petition BLM under 5 USC § 555(e) to reconsider its decision to offer these lands for lease under the Rawlins RMP, and call upon the agency to render a new Decision under its VRM Plan Amendment to reclassify these lands as 'no leasing' or 'NSO only' areas to protect the important viewsheds they encompass, both for the sake of wilderness characteristics within the units themselves and the importance that protecting these viewsheds has for visitors to scenic overlook points along the Skull Creek Rim, within Adobe Town WSA.

Importantly, BCA's legal settlement with BLM over the Rawlins RMP dictates that the agency shall consider VRM Class I, which would entail no leasing or non-waivable NSO, for lands

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adjacent to Adobe Town. The VRM Plan amendment currently underway provides the NEPA process for considering this VRM change. BLM must not lease these adjacent parcels until the VRM Plan Amendment is complete and the alternative to apply VRM Class I to these lands is fully considered, in order to comply with the terms of this settlement agreement.

BLM is currently in the RMP amendment process for the Rawlins RMP for both Visual Resource Management and sage grouse conservation. The VRM amendment is intertwined with the Adobe Town parcels in question, because the Adobe Town Very Rare or Uncommon state designation was specifically established in part to protect scenery, and BLM must consider granting protections to the scenic resources of this area under its FLPMA authority, as part of NEPA's Range of Alternatives requirement. In this case, clearly the BLM has failed to take the necessary 'hard look,' as the Very Rare or Uncommon designation, the purpose of which is to recognize and protect a variety of resources including scenery, is clearly incompatible with industrial-scale development. The fact that the VRU designation itself confers protection only from non-coal surface mining due to the circumscribed authority possessed by EQC under the statue in no way conflicts with the purpose of the designation, which is to recognize and grant protection to resource values found to be very rare or uncommon in the state. And where the Wyoming Environmental Quality Act does not contain the authority to limit oil and gas leasing and development, the BLM has full authority over this aspect, and we expect the agency to exercise it. BLM also has the obligation to consider expanding Class I VRM management beyond the boundaries of the Adobe Town WSA as part of the terms of its February settlement with BCA and other groups over the Rawlins RMP. Leasing these parcels absent NSO stipulations forecloses the option of applying protections for the Adobe Town VRU area and applying Class I VRM protections to the lands neighboring the Adobe Town WSA, in violation of the terms of the settlement. BLM is also obligated to consider applying Class II VRM status to all lands in the Adobe Town Dispersed Recreation Use Area (DRUA) under the settlement, which includes the Kinney Rim lease parcels. BLM is therefore put on notice that BCA believes the offering of these leases places BLM in violation of the settlement and good-faith efforts to resolve this issue must commence.

BLM has the ongoing authority and responsibility to consider the wilderness values of an area before it authorizes the sale of leases which intrude upon Citizen Wilderness Proposal areas. The U.S. District Court for the District of Utah recently underscored this duty with its decision in *Southern Utah Wilderness Alliance v. Norton*, Case No. 2:04CV574 DAK. The Court held that BLM violated NEPA by issuing leases in areas proposed for wilderness without taking a hard look at the no-leasing alternative and by failing to consider significant new information about wilderness values and characteristics of the parcels. The Rawlins RMP contains a similar error of law. The BLM should take the hard look at a no-leasing alternative for these parcels and give adequate consideration to the wilderness values and characteristics of the parcels. All of the special values parcels should be withdrawn from the sale.

BLM's failure to evaluate lease parcels for locations in important viewsheds is a troubling violation of NEPA's hard look requirements. BLM is well aware that a number of these parcels, particularly those on the northern slope of the Powder Rim, are prominent in the foreground or middleground viewsheds of key observation points in the Adobe Town DRUA. Some of these

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observation points inside the Adobe Town Wilderness Study Area. BLM argues that the location of roads or wellpads is not known at this time, and therefore impacts cannot be assessed. However, for many of these parcels, the entire parcel is visible (indeed, obvious) from a key observation point, such as the crest of the Powder Rim or overlooks atop the Skull Creek Rim within the Adobe Town WSA. Any industrial development associated with oil and gas leasing on such parcels would have major impacts on visual resources. GIS technology is readily available that maps the viewsheds visible from key overlooks or areas; we have attached several analyses we undertook during the Adobe Town Very Rare or Uncommon Area state designation process. See Attachments B – F to BCA's comments submitted May 22, 2013, on the EA. BLM must map sensitive viewsheds and compare these to proposed leases to determine which leases will entail significant impacts on visual resources should they be developed.

Monument Valley Management Area

Parcel WY-1308-011 falls within the Monument Valley Management Area (MVMA), established under the Green River Resource Management Plan. BLM cannot offer these parcels for lease without a VRM Class II CSU stipulation, and does so in Table 12. The Monument Valley Management area is an Area of Critical Environmental Concern candidate area; BLM will need to make a decision on whether to designated these lands as an ACEC under the Rock Springs RMP, which is currently undergoing its NEPA analysis and review. BLM must not foreclose on options for more stringent protections, potentially including No Surface Occupancy and no leasing, that may be applied under the new RMP. While the revision is underway, these parcels should be deferred. BCA protests this parcel for these reasons.

B. LEASE PARCELS WITH SAGE-GROUSE CORE AND OTHER SAGE-GROUSE HABITAT

BCA protests lease parcels WY-1308-003, 005, 021, 022, 024, 025, 026, 027, and 028, which are in close proximity to a sage-grouse leks. These parcels contain important sage-grouse nesting habitats and/or wintering habitats. Furthermore, parcels WY-1308-006, 007, 012, 028, 032, and 034 appear to lie within designated sage-grouse Core Areas, declared priority protection areas for greater sage-grouse.[2] BCA protests these parcels as well. The discrepancy between the parcels BLM itself identified as containing sage-grouse habitat and those found within designated 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),"[3] yet the BLM still appears to be issuing leases for sale in these areas.

We request that all parcels listed above be deferred from the lease sale pending analysis of whether large-block unleased parcels inside Core Areas are being leased, and pending pre-leasing NEPA pursuant to the new Interior department leasing IM. BLM should do its best to

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[2] Executive Order 2010-4, Greater Sage-Grouse Core Area Protection, August 18, 2010, available at http://governor.wy.gov/Media.aspx?MediaId=1313.

[3] 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.

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keep largely unleased areas of public land in Core Areas unleased, regardless of mineral ownership patterns. 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%;[4] one of WGFD's biologists reported a 40% statewide decline over the last 20 years.[5] 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.[6] 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."[7] 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.[8] 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

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[4] 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.

[5] 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.

[6] 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.

[7] 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.

[8] 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.

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publication.[9] 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 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."[10] 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,[11] a far cry from the science-based 3-mile buffer recommended by field biologists. Even less protective, restrictions outside Core Areas allow surface disturbing

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[9] 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.

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

[11] 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.

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activities and surface occupancy as close as one quarter (0.25) of a mile from leks.[12] 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.

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-1102-025, BLM imposes a Timing Limitation Stipulation and a Controlled Surface Use Stipulation. 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-1102-025 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.[13]

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

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[12] *Id.*

[13] BLM Notice of Competitive Oil and Gas Lease Sale, February 1, 2011, page 13.

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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 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.

C. BIG GAME CRUCIAL WINTER RANGE PARCELS

BCA protests the sale of parcels located in big game crucial winter range asks that they be deferred pending pre-leasing site-specific NEPA analysis. Parcels WY-1308-003, 010, 013, 014, 022, 023, 032, and 034 are located in antelope crucial winter range. Parcels WY-1308-008, 009, 010, 011, and 016 are located in mule deer crucial winter range. Parcels WY-1308-008, 009, 013, and 014 are located within elk crucial winter range. We protest the sale of these lease parcels for these reasons. These parcels are critical for the survival of these species in this area, and recent scientific studies show that populations of big game are declining sharply and the current lease stipulations are not adequate to protect big game species. These parcels should be withdrawn from the lease sale and deferred pending pre-leasing NEPA analysis.

BCA was a party to an appeal filed with the Interior Board of Land Appeals of the BLM's denial of their Protest filed against the June 6, 2006 lease sale. In its April 2008 Decision,[14] the Board inquired into whether BLM had complied with the Memorandum of Understanding between BLM and the Wyoming Game and Fish Department in regarding lease parcels in big game crucial winter range and parturition areas. The BLM is required to have a rational basis for its decision to issue leases in crucial wildlife habitat, and that basis must be supported by the agency's compliance with applicable laws. While the Board held that failure of BLM to follow the directives contained in Instruction Memorandum No 2004-110 Change 1 was not, standing alone, proof of the violation of law or discretionary policy, it was probative of whether BLM had a rational basis for its decision. The Board found that the appeal record presented no evidence of compliance with the Memorandum of Understanding.

BCA protests the lease parcels listed above because BLM has again failed to comply with the Memorandum of Understanding and therefore has not provided a rational basis for its decision to offer lease parcels in areas with big game crucial winter range and parturition areas. Until such time as BLM complies with the Memorandum of Understanding it has no rational

[14] IBLA 2007-136 (174 IBLA 174), decided April 4, 2008.

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basis for its decision and the decision is arbitrary and capricious. We request that the parcels be withdrawn from the April 2009 lease sale.

While BCA strongly protests the offering of any of these lease parcels for sale, at the minimum, all such parcels in big game crucial winter range and parturition areas should have No Surface Occupancy (NSO) stipulations applied to them. NSOs provide the only real protection for big game. Recent studies on the impacts of oil and gas development and production on big game in Wyoming show that the impacts have been huge.[15] Not only have impacts to big game been significant, but they have occurred in spite of the application of winter timing limitations, demonstrating that these stipulations alone do not provide adequate protections for big game.

A further noteworthy factor is that timing limitations apply only during oil and gas development, not during the production phase. Once production begins, there are no stipulations in place for the protection of big game. It is therefore imperative that stipulations adequate to protect big game be applied at the ***leasing*** stage, not the APD stage. *See Center for Native Ecosystems,* IBLA 2003-352, November 22, 2006.

Attached to some of the parcels listed above is a timing limitation stipulation prohibiting drilling between November 15 and April 30 for "protecting big game crucial winter ranges." These are, however, not total prohibitions on drilling during the stressful winter period and birthing time. Exceptions to the stipulations are regularly—almost automatically—granted anytime a lessee requests it. See, for example, http://www.wy.blm.gov/pfo/wildlife/exceptions.php (Pinedale Field Office winter range stipulation exceptions) which shows that ***123*** exceptions were granted for the winter of 2006-2007. Similar statistics are available for other Wyoming Field Offices. The enthusiasm with which the Pinedale FO has granted ***winter-long*** exceptions to the stipulation for drilling on crucial winter range further illustrates the totally discretionary nature and consequent ineffectiveness of this stipulation.

Just as important, these stipulations do not limit operational and production aspects of oil and gas development. *See,* for example, Jack Morrow Hills CAP EIS at A5-3. Obviously, if the stipulation does not reserve authority to BLM at the ***leasing stage***, BLM must allow

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[2] Berger, J., K. Murray Berger and J. Beckmann. 2006. Wildlife and Energy Development: Pronghorn of the Upper Green River Basin – Year 1 Summary. Wildlife Conservation Society, Bronx, NY. Berger, K., J. Beckmann, J. Berger. 2006. Wildlife and Energy Development: Pronghorn of the Upper Green River Basin – Year 2 Summary. Wildlife Conservation Society, Bronx, NY. These reports are attached to the BCA June 2008 Lease Protest as Exhibits 17 and 18.

Sawyer, H., R. Neilson, D. Strickland and L. McDonald. Oct. 2005. Sublette Mule Deer Study (Phase II): 2005 Annual Report. Sawyer, H., R. Neilson, D. Strickland and L. McDonald. 2006. Sublette Mule Deer Study (Phase II): 2006 Annual Report. Sawyer, H., R. Neilson, F. Lindzey and L. McDonald. Winter Habitat Selection of Mule Deer Before and During Development of a Natural Gas Field. Copies of these reports are attached to the BCA June 2008 Lease Protest as Exhibits 19, 20 and 21.

Powell, J.H. 2003. Distribution, habitat use patterns, and elk response to human disturbance in the Jack Morrow Hills, Wyoming. MS Thesis, Univ. of Wyoming, 52 pp. A copy of this study is attached to the BCA June 2008 Lease Protest as Exhibit 22.

Sawyer, H., and R. Nielson. 2005. Seasonal distribution and habitat use patterns of elk in the Jack Morrow Hills Planning Area, Wyoming. Cheyenne: WEST, Inc., 28 pp. A copy of this report is attached to the BCA June 2008 Lease Protest as Exhibit 23.

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development despite severe impacts to winter ranges and big game, except for being able to require very limited "reasonable measures." These reasonable measures cannot be nearly broad enough to ensure crucial winter ranges and parturition areas are protected at the operation ***and*** production stage. *See* 43 CFR 3101.1-2.

The Wyoming Game and Fish Commission (WG&F) has a formal policy relative to disturbance of crucial habitats, including crucial winter ranges.[16] Crucial habitat is habitat "which is the determining factor in a population's ability to maintain and reproduce itself . . . over the long term." *Id.* at 7. WG&F further describes big game crucial winter ranges as vital habitats. Vital habitats are those which directly limit a community, population, or subpopulation (of species), and restoration or replacement of these habitats may not be possible.[17] The WG&F has stated that there should be "no loss of habitat function" in these vital/crucial habitats, and although some modification may be allowed, habitat function, such as the location, essential features, and species supported must remain unchanged. Mitigation Policy at 5.

Furthermore, Wyoming Game and Fish released the recommended minimum standards to sustain wildlife in areas affected by oil and gas development. Their policy recognized the ineffectiveness of winter range stipulations standing alone as currently applied. Mitigation Policy at 6. In all cases, Wyoming's new mitigation policy recommends going beyond just the winter drilling timing limitations, which BLM currently applies to lease parcels on crucial winter range. In addition to the winter timing limitations, the Mitigation Policy includes a suite of additional standard management practices. Mitigation Policy at 9-11, 52-58. These additional management practices include planning to regulate the pattern and rate of development, phased development, and cluster development, among many other provisions. Mitigation Policy at 52.

Clearly, the timing limitation stipulation applicable to the Crucial Winter Range Parcels is not in compliance with the State of Wyoming's policies and plans regarding the protection of wildlife. The timing stipulation, standing alone, does not ensure protection of habitat function. There is absolutely no guarantee, or even the remote likelihood that the location, essential features, and species supported on the crucial winter range will remain "unchanged."

Popular and scientific literature makes it clear that there will be loss of function if significant exploration and development occurs on the leaseholds. In prior Protests BCA has submitted substantial evidence showing that big game species are negatively affected by oil and gas drilling on winter ranges. *See* the studies referenced in Footnote 2 above. These studies document the negative effects of oil and gas drilling on big game winter ranges and winter range use, as well as on big game migration routes, even when winter timing stipulations are in effect.

The findings in the scientific and popular literature have been confirmed in recent BLM NEPA documents. The Green River EIS/RMP/ROD is replete with documentation of the

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[16] Wyoming Game and Fish Department. April 1998. Policy No. VII H, Mitigation, attached to the BCA June 2008 Lease Protest as Exhibit 24.

[17] Wyoming Game and Fish Department. Dec. 2004. Recommendations for Development of Oil and Gas Resources within Crucial and Important Wildlife Habitats, at 3. This document is attached to the BCA June 2008 Lease Protest as Exhibit 25.

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importance of crucial winter ranges, and their ongoing loss, despite the stipulation required by BLM. Green River EIS/RMP at 347-349. ("Probably the single most important factor affecting antelope populations are weather," at 438-441.) (" . . . oil and gas development in Nitchie Draw causing forage loss and habitat displacement;" "Displaced wildlife move to less desirable habitat where animals may be more adversely stressed . . .;" "Long-term maintenance and operations activities in crucial wildlife habitats would continue to cause displacement of wildlife from crucial habitats, including . . . crucial big game winter habitats;" "Surface disturbing activities would continue to cause long-term loss of wildlife habitat," etc.) The Jack Morrow Hills EIS also documents the importance of crucial winter ranges, particularly to elk, and the sensitivity of wildlife on winter ranges not only to drilling during the winter period, but also due to ongoing displacement and disturbance of wildlife from oil and gas development. Jack Morrow Hills EIS at 4-61 to 4-64, 4-80 to 4-88. The Rawlins Draft RMP further documents the negative effects of oil and gas drilling on big game when on winter ranges. Rawlins RMP Draft EIS at 3-131 to 3-136.

Given this evidence and the simple fact that each well pad converts 3-5 acres of crucial winter range to bare ground for extended periods of time, there is no rational basis for BLM to claim that it meets Wyoming's mitigation policy. It is impossible for crucial winter ranges to remain "unchanged" in terms of the location, essential features, and species supported, even if drilling does not take place during the timing stipulations. What is worse, however, is the fact that drilling ***does*** take place during the timing stipulations when they are waived, as they frequently are. Crucial winter ranges will clearly not remain "unchanged" because BLM has not retained the authority to condition well operations (lasting for decades) at the leasing stage.

The Federal Land Policy and Management Act (FLPMA) requires BLM to "coordinate the land use inventory, planning, and ***management activities*** of [public lands] with the land use planning and management programs of . . . the States and local governments . . . by, among other things, considering the policies of approved State and tribal resource management programs." 43 USC 1712I(9) (emphasis added). BLM must give special attention to "officially approved and adopted resource related plans." 43 CFR 1601.0-5(g). BLM must remain apprised of State land use plans, assure they are considered, and resolve to the extent practical, inconsistencies between state and federal plans. 43 USC 1712I(9).

There is no indication that BLM's winter timing stipulation is based on consideration of Wyoming's 1998 Mitigation Policy, or its new programmatic standards policy. *See* Footnote 3. It is apparent there has been no attempt to resolve inconsistencies between what BLM's stipulation provides and what Wyoming's mitigation policy requires. There are certainly inconsistencies. BLM's timing stipulation attempts to prohibit drilling during limited periods, yet this prohibition is frequently waived.[18] Indeed, quite recently the WG&F asked BLM in Wyoming not to grant any waivers of stipulations last winter due to the lack of quality forage for big game in their winter range and the anticipated impacts that year-round drilling will have on big game under those conditions. BLM has refused to accede to this request and has proceeded to grant waivers. Wyoming's mitigation policy specifically seeks to fill gaps left by the timing stipulation, by requiring a number of standard management practices on crucial winter ranges in

[18] Rocky Mountain News, Nov. 13, 2006, *BLM grants drilling rights: 13 permits for gas run counter to will of Wyoming officials.* Copy attached to the BCA June 2008 Lease Protest as Exhibit 26.

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all cases. These recommendations are standing policy which WG&F expects to be applied in every instance of leasing in crucial winter range.

The inconsistencies are even more glaring when one considers the fact that BLM's timing stipulation does not regulate the production phase. Until BLM considers and attempts to resolve these inconsistencies, it cannot allow the sale of the Crucial Winter Range Parcels to go forward. To do so would be a violation of NEPA.

Furthermore, the timing stipulation attached to the Crucial Winter Range Parcels is inconsistent with the policy of the BLM Wyoming State Office, as enunciated in the Revised Umbrella Memorandum of Understanding (MOU) between BLM and Wyoming Game and Fish Department.

The various requirements in the WG&F minimum programmatic standards for oil and gas development establish "sideboards" as to what actions need to be taken to prevent unnecessary or undue degradation. BLM has not considered these standards from the perspective of its FLPMA-imposed requirement to prevent unnecessary or undue degradation. BLM is not meeting its duty to take "any" action that is necessary to prevent unnecessary or undue degradation. 43 USC 1732(b). Once again, this failure is most apparent where application of the winter timing stipulation does not even regulate ongoing operations such as production. BLM has an independent duty under FLPMA to take any action necessary to prevent unnecessary or undue degradation, in addition to its NEPA duty to coordinate its activities with the State of Wyoming and comply with the MOU. Since BLM has given up its ability to require restrictions in the future by not imposing sufficient stipulations at the leasing stage, the effect of this failure to require adequate restrictions at the leasing stage violates FLPMA by permitting unnecessary or undue degradation when oil and gas development commences.

BCA also protests the sale of the Crucial Winter Range parcels on the basis that their sale would cause unnecessary or undue degradation of public lands. "In managing the public lands the [Secretary of Interior] **shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.**" 43 U.S.C. § 1732(b) (emphasis added). BLM's obligation to prevent unnecessary or undue degradation is not discretionary; it is mandatory. "The court finds that in enacting FLPMA, Congress's intent was clear: **Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary . . . is undue or excessive.**" *Mineral Policy Center v. Norton,* 292 F.Supp.2d 30, 43 (D.D.C. 2003) (emphasis added). The BLM has a statutory obligation to demonstrate that leasing will not result in unnecessary or undue degradation.

We hereby incorporate by reference all Protests previously filed by the BCA which address this issue.

III. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, BCA requests that the protested parcels not be offered for sale at the November 2013 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-

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by-parcel on the impacts of oil and gas development on citizens' proposed wilderness, visual resources, recreation opportunities, greater sage-grouse, and big game crucial range and migration corridors, ***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,

John Persell
Biodiversity Conservation Alliance
P.O. Box 1512
Laramie, WY 82073
(307) 742-7989
john@voiceforthewild.org

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