UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

Wyoming Outdoor Council Greater Yellowstone Coalition The Wilderness Society	*	Appeal of the Dismissal of Protest of the Sale of Oil and Gas Lease Parcels WY-0604-147, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159, April 4, 2006 Lease Sale
Appellants	*	BLM Wyoming State Office
	*	IBLA No. 2006-208
	*	

APPELLANTS' REPLY IN SUPPORT OF
PETITION FOR STAY PENDING APPEAL

This appeal of the Bureau of Land Management's ("BLM") April 2006 auction of eleven oil and gas leases in the Wyoming Range portion of the Bridger-Teton National Forest represents the second stage of a four-stage leasing plan undertaken by the BLM and U.S. Forest Service. If completed, this leasing plan would result in conveyance of oil and gas development rights across approximately 44,600 acres of National Forest lands in western Wyoming that are highly prized for hunting, fishing, horsepacking, hiking, backpacking, and motorized recreation, and that offer outstanding habitat for popular game species such elk and mule deer and imperiled species such as the rare Canada lynx and Colorado River cutthroat trout.

This Board addressed the first phase of this leasing plan—consisting of a single lease encompassing 1,280 acres auctioned in December 2005—in a ruling issued on July 10, 2006. In that ruling, the Board granted a petition by these same appellants to stay issuance of the December 2005 lease, ruling that appellants had demonstrated likely success on the merits of their claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.,

because the BLM's Documentation of Land Use Plan Conformance and NEPA Adequacy ("DNA") for the lease failed to establish that the agency had adequately considered significant new information concerning environmental impacts that are likely to result from the leasing. See Order, Wyoming Outdoor Council, IBLA 2006-184, at 10 (July 10, 2006) ("July Stay Order").

The leases challenged in this appeal result from the same deficient environmental analysis process that this Board identified in the July Stay Order. The BLM's April 2006 leasing in the Bridger-Teton forest relies on precisely the same DNA and other analyses that this Board addressed in the July Stay Order. All of the same flaws identified by the Board in the July Stay Order equally infect the BLM's pre-leasing environmental analysis here. Accordingly, for all the same reasons that the Board stayed issuance of the December 2005 lease in the Wyoming Range, it should stay issuance of these April 2006 Wyoming Range leases as well.

In an effort to avert this logical result, the BLM and two intervenors, Hanson & Strahn, Inc. and Stanley Energy, Inc., present the Board with a flurry of papers that they claim evidence an adequate NEPA review that was not shown in the BLM's DNA. The BLM even proffers a new post hoc declaration from Ms. Vickie Mistarka, the BLM Wyoming State Office employee who prepared the flawed DNA, in an effort to explain away that document's many shortcomings.

However, none of the new documents and sworn statements offered by the respondents alters three fundamental, and dispositive, facts: (1) The BLM and the Forest Service were aware of significant new information relevant to environmental concerns regarding development that would result from the challenged leases, including concerns with air quality, the imperiled Canada lynx, a mule deer herd, and a rare subspecies of cutthroat trout; (2) Well in advance of the auction of these leases, the BLM and the Forest Service developed a reasonably foreseeable development scenario that anticipated the drilling of ten gas wells as a result of the challenged

leases; and (3) Nevertheless, neither the BLM nor the Forest Service considered the impacts associated with this anticipated post-leasing development in light of the significant new environmental information before auctioning the challenged leases. Instead, the BLM and the Forest Service limited their environmental analysis to the "paper transaction" of leasing, with no assessment of the impacts associated with post-leasing, surface-disturbing activities that both agencies anticipate.

Accordingly, this Board's assessment that the BLM's DNA revealed a slipshod agency leasing process remains right on target. This conclusion is not altered even if the Board "looks behind" the DNA to assess the purported underlying agency analysis, as the respondents urge. A well-established body of Board and judicial precedent makes clear that NEPA and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., require an analysis of projected post-leasing development impacts in advance of the irreversible and irretrievable commitment of resources that occurs when the federal government issues an onshore oil and gas lease. Here, however, the underlying environmental analysis documents reveal that the Forest Service and the BLM indulged in a limited, abstract exercise that eschewed consideration of any such development impacts, even as they auctioned off development rights to some of the most treasured lands in one of the most revered National Forests in the nation.

Because the Forest Service and the BLM failed to prepare an adequate environmental analysis before authorizing the challenged leasing, they violated NEPA and the ESA. This Board should therefore stay issuance of the challenged April 2006 leases, just as it stayed issuance of the December 2005 lease that arose from this same agency process. In addition, because the only impediment to issuance of the challenged leases at this point is a voluntary stay

imposed by the BLM that expires on September 21, 2006, appellants respectfully request a stay order from this Board in advance of that date.

I. THE BLM VIOLATED NEPA BY FAILING TO TAKE A "HARD LOOK" AT SIGNIFICANT NEW INFORMATION CONCERNING LIKELY DEVELOPMENT IMPACTS OF THE CHALLENGED LEASING.

Respondents offer no justification for the failure of the BLM or the Forest Service to prepare a supplemental NEPA analysis to take a "hard look" at significant new information that has emerged regarding natural resources that would be affected by development of the challenged leases. Throughout their response briefs, the BLM and the industry intervenors repeatedly suggest that appellants' NEPA arguments documenting likely oil and gas development impacts are "premature at this stage of leasing," and instead must be raised "at the APD stage when site-specific NEPA is done." BLM's Response to Petition for Stay and Supplement to the Record ("BLM Resp.") at 24; see also id. at 30 ("Appellants have again confused leasing with actual surface disturbance and human intrusion."); Hanson & Strahn, Inc.'s Opposition to the Petition for Stay ("H&S Resp.") at 13 (arguing that the BLM adequately considered "impacts associated with leasing," and that "impacts of development can and will be addressed on a site-specific basis as necessary if development operations are actually proposed"). They are wrong.

NEPA does not permit the BLM to limit its environmental impact analysis solely to the leasing stage of the oil and gas development process, without any consideration of likely post-leasing development impacts on affected resources contained within the lease parcels. As this Board and numerous court decisions have made clear:

> [T]he appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public lands for oil and gas purposes, because leasing without NSO stipulations constitutes an

> irreversible and irretrievable commitment to permit surface-disturbing activity, in some form and to some extent.

Southern Utah Wilderness Alliance, 166 IBLA 270, 276-77 (2005) (emphasis added); accord Conner v. Burford, 848 F.2d 1441, 1448-51 (9th Cir. 1988) (holding that federal agency must assess impacts of estimated post-leasing development in pre-leasing NEPA analysis of non-NSO leases); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227-28 (9th Cir. 1988) (same); Sierra Club v. Peterson, 717 F.2d 1409, 1413-15 (D.C. Cir. 1983) (rejecting argument "that leasing is a discrete transaction which will not result in any physical or biological impacts"); Montana Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1145 (D. Mont. 2004) (holding that NEPA required federal agencies to take "a 'hard look' at the foreseeable environmental consequences of oil and gas development on these leaseholds" prior to issuing leases). In contrast to this uniform body of Board and judicial authority, there is no authority supporting the respondents' suggestion that NEPA permits a federal agency to avoid assessment of likely post-leasing development altogether at the leasing stage, instead deferring all such analysis to the APD stage.

In this appeal, the issue before the Board is whether the BLM was required to prepare supplemental environmental analysis in light of significant new information regarding affected resources. This context does not alter NEPA's demand for an assessment of likely post-leasing development impacts before leasing may occur. As the Tenth Circuit stated in reviewing a ruling of this Board arising from similar circumstances: "To determine whether additional NEPA documents were needed, the IBLA was required to consider whether existing NEPA documents were sufficient to allow the agency to take a 'hard look' at the environmental impacts of … development on the … parcels at issue." Pennaco Energy, Inc. v. U.S. Dept. of Interior, 377 F.3d 1147, 1156-57 (10th Cir. 2004) (emphasis added); see also Southern Utah Wilderness Alliance v. Norton, No. 2:04CV574 DAK, slip op. at 22-23 (D. Utah Aug. 1, 2006) (holding that

BLM violated NEPA by issuing leases absent supplemental analysis to address new information regarding wilderness character "that would be impacted by oil and gas development") (attached as Exhibit 1).

None of the authorities cited by the respondents is to the contrary. All of the respondents seek to make much of the Ninth Circuit's recent decision in Northern Alaska Envtl. Ctr. v. Kempthorne, No. 05-35085, 2006 WL 2061246 (9th Cir. July 26, 2006). See BLM Resp. at 23-24; H&S Resp. at 13; Stanley Energy, Inc.'s Opposition to Appellants' Petition for Stay Pending Appeal and Response to Appellants' Statement of Reasons ("Stanley Resp.") at 37. However, this decision offers no support for their position. The issue in the Northern Alaska case was not whether a federal agency could forego any analysis of likely post-leasing development impacts prior to issuing oil and gas leases. In fact, the Interior Department in Northern Alaska had issued a pre-leasing EIS that "projected types of drilling and patterns of development that might ensue" under various scenarios, and "conducted an analysis under each scenario for each of the natural resources affected in the area, as, for example, water, wildlife, and specific bird species." 2006 WL 2061246, at *2-3. As discussed in more detail below, this is far more than the Forest Service or the BLM did in this case, where the agencies consciously refused to undertake any analysis of likely post-leasing development impacts on several significant natural resources before auctioning the challenged leases—despite having a 10-well development forecast in hand. While the Ninth Circuit deemed the Interior Department's analysis in Northern Alaska sufficiently specific at the leasing stage, see id. at *6, it equally reaffirmed the Conner holding that a NEPA analysis of likely post-leasing development impacts is required before any leases

may issue. See id. at *4-5. Nothing in its opinion supports an attempt to entirely defer analysis of development impacts on natural resources to the APD stage.[1]

The BLM also relies on this Board's decision in Southern Utah Wilderness Alliance and Natural Resources Defense Council, 164 IBLA 1, 29-31 (2004), which held that supplemental NEPA analysis was not required before issuance of oil and gas leases in Utah. However, the appellants in that case "devote[d] somewhat limited attention" to the NEPA issue, arguing merely that governing law required a pre-leasing EIS and failing to identify specific environmental issues that were left unaddressed by the BLM. Id. at 29-30. In contrast, appellants here have identified four specific environmental issues—air quality, lynx, mule deer, and cutthroat trout—that were insufficiently addressed by the BLM and the Forest Service prior to auctioning the challenged leases, and appellants have shown that these agencies were aware of numerous scientific and agency documents providing significant new information regarding these issues well before the challenged lease sale.[2]

The BLM also proffers the newly filed Ms. Mistarka declaration, which asserts that, "[w]ithout a concrete proposal for exploration, any further NEPA would be speculation at best. Geology is pretty much an unknown until geophysical work and drilling occurs." Mistarka Decl.

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[1] The Northern Alaska decision is also distinguishable because the Ninth Circuit in that case explicitly sought "to give effect to Congressional intent as expressed not only in NEPA, but also in the 1976 and 1980 enactments relating to the Alaska Reserve [i.e., the National Petroleum Reserve-Alaska]," which directed an expeditious leasing program in the Reserve. See 2006 WL 2061246, at *2, 4. By contrast, here the BLM's NEPA duties are not balanced against any such specific competing congressional directive. Further, the Northern Alaska court considered NEPA's demands in light of a leasing proposal spanning 8.8 million acres, see id. at *2, as opposed to the far more limited 19,682.75-acre area at issue here.

[2] Hanson & Strahn seeks to extract some support from the Colorado district court's opinion in Colorado Envtl. Coalition v. BLM, 932 F. Supp. 1247 (D. Colo. 1996) (cited in H&S Resp. at 14). However, the Colorado court in that case did not address the level of NEPA analysis required at the leasing stage; it addressed only the level of NEPA analysis required for drilling two gas wells on a lease that had been issued 25 years earlier. See id. at 1249.

at 4 (unnumbered ¶ 13). Ms. Mistarka's claim echoes an argument advanced by the federal defendants—and rejected by the Ninth Circuit—in Conner:

> Appellants also complain that the uncertain and speculative nature of oil exploration makes preparation of an EIS untenable until lessees present precise, site-specific proposals for development. The government's inability to fully ascertain the precise extent of the effects of mineral leasing in a national forest is not, however, a justification for failing to estimate what those effects might be before irrevocably committing to the activity. Appellants' suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid.

848 F.2d at 1450-51 (footnotes and citation omitted). Indeed, Ms. Mistarka's claim rings particularly hollow in light of the fact that the Forest Service already has developed, and the BLM already has revalidated, an estimate of post-leasing oil and gas development in Bridger-Teton National Forest Management Area 24 ("MA 24"), where the challenged lease parcels are located. See U.S. Forest Serv., Bridger-Teton National Forest Final EIS, at 245 (1989) ("BTNF FEIS") (excerpt attached as Exhibit 2); see also Letter from Asghar Shariff to Brent Larson (Sept. 18, 2003) (BLM revalidating Forest Service RFD information) (attached as Exhibit 3). The agencies' reasonably foreseeable development scenario anticipates that "drilling would be on 640 acre spacing, gas with some oil or condensate would be produced, and about 10 wells would be drilled" in MA 24 once leases are issued. BTNF FEIS at 245 (Ex. 2). Nevertheless, neither the Forest Service nor the BLM applied this development projection in analyzing new environmental information before approving issuance of the challenged leases. The BLM should not be heard to complain that the required pre-leasing NEPA analysis "would be speculation at best," Mistarka Decl. at 4 (unnumbered ¶ 13), when the agency already has validated a scenario of likely post-leasing development that it has simply failed to apply.

Indeed, further undermining the BLM's argument is the agency's own interagency agreement with the Forest Service concerning oil and gas leasing, which the BLM itself

submitted as Attachment A to its opposition brief. That agreement establishes that required documentation in advance of authorizing any leasing of National Forest lands

> shall include:
> * * * * *
> 3. Projection of the type and amount of activity that is reasonably foreseeable within the analysis area based on the trends identified and the assessment of potential for occurrence of oil and gas. … For purposes of analysis, and to provide a basis for identifying lease stipulations, at least some exploration, development, and production is to be projected for the area even if activity is not likely.
> 4. Summary of the anticipated beneficial and adverse environmental effects (including social and economic) of the reasonably foreseeable activity projected under the proposed action and under each alternative.

U.S. Forest Serv. & BLM, Interagency Agreement Between the Forest Service and the Bureau of Land Management for Oil and Gas Leasing, at 1 (1991) (emphasis added) (Attachment A to BLM Resp.).

In sum, the BLM cannot prevail in this appeal absent evidence that either the BLM or the Forest Service conducted an adequate assessment of likely post-leasing oil and gas development impacts in light of new information regarding environmental concerns that the record makes clear "warranted review" by these agencies. SIR, at 1 (Ex. 9). As set forth in the discussion that follows, no such evidence exists, and the Board should issue the requested stay.

A. Respondents Fail To Identify Any Adequate Pre-Leasing NEPA Analysis Of "Key" Air Quality Impacts.

Respondents' arguments concerning the critical issue of air quality in the Wyoming Range area fail to justify the failure of the Forest Service and the BLM to prepare an updated pre-leasing NEPA analysis. In preparation for the April lease sale, the Forest Service recognized that air quality was a "minor issue" in the early 1990s, and that "not much attention" was given to it in the agency's NEPA analyses prepared at that time, yet it had now "emerged as a key issue" due to the impacts of burgeoning gas development in the Upper Green River area, the

western border of which is the Wyoming Range. Air Quality SIR, at 1 (Ex. 16). From the Forest Service's point of view, this issue is especially significant relative to air quality impacts in Class I wilderness areas with respect to acid deposition and degradation of visibility. Id. at 1 (Ex. 16). The Forest Service recognized that these issues "warrant[] review." SIR, at 1 (Ex. 9).

Moreover, as this Board is aware due to the filings made in Wyoming Outdoor Council et al., IBLA No. 2006-155 (the challenge to the Jonah Infill project approval on air quality grounds), which is also before Deputy Chief Administrative Judge Harris, there have been a number of exceedances of the national standard for ozone in the Upper Green River Valley area, stretching back to February 2005, well before the lease parcels at issue here were offered for sale. Ozone pollution in this area is a specific emerging key air quality issue that implicates visibility and other air quality related values in Class I areas, as well as human health. And as recognized by the Greater Yellowstone Clean Air Partnership, which includes representatives of the Forest Service and the BLM, "Managing [ ] energy development emission increases [in southwest Wyoming] is currently the most pressing air quality issue in the [Greater Yellowstone Area]." Greater Yellowstone Area Air Quality Assessment Update, at unnumbered page 4 (Ex. 55). It is therefore clear that there are "significant new circumstances or information" with respect to air quality that require supplemental NEPA analysis, given the uncontested insufficient consideration of these issues in the Forest Service's underlying NEPA documents—i.e., the 1989 Forest Plan EIS and the 1993 MA 24 Environmental Assessment. 40 CFR 1502.9(c)(1)(ii).

The respondents fail to offer any legitimate defense of the failure by the BLM and the Forest Service to prepare such supplemental NEPA analysis. All of the respondents seek to defend the Forest Service's conclusion that "the impacts to air quality could be demonstrated not to have a significant impact on air quality by tiering our discussions to the Pinedale Anticline

EIS." Air Quality SIR at 2; SIR at 3; see BLM Resp. at 25-26; H&S Resp. at 9; Stanley Resp. at 29-30.[3] However, the failures of the Pinedale Anticline EIS to provide a valid current NEPA analysis of potential air quality impacts resulting from the challenged leasing was detailed in the Petition for Stay Pending Appeal (at 19-26). As shown, the Pinedale Anticline EIS fails to provide a sufficient analysis of the "key issue" of air quality because its assumptions regarding the number of wells that will be drilled in the relevant cumulative impacts area is already off by 1,058 wells (1,944 wells were projected in the EIS; 3,086 wells are already in place), id. at 19-20; the BLM and the Forest Service have already determined that the Pinedale Anticline EIS is out of date and must be supplemented before it can be used to support air quality analyses in this area (specifically, it cannot be used to support the forthcoming supplement to the Riley Ridge EIS), id. at 20-23; the BLM is on record in the Questar Year-Round Drilling EA that the Pinedale Anticline EIS is out of date with respect to its nitrogen oxides analyses, id. at 23-24; and the Pinedale Anticline EIS did not even consider well drilling in MA 24 (it only considered MAs 21 and 72), id. at 24-25.

These broad failures have nothing to do with "a mere difference of opinion" or disputes over scientific validity, BLM Resp. at 15; they are fundamental shortcomings in the analysis (given the significant new circumstances), many of which the BLM and the Forest Service themselves recognize. Indeed, EPA—the expert federal agency on air quality issues—has

[3] Stanley briefly references a discussion of air quality in the 17-year-old Final EIS for the Bridger-Teton forest plan, which was prepared long before the current energy development boom in the Upper Green River Valley began. See Stanley Resp. at 29. However, the sole paragraph quoted by Stanley is explicit that no evaluation of air quality impacts will be made until the "design stage." Further, the quoted statement that air quality impacts due to oil and gas development are related to flaring and refinery emissions fails to recognize the present reality in the Upper Green River area, in which drill rigs and compressor stations are major sources of emissions that were not even acknowledged in the Forest Plan EIS. Final Air Quality TSD at 45 (attached as Exhibit 4).

reviewed the Forest Service's attempt to demonstrate NEPA compliance for the challenged leasing by tiering to the Pinedale Anticline EIS, and advised the Forest Service that "we are not prepared to support your decision at this time." Email correspondence from Larry Svoboda, EPA, to Barry Burkhardt, USFS (Dec. 16, 2005) (emphasis added) (Ex. 29).

Although the BLM and the industry intervenors persist in claiming the Pinedale Anticline EIS can be used to validly supplement the Forest Service's inadequate analyses in its underlying NEPA documents (i.e., the 1989 Bridger-Teton forest plan EIS and 1993 MA 24 EA), none even attempts to dispute appellants' specific charges that the document's analysis is insufficient and outdated and that the agencies themselves have recognized these failures.[4] Only Stanley offers a limited defense (which is relegated to a footnote) suggesting that, although the Pinedale Anticline EIS "analysis was not specific to MA 24" where the challenged leases are located, emissions sources can be treated as area sources in the Pinedale Anticline EIS analysis. Stanley Resp. at 30 n.4. However, even accepting Stanley's point for the sake of argument, it does not overcome the fact that the Pinedale Anticline EIS's air quality analysis is so outdated that its cumulative assessment of air quality impacts from all existing and foreseeable regional emissions sources over a period of 10 to 15 years fails even to account for all of the oil and gas development in the Upper Green River Valley that already exists today, only seven years after

[4] Hanson & Strahn claims that "Appellants' reliance on information contained within the Questar Winter Drilling EA or information regarding the Supplemental EIS for the Riley Ridge Project are irrelevant because they relate to actual development proposals, not oil and gas leasing." H&S Resp. at 13. By this standard, both the Pinedale Anticline EIS and Jonah Infill EIS are also "irrelevant" because both address "actual development proposals," not oil and gas leasing. As discussed infra, because the Pinedale Anticline and Jonah Infill EISs are not pre-leasing NEPA analyses, BLM and the Forest Service cannot rely on them to supplement the inadequate underlying Forest Service NEPA analyses in this appeal.

the EIS was issued. See Stay Pet. at 20. Neither Stanley nor the other respondents offers any response to this criticism, and there is none.[5]

Given the insufficiency of the Pinedale Anticline EIS to demonstrate a sufficient examination of significant new air quality issues in advance of the challenged leasing, the sole remaining defense offered by the BLM and the industry intervenors is that Ms. Mistarka's declaration asserts that she also considered the Jonah Infill EIS before approving the leases. See BLM Resp. at 26; H&S Resp. at 9-19; Stanley Resp. at 32-33.[6] Ms. Mistarka's declaration avers that she checked the Jonah Infill EIS before completing the BLM DNA for the challenged leases. See Mistarka Decl. at 2-4 (unnumbered ¶¶ 8, 11, 15). However, as this Board has already observed, "the Jonah FEIS and the accompanying Final Air Quality TSD were both issued in January 2006, prior to issuance of the BLM's March 7, 2006, DNA," but "[n]o mention of those documents is made in the DNA." July Stay Order at 10. Ms. Mistarka prepared the BLM DNA. Mistarka Decl. at 4 (unnumbered ¶ 15).

Nevertheless, even accepting that Ms. Mistarka "checked" and "looked very carefully at" the 412-page Jonah Infill EIS and accompanying 424-page Final Air Quality Technical Support Document (and the equally voluminous Pinedale Anticline EIS), but "inadvertently" forgot to include any mention of these behemoths in the March 2006 DNA, Mistarka Decl. at 2-4

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[5] The Forest Service SIR and Air Quality SIR, as well as the March 2006 BLM DNA, cannot make up for these deficiencies because they are not NEPA documents. See Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 565-68 (9th Cir. 2000); Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147, 1151, 1162 (10th Cir. 2004) (both making clear that SIRs and DNAs may be used to assess sufficiency of existing NEPA documentation but cannot substitute for NEPA documents). And as observed in this Board's July stay of Wyoming Range leasing, the BLM's DNA is "blank" with respect to mentioning any reliance on the Pinedale Anticline (and Jonah Infill) EIS. July Stay Order at 9.

[6] Respondents also appear to suggest that BLM's insufficient NEPA analysis is somehow remedied by the agency's Decision in this matter. See Mistarka Decl. at 2 (unnumbered ¶ 8); H&S Resp. at 10; Stanley Resp. at 33. However, BLM's Decision is no more a NEPA document than are the Forest Service SIRs and the BLM DNA.

(unnumbered ¶¶ 8, 11, 15), the BLM's NEPA analysis for the challenged leasing remains inadequate for two reasons. First, the Jonah Infill EIS considered only the cumulative impacts of the potential wells in MA 24 along with the other oil and gas development occurring in western Wyoming, and engaged in such consideration only relative to nitrogen oxides. See Petition for Stay at 29 & Ex. 18 at C-40. The Jonah Infill EIS did not consider the cumulative impacts of any other pollutant relating to the anticipated MA 24 development, and failed to consider the potential direct and indirect impacts on air quality as a result of emissions of any pollutants—including nitrogen oxides—resulting from the oil and gas development that is expected to occur in MA 24. See Petition for Stay at 30-31; cf. 40 C.F.R. §§ 1502.16(a), (b) (requiring consideration of direct and indirect effects), 1508.8(a), (b) (defining same). Thus, the Jonah Infill EIS failed to undertake any consideration of the impacts (direct, indirect, or cumulative) of the challenged MA 24 leasing for sulfur dioxide, particulate matter, ozone, and hazardous air pollutants, as well as any consideration of whether increments for increased pollution levels of sulfur dioxide or particulate matter would be exceeded, even though these pollutants and standards relate directly to primary concerns of the Forest Service—i.e., acidification of alpine lakes and watersheds and impacts on visibility.[7] See Petition for Stay at 29-31. Hanson & Strahn summed up these problems when it observed that the Jonah Infill EIS

[7] Intervenors claim that the Jonah Infill EIS's failure to consider the cumulative impacts of sulfur dioxide and particulate matter pollution relative to MA 24 can be excused because BLM stated in the Jonah Infill EIS (with no supporting analysis) that these pollutants "were assumed to be negligible." Stanley Resp. at 32 n.5; H&S Resp. at 11 (both citing the Jonah Infill Final Air Quality Technical Support Document, Vol. 1, at C-3). However "negligible" these pollutants may appear in the context of the regional cumulative inventory analysis where this statement appears, there is no indication that the direct and indirect impacts of these pollutants are "negligible" relative to air quality in MA 24. The direct and indirect impacts of these pollutants in close proximity to development activities warrants NEPA consideration, as evidenced by the fact that the Jonah Infill EIS engaged in extensive analyses of the impacts of these pollutants relative to the Jonah Infill project itself. Final Air Quality TSD at 14 (attached as Exhibit 5).

was prepared to "understand how development in the Jonah Field might impact regional air quality." H&S Resp. at 9-10 (emphasis added). The Jonah Infill EIS was not prepared to analyze how development in MA 24 might impact air quality, and for this reason alone cannot serve as an adequate NEPA analysis for the challenged leases.

Second, even if the Jonah Infill EIS had considered all pertinent air pollutant impacts—which it did not—the document still cannot satisfy the BLM's NEPA duties because it is not a pre-leasing NEPA analysis that considered the critical "no action" option of not issuing the challenged leases in light of expected impacts. It is well established that, prior to leasing, the BLM must prepare a NEPA analysis that considers, in light of relevant environmental concerns, "reasonable alternatives available in a leasing decision, including whether specific parcels should be leased, appropriate lease stipulations, and NSO and non-NSO areas." Wyoming Outdoor Council et al., 156 IBLA 347, 357-59 (2002); see also Pennaco, 377 F.3d at 1160 (affirming this Board's decision and analysis "in light of the Wyodak EIS' failure to consider the pre-leasing options"); Bob Marshall Alliance, 852 F.2d at 1229 (holding that, prior to issuing oil and gas leases, NEPA "requires that alternatives—including the no-leasing option—be given full and meaningful consideration"); Montana Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1146 (D. Mont. 2004) (finding NEPA violation in connection with oil and gas leasing where agency relied on existing EIS that "contains no discussion of alternatives; instead, it is based on the assumption that oil and gas leasing will take place"). Here, the Jonah Infill EIS (as well as the Pinedale Anticline EIS) is a project-level NEPA analysis that considered only the level of development that would be permitted on existing leases. The Jonah Infill EIS addressed a project to enable the commercial production of natural gas by operators in the Jonah field "pursuant to their rights under existing oil and gas leases issued by the BLM." Jonah Infill FEIS at 1-4 (emphasis added)

(excerpt attached as Exhibit 6). As a project-level rather than pre-leasing EIS, it did not—and could not—consider a full range of pre-leasing options, including the option of not issuing any of the challenged leases in MA 24. The Jonah Infill EIS thus stands in the same position as the Wyodak EIS in this Board's Wyoming Outdoor Council decision, where the Board concluded that "the 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. Consequently, neither the Forest Service nor the BLM can rely upon the Jonah Infill EIS (or the Pinedale Anticline EIS) to provide the supplemental air quality analysis required by NEPA before authorizing the challenged leasing.

B. Respondents Fail To Justify the BLM's Failure To Consider Impacts On Lynx And Their Habitat From Likely Post-Leasing Development

Respondents offer nothing to excuse the BLM's utter failure to consider impacts on the threatened Canada lynx and its habitat from the 10 new gas wells that are anticipated to result from the challenged leasing. The challenged leases encompass a part of the area "generally regarded as the best lynx habitat anywhere in the state [of Wyoming]." Wyoming Natural Diversity Database, Habitat Mapping and Field Surveys for Lynx (*Lynx canadensis*) on Lands Administered by the USDI—BLM in Wyoming, at 9 (Oct. 10, 2001) (Ex. 58). A biological study in 2005 confirmed actual lynx presence within the challenged lease parcels. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report at 11 ("Endeavor Lynx Report") (Ex. 38). The same study observed that the Wyoming Range drainages where the challenged leasing would occur exhibit "particularly high" activity of the lynx's essential prey, the snowshoe hare. Id. at 8 (Ex. 38). The Wyoming Game and Fish Department explicitly warned the Forest Service before the challenged lease auction that "[a]dditional loss of lynx habitat and construction of new roads in the area as a result of oil and

gas activity may well be the final threshold for the continued existence of this species in the Wyoming Range." Letter from Bill Wichers to Greg Clark, at 4 (May 26, 2005) (emphasis added) (attached as Exhibit 7). This statement constitutes the only opinion of any expert wildlife agency ever obtained by the Forest Service or the BLM regarding the impacts on lynx from post-leasing development of the challenged leases.

These new lynx data and analyses constitute "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," necessitating supplemental NEPA analysis. 40 C.F.R. § 1502.9(c)(1)(ii). Indeed, among the factors the BLM was required to consider in assessing the "significance" of new information was "[t]he degree to which the action may adversely affect an endangered or threatened species." Id. § 1508.27(b)(9). Nevertheless, in the face of the foregoing evidence, neither the Forest Service nor the BLM prepared a pre-leasing NEPA analysis of the impacts on lynx and their habitat from anticipated post-leasing development on the April lease parcels.

In an effort to evade this plain NEPA violation, respondents invoke the "no effect" determination from a non-NEPA document—the Forest Service's February 2004 Supplemental Information Report ("SIR"), which based its conclusion on that same agency's January 2004 Supplemental Biological Assessment ("BA"). See BLM Resp. at 27; H&S Resp. at 15; Stanley Resp. at 34; see also Idaho Sporting Cong., 222 F.3d at 567 (holding that SIR may not substitute for NEPA document). However, as this Board has already observed, "FS specifically did not consider the effects of drilling and related surface-disturbing activity in making its determination of no effect, stating that BAs would be produced for subsequent site-specific ground disturbing activities." July Stay Order at 10-11 (emphasis added). Because the SIR and Supplemental BA did not examine any post-leasing oil and gas development impacts, they cannot suffice to meet

NEPA's demand for "a 'hard look' at the environmental impacts of … development on the … parcels at issue." Pennaco, 377 F.3d at 1156-57 (emphasis added).[8]

Faced with the insufficiency of the SIR and Supplemental BA to satisfy the BLM's NEPA obligations, respondents next seek refuge in Ms. Mistarka's asserted review of a January 2004 Draft EIS for the Northern Rockies Lynx Amendment. See BLM Resp. at 27-28; H&S Resp. at 15; Stanley Resp. at 35-36. This document does not demonstrate BLM's NEPA compliance for two reasons. First, as its name makes clear, this was a draft EIS that was necessarily a preliminary document in the NEPA process. NEPA requires that an EIS "shall be prepared in two stages"—i.e., a draft and final EIS—and does not exhaust an agency's environmental analysis obligations upon mere consideration of a draft EIS that has not yet been tested through the process of review by the public and other expert agencies. 40 C.F.R. § 1502.9; see also Conservation Law Found. v. Fed. Highway Admin., 24 F.3d 1465, 1474-75 (1st Cir. 1994) (stating that draft EIS "has no legal effect and cannot, by itself, serve as the first tier in the EIS process") (emphasis added); Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci, 857 F.2d 505, 509 (9th Cir. 1988) (stating that a draft supplemental EIS "was only a draft, i.e., necessarily preliminary in nature, and as a result, its conclusions were tentative at best").[9]

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[8] Hanson & Strahn attempts to claim that the SIR and Supplemental BA found that "neither the issuance of the Subject Leases nor actual development operations" would adversely impact lynx. H&S Resp. at 15 (emphasis added). However, neither of these documents considered "actual development operations." As the Supplemental BA made clear, it constituted "an evaluation for just the leasing portion for the proposed projects," which it defined as "for the potential purchaser reviewing maps, field surveys and offering bids on areas that they will drill for oil and gas." Supplemental BA at 5, 7 (emphasis added). The Supplemental BA explicitly stated that "[t]here is not any ground disturbance in this phase." Id. at 7 (emphasis added). The SIR merely parroted the findings of the Supplemental BA. See SIR at 2-3.

[9] Stanley points out that NEPA regulations permit BLM to adopt another agency's draft EIS so long as BLM so specifies. See Stanley Resp. at 35 n.7 (citing 40 C.F.R. § 1506.3(d)). However, nothing in the cited regulation transforms another agency's draft EIS into a final EIS for BLM's purposes. Whether adopted or not, a draft remains a draft. Stanley's contrary suggestion

Second, even if it were not merely a draft—which it is—the EIS for the Northern Rockies Lynx Amendment cited by Ms. Mistarka would not satisfy NEPA's requirements in this case. The analysis of impacts of leasable minerals set forth in this preliminary document assumed that only "eight more wells may be drilled in the next decade in lynx habitat" across eight National Forests and three BLM units in the Northern Rockies region. U.S. Forest Serv., Draft EIS, Northern Rockies Lynx Amendment, at 227 (Jan. 2004) (excerpt attached as Exhibit 8). Further, the analysis assumed that the number of foreseeable wells in the Bridger-Teton National Forest's lynx habitat was zero. See id. at 387, Table K-11; see also id. at 227 (referencing Table K-11). The BLM's review of a document that anticipated only eight wells across the entirety of Northern Rockies lynx habitat, and none in lynx habitat in the entire Bridger-Teton forest, cannot satisfy the agency's NEPA obligations with respect to leasing that the BLM itself has confirmed is expected to lead to development of ten wells in a single management area of documented high-quality lynx habitat occupying a small portion of the Bridger-Teton forest.[10]

Respondents' last-ditch argument in support of the BLM's NEPA compliance is to claim that a notice contained in the April leases supported deferring any assessment of development impacts to the APD stage. See BLM Resp. at 28; Stanley Resp. at 36. However, the lease notice cited by the respondents is a virtually verbatim copy of the lease notice cited by the federal agency defendants in Conner, but deemed insufficient by the Ninth Circuit to obviate NEPA's

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represents an evasion of the "two stage" analysis process set forth in the NEPA regulations. See 40 C.F.R. § 1502.9. The BLM NEPA Handbook cited by Stanley makes clear that, even where BLM is permitted to adopt another agency's EIS as a draft EIS, "[t]he draft EIS must be followed by a final EIS and an ROD." BLM NEPA Handbook, H-1790-1, III-7 (1988).

[10] The BLM and Hanson & Strahn also observe that BLM and the Forest Service SIR referenced the August 2000 Canada Lynx Conservation Assessment and Strategy before approving the challenged leases. See BLM Resp. at 27-28 & n.5; H&S Resp. at 15; SIR, at 2 (Ex. 9). However, the Assessment and Strategy is not a NEPA document, nor is the SIR in which it was referenced by the Forest Service.

demand for an assessment of likely post-leasing development impacts at the leasing stage. Compare Conner, 848 F.2d at 1455 (quoting lease notice) with BLM Resp. at 28 & Stanley Resp. at 36-37 (both quoting notice from April leases); see also Conner, 848 F.2d at 1448-49 & n.18 (discussing insufficiency of lease provisions to negate NEPA duties). As the Ninth Circuit explained, while this lease notice makes clear that the government reserves the authority to prohibit activities that would jeopardize endangered or threatened species in violation of the Endangered Species Act, "that authority does not extend to the myriad of significant environmental effects outside the narrow issue of species survival." 848 F.2d at 1449 n.18. NEPA analysis remains necessary to assess and evaluate such "significant environmental effects." See id. at 1450; see also Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) ("Clearly, there can be a significant impact on a species even if its existence is not jeopardized.").[11]

In sum, neither the Forest Service nor the BLM conducted any NEPA analysis of anticipated post-leasing oil and gas development impacts on lynx or their habitat before approving issuance of the challenged lease parcels, even though the lease parcels contain high-quality lynx habitat with documented lynx presence, and state wildlife biologists have warned that development of the leases may well extirpate the species from this area. Moreover, as the Board has already observed in addressing the December 2005 lease that was part of this same Forest Service and BLM leasing program in the Bridger-Teton National Forest, "[t]here is no indication in the record that any BLM wildlife specialist reviewed any existing documentation related to Canada lynx before offering Parcel 176 for lease or as part of the DNA process." July

[11] Moreover, the lease provision cited by BLM and Stanley is an information notice. Unlike legally binding stipulations, information notices attached to a lease have "no legal consequences, except to give notice of existing requirements," and specifically "shall not be a basis for denial of lease operations." 43 C.F.R. § 3101.1-3 (emphases added).

Stay Order at 11. Ms. Mistarka's newly filed declaration confirms that no such review occurred with respect to the challenged April 2006 lease parcels as well. It makes clear that Ms. Mistarka, who is a geologist working in the Wyoming State Office's Branch of Fluids, was the sole BLM official to review lynx-related information in advance of the challenged lease auction. See Mistarka Decl. at 2-3 (unnumbered ¶ 9). Ms. Mistarka's affidavit only highlights the deficiencies in such a process for analyzing wildlife impacts, for she asserts that, "[a]t this point in time, the only information stating there is lynx in Wyoming is a National Park Service documenting [sic] a mother lynx with kittens in Yellowstone National Park." Id. Ms. Mistarka thus is unaware of the 2005 report confirming actual lynx presence within the challenged lease parcels, despite the fact that the Forest Service heralded this lynx discovery with a press release more than a year before the challenged leases were auctioned. See U.S. Forest Serv., News Release, Endeavor Wildlife Research Biologists Confirm Canada Lynx Presence on Bridger-Teton National Forest (Feb. 28, 2005) (attached as Exhibit 9); see also Endeavor Lynx Report, at 11 (Ex. 38).[12]

This Board should not permit the challenged leases to be issued in circumstances where no federal agency analyzed the impacts of anticipated post-leasing development on lynx or their habitat prior to leasing, and where the sole BLM officer to review wildlife information prior to leasing was a geologist who was unaware that lynx were even present within the challenged lease parcels. See 40 C.F.R. § 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."). The BLM violated NEPA by authorizing the challenged leases in these circumstances.

[12] These same concerns apply to Ms. Mistarka's review of air quality issues. There is no indication that Ms. Mistarka has any expertise in this area, yet, as her declaration and DNA make clear, she was the only BLM employee to review air quality impacts before the challenged leasing.

C. Respondents Do Not Justify BLM's Failure To Consider Cumulative Impacts To The Already Depleted Sublette Mule Deer Herd.

Respondents rely on one sentence from the 1993 EA for MA 24 to support their assertion that the agencies adequately considered cumulative impacts to mule deer before auctioning the April lease parcels. The sentence reads, "Activities associated with most oil and gas development will not significantly affect mule deer in these areas." BLM Resp. at 29; H&S Resp. at 16; Stanley Resp. at 38 (quoting MA-24 EA at 12) (Ex. 2). This assertion, written some thirteen years ago, and itself based on the even older Riley Ridge EIS which the agencies have decided must be supplemented, does not meet the agencies' NEPA obligations today. It is no longer accurate given the significant new information that shows a marked decrease in the Sublette deer herd's size as a result of oil and gas development on the herd's nearby winter range, which is integrally connected to its summer range on the MA 24 lease parcels. See Sawyer, Hall et al., "Sublette County Mule Deer Study (Phase II): Long-Term Monitoring Plan to Assess Potential Impacts of Energy Development on Mule Deer in the Pinedale Anticline Project Area (October 2005) at 44-46 ("Sawyer study") (showing a "disconcerting" 46 percent decline in the population between 2002-2005 largely due to oil and gas development on the Pinedale Anticline) (Ex. 46). The extensive oil and gas development that caused this decline did not even exist when the 1993 EA was prepared.

Despite the fact that this new Sawyer study was available to the BLM prior to making its decision to lease the April Wyoming Range parcels, nowhere does the record reflect that the BLM considered it, or any other evidence concerning the likely cumulative impact of oil and gas development spreading on to the deer herd's summer range as a result of the challenged leases.

Indeed, BLM continues to ignore the Sawyer study even in its response brief.[13] BLM suggests that the only evidence appellants offered showing significant new information related to mule deer was a newspaper article that reported preliminary findings from the Wyoming Game and Fish Department's annual winter mortality survey suggesting that 42 percent of mule deer fawns did not survive the 2005 winter. See BLM Resp. at 29 (stating that "[t]hese figures come from a news article—it is not science."). Although the 42 percent mortality figure appears in a newspaper article, this does not negate the fact that the figure itself is based on scientific surveys performed by Wyoming state biologists. See Excerpt from Wyoming Game and Fish Department's 2005 Job Completion Report at unnumbered page 1 (attached as Exhibit 11). Even more important, however, is the Sawyer mule deer study's finding of a 46 percent decline in the Sublette mule deer herd as a result of oil and gas development on the herd's winter range—a finding that the BLM simply ignores. See Sawyer study at 44-46 (Ex. 46). The results of the Sawyer study showing a precipitous decline in the mule deer herd warranted supplemental NEPA review prior to leasing the April parcels.

The intervenors seek to dismiss the Sawyer study on the basis that it addressed impacts to the herd from development on winter range more than 20 miles away from the challenged leases. See H&S Resp. at 17; Stanley Resp. at 37-38. However, Phase I of the Sawyer study establishes that all seasonal ranges are important to the survival of the herd:

Summer, transition, winter, and severe winter relief ranges are equally important

[13] The BLM is well aware of the existence and importance of the Sawyer study. Not only did BLM help to pay for the study, but the BLM cited the study's findings in a NEPA document recently prepared for another project. See Environmental Assessment for the Questar Year-Round Drilling Proposal, Sublette County, Wyoming, Nov. 2004 at 3-13 to 3-17 (attached as Exhibit 10) (quoting Phase I of the study that "[m]ule deer that summer in the mountainous terrain surrounding the [Pinedale Anticline] to the west (Salt River Range and Wyoming Range) . . . migrate to winter ranges on the [Pinedale Anticline]. . . .").

> components of the Sublette mule deer herd's range. The relative importance of each will likely change annually but loss or degradation of one will not be compensated for by the others, and the mule deer population will suffer in the long run. Managers should recognize the importance of all seasonal ranges for maintaining healthy and productive mule deer populations.

Sawyer, Hall and Fred Lindzey "Sublette Mule Deer Study," Wyoming Cooperative Fish and Wildlife Research Unit, March 2001 at 43 (emphases added) (Ex. 43). The study documents the unique features of the Sublette mule deer herd, which is "likely the most migratory deer population in the western states":

> Mule deer migrations in the Sublette [Data Analysis Unit] were generally much longer than movements of other deer populations in the western states … . Among Wyoming deer populations, no other herd migrates further or through more rugged terrain. … Mule deer management in the Sublette [Data Analysis Unit] is complicated by the long-distance (40-100 mi, 54-160 km) migrations that occur through a variety of habitats and across a mix of land ownership. Because the Sublette [Data Analysis Unit] provides winter range for mule deer that occupy 5 different mountain ranges across western Wyoming, conserving seasonal ranges and migration routes will be essential for the long-term maintenance of this mule deer population.

Id. at 38 (emphasis added) (Ex. 43). The relevance of the study's findings to the challenged MA 24 leasing is emphasized by data and a GIS map establishing that individual radio-collared deer from this herd have been tracked migrating from the Pinedale Anticline to within the April lease parcels. See Ex. 47.

Given the Sublette deer herd's reliance on all seasonal ranges, NEPA required the BLM to consider the cumulative impact to the migratory herd from existing oil and gas development on the Pinedale Anticline winter range in combination with anticipated oil and gas development on the herd's summer range contained within the challenged lease parcels. See Natural Resources Defense Council v. Hodel, 865 F.2d 288, 298-300 (D.C. Cir. 1988) (requiring NEPA analysis of cumulative impacts of oil and gas development on migratory species); see also Davis v. Mineta, 302 F.3d 1104, 1125-26 (10th Cir. 2002); TOMAC, Taxpayers of Michigan Against

Casinos v. Norton, 433 F.3d 852, 864 (D.C. Cir. 2006); National Audubon Soc'y v. Department of the Navy, 422 F.3d 174, 196-98 (4th Cir. 2005); Grand Canyon Trust v. Federal Aviation Admin., 290 F.3d 339, 345-47 (D.C. Cir. 2002) (all requiring cumulative impacts analysis under NEPA).

Finally, respondents incorrectly argue that even if information from the 1993 MA 24 EA is outdated, the agencies need not consider potential impacts of oil and gas development on mule deer. They suggest that at the leasing stage, the agencies need only consider impacts related to the act of leasing. See BLM Resp. at 30 (stating "Appellants have again confused leasing with actual surface disturbance and human intrusion. It is at [the APD stage] that the FS will look at impacts to mule deer, and all wildlife. Leasing in and of itself causes no surface disturbance."); see also H&S Resp. at 17. As discussed supra, such arguments simply ignore uniform Board and federal court precedent holding that "the appropriate time for considering the potential impacts of oil and gas exploration and development is when the BLM proposes to lease public lands for oil and gas purposes." Southern Utah Wilderness Alliance, 166 IBLA at 276-77 (emphasis added).

D. Respondents Equally Fail To Excuse the BLM's Failure To Consider Significant New Information Concerning Impacts To Colorado River Cutthroat Trout.

Respondents fare no better in attempting to demonstrate an adequate BLM or Forest Service NEPA analysis of impacts on sensitive populations of Colorado River cutthroat trout. Respondents point to a statement in the Forest Service's 1993 EA for MA 24 to the effect that oil and gas development in the Wyoming Range at that time had not harmed trout populations. See Stanley Resp. at 38; H&S Resp. at 19. However, a far more recent 2005 evaluation of the status of Colorado River cutthroat trout by the Wyoming Game and Fish Department warns of the

cumulative impact of development resulting from the challenged leasing together with other recent developments in the Wyoming Range:

> Additional oil and gas development along with past and current timber sales, road construction, and domestic grazing within these watersheds will result in a loss of spawning, rearing, and adult habitat, and may impact the long-term prosperity of the native trout. In addition, given that stream systems are directly and indirectly related to upland and riparian habitat conditions, impacts to the upland habitat will impact lateral and longitudinal functionality of the stream channel and overall ecological condition of the watersheds.

Letter from Wichers to Clark, at 2 (attached as Exhibit 7). The Game and Fish Department concluded that "[t]he sale of many of these leases will not assist in assuring the long-term prosperity of Colorado River cutthroat trout throughout their historic range and increase abundance in these core conservation populations." Id. at 1. Despite the fact that the state wildlife agency's determinations were addressed to the Forest Service nearly a year in advance of the challenged lease sales, nothing in the record or in respondents' arguments indicates that either the Forest Service or the BLM took the requisite NEPA "hard look" at this issue.[14]

Respondents also rely on a Biological Evaluation prepared by the Forest Service in 2004 to address the potential impacts of leasing in MA 24 on sensitive species, including Colorado River cutthroat trout. See Stanley Resp. at 39; BLM Resp. at 30; H&S Resp. at 17. However, this Biological Evaluation ("BE") cannot satisfy the Forest Service and the BLM's NEPA obligations because, like the agency's January 2004 Supplemental BA, it focuses solely on the leasing phase of the oil and gas development process, with no consideration of expected post-leasing development. The BE mentions development projections for the various management

[14] Respondents also contend that the need for supplemental NEPA analysis is obviated by a lease notice or Forest Service regulations creating the potential for future development restrictions in the interest of cutthroat trout. See BLM Resp. at 31-32; Stanley Resp. at 38. However, Conner made clear that such post-leasing mitigation authorities do not "reduce the effects of even oil and gas exploration, development, and production activities to environmental insignificance." 848 F.2d at 1450.

areas, including "up to ten wells within the Thrust Belt and five wells on 640 acres in Hoback Basin." BE at 7. Moreover, it states that the "potential for the occurrence of hydrocarbons is high throughout [MA 24]." Id. However, the BE's finding of "no impact" to Colorado River cutthroat trout, is not premised on an assessment of impacts from the agency's own estimated 10 wells or from the accompanying network of roads necessary for constructing those wells, but is based only upon the effects to trout from the leasing itself: "The Oil and Gas Leasing Phase will have **'no impact'** on these species or their habitats. Due to this phase consists [sic] only of field survey (foot, vehicle), map review and bidding for purchase. There will not be any ground disturbance or lengthy time periods spent within the MA's." Id. at 13; see also id. at 3 (stating that "[t]here is not any ground disturbance in this phase"). Indeed, the BLM even emphasizes this fact in its brief, using bold type to defend the distinction that "[t]he **effects of leasing**, not development, on Colorado cutthroat trout **were considered**" in the BE. BLM Resp. at 30.

Again, as discussed supra, NEPA does not permit such a truncated analysis of environmental impacts in connection with the irreversible and irretrievable commitment of resources represented by issuance of a federal onshore oil and gas lease. See Southern Utah Wilderness Alliance, 166 IBLA at 276-77. For this reason, too, the BLM violated NEPA.

II. THE BLM'S FAILURE TO CONSULT WITH EXPERT BIOLOGISTS REGARDING IMPACTS OF LIKELY POST-LEASING DEVELOPMENT ON LYNX VIOLATED THE ENDANGERED SPECIES ACT.

Respondents do not justify the BLM's failure to consult with U.S. Fish and Wildlife Service ("FWS") biologists regarding the impacts on the threatened Canada lynx and its habitat from anticipated post-leasing development. As set forth supra, the April lease parcels encompass an area containing the best lynx habitat in Wyoming, where presence of the rare lynx was detected as recently as 2005; the Forest Service and the BLM expect the drilling of 10 wells on

these leases; and the Wyoming Game and Fish Department has warned that development impacts flowing from the challenged leases could doom the species in this area. The challenged leasing therefore represented agency "action" that "may affect" the threatened lynx, such that the Endangered Species Act ("ESA") required interagency consultation regarding impacts to the species from leasing and anticipated post-leasing developments on the lease parcels. 50 C.F.R. § 402.14(a); see generally 16 U.S.C. § 1536(a)(2).

Nevertheless, neither the BLM nor the Forest Service consulted with FWS biologists concerning the challenged leasing.[15] Instead, they deemed such consultation unnecessary based on the "no effect" finding in the January 2004 Supplemental BA—a document that, as this Board has observed, "specifically did not consider the effects of drilling and related surface-disturbing activity in making its determination of no effect." July Stay Order at 10-11. Thus, these federal agencies did not consider the likely impacts on lynx or lynx habitat from the 10 gas wells that their own reasonably foreseeable development scenario estimated were likely to result from the challenged leasing—development that the Wyoming Game and Fish Department determined "may well be the final threshold for the continued existence of this species in the Wyoming Range." See BTNF FEIS, at 245 (attached as Exhibit 2); Letter from Wichers to Clark at 4 (attached as Exhibit 7). This necessarily violates the ESA's explicit command for all federal

[15] Respondents refer to the fact that the Forest Service and BLM obtained a biological opinion from FWS regarding their programmatic land management plans in October 2000. See BLM Resp. at 36; H&S Resp. at 20; Stanley Resp. at 41-42. However, this programmatic biological opinion explicitly stated that "[a]ny actions implemented under the Plans and the CAs that may adversely affect lynx would require section 7 consultation." Biological Opinion on the Effects of National Forest Land and Resource Management Plans and BLM Land Use Plans on Canada Lynx, at 57 (Oct. 25, 2000) (emphasis added).

agencies to "use the best scientific and commercial data available" in meeting their ESA obligations. 16 U.S.C. § 1536(a)(2).[16]

In addressing the ESA issue, the BLM and the industry intervenors do not contest the importance of the lease parcels for lynx and the documented presence of lynx in the area. Nor do they offer any statutory or regulatory analysis to indicate that the ESA's consultation obligations would not apply to the BLM's action, or could be limited to a myopic focus on solely the "paper transaction" of lease issuance to the exclusion of estimated post-leasing development.

Instead, the sole defense offered by the respondents for the BLM and Forest Service's failure to consider impacts on lynx from anticipated post-leasing development is that such limited analysis was authorized by the lone, unreviewed district court opinion in Wyoming Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 92 (D.D.C. 2003), which deemed an ESA consultation challenge to oil and gas leasing unripe for federal court review at the leasing stage based upon its conclusion that the "right to development of the lease parcel is far from certain." See BLM Resp. at 33-35; H&S Resp. at 23-25; Stanley Resp. at 43-44.

This Board should not accept respondents' invitation to follow Bosworth. Bosworth addressed a jurisdictional issue applicable only to the federal courts that is not relevant to this Board's consideration, flies in the face of a host of contrary appellate court authority, and fails to

[16] In the factual background sections of their response briefs, BLM and Stanley quote the Forest Service's assertion, in a letter to BLM, that FWS concurred in the Forest Service's "no effect" determination for the challenged leasing. See BLM Resp. at 12; Stanley Resp. at 15. However, no such FWS concurrence appears in the record; neither the Forest Service nor BLM has provided documentation of any such FWS concurrence in response to an explicit request from the Wyoming Game and Fish Department, see Letter from Wichers to Clark at 4; and none of the respondents refers to any such FWS concurrence in the argument sections of their briefs.

give appropriate respect to Congress' intent that ESA consultation not be put off until the last possible moment in addressing federal agency actions.[17]

First, Bosworth addressed only ripeness, and even on that score it defies a uniform body of contrary appellate court precedent. Bosworth held that "plaintiffs' failure-to-initiate [ESA consultation] claims are not ripe." 284 F. Supp. 2d at 93. The ripeness principles that limit the jurisdiction of Article III federal courts do not similarly constrain this Board's administrative review as an Executive Branch function. In any event, the Bosworth ripeness ruling is at odds with the D.C. Circuit's decision in North Slope Borough v. Andrus, 642 F.2d 589, 607-11 (D.C. Cir. 1980), and the Ninth Circuit's decisions in Conner v. Burford, 848 F.2d at 1451-58, Bob Marshall Alliance v. Hodel, 852 F.2d at 1228, and Northern Alaska Envtl. Ctr. v. Kempthorne, 2006 WL 2061246 at *9, all of which addressed the merits of ESA challenges to federal oil and gas leasing and did not even question whether such claims were ripe for review. See also Petition for Stay at 56-57 (citing additional contrary authority).

Moreover, while respondents wrongly attempt to transform Bosworth from a jurisdictional determination applicable to federal courts into a decision on the merits of the ESA issue in this appeal, the decision equally defies uniform appellate court rulings—including a ruling from the Bosworth court's own circuit—if viewed as an authority for dispensing with ESA consultation in connection with oil and gas leasing. The seminal authority on this issue, Conner, held that the required scope of "agency action" subject to ESA examination at the leasing stage "entails not only leasing but leasing and all post-leasing activities through production and

[17] Because Bosworth constitutes the sole legal basis offered by respondents to defend the Forest Service and the BLM's lack of ESA compliance, appellants address the decision in detail. While this Board deemed Bosworth persuasive on a "preliminary" basis in Wyoming Outdoor Council and Biodiversity Conservation Alliance, IBLA 2004-84, at 6-7 (Jan. 22, 2004) (attached to BLM Resp.), appellants respectfully request that the Board reconsider its preliminary assessment of that case in light of the arguments set forth above.

abandonment." 848 F.2d at 1453. The Ninth Circuit echoed this ruling in Bob Marshall Alliance, 852 F.2d at 1228, where the court invalidated leases that "were issued without preparation of a comprehensive biological opinion as to the effects of the leases and of all post-leasing activities on threatened and endangered species." Most recently, in Northern Alaska Environmental Center, the Ninth Circuit reaffirmed the ESA's requirement for a leasing agency "to 'make projections, based on potential locations and levels of oil and gas activity, of the impact of production on protected species.'" 2006 WL 2061246, at *9 (quoting Conner, 848 F.2d at 1454); see also Fry, 310 F. Supp. 2d at 1149-50 (invalidating biological assessment that failed to assess likely post-leasing oil and gas development impacts on endangered and threatened species as required by ESA).[18]

Bosworth also conflicts with D.C. Circuit authority. In North Slope Borough v. Andrus, 642 F.2d 589, the D.C. Circuit addressed the required scope of ESA consideration in connection with issuance of offshore oil and gas leases. The district court in that case held that the required scope of "agency action" for ESA analysis "constitutes the lease sale and all resulting activities." North Slope Borough v. Andrus, 486 F. Supp. 332, 351 (D.D.C. 1980), aff'd in part, rev'd in part, 642 F.2d 589. The D.C. Circuit agreed, stating:

> We agree that
>
> > (c)aution can only be exercised if the agency takes a look at all the possible ramifications of the agency action. As Senator Culver stated,

[18] Hanson & Strahn suggests that Conner did not recognize the BLM's authority "to disapprove operations when necessary to avoid jeopardy to species listed as threatened or endangered under the [ESA]." Id. at 26. However, Conner emphasized that its analysis was not meant "to impugn the government's independent statutory authority under the ESA to prevent any actions which would jeopardize threatened or endangered species." 848 F.2d at 1449 n.18. Conner also rejected the argument that the government's post-leasing "authority to absolutely preclude any activity likely to jeopardize a species" obviates "the need for a comprehensive biological opinion at the initial lease phase." Id. at 1455 (emphasis in original).

> "The earlier in the progress of a project a conflict (between a species and the project) is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action."
>
> This statement is much too sensible to quibble with. The relevant statutes—ESA, NEPA, OCSLA—all insist on foresight. Evaluating an outer continental shelf project in the light of all contemplated and congruous actions merely reflects that "pumping oil" and not "leasing tracts" is the aim of congressional policy.

642 F.2d at 608 (quoting 486 F. Supp. at 351 (in turn quoting Cong. Rec. S10,896 (June 17, 1978) (remarks of Sen. Culver)) (footnote omitted). While the D.C. Circuit held that environmental safeguards established by the Outer Continental Shelf Lands Act ("OCSLA") could be factored into the required assessment of likely post-leasing development impacts on endangered and threatened species, the court equally made clear that the required scope of ESA analysis at the leasing stage constituted "the lease sale and all subsequent activities." Id. at 609 (emphasis added); see also Secretary of Interior v. California, 464 U.S. 312, 338 (1984) (stating that "[r]equirements of the … Endangered Species Act must be met first" before sale of offshore leases). The D.C. Circuit's reasoning applies with even greater force in this appeal, which involves onshore leases that confer development rights pursuant to the Mineral Leasing Act, in contrast to offshore leases that confer no development rights pursuant to OCSLA. See Conner, 848 F.2d at 1456-57 (contrasting onshore and offshore leasing schemes); see also Wyoming Outdoor Council (On Reconsideration), 157 IBLA 259, 265-66 (2002) (rejecting BLM argument equating post-leasing authority to restrict development of onshore lease pursuant to Mineral Leasing Act with post-leasing authority to restrict development of offshore lease pursuant to OCSLA).

This unanimous appellate court authority properly recognizes the important role that ESA consultation plays at the leasing stage of the oil and gas development process. ESA section 7

consultation insures that the BLM's critical leasing decisions are informed by the expert advice of FWS biologists. Here, such a consultation could have—and should have—informed the BLM's decisions as to whether to lease these parcels containing some of the best lynx habitat in the State of Wyoming where lynx are known to occur, or, if leasing were appropriate, what lease stipulations should be added in the interest of lynx. For example, consultation could have identified the need for a "no surface occupancy" stipulation to protect important lynx movement corridors or productive habitat for snowshoe hare that the lynx depends upon for survival. Stipulations cannot be added once a lease is issued.

ESA consultation at the leasing stage also provides an early opportunity to assess whether a particular lease parcel is so critical that ensuing development may threaten jeopardy to a listed species. As the D.C. Circuit observed, "[t]he earlier in the progress of a project a conflict (between a species and the project) is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action." North Slope Borough, 642 F.2d at 203 (quotations and citations omitted). Conner elaborated how ESA consultation on leasing furthers this statutory purpose:

> With the post-leasing and biological information that was available, the FWS could have determined whether post-leasing activities in particular areas were fundamentally incompatible with the continued existence of the species. … With the information available, the FWS could also have identified potential conflicts between the protected species and post-leasing activities due to the cumulative impact of oil and gas activities. For example, species like the grizzly and the gray wolf require large home ranges making it critical that ESA review occur early in the process to avoid piecemeal chipping away of habitat.

848 F.2d at 1454. Conner's analysis applies equally to the wide-ranging lynx. Here the BLM and the Forest Service ignored "the post-leasing and biological information that was available," id., in concluding that the challenged leases would have no effect on the lynx. In so doing, these agencies violated the ESA.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR THE REQUESTED STAY.

This Board's order regarding the BLM's December 2005 lease sale in the Wyoming Range determined that appellants satisfied the harm and public interest criteria for a stay of the leasing decision. See July Stay Order at 12. The April 2006 leases at issue in this appeal present precisely the same considerations with respect to irreparable harm, the balance of harms, and the public interest, and warrant the same ruling from this Board. Indeed, the threat of harms to the appellants and the public interest is more pronounced here than it was for the December 2005 lease sale, because far more acreage of sensitive National Forest lands is at stake.

Nevertheless, respondents claim that appellants have not shown how issuance of the April leases will harm them. See Stanley Resp. at 48; H&S Resp. at 27; BLM Resp. at 38. To the contrary, in the Petition for Stay, appellants identified and discussed the cognizable harm that results from agency decisions made in the absence of compliance with NEPA and the ESA. See Petition for Stay at 58-60. Because the agencies' failure to comply with federal environmental laws happens now—at the leasing stage—harm is immediate. Similarly, because no future NEPA or ESA compliance at the APD stage will remedy the lack of pre-leasing NEPA or ESA compliance now, the harm is irreparable.

It is well established that environmental harm can be assumed when agency activity proceeds absent statutorily required environmental analysis.

> The risk of irreparable harm is impossible to assess, because the studies that would quantify the harm are incomplete. Legal remedies are inadequate, however, because permitting construction to proceed before the NEPA studies have been completed would defeat the purpose of undertaking the studies, whose purpose is to make the agency aware of the relevant environmental consideration before acting.

Sierra Club v. Hodel, 848 F.2d 1068, 1097 (10th Cir. 1988), overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d at 970 (10th Cir. 1992); see also Davis, 302 F.3d at 1115 (holding that "harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure."); Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) ("[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.").

Next, respondents argue that the "legal requirement of future environmental review, coupled with the appropriate review the agencies have already undertaken, entirely vitiates Appellants allegation of present procedural harm." Stanley Resp. at 51. As discussed in detail in the Petition for Stay and in this Reply, the agencies have not come close to undertaking the "appropriate review" that NEPA requires prior to offering the April parcels for lease sale. Without an adequate pre-leasing assessment of the potential impacts that oil and gas exploration, development and production could have on air quality, Canada lynx, mule deer and Colorado River cutthroat trout, the agencies cannot look to future compliance as a way to remedy their NEPA and ESA non-compliance now. Thus, the BLM's assurances that it is "committed to providing updated analysis at the appropriate time, if and when actual development of the area comes to play" is irrelevant. BLM Resp. at 39. When, as here, there are significant new circumstances warranting supplemental NEPA review, it is at the leasing stage that updated NEPA is required, and at the leasing stage that appellants would suffer harm if the leases were issued absent compliance with federal law.

Respondents also contend that a stay is not required because surface disturbance cannot occur without the administrative next step of filing an APD. H&S Resp. at 27; Stanley Resp. at

49. This argument is wrong on two counts. First, as mentioned above, procedural harm will occur immediately if the leases are issued without sufficient pre-leasing environmental analysis required by federal law. The requested stay is essential to avert harms to appellants' interests.

Second, respondents have tended throughout their briefing to downplay the significance of the leasing stage in an effort to convince this Board that leasing is not the point at which an agency makes an irreversible and irretrievable commitment of resources. This argument, however, is particularly unpersuasive in light of the statements respondents make regarding the alleged harm they will suffer if issuance of the April leases is stayed. Hanson & Strahn avers, "If the BLM's lease issuance decision is stayed, [it] will be unable to begin exploration of the leased lands and attempt to make a return on its substantial investment." H&S Resp. at 27. Similarly, Stanley argues that if a stay is issued, the APD process will be delayed and "[s]uch a delay will, in turn, forestall the ultimate development of these gas reserves." Stanley Resp. at 54. Although they have eschewed any direct connection between leasing and surface disturbance in previous arguments, respondents now acknowledge that a lease is critical and without it, the companies are prevented from beginning the surface disturbing steps of exploration and development. For this reason, as discussed supra, courts and this Board have uniformly held that the lease stage is the point of commitment upon which NEPA analysis and ESA compliance is required. It is also the point at which appellants suffer harm if pre-leasing analysis insufficiently considered the environmental consequences of the action.

In addressing the public interest, respondents assert that drilling in the Bridger-Teton National Forest is in the public interest so that the "energy needs of the Nation" may be met. H&S Resp. at 29; see also Stanley Resp. at 54 (stating that "leasing . . . should not be needlessly delayed given the important public policy of increasing America's domestic energy supply").

However, Wyoming is doing more than its share to provide mineral resources to the nation. Current energy development far exceeds past projections, and future development is slated to occur at a staggering rate.[19] In light of the numerous other projects the BLM has authorized and continues to authorize in Wyoming, respondents' suggestion that development of an estimated 10 wells in one of our most scenic and beloved national forests is essential to meet the nation's energy needs is unconvincing.

Appellants have offered evidence that the public interest overwhelmingly supports a stay of the leases. Wyoming citizens from many walks of life—labor union members, hunters, anglers, outfitters, educators, employees of oil and gas companies who work in the gas fields but recreate in the Wyoming Range, homeowners and ranchers, as well as conservationists—are unified in their support for protection of this area of the Bridger-Teton National Forest from oil and gas leasing and development. See newspaper articles attesting to outfitter, labor and sporting groups' opposition to leasing in the Wyoming Range (Appellants' SOR Ex. 10, 11, 12 & 13). The public's opposition to leasing in the Wyoming Range, particularly in the April parcels, has received the bipartisan endorsement of Wyoming's governor and senior U.S. senator, both of whom have expressed their opposition to the lease sales. See Petition for Stay at 62-64. The BLM suggests that the governor is only voicing opposition to the sale to garner public favor prior to elections. See BLM Resp. at 40 ("It is not surprising that the Governor has listened to his constituents and taken action right before elections."). Notwithstanding the inappropriateness of this remark, it is incorrect and does nothing to further respondents' argument that the public

[19] The Wyoming State Office of the BLM completed in August 2006 a "hot sheet" of land use planning and projects underway in Wyoming. See http://www.wy.blm.gov/nepa/hot_sheet.pdf#search=%22Pinedale%20Anticline%20Supplemental%20EIS%22 (attached as Exhibit 12). Reference to the websites listed in this document show that tens of thousands of new oil, gas and coalbed methane natural gas wells are slated for development in Wyoming over the next several years.

interest favors leasing. First, the governor publicly expressed his concern regarding leasing in the Wyoming Range nearly two years ago—this is not an election-year conversion to garner votes. See Governor's press release from September 14, 2004 (attached as Exhibit 13). Second, even if the governor's comments did reflect political strategy, that would only show that protection of the Wyoming Range is so important to the people of Wyoming that elections may be won or lost based on it. The public interest clearly tilts toward the prohibition of leasing in the Wyoming Range.

Respondents' final argument is that because the Forest Service cut back the amount of land originally authorized for lease sale, the agency has listened to and involved the public. See Stanley Resp. at 53; BLM Resp. at 40. Appellants do not dispute that the Forest Service reduced its original Wyoming Range leasing proposal in response to public outcry and requests from the governor and Senator Thomas. As the Regional Forester conceded in a letter to Senator Thomas, however, the Forest Service's effort to strike a compromise was "not an environmental analysis process, [but] it [was] a demonstration of [the Forest Service's] commitment to working with the public to resolve their concerns before it move[d] forward with additional leasing." Letter from Jack Troyer to Senator Thomas, February 10, 2005 (BLM's Attachment I). Whatever modifications the Forest Service made in response to overwhelming public opposition do not allow the agencies to circumvent their obligations under NEPA and the ESA with respect to the remaining leases. Moreover, meeting informally with selected interests is not a substitute for a formal NEPA process in which all of the interested public has an opportunity to submit comments, or an ESA process in which expert biologists provide critical input on leasing decisions.

IV. CONCLUSION

Appellants have met their burden to show not only a likelihood of success on the merits, but also that the balance of harms and the public interest favor granting a stay. For the reasons set forth in the Petition for Stay and in this Reply, appellants request that the Board grant the Petition for Stay and stay the BLM's decision to issue lease parcels WY-0604-147, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159. In this regard, the Forest Service and the BLM have "concur[red] that no action will be approved and/or taken on the leases at issue in this case until September 21, 2006." BLM's Request for Second Extension of Time, July 18, 2006 (attached as Exhibit 14). Because of the voluntary nature of this stay, appellants respectfully request that this Board issue a decision on the Petition for Stay prior to September 21, 2006.

Respectfully submitted this 5th day of September 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2006 I caused to be served a true and correct copy of the foregoing **Reply in Support for Petition for Stay Pending Appeal** via federal express standard overnight delivery and also via certified priority mail, return receipt requested to:

Interior Board of Land Appeals
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