CENTER FOR NATIVE ECOSYSTEMS
1536 Wynkoop, Suite 302
Denver, Colorado 80202
303.546.0214
cne@nativeecosystems.org
www.nativeecosystems.org

Selma Sierra
Bureau of Land Management
Utah State Office
PO Box 45155
Salt Lake City, Utah 84145

6 November 2006

BY HAND-DELIVERY

Re: Protest of BLM's Notice of Competitive Oil and Gas Lease Sale of Parcels with High Conservation Value

Dear Ms. Sierra:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Center for Native Ecosystems and Forest Guardians protest the November 21, 2006 sale of the following parcels:

UT1106-003: white-tailed prairie dog habitat
UT1106-112: Heart of the West Conservation Plan Duchesne Core
UT1106-131: Heart of the West Conservation Plan Duchesne Core
UT1106-132: white-tailed prairie dog habitat
UT1106-133: white-tailed prairie dog habitat
UT1106-136: white-tailed prairie dog habitat
UT1106-151: Heart of the West Conservation Plan Duchesne Core
UT1106-153: white-tailed prairie dog habitat
UT1106-157: white-tailed prairie dog habitat
UT1106-158: white-tailed prairie dog habitat
UT1106-159: white-tailed prairie dog habitat
UT1106-160: white-tailed prairie dog habitat
UT1106-161: white-tailed prairie dog habitat
UT1106-163: white-tailed prairie dog habitat
UT1106-167: white-tailed prairie dog habitat
UT1106-170: Heart of the West Conservation Plan Duchesne Core
UT1106-171: Heart of the West Conservation Plan Duchesne Core
UT1106-172: Heart of the West Conservation Plan Duchesne Core
UT1106-175: Heart of the West Conservation Plan Duchesne Core
UT1106-176: Heart of the West Conservation Plan Duchesne Core
UT1106-177: Heart of the West Conservation Plan Duchesne Core
UT1106-178: Heart of the West Conservation Plan Duchesne Core

UT1106-180: white-tailed prairie dog habitat
UT1106-183: Heart of the West Conservation Plan Duchesne Core
UT1106-184: Heart of the West Conservation Plan Duchesne Core
UT1106-185: Heart of the West Conservation Plan Duchesne Core
UT1106-193: white-tailed prairie dog habitat
UT1106-195: white-tailed prairie dog habitat
UT1106-196: white-tailed prairie dog habitat
UT1106-202: Heart of the West Conservation Plan Book Cliffs Core
UT1106-203: Heart of the West Conservation Plan Book Cliffs Core
UT1106-235: white-tailed prairie dog habitat
UT1106-236: white-tailed prairie dog habitat
UT1106-237: white-tailed prairie dog habitat
UT1106-239: Heart of the West Conservation Plan Book Cliffs Core
UT1106-247: Heart of the West Conservation Plan Corridor
UT1106-252: white-tailed prairie dog habitat
UT1106-254: Heart of the West Conservation Plan Corridor
UT1106-256: white-tailed prairie dog habitat, Heart of the West Conservation Plan Corridor
UT1106-257: Heart of the West Conservation Plan Core, Heart of the West Conservation Plan Corridor
UT1106-261: Heart of the West Conservation Plan Corridor
UT1106-267: Heart of the West Conservation Plan Corridor
UT1106-269: Heart of the West Conservation Plan Book Cliffs Core
UT1106-272: Graham's penstemon potential habitat (Buck Canyon/Seep Ridge Road Junction population), Heart of the West Conservation Plan Book Cliffs Core
UT1106-273: Graham's penstemon potential habitat (Buck Canyon/Seep Ridge Road Junction population), Heart of the West Conservation Plan Book Cliffs Core
UT1106-274: Graham's penstemon potential habitat (Sunday School Canyon (East) population), Heart of the West Conservation Plan Book Cliffs Core
UT1106-275: Heart of the West Conservation Plan Book Cliffs Core
UT1106-276: Heart of the West Conservation Plan Book Cliffs Core
UT1106-281: white-tailed prairie dog habitat, Shiner Subcomplex nominated white-tailed prairie dog ACEC
UT1106-282: white-tailed prairie dog habitat, Heart of the West Conservation Plan Corridor
UT1106-283: Heart of the West Conservation Plan Corridor
UT1106-292: Graham's penstemon potential habitat (Bitter Creek population), Heart of the West Conservation Plan Book Cliffs Core
UT1106-293: Heart of the West Conservation Plan Book Cliffs Core
UT1106-297: white-tailed prairie dog habitat, Cisco Complex nominated white-tailed prairie dog ACEC
UT1106-300: white-tailed prairie dog habitat, Kennedy Wash Subcomplex nominated white-tailed prairie dog ACEC, Coyote Basin Complex nominated white-tailed prairie dog ACEC
UT1106-307: Heart of the West Conservation Plan Book Cliffs Core
UT1106-309: Heart of the West Conservation Plan Book Cliffs Core
UT1106-311: Heart of the West Conservation Plan Book Cliffs Core
UT1106-314: Heart of the West Conservation Plan Book Cliffs Core

UT1106-316: white-tailed prairie dog habitat, Cisco Complex nominated white-tailed prairie dog ACEC
UT1106-323: Duchesne milkvetch habitat, Coyote Basin Complex nominated white-tailed prairie dog ACEC, white-tailed prairie dog habitat, black-footed ferret habitat
UT1106-326: Graham's penstemon potential habitat (Rainbow population), Heart of the West Conservation Plan Book Cliffs Core
UT1106-327: Heart of the West Conservation Plan Book Cliffs Core
UT1106-328: Graham's penstemon potential habitat (Rainbow population), Heart of the West Conservation Plan Book Cliffs Core
UT1106-329: Graham's penstemon potential habitat (East Seep Canyon population), Heart of the West Conservation Plan Book Cliffs Core
UT1106-330: Heart of the West Conservation Plan Book Cliffs Core
UT1106-331: white-tailed prairie dog habitat, Cisco Complex nominated white-tailed prairie dog ACEC
UT1106-332: white-tailed prairie dog habitat, Cisco Complex nominated white-tailed prairie dog ACEC
UT1106-333: white-tailed prairie dog habitat, Cisco Complex nominated white-tailed prairie dog ACEC
UT1106-334: white-tailed prairie dog habitat, Cisco Complex nominated white-tailed prairie dog ACEC
UT1106-335: white-tailed prairie dog habitat, Cisco Complex nominated white-tailed prairie dog ACEC

The grounds for the protest follow.

I. PROTESTING PARTIES

CNE has a longstanding record of involvement in management decisions and public participation opportunities on public lands, including federal lands managed by the Bureau of Land Management ("BLM"). CNE's mission is to use the best available science to participate in policy and administrative processes, legal actions, and public outreach and education to protect and restore native plants and animals in the Greater Southern Rockies. We are committed to ensuring that federal agencies meet all of their Endangered Species Act obligations, including Section 7 Consultation. Staff and members intend to return to the subject lands to observe and monitor these important values.

Forest Guardians also has a long history of participation in BLM decisionmaking, and is advocating for the conservation of many species that depend on BLM lands in Utah.

Erin Robertson, CNE's Staff Biologist, like all other CNE employees, is authorized to file this protest on behalf of CNE. Nicole Rosmarino, Forest Guardians's Conservation Director, has authorized the filing of this protest on Forest Guardians's behalf.

Oil and gas leasing, when done irresponsibly, can cause considerable harm to imperiled species. Therefore protestors have legally recognizable interests that will be affected and impacted by the proposed action.

II. STATEMENT OF REASONS

For the reasons set forth below, BLM should withdraw all of the protested parcels pending Resource Management Plan ("RMP") revisions or completion of necessary supplemental Environmental Impact Statements ("EISs"). BLM should withdraw from the sale all protested parcels because there is credible evidence of resource conflicts and potentially significant environmental impacts which have not been properly analyzed. Removing the disputed parcels will reduce the offerings to a level that will limit interference with ongoing RMP revision. Whether to lease these lands, and if so, subject to what conditions and mitigation measures, are decisions properly made after the RMP revision or supplemental EIS is finalized.

A. NEPA Requires That the BLM Supplement EISs When New Information or Circumstances Arise

The BLM must analyze significant recent information relevant to environmental concerns in the affected area before actions such as the proposed leasing may proceed. If the BLM fails to do so, Council on Environmental Quality ("CEQ") regulations mandate preparation of a supplemental analysis before the proposal may proceed.

CEQ regulations implementing the National Environmental Policy Act ("NEPA") explicitly recognize that circumstances may arise after completion of an EIS that create an obligation for supplemental environmental review. According to 40 C.F.R. § 1502.9(c)(1), a supplemental EIS is required when:

> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

An agency also has discretion to prepare a supplemental statement if "the purposes of the Act will be furthered by doing so." 40 C.F.R. § 1502.9(c)(2).

The United States Supreme Court validated the CEQ regulations in 1989, holding that a supplemental environmental review must be performed when:

> [T]here remains "major federal action" to occur, and 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 . . .

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989). The *Marsh* opinion confirms that an agency's duty to comply with NEPA is ongoing, and continues even after the agency has made its decision based on an EIS. *Id.* The Supreme Court reasoned:

> It would be incongruous with this approach to environmental protection, and with [NEPA's] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Id. at 371. CEQ regulations provide that, where either an EIS or supplemental EIS is required, the agency "shall prepare a concise public record of decision" which "shall: (a) [s]tate what the decision was[], (b) [i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable," and (c) "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not." 40 C.F.R. § 1505.2.

CEQ guidance concerning NEPA's implementation state that "if the proposal has not yet been implemented, EISs that are more than 5 years old should be carefully reexamined to determine if [new circumstances or information] compel preparation of an EIS supplement." 46 Fed. Reg. 18026 (1981). The NEPA documents that much of the proposed leasing are tiered to are outdated, and, as we present below, do not adequately analyze the impacts of leasing on the white-tailed prairie dog, Graham's penstemon, and other species.

The new information presented below meets several of NEPA's factors indicating significance, including:

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
2. The degree to which the proposed action affects public health or safety.
3. Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of

Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

NEPA requires federal agencies to take a "hard look" at new information or circumstances concerning the environmental effects of a federal action even after an initial environmental analysis have been prepared. Agencies must supplement the existing environmental analyses if the new circumstances "raise [ ] significant new information relevant to environmental concerns." *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708-9 (9th Cir. 2000). Specifically, 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 actions." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000).

NEPA's implementing regulations further underscore an agency's duty to be alert to, and to fully analyze, potentially significant new information. 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 C.F.R. §1502.9(c)(1)(ii)(emphasis added).

This is supported by BLM Instruction Memoranda ("IM"). According to a 2000 IM from the Washington Office:

> We are concerned about the maturity of some of our NEPA documents. In completing your [Determination of NEPA Adequacy or DNA], keep in mind that the projected impacts in the NEPA document for given activities may be understated in terms of the interest shown today for any given use. You need to take a "hard look" at the adequacy of the NEPA documentation.

IM No. 2000-034 (expired September 30, 2001). In a subsequent IM, the Washington Office instructed field offices as follows:

> If you determine you can properly rely on existing NEPA documents, you must establish an administrative record that documents clearly that you took a "hard look" at whether new circumstances, new information, or environmental impacts not previously analyzed or anticipated warrant new analysis or supplementation of existing NEPA documents…
>
> The age of the documents reviewed may indicate that information or circumstances have changed significantly.

IM No. 2001-062 (emphasis added)(expired September 30, 2002). When considering whether BLM has taken a "hard look" at the environmental consequences that would result from a

proposed action, the Interior Board of Land Appeals will be guided by the "rule of reason." Bales Ranch, Inc., 151 IBLA 353, 358 (2000). "The query is whether the [BLM's DNA] contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the proposed action. Southwest Center for Biological Diversity, 154 IBLA 231, 236 (2001)(quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)). *See also*, *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1213 (10th Cir. 1997)(to comply with NEPA's "hard look" requirement an agency must adequately identify and evaluate, environmental concerns)(emphasis added).

1. Changes in the status of the white-tailed prairie dog have occurred, and significant new information is available

Oil and gas development is the main competing land use that threatens the white-tailed prairie dog. The BLM must reexamine its oil and gas leasing program before issuing leases for parcels in habitat for these and other special status species.

The relevant RMPs did not directly consider the imperiled status of these species, and the BLM has not presented the necessary evidence that it did consider this new information before deciding to lease these parcels. Because the white-tailed prairie dog is a keystone species, in failing to consider its habitat needs when considering the appropriateness of oil and gas leasing in an area, the BLM also fails to manage for other imperiled species dependent upon its habitat, such as the black-footed ferret, mountain plover, burrowing owl, and ferruginous hawk. It is important to note that simply having the data in hand is not the same as analyzing the implications.

i. BLM has ignored the states' guidance on leasing in white-tailed prairie dog habitat

None of the NEPA documents that this leasing is tiered to address these facts, nor does the record demonstrate that the agency took the necessary "hard look" to determine whether these new circumstances and information warranted new analysis or supplementation of existing NEPA documents. By ignoring the states' recommendations in the White-tailed Prairie Dog Conservation Assessment, the BLM is contributing to the need to list this species.

ii. BLM has ignored ACEC nominations

This protest includes areas that have been nominated as Areas of Critical Environmental Concern ("ACECs"). These areas were nominated as ACECs because of their relevance and importance as some of the largest remaining white-tailed prairie dog complexes and because of their value as recovery habitat for this species. Here we incorporate by reference our white-tailed prairie dog ACEC nominations and all the references they contain. The BLM Manual is clear that Field Managers are required to determine whether nominated areas meet the relevance and significance criteria for ACEC designation and then decide whether interim management is necessary. The BLM is considering designating ACECs for the Coyote Basin, Kennedy Wash, Shiner, and Cisco Complexes, and has not yet considered the impacts of oil and gas leasing and development on the resources for which these ACECs would be designated. By not protecting

this habitat, the BLM is contributing to the need to list this species and is in violation of the BLM Manual. The BLM has deferred many parcels in this sale in other areas that are being considered for ACEC designation - the parcels in nominated white-tailed prairie dog ACECs should be withdrawn as well. Coyote Basin would be designated as an ACEC under every one of the Vernal RMP DEIS alternatives - leasing now while the RMP is being revised is inappropriate.

2. Graham's penstemon is proposed for Threatened listing and designation of critical habitat.

The BLM has a different set of obligations toward Proposed species. The agency must conference with the U.S. Fish and Wildlife Service on any action that may jeopardize the existence of Proposed species or that may lead to adverse modification of Proposed critical habitat. The BLM has made the wise decision of deferring the proposed critical habitat units from the lease sale, but there are still portions of parcels in the sale that may include potential habitat for Graham's penstemon. The BLM has not comprehensively inventoried Graham's penstemon habitat - the critical habitat proposal is mostly based on survey work done in the late 1970's and early 1980's. Before leasing potential Graham's penstemon habitat, the BLM must conference with the Service and ensure that lease stipulations are adequate to conserve the species. At present the BLM appears to be relying on the Threatened and Endangered species stipulation to protect Graham's penstemon, but the species has not yet been granted either status. It is our understanding that the BLM is in the process of finalizing a Conservation Agreement for the penstemon. Leasing must be consistent with this Agreement if the agency intends to show that it possesses the regulatory mechanisms to conserve the species absent Endangered Species Act protection. Leasing potential habitat for Graham's penstemon now with inadequate stipulations is foolish and violates both the BLM Manual and the Endangered Species Act. These areas occur in the Vernal Field Office, and leasing should be deferred, especially in habitat for a Proposed species, until the RMP revision is complete and necessary conservation measures in the revised RMP may be implemented.

3. A new regional conservation plan constitutes significant new information that the BLM should fully consider before managing these lands for oil and gas extraction

The BLM now plans to lease many parcels in these identified key areas and open them up to oil and gas drilling, which will compromise their integrity and, potentially jeopardize species conservation in the region. The BLM did not fully consider the results of the analyses that were conducted to formulate these plans when it authorized leasing in these areas; thus, leasing them now violates NEPA.

These RMPs are being revised in part to deal with much significant new information, including changes in the status of imperiled species that will be affected by leasing in these parcels.

B. Leasing for CBM Exploration or Development Would Violate NEPA

Some of these lands appear to have potential for coalbed methane ("CBM") development. The relevant RMPs do not adequately analyze the specific impacts of this type of development in this

region or for these geological formations. If these parcels are not withdrawn from the sale, any leases issued for these lands must exclude CBM exploration and development.

Coalbed methane extraction involves unique impacts which must be evaluated prior to leasing. *See e.g. Pennaco Energy, Inc. v. Department of the Interior,* 377 F.3d 1147 (10th Cir. 2004); Wyoming Outdoor Council, 156 IBLA 347 (2002). The courts have held that existing RMPs are inadequate to authorize leasing if they do not specifically analyze coalbed methane impacts in areas where this type of development is foreseeable.

Until the required analysis has occurred and appropriate measures have been enacted, BLM cannot lease lands for coalbed methane development. Among the impacts requiring a "hard look" under NEPA are aquifers, groundwater quantity and quality, air quality, management practices, produced water, water wells, irrigation water quality, grazing issues, wildlife habitat, and soil erosion.

C. NEPA Prohibits Interim Actions That Have Adverse Environmental Impacts and/or Limit the Choice of Reasonable Alternatives

NEPA regulations require that, while BLM is in the process of an EIS, such as during revision or amendment of a RMP, the agency must not take any action concerning a proposal that would "[l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1. *See also* 40 C.F.R. § 1502.2(f) (while preparing environmental impact statements, federal agencies "shall not commit resources prejudicing selection of alternatives before making a final decision"). BLM has historically interpreted this NEPA regulation to require that proposed actions that could prejudice selection of any alternatives under consideration "should be postponed or denied" in order to comply with 40 C.F.R. § 1506.1, and the Land Use Planning Handbook previously contained this direction. Another section of this same regulation directs that while BLM is preparing a required EIS "and the [proposed] action is not covered by an existing program statement," then BLM must not take any actions that may "prejudice the ultimate decision on the program." 40 C.F.R. § 1506.1(c). The regulation continues that "[i]nterim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives." *Id.* (emphasis added).

The official position of the Department of Interior ("DOI"), which comports with federal caselaw, is that the BLM must consider impacts arising from oil and gas exploration and development on these leases before leasing. *See, e.g.,* Southern Utah Wilderness Alliance, 159 IBLA 220, 240-43 (2003) ("SUWA"); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior,* 377 F.3d 1147 (10th Cir. 2004); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983). Leasing these parcels now, while ACEC nominations for the area in question are being considered and while RMPs are being revised, violates NEPA's prohibition on interim actions. According to 40 C.F.R § 1506.1(a):

> Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would:
>
> (1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

1. Granting valid rights may prejudice management prescriptions for nominated ACECs

Granting valid and existing rights in these parcels before ACEC designation is fully considered and management prescriptions are developed could both adversely impact the environment and limit the choice of reasonable alternatives for the management of these areas. These parcels should be withdrawn until the nominated ACECs are evaluated and management prescriptions are developed.

ACECs may be nominated even when plan revision is not in progress, and a preliminary evaluation should take place after receiving such a nomination. The District Manager may determine that either a plan amendment or temporary management are required.

> If an area is identified for consideration as an ACEC and a planning effort is not underway or imminent, the District Manager or Area Manager must make a preliminary evaluation on a timely basis to determine if the relevance and importance criteria are met. If so, the District Manager **must** initiate either a plan amendment to further evaluate the potential ACEC or provide temporary management until an evaluation is completed through resource management planning. Temporary management includes those reasonable measures necessary to protect human life and safety or significant resource values from degradation until the area is fully evaluated through the resource management planning process. BLM Manual 1613.21.E (emphasis added).

> The public has an opportunity to submit nominations or recommendations for areas to be considered for ACEC designation. Such recommendations are actively solicited at the beginning of a planning effort. However, nominations may be made at any time and must receive a preliminary evaluation to determine if they meet the relevance and importance criteria, and, therefore, warrant further consideration in the planning process....BLM Manual 1613.41 (emphasis added).

The presence of oil and gas leases should have no bearing on whether an area meets the criteria for ACEC designation, but may prejudice the development of ACEC management prescriptions. BLM Manual 1613.22.A states:

> Identify Factors Which Influence Management Prescriptions....These factors are important to the development of management prescriptions for potential ACEC's. Factors to consider include, but are not limited to, the following:....
> 8. Relationship to existing rights. What is the status of existing mining claims or pre-FLPMA leases? How will existing rights affect management of the resource or hazard?

CNE and Forest Guardians strongly believe that temporary management is required to preserve the values of these areas as potential ACECs. Instead of approving leasing of key wildlife

habitat -- and opening the floodgates for a wave of new APDs on these sensitive lands, the BLM should focus on evaluating our ACEC nominations in a timely fashion and managing exploration and development under *existing* leases.

It simply makes no sense for the BLM to waste its opportunity to designate ACECs that could help conserve habitat for special status species and the species associated with them. Not only is this poor judgment, it is also a violation of NEPA, FLPMA, and the BLM Manual.

BLM presently has the opportunity to plan for rational, environmentally sound development of energy resources in the nominated ACECs while protecting other uses of these lands—as required by law. Allowing leasing prior to ACEC evaluation and RMP revision will sacrifice this opportunity – without taking a hard look at the consequences. BLM and the public will have lost the chance to prevent the haphazard, poorly planned development that has characterized other federal lands in the Rockies. As an irretrievable commitment of resources, leasing will severely limit the range of management prescriptions.

2. Leasing the parcels at this time would undermine the RMP revision process

The BLM routinely cites recent Instruction Memoranda ("IM") in its assertion that leasing should continue under existing RMPs whether or not they have expired, and whether or not the public has submitted new information suggesting that the RMP's allocation of certain lands for leasing will result in unacceptable environmental consequences. Even though the BLM's internal guidance takes the misguided position that there are very few triggers for additional NEPA analysis before leasing, the BLM is still compelled to comply with NEPA and its implementing regulations. Many of these IMs have been released recently, and often the next one tweaks the position of the last – it's highly possible that the BLM's current position will be overturned either by the courts or internally in the future. The statutes that apply to leasing must trump a flawed internal interpretation.

RMP revision will be a waste of taxpayers' money and participants' time if the BLM approves leasing in the planning areas prior to RMP revision. Past agency directives correctly recognized that *any* leasing will constrain the choice of reasonable alternatives. Therefore, the agency followed a policy of no new leasing – even of lands designated open – for areas undergoing RMP revisions focused on oil and gas development. Absent such policy, any new leasing must be conditioned on findings that adequate NEPA analysis has been performed.

Under no circumstances should BLM approve new leasing of sensitive lands while the RMP revisions go forward. Offering sensitive lands without adequate NEPA analysis cannot proceed independently of the RMP revisions.

The Federal Land Policy and Management Act ("FLPMA") requires that land management actions be "in accordance with the land use plans developed" by the Secretary of the Interior. 43 U.S.C. § 1732(a). The regulations provide that "resource management action[s] shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." 43 C.F.R. §

1601.0-5(b). "All resource management authorizations and actions and detailed and specific planning undertaken subsequent to the RMP must conform to the RMP. . . BLM is required to manage . . . as outlined in the RMP, until or unless the RMP is amended pursuant to 43 CFR 1610.5-5." Marvin Hutchings, 116 IBLA 55, 62 (1990).

One of the critical issues the BLM addresses during RMP amendment is whether and which areas should be open to leasing in the first place. BLM Handbook 1624, Planning For Fluid Mineral Resources (or H-1624-1). H-1624-1, for instance, requires BLM in the amendment and revision process to look at areas open to leasing in any capacity, open to leasing with restrictions, open to leasing with NSO and areas open to leasing with special stipulations of conditions of approval. H-1624-1, Ch. IV. B., C.2. "During the amendment or revision process, the BLM should review all proposed implementation actions [this includes oil and gas leasing] through the NEPA process to determine whether approval of a proposed action would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined." H-1601-1 at VII.E.

Leasing *prior* to the RMP revisions will undermine the planning process. As an irretrievable commitment of resources, leasing will severely limit the range of alternatives. This violates the amendment process and agency policy.

NEPA §102(2)(C)(v) was intended to ensure that environmental impacts would "not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "The appropriate time for considering the potential environmental impacts of oil and gas exploration and development under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), is when BLM proposes to lease public lands for oil and gas purposes because leasing, at least without NSO stipulations, constitutes an irreversible and irretrievable commitment of resources by permitting surface disturbing activities in some form and to some extent." Wyoming Outdoor Council, 156 IBLA 347 (2002). See also Colorado Environmental Coalition, 149 IBLA 154, 156 (1999); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); Wyoming Outdoor Council, 153 IBLA 379 (2000) (emphasis added).

The BLM has the opportunity to learn from the planning mistakes and resulting environmental damage occurring in federally managed oil and gas fields elsewhere in the Rockies. In the Powder River Basin in Wyoming and Montana, the Upper Green Country in Wyoming, and Farmington, New Mexico, the BLM leased out practically all mineral lands under its jurisdiction *before* conducting required analyses of the impacts of such a blanket leasing program. When a high percentage of lands are under lease, the BLM has severely limited its ability to limit environmental impacts.

BLM needs to comply with NEPA, FLPMA and other applicable law through the RMP revisions *before* leasing more lands for oil and gas development. At the post-leasing phase, the BLM has already made an irretrievable commitment of resources. Leasing ties the BLM's hands and it loses the opportunity to consider such alternatives as no leasing, leasing subject to NSO, phased development, baseline data collection, and mitigation measures identified through the NEPA

process. See Doing It Right, A Blueprint for Responsible Coal Bed Methane Development in Montana -- http://www.northernplains.org/files/Doing_It_Right.pdf/view.

The existing RMPs are inadequate and outdated for current and reasonably anticipated levels of oil and gas development. There is an urgent need for comprehensive planning and consistent management direction. It appears that the existing RMPs and EISs are largely useless to agency professionals charged with managing the impacts of oil and gas development and protecting other uses on these public lands.

The environmental community is committed to working with the BLM constructively on the RMP revision process. The BLM needs to acknowledge that new leasing – while the revision process is ongoing – will render the RMP revisions largely moot.

E. The Determination That the Lease Notices Applied Are Sufficient is Arbitrary and Capricious

NEPA allows the agency to institute mitigating measures in order to render the action "insignificant," however the BLM has wholly failed to do so. Before the BLM can rely on controlled surface use ("CSU") stipulations as a mitigation measure, it is "required to adequately study any measure identified as having a reasonable chance of mitigating a potentially significant impact of a proposed action and reasonably assess the likelihood that the impact will be mitigated to insignificance by the adoption of that measure." Klamath Siskiyou Wildlands Ctr., 157 IBLA 332, 338 (2002). "NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance." *Id.* (quoting Powder River Basin Resource Council, 120 IBLA 47, 60 (1991).

The record is completely devoid of any support for the agency's conclusion that assorted general CSU stipulations will effectively mitigate impacts on special status species from oil and gas development. Nor does it address how such measures will preserve ACEC values. The record itself establishes that the BLM failed to analyze the proposed measures and their effectiveness, as required under NEPA.

The CSU that the BLM has chosen to use to supposedly mitigate impacts only requires modifications to activities "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." The ESA already requires these protections, and non-listed special status species are not guaranteed any protections based on this stipulation.

The special stipulations do not provide the BLM with the necessary authority to protect special status species. Nor do the Lease Notices satisfy FWS's recommendations for stipulations. The BLM is only able to require changes to proposed projects if a species is listed under the ESA. Thus, choosing to move forward with leasing is "arbitrary and capricious."

F. BLM is Failing to Protect Sensitive Species as Required

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

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

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

BLM Manual 6840.06. Despite this clear guidance, there is little evidence that BLM is fulfilling these obligations. Specifically, BLM failed to: 1) conduct surveys and/or inventories necessary to determine the distribution and abundance of Sensitive Species; 2) failed to assess the reasons for the current status of Sensitive Species; 3) failed to evaluate the potential impacts of leasing and subsequent oil and gas activities on Sensitive Species; 4) develop conservation strategies for Sensitive Species and ensure that the activities in question are consistent with those strategies; 5)

monitor populations and habitats of Sensitive Species; and 6) request appropriate technical assistance from all other qualified sources.

1. BLM failed to adequately consider sensitive species in its RMPs and in its supplemental NEPA analyses

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

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

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

2. The BLM has not adequately considered the cumulative impacts of its oil and gas leasing programs throughout the white-tailed prairie dog's range or Graham's penstemon's range, nor has it considered the cumulative impacts of proposed leasing on other Sensitive species

NEPA requires that the BLM consider direct, indirect, and cumulative impacts to the environment. The BLM obviously has not taken a "hard look" at the cumulative impacts that its oil and gas programs may have on the white-tailed prairie dog, Graham's penstemon, and other special status species.

The BLM has not met these NEPA requirements and thus must pull the protested parcels from the lease sale.

G. The BLM's Reliance on DNAs is Insufficient

An examination of the record BLM relied upon in making the leasing decision at issue illustrates the inherent flaws in its chosen procedures to comply with NEPA. BLM has elected to document land use plan conformance and NEPA adequacy for oil and gas leasing through the use of determinations of NEPA adequacy ("DNAs"), which are intended to assist the agency in determining "whether [it] can rely on existing NEPA documents for a current proposed action," and, if so, to assist in recording its rationale. Importantly, DNA's are a BLM construct and are not found or authorized in CEQ's NEPA regulations. *See* 40 C.F.R. Part 1508 (describing EIS, EA, and categorical exclusion requirements). The foundation documents for these DNAs are the

broad, generalized RMPs and subsequent supplements that, in most cases, are decades old and only contain general information about oil and gas exploration and development.

Importantly, the DNAs prepared by BLM to sanction oil and gas leasing do not engage in any site-specific analysis. Instead, they merely repeat the broad, programmatic language used in the field office-wide RMPs.

Thus, BLM's decision to sell and issue the non-NSO oil and gas leases at issue is a violation of NEPA, which requires "up-front" environmental analysis and disclosure before the agency engages in an irreversible commitment of resources. *See Southern Utah Wilderness Alliance*, 159 IBLA at 241-43 (citing *Friends of the Southeast's Future*, 153 F.3d at 1063)(additional citations omitted).

The recent *Pennaco* ruling addresses the use of DNAs rather than preparing additional NEPA documents prior to leasing:

> [I]n this case, the BLM did not prepare such an EA, did not issue a FONSI, and did not prepare any environmental analysis that considered not issuing the leases in question. Instead, the BLM determined, after filling out DNA worksheets, that previously issued NEPA documents were sufficient to satisfy the "hard look" standard. DNAs, unlike EAs and FONSIs, are not mentioned in the NEPA or in the regulations implementing the NEPA. See 40 C.F.R. § 1508.10 (defining the term "environmental document" as including environmental assessments, environmental impact statements, findings of no significant impact, and notices of intent). As stated, agencies may use non-NEPA procedures to determine whether new NEPA documentation is required. For reasons discussed above, however, we conclude the IBLA's determination that more analysis was required in this case was not arbitrary and capricious.

The recent *SUWA* ruling also demonstrates that the BLM cannot rely on DNAs, especially when tiered to inadequate NEPA analyses like MFPs.

H. NEPA Requires the BLM to Act Before Issuing Leases

NEPA regulations require that, while BLM is in the process of completing an EIS, such as during revision or amendment of a Resource Management Plan, the agency must not take any action concerning a proposal that would "[l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1. *See also* 40 C.F.R. § 1502.2(f). BLM has historically interpreted this NEPA regulation to require that proposed actions that could prejudice selection of any alternatives under consideration "should be postponed or denied" in order to comply with 40 C.F.R. § 1506.1, and the Land Use Planning Handbook previously contained this direction. Another section of this same regulation directs that while BLM is preparing a required EIS "and the [proposed] action is not covered by an existing program statement," then BLM must not take any actions that may "prejudice the ultimate decision on the program." 40 C.F.R. § 1506.1(c). The regulation continues that "[i]nterim action prejudices the ultimate decision on the program when it tends to

determine subsequent development or limit alternatives." *Id.* (emphasis added). Therefore, BLM needs to consider and act on the following prior to issuing any leases.

1. BLM must analyze impacts of oil and gas development before issuing leases

The BLM must analyze the impacts of subsequent development prior to leasing. The BLM cannot defer all site-specific analysis to later stages such as submission of Applications for Permit to Drill ("APDs") or proposals for full-field development. Because stipulations and other conditions affect the nature and value of development rights conveyed by the lease, it is only fair that potential bidders are informed of all applicable lease restrictions before the lease sale.

An oil and gas lease conveys "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. §3101.1-2. This right is qualified only by "[s]tipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed." 43 C.F.R. § 3101.1-2.

Unless drilling would violate an existing lease stipulation or a specific nondiscretionary legal requirement, the BLM argues lease development must be permitted subject only to limited discretionary measures imposed by the surface managing agency. However, moving a proposed wellpad or access road a few hundred feet will generally fall short of conserving wilderness characteristics unless the well was proposed for the very edge of the proposed wilderness. Accordingly, the appropriate time to analyze the need for protecting site-specific resource values is before a lease is granted.

Sierra Club v. Peterson established the requirement that a land management agency undertake appropriate environmental analysis prior to the issuance of mineral leases, and not forgo its ability to give due consideration to the "no action alternative." 717 F.2d 1409 (D.C. Cir. 1983). This case challenged the decision of the Forest Service ("FS") and BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without preparing an EIS. The FS had conducted a programmatic NEPA analysis, then recommended granting the lease applications with various stipulations based upon broad characterizations as to whether the subject lands were considered environmentally sensitive. Because the FS determined that issuing leases subject to the recommended stipulations would not result in significant adverse impacts to the environment, it decided that no EIS was required at the leasing stage of the proposed development. *Id.* at 1410. The court held that the FS decision violated NEPA:

> Even assuming, arguendo, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to *preclude* surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee . . . Thus, with respect to the [leases allowing surface occupancy] the

> decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

Id. at 1414 (emphasis added). The appropriate time for preparing an EIS is prior to a decision "when the decision-maker retains a maximum range of options" prior to an action which constitutes an "irreversible and irretrievable commitments of resources[.]" *Id.* (*citing Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)); *see also* Wyoming Outdoor Council, 156 IBLA 347, 357 (2002) *rev'd on other grounds by Pennaco Energy, Inc. v. US Dep't of Interior*, 266 F.Supp.2d 1323 (D. Wyo. 2003).

The court in *Sierra Club* specifically rejected the contention that leasing is a mere paper transaction not requiring NEPA compliance. Rather, it concluded that where the agency could not completely preclude all surface disturbances through the issuance of NSO leases, the "critical time" before which NEPA analysis must occur is "the point of leasing." 717 F.2d at 1414. This is precisely the situation for disputed CWP parcels.

In the present case, the BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbances. None of the environmental documents previously prepared by BLM for examine the site-specific impacts of mineral leasing and development to the CWP areas. The agency has not analyzed the new information, nor has it assessed what stipulations might protect special surface values. This violates federal law by approving leasing absent environmental analysis as to whether NSO stipulations should be attached to the CWP lands.

Federal law requires performing NEPA analysis before leasing, because leasing limits the range of alternatives and constitutes an irretrievable commitment of resources. Deferring site-specific NEPA to the APD stage is too late to preclude development or disallow surface disturbances of CWP lands.

2. BLM must consider NSO and no-leasing alternatives prior to leasing

The requirement that agencies consider alternatives to a proposed action further reinforces the conclusion that an agency must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C. §4332(C). CEQ regulations implementing NEPA and the courts make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. Environmental analysis must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after agency officials have bound themselves to a particular outcome (such as surface occupation within these sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e. no leasing or NSO stipulations).

When lands with wilderness characteristics are proposed for leasing, the IBLA has held that, "[t]o comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis

is completed." Sierra Club, 79 IBLA at 246. Therefore, formal NEPA analysis is required unless the BLM imposes NSO stipulations.

Here, the BLM has not analyzed alternatives to the full approval of the leasing nominations, such as NSO and no-leasing alternatives. 42 U.S.C. § 4332(2)(C)(iii). Federal agencies must, to the fullest extent possible, use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. 40 C.F.R. § 1500.2(e). "For all alternatives which were eliminated from detailed study," the agencies must "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

Wyoming Outdoor Council held that the challenged oil and gas leases were void because BLM did not consider reasonable alternatives prior to leasing, including whether specific parcels should be leased, appropriate lease stipulations, and NSO stipulations. The Board ruled that the leasing "document's failure to consider reasonable alternatives relevant to a pre-leasing environmental analysis fatally impairs its ability to serve as the requisite pre-leasing NEPA document for these parcels." 156 IBLA at 359 *rev'd on other grounds by Pennaco*, 266 F.Supp.2d 1323 (D.Wyo., 2003)(holding that when combined NEPA documents analyze the specific impacts of a project and provide alternatives, they satisfy NEPA). The reasonable alternatives requirement applies to the preparation of an EA even if an EIS is ultimately unnecessary. *See* Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 US 1066 (1989). Therefore, the BLM must analyze reasonable alternatives under NEPA prior to leasing.

Here, lease stipulations must be designed to protect the important wilderness resource. The agency, at a minimum, must perform an alternatives analysis to determine whether or not leasing is appropriate for these parcels given the significant resources to be affected and/or analyze whether or not NSO restrictions are appropriate.

3. BLM must comply with the Clean Water Act standards prior to leasing lands for oil and gas development

FLPMA establishes a general requirement that land use planning and the resulting plan provide for compliance with "pollution control laws." 43 U.S.C. § 1712(c)(8). Compliance with the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. ("CWA") water quality standards is an important element of this requirement. BLM must acknowledge the pollution control requirements under federal, state and local authority and prepare a management plan that is consistent with their requirements before leasing lands for oil and gas development.

The CWA establishes many requirements that BLM must adhere to in the underlying resource management plan and its NEPA analysis. It is imperative that BLM ensure that waters on its lands comply with State water quality standards. In doing so, it is critical that BLM recognize that State water quality standards "serve the purposes" of the CWA, which, among other things, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . ." 33 U.S.C. §1251(a). That is, a purpose of water quality standards is to protect aquatic

ecosystems, and BLM must ensure this comprehensive objective is met by ensuring water quality standards are complied with before leasing.

Water quality standards are typically composed of numeric standards, narrative standards, designated uses, and an antidegradation policy. The RMP and NEPA documents must analyze how all components of State water quality standards will be met, not just numeric standards. As state water quality standards in Colorado also provide a clear description of the "affected environment," the impacts of oil and gas leasing and development must be analyzed before leasing.

Adopting this legally sanctioned view of water quality standards is important. Designated uses encompass a more holistic, ecosystem-based view than focusing on, say, the concentration of chloride in the stream (a numeric standard). Consequently, BLM's management plan should provide that designated uses be fully achieved, and if they are not, require prompt management changes even if numeric standards are otherwise being met. Similarly, the NEPA analysis must describe how management decisions will affect the water quality of the segment before leasing.

I. BLM Must Prevent Undue and Unnecessary Degradation

"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." The BLM's duty to prevent unnecessary or undue degradation ("UUD") under FLPMA is mandatory, and BLM must, at a minimum, demonstrate compliance with the UUD standard. *See Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988)(the UUD standards provides the "law to apply" and "imposes a definite standard on the BLM."). The agency is required to demonstrate compliance with the UUD standard by showing that future impacts from development will be mitigated and thus avoid undue and unnecessary degradation of wilderness resources. See e.g., Kendall's Concerned Area Residents, 129 IBLA 130, 138 ("If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.").

BLM's obligation prevent UUD of the land is not "discretionary." "[T]he 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). "FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible…operation because the operation though necessary…would unduly harm or degrade the public land." *Id.* at 40 (emphasis added). In the case at bar, BLM has a statutory obligation to demonstrate that leasing in will not result in UUD.

Specifically, BLM must demonstrate that leasing will not result in future mineral development that causes UUD by irreparably damaging the CWP lands. Further, the agency is required to manage the public's resources "without permanent impairment of the productivity of the land and the quality of the environment…" 43 U.S.C. §1702(c). *See also, Mineral Policy Center v. Norton*, 292 F.Supp.2d at 49. Existing analysis has not satisfied the BLM's obligation to comply with the UUD standard and prevent permanently impairment of the wilderness qualities of these public lands.

J. Leasing Would Violate the National Historic Preservation Act

The National Historic Preservation Act ("NHPA") requires, prior to any federal undertaking, that a federal agency "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" and "afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking." 16 U.S.C. § 470f. The NHPA requires a federal agency to make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of an "undertaking" on any eligible historic properties found, 36 C.F.R. §§ 800.4, 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5, 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9. Additional NHPA provisions apply to Indian tribes: "In carrying out its responsibilities under Section 106, a Federal Agency shall consult with any Indian Tribe ... that attaches religious and cultural significance to properties described in Subparagraph (A)." 16 U.S.C. § 470a(d)(6)(B).

Once a historic property has been identified, the agency must "[s]eek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties." 36 C.F.R. § 800.4(a)(3). Consulting parties are defined as including Indian tribes and the public. 36 C.F.R. § 880.2.

The NHPA is a procedural statute that has been characterized as a "stop, look and listen" provision. *Muckleshoot Indian Tribe v. U.S. Forest Svc.*, 177 F.3d 800, 805 (9th Cir. 1999). In order to effectuate its purposes, an agency must comply with the NHPA's provisions before selling oil and gas leases. *Montana Wilderness Assoc.*, 310 F.Supp.2d at 1153; *see also* 36 C.F.R. § 800.16(y); Southern Utah Wilderness Alliance, 164 IBLA 1, 22 (2004); BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2).

The lease notice does not indicate that either the BLM or Forest Service:

1) made the requisite reasonable and good faith effort to identify historic properties in the vast majority of the areas covered by these leases as required by 36 C.F.R. § 800.4(b);
2) determined whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4;
3) assessed the effects of the proposed oil and gas leasing on any eligible historic properties found, as required under 36 C.F.R. §§ 800.4, 800.5, 800.9(a);
4) determined whether those effects would be adverse, as required by 36 C.F.R. §§ 800.5, 800.9(b); or
5) have avoided or mitigated any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9.

Nor does the notice whether the BLM and Forest Service have consulted with either the public or Native American tribes regarding the potential effects that oil and gas leasing and associated

exploration and development could have on cultural resources that have been located to date. 16 U.S.C. § 470a(d)(6)(B); 36 C.F.R. § 800.4(a)(3). Absent such identification and consultation, offering the proposed leases violates the NHPA.

K. BLM Has Discretion Not to Lease the Challenged Parcels

The BLM has discretionary authority to approve or disapprove mineral leasing of public lands. The Mineral Leasing Act ("MLA") provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary." 30 U.S.C. § 226(a). In 1931 the Supreme Court found that the MLA "goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare." *U.S. ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931). A later Supreme Court decision stated that the MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 85 S.Ct. 792, 795 (1965) *reh. den.* 85 S.Ct. 1325.

Submitting a leasing application vests no rights to the applicant or potential bidders. The BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966). *See also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975); *Pease v. Udall*, 332 F.2d 62 (9th Cir. 1964); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839 (D.C. Wyo. 1981).

Withdrawing the protested parcels from the lease sale until proper pre-leasing analysis has been performed is a proper exercise of BLM's discretion under the MLA. The BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law.

III. CONCLUSION & REQUEST FOR RELIEF

CNE and Forest Guardians therefore request that the BLM withdraw the protested parcels from the November 2006 sale.

Sincerely,

Erin Robertson
Staff Biologist
Center for Native Ecosystems

On behalf of

Nicole Rosmarino
Conservation Director
Forest Guardians
312 Montezuma
Santa Fe, New Mexico 87501