CENTER FOR NATIVE ECOSYSTEMS
1536 Wynkoop, Suite 303
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 August 2007

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 August 21, 2007 sale of the following parcels:

UTU85695: greater sage-grouse habitat
UTU85696: greater sage-grouse habitat
UTU85697: greater sage-grouse habitat
UTU85698: greater sage-grouse habitat
UTU85707: greater sage-grouse habitat
UTU85708: greater sage-grouse habitat
UTU85709: greater sage-grouse habitat
UTU85710: greater sage-grouse habitat
UTU85711: greater sage-grouse habitat
UTU85712: greater sage-grouse habitat
UTU85713: greater sage-grouse habitat
UTU85714: greater sage-grouse habitat
UTU85715: greater sage-grouse habitat
UTU85716: greater sage-grouse habitat
UTU85717: greater sage-grouse habitat
UTU85718: greater sage-grouse habitat
UTU85719: greater sage-grouse habitat
UTU85720: greater sage-grouse habitat
UTU85721: greater sage-grouse habitat
UTU85722: greater sage-grouse habitat
UTU85723: greater sage-grouse habitat

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 is a non-profit corporation with approximately 2,000 members throughout the United States, including New Mexico. Forest Guardians' mission is to preserve and restore the wildlands and wildlife in the American Southwest through fundamental reform of public policies and practices. We have a special interest in prairie and desert grassland ecosystems in the southern Great Plains and southwest. Our conservation efforts prioritize the recovery of focal wildlife, such as the black-tailed prairie dog, Gunnison's prairie dog, and other species whose protection can safeguard whole ecosystems. In addition, we are committed to the preservation of all native animal and plant species within our geographic scope, particularly on federal lands.

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

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 greater sage-grouse 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 greater sage-grouse have occurred, and significant new information is available

Oil and gas development is a major competing land use that threatens greater sage-grouse. The BLM must reexamine its oil and gas leasing program before issuing leases for parcels in habitat for this species.

The relevant RMPs did not directly consider the imperiled status of greater sage-grouse, and the BLM has not presented the necessary evidence that it did consider this new information before deciding to lease these parcels. The BLM must consider new information about this species and

any other special status species affected by the proposed leasing before offering their habitat for lease. It is important to note that simply having the data in hand is not the same as analyzing the implications.

None of the NEPA documents that this leasing is tiered to directly consider the imperiled status of greater sage-grouse, or address significant new information available on this species, 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 failing to conduct adequate NEPA analysis of the impacts of oil and gas development on the greater sage-grouse, the BLM is contributing to the need to list this species.

a. greater sage grouse

Effects of oil and gas drilling on greater sage-grouse have only recently been investigated, and none of the relevant RMPs took the potential direct, indirect and cumulative impacts of oil and gas drilling on greater sage-grouse into account. On April 21, 2004, FWS made a positive 90-day finding on several petitions to list the greater sage grouse under the Endangered Species Act. CNE is one of the greater sage-grouse petitioners. While the Service recently made a negative 12-month finding, it clearly remains concerned about sage grouse status. It is very important to note that FWS made clear that part of its rationale for not supporting listing, at the time of the 12-month finding, was that draft conservation strategies were in place. It is becoming apparent that these draft conservation strategies will not be sufficient to prevent further declines and eventual listing if the BLM does not address the direct, indirect and particularly cumulative effects of its oil and gas leasing program. The FWS's 90-day finding included the following sections that address the sage grouse's status and the threat that oil and gas development poses to this species.

> Using our population estimates in the August 24, 2000 Federal Register notice, sage-grouse population numbers may have declined between 69 and 99 percent from historic to recent times (65 FR 51578). The WSSCSTGTC (1999) estimated the decline between historic and present day to have been about 86 percent. (69 Fed. Reg. 21486 (April 21, 2004))
>
> Sage-grouse populations in Colorado have declined from 45 to 82 percent since 1980. (69 Fed. Reg. 21487 (April 21, 2004))
>
> Proposed coal-bed methane development in the Powder River Basin of Wyoming is expected to result in the loss of 21,711 ha (53,626 ac) of sagebrush shrublands by 2011 (Bureau of Land Management 2003). Current sage-grouse habitat loss in the basin from coal-bed methane is estimated at 2,024 [ha, sic] (5,000 ac) (Braun *et al.* 2002). Although reclamation of short-term disturbances will be concurrent with project development, 'sage-grouse habitats would not be restored to predisturbance conditions for an extended period because of the time need [sic] to develop sagebrush stands with characteristics that are preferred by sage-grouse.' (Bureau of Land Management 2003a). Disturbance to other sage-grouse habitats, such as late summer/brood-rearing areas, was not quantified in the Final

Environmental Impact Statement for this project, but 'disturbance would occur to all other habitat types, including nesting, brood rearing, and wintering areas that are located more than 0.25 miles from lek sites' (Bureau of Land Management 2003a). (69 Fed. Reg. 21488 (April 21, 2004))

In addition to the direct habitat loss previously mentioned, associated facilities, roads, and powerlines, as well as noise and increased human activities (*see* discussion under Factor E) associated with mining and energy development, can fragment sage-grouse habitats (Braun 1998; Connelly *et al.* 2000). More chronic impacts are less clear. Lek abandonment as a result of oil and gas development has been observed in Alberta (Connelly *et al.* 2000), and, in the Powder River Basin of Wyoming, leks within 0.4 km (0.25 mi [sic]) of a coal-bed methane well have significantly fewer males compared to less disturbed leks (Braun *et al.* 2002). The network of roads, trails, and powerlines associated with wells and compressor stations decreases the suitability and availability of sage-grouse habitat, and fragments remaining habitats (Aldridge and Brigham 2003). Human activities along these corridors can disrupt breeding activities and negatively affect survival (Aldridge and Brigham 2003). Female sage-grouse captured on leks near oil and gas development in Wyoming had lower nest-initiation rates, longer movements to nest sites, and different nesting habitats than hens captured on undisturbed sites (Lyon 2000; Lyon and Anderson 2003). Lower nest-initiation rates can result in lower sage-grouse productivity in these areas (Lyon and Anderson 2003). Activities which remove live sagebrush and reduce patch size negatively affect all sagebrush obligates (Braun *et al.* 2002). (69 Fed. Reg. 21490 (April 21, 2004))

As with fences, powerlines provide perches for raptors (Connelly *et al.* 2000; Vander Haegen *et al.* 2002, cited in Knick *et al.* 2003), thereby resulting in sage-grouse avoidance of powerline corridors (Braun 1998). Approximately 9656 km (6,000 mi [sic]) of powerlines have been constructed in sage-grouse habitat to support coal-bed methane production in Wyoming's Powder River Basin within the past few years. Leks within 0.4 km (0.25 mi [sic]) of those lines have significantly lower growth rates than leks further from these lines, presumably as the result of increased raptor predation (Braun *et al.* 2002). The presence of powerlines also contributes to habitat fragmentation, as greater sage-grouse typically will not use areas immediately adjacent to powerlines, even if habitat is suitable (Braun 1998). (69 Fed. Reg. 21490 (April 21, 2004))

Lyon (2000) found that successful sage-grouse hens nested farther (mean distance = 1,138 m) from the nearest road than did unsuccessful hens (mean distance = 268 m) on Pinedale Mesa near Pinedale, Wyoming. (69 Fed. Reg. 21490 (April 21, 2004))

In Wyoming's Powder River Basin, leks within 1.6 km (1 mi [sic]) of coal-bed methane facilities have consistently lower numbers of males attending than leks farther from these types of disturbances. Noise associated with these facilities is

> cited as one possible cause (Braun *et al.* 2002). (69 Fed. Reg. 21493 (April 21, 2004))

The Service summed up, "This finding is based primarily on the historic and continued destruction, modification, or curtailment of greater sage-grouse habitat or range, and the inadequacy of existing regulatory mechanisms in protecting greater sage-grouse habitats throughout the species' range" (69 Fed. Reg. 21494 (April 21, 2004)).

By leasing parcels with known sage grouse habitat with inadequate protective stipulations, the BLM is contributing to the need to list this species both through promoting additional habitat destruction and by confirming that its regulatory mechanisms are inadequate to prevent the extinction of the species.

The relevant RMPs (House Range Resource Area RMP and Warm Springs Resource Area RMP) were finalized in 1987. The supplemental EA's for oil and gas leasing for these resource areas were finalized in 1988. Many of the references cited in FWS's positive 90-day finding were published well after the relevant resource management plans and NEPA documents considered the effects of oil and gas development on greater sage grouse in Utah. Further new information has become available subsequent to the FWS's positive 90-day finding. Four new relevant studies have become available between 2005 and the present, including three peer reviewed studies that have become available in 2007. Holloran (2005) presents results of a study of greater sage-grouse population response to natural gas field development in Western Wyoming. Naugle et al. (2006a) analyze greater sage-grouse population response to coal-bed methane development in the Powder River Basin. Naugle et al. (2006b) analyze greater sage-grouse winter habitat selection and energy development in the Powder River Basin. The studies detailed in the unpublished manuscript (Naugle et al. 2006a), and progress report (Naugle et al. 2006b) described above, have been completed and are now in press awaiting publication in peer reviewed journals (Walker et al. in press, Doherty et al. in press). Walker et al. (in press) analyze greater sage-grouse population response to energy development and habitat loss. Doherty et al. (in press) analyze the impacts of energy development on winter habitat selection. Finally Walker et al. (2007) estimate infection rate of West Nile virus in a greater sage-grouse population. The Colorado Division of Wildlife (CDOW) recognizes the importance of some of the new information outlined above, in their recent comments on the Colorado BLM's draft Little Snake Resource Management Plan. CDOW recommends substantial changes to the Colorado BLM's draft Little Snake Resource Management Plan, based on this new information (CDOW 2007). The CDOW states that:

> "…more information about the impacts of oil and gas development on sage grouse has been reported since spring, 2006 than was known before. Matt Holloran's work in Wyoming (Holloran 2005) was just beginning to become widely available in the spring of 2006. Holloran found that greater sage-grouse lek attendance declined as oil and gas activity developed with eventual abandonment of leks occurring with time and higher density of gas development. Additionally, he documented that significant additional mortality of adults occurred at higher surface densities. Holloran also suggests that existing greater sage-grouse habitat protection stipulations applied by the BLM in Wyoming are inadequate to protect sage grouse at large scales and high levels of development.

> Dave Naugle's initial work on effects of oil and gas (coal-bed methane) development on greater sage-grouse in the Powder River Basin was released in June, 2006…His findings are currently undergoing peer review and are expected to be published in a peer reviewed journal soon. His work (Naugle et al. 2006a) supports many of the findings in Holloran (2005) and further fleshes out the surface density at which substantial impacts on greater sage-grouse occur. He reports that impacts on lek attendance began to occur at surface spacings at or above 1 well pad per 640 acres, and those impacts became significant between 1 well pad per 320 acres, and 1 well pad per160 acres…" (pg. 3).

CDOW goes on to state that:

> "Naugle et al. (2006b) also found that the presence of development affected use of winter ranges by greater sage-grouse. It is becoming widely suggested that surface spacings at or below 1 well pad per 80 acres eventually eliminates greater sage-grouse from these habitats. Naugle et al. (2006a) also report that current BLM stipulations are inadequate to protect greater sage-grouse in the Powder River Basin, where wells are spaced at relatively close densities. He [Naugle] has proposed that the only way to protect greater sage-grouse at a landscape scale in the face of significant oil and gas development is to develop and maintain use areas within critical occupied habitat. Dave Naugle is currently employed as a science advisor by BLM in Washington, D.C. for the 2006-2007 academic year." (pg. 4)

The CDOW further states that:

> "Evidence from Montana and Wyoming suggests that greater sage-grouse may be extirpated from areas if large refuge areas are not set aside devoid of oil and gas development." (p. 5)

Finally, the CDOW notes that:

> "Research in Wyoming and Montana (Holloran 2005, Naugle et al. 2006a) indicates that current BLM stipulations to protect greater sage-grouse, including .25 mile radius lek buffers are not protecting leks as expected in areas of significant energy development." (p. 9, *emphasis added*)

Finally, on page 16, the DOW notes that:

> "Research in Montana and Wyoming has indicated that lease stipulations designed to protect sage grouse, namely timing restrictions on drilling and 0.25 mile no surface occupancy restrictions have not prevented grouse declines in natural gas and coalbed methane fields. (CDOW comments on Colorado BLM's Draft Little Snake RMP). (*emphasis added*)

The Colorado Division of Wildlife is beginning to recognize that existing regulatory mechanisms, including standard lease stipulations, may be inadequate to protect the greater sage-grouse from declines associated with oil and gas development. CDOW states:

> "Given the scope and intensity of oil and gas development in the West, listing of Greater sage-grouse under the ESA is likely in the near future if some plan for maintaining them is not developed and funded." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

> "Several approaches to mitigating impacts of energy development have been tried or proposed. The classic approach used by BLM who manages leases on Federal mineral rights, is to apply stipulations to protect wildlife (conditions on the operator) at the time the lease is granted. For a variety of reasons, including a weak scientific knowledge base, failure to consider cumulative effects (*emphasis added*), etc., this approach has largely failed." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

The CDOW goes on to state that:

> "Creating refuges in time and space is emerging as the leading strategy for reducing impacts, both because stipulations have not been completely effective and because they are very costly to industry…Against this backdrop we were asked to evaluate areas where wildlife values are so high that energy development should not be allowed, either forever or for some period of time." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

The CDOW went on to explore a refuge concept, in which they identify core refuge areas for sage grouse. They suggest that protection of these core refuge areas be coupled with mitigation of oil and gas development on off-refuge sites is necessary to protect sage grouse populations. CDOW states that, "Available evidence indicates that sage-grouse are highly sensitive to even low-intensity disturbance associated with energy development, particularly on leks/breeding areas but also on winter range." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

CDOW used the best available evidence including the new evidence outlined earlier in this discussion, to identify core refuge areas for sage grouse. CDOW states, "In order to identify core refuge areas for sage grouse, the DOW GIS group mapped intersections of three GIS layers: 4-mile buffers around active leks, 5-year average numbers (density) of males on leks, and sage brush patch sizes. This identified areas most critical to sage grouse and presumably other sagebrush obligates."

CDOW then goes on to recommend that, "These core refuge areas would be off-limits to any energy development or production activity until development in non-core areas was completed and successfully rehabilitated."

Utah BLM should follow Colorado Division of Wildlife's example, and seriously take into consideration new information on the potential impacts of oil and gas drilling on greater sage-grouse.

New evidence also suggests that West Nile virus is a new threat to sage grouse, and coal bed methane development may increase the odds of exposure to this disease. This also should be analyzed before considering leasing. In addition, the BLM has developed a national plan for sage grouse conservation, and Colorado should be careful that its leasing program does not preclude conservation measures that may prove necessary to prevent the extinction of this species.

There is clearly new information that should be considered that suggests that potentially significant direct, indirect and cumulative effects to the greater sage-grouse are likely to result from sale of the protested lease parcels. The new information suggests that the lease stipulations generally relied upon by the BLM to prevent significant impacts to sage-grouse are inadequate and will likely result in extirpations. This new information has never been considered in any of the NEPA documents that this leasing is tiered to. The Utah BLM is relying upon the following lease stipulation to mitigate the impacts of oil and gas drilling on sage-grouse to insignificance:

> UT-LN-51: "The lessee/operator is given notice that lands in this lease have been identified as containing habitat for named species on the BLM Sensitive Species List and the Utah Sensitive Species List. Modifications to the Surface Use Plan of Operations may be required in order to protect any sensitive Species and/or habitat from surface disturbing activities in accordance with Section 6 of the Oil and Gas Lease Terms, Endangered Species Act, and 43 CRF 3101.1-2. This notice may be waived, excepted, or modified by the authorized officer if either the resource values change or the lessee/operator demonstrates that adverse impacts can be mitigated."

This lease stipulation is completely inadequate and will not protect the greater sage-grouse from significant direct, indirect and cumulative impacts that will result from leasing of the parcels protested herein. This stipulation only allows BLM to require modifications to the Surface Use Plan of Operations to protect greater sage-grouse within the parameters set by Section 6 of the Oil and Gas Lease Terms and 43 C.F.R. 1301.1-2. Section 6 of the Oil and Gas Lease Terms states the following:

"Conduct of operations – Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measure may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specifications of interim and final reclamation measures. (*emphasis added*)"

Measures "consistent with lease rights granted" is defined by 43 C.F.R. 1301.1-2 as follows:

"At a minimum, measures shall be deemed consistent with lease rights granted provided

that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year."

Thus, this lease stipulation only allows the BLM to ask the operator to move a proposed well pad, road, pipeline, or other oil and gas infrastructure location by up to 200 meters (0.12 miles), or put a seasonal restriction on surface disturbing operations for up to 60 days in order to protect greater sage-grouse habitat. All of the best available science suggests that this stipulation is inadequate to mitigate the impacts to greater sage-grouse into insignificance.

In a November 22, 2006 ruling on Center for Native Ecosystems' appeal of Utah BLM's March 17, 2003 denial of CNE's February 3, 2003 oil and gas lease sale protest, the IBLA states that:

> "The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public land for oil and gas purposes, because leasing without stipulations requiring no surface occupancy constitutes an irreversible and irretrievable commitment to permit surface disturbing activity" (170 IBLA 331).

The IBLA also states that:

> "Although BLM may use DNAs to determine whether new NEPA documentation is required, DNAs cannot be properly used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them." (170 IBLA 332)

None of the NEPA documents that leasing is tiered to directly consider the potential direct, indirect and cumulative effects of oil and gas drilling on greater sage-grouse habitat, or address significant new information available on the status of this species and the likely impacts of widespread oil and gas development on the status of this species, 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. Further, it is not proper to rely on the stipulation in the lease notice (UT-LN-51) to determine that the sale of the lease parcels is not likely to have significant adverse effects on greater sage-grouse. In the same finding discussed above, the IBLA states that:

> "A finding that impacts of issuing an oil and gas lease would not be significant due to the mitigative effects of a …stipulation must be based on NEPA analysis. The stipulation does not provide a basis for deferring an environmental analysis in the absence of an existing NEPA statement that includes an analysis of the mitigative effects of the stipulation (170 IBLA 332)…Although BLM attached a stipulation to the leases for the protection of special status species, BLM has identified no NEPA document containing an analysis of the mitigative effect of that stipulations…"

The BLM has failed to comply with NEPA's procedural requirement to prepare an environmental analysis describing the effects of the proposed action on the greater sage-grouse,

or the adequacy of its stipulation to mitigate potential impacts of sale of these parcels for oil and gas development. This failure may result in an irreversible and irretrievable commitment of resources, and in BLM contributing to the need to list the greater sage-grouse under the ESA – especially given that the best available scientific information suggests that the stipulations relied upon are utterly inadequate to mitigate impacts to greater sage-grouse to insignificance. There is no evidence available to suggest that the roughly 1/10 of a mile (0.12 kilometer) buffer from surface disturbing activities, and less than 60-day timing restriction on surface disturbing activities allowed by the stipulation (UT-LS-51) will protect sage-grouse leks and other important habitats. In reference to the standard ¼ mile buffer around sage-grouse leks included in Wyoming BLM's oil and gas lease sale stipulations to protect sage-grouse, Dave A. Roberts Wyoming Wildlife Program Leader, BLM, states:

> "…The BLM started using the ¼ mile distance, for lack of anything better, along with the rest of the published guidelines, back in the late 1960's. Over a period of time (now over 3 decades) the ¼ mile distance just evolved into a de facto guideline or standard, through routine, everyday usage, even though there was not any real, empirical, scientific evidence to either support or refute its usage.." (in a 1998 affidavit submitted in response to Jonah oil and gas field development appeal)

The best available evidence indicates that the stipulation in question here (UT-LS-51), will not be adequate to protect greater sage-grouse from significant impacts associated with leasing of the protested parcels. Walker et al. (in Press), find that "Current lease stipulations that prohibit development within 0.4 km [1/4 mile] of sage-grouse leks on federal lands are inadequate to ensure lek persistence and may result in impacts to breeding populations over larger areas. Seasonal restrictions on drilling and construction do not address impacts caused by loss of sagebrush and incursion of infrastructure that can affect populations over long periods of time."

As discussed earlier, the lease stipulation intended to mitigate impacts of leasing of the protested parcels on greater sage-grouse, only allows for: 1) a prohibition on development within 0.2 kilometers [approx 1/10 mile] of sage grouse leks or other important habitats, and 2) a seasonal restriction of , 60 days on drilling and construction. The best available scientific evidence clearly indicates that this stipulation is inadequate to mitigate the impacts of leasing of the protested parcels on greater sage-grouse to insignificance. Leasing of the protested parcels will clearly result in significant direct, indirect and cumulative impacts to greater sage-grouse.

Thus, The BLM must conduct NEPA analysis and take a "hard look" at how its oil and gas program is affecting the greater sage-grouse. Additional leasing should not occur in any sage grouse habitat until the BLM finishes this analysis and the Field Offices responsible for management of sage grouse habitat reevaluate their management of this species, including their oil and gas programs.

The BLM's management of the sage grouse has already resulted in major declines across the species' range. The BLM is clearly contributing to the need to list this species by moving forward with leasing in important greater-sage grouse habitat without taking the required 'hard look' at the potential direct, indirect and particularly cumulative impacts; particularly given that

the best available science clearly demonstrates that the lease stipulation relied upon to protect greater sage-grouse from significant impacts is inadequate. Leasing parcels in important sage-grouse habitat before the BLM has done the appropriate NEPA analysis, and before RMP revision is complete, is highly inappropriate, and violates NEPA's prohibition on interim actions. All parcels in greater sage-grouse habitat should be withdrawn until the BLM has completed RMP revision and/or the additional supplemental NEPA analysis that takes the required 'hard look' at the direct, indirect and cumulative effects that leasing of these parcels would have on greater sage-grouse populations. The BLM must ensure that its activities do not contribute to the need for ESA listing, and must meet its sensitive species obligations for sage grouse.

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. 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.

D. 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 lease stipulations will effectively mitigate impacts on special status species from oil and gas development. The record itself establishes that the BLM failed to analyze the proposed measures and their effectiveness, as required under NEPA.

The lease stipulations do not provide the BLM with the necessary authority to protect special status species. Thus, choosing to move forward with leasing is "arbitrary and capricious."

E. 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, including greater sage-grouse, 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 range of the greater sage-grouse, nor has it considered the cumulative impacts of proposed leasing on other sensitive and special status 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 greater sage-grouse, and other special status species.

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

F. 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.

F. 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. Paterson 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 a number of important resources, including special status species and habitats. 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.

G. 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 lands that provide important habitat for special status species, including the greater sage-grouse. 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 important qualities and values of these public lands.

H. 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 August 2007 sale.

Sincerely,

Erin Robertson
Staff Biologist
Center for Native Ecosystems

On behalf of

Bryan Bird
Forest Program Director
Forest Guardians
312 Montezuma
Santa Fe, New Mexico 87501