

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

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Wyoming Outdoor Council	*	Appeal of the Dismissal of Protest of
The Wilderness Society		the Sale of Oil and Gas Lease Parcel:
Greater Yellowstone Coalition	*	WY-0512-176, December 2005
		Lease Sale
	*	BLM Wyoming State Office
	*	
Appellants	*	IBLA No. _____
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**PETITION FOR STAY PENDING APPEAL**

This is a petition for a stay pending appeal pursuant to 43 C.F.R. §§ 4.21 of an adverse decision made by the Deputy State Director, Bureau of Land Management (“BLM”), Wyoming State Office, on April 5, 2006. The challenged decision is the Dismissal of the Protest of the Sale of Oil and Gas Lease Parcel WY-0512-176 (“parcel 176”).

Parcel 176 is located within the Wyoming Range, an area in the Bridger-Teton National Forest renowned for its pristine cutthroat trout fisheries, thriving populations of elk, moose and deer, varied recreational opportunities that support a sustainable local economy and a rare habitat type on which the Canada lynx, a species listed as threatened under the Endangered Species Act, depends for its survival. This beloved mountain range is a critical part of the Greater Yellowstone Ecosystem, the largest nearly intact ecosystem in the lower forty-eight states. The 1280-acre parcel in question represents the first of several sales that will open some 44,600 acres on the forest to oil and gas development. See

Skytruth topographic maps and satellite images (illustrating the location of parcel 176) (Exhibit 1). The requested stay would prohibit the BLM from issuing the lease until it fully complies with its legal obligations under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq. and the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2).

Appellants reserve the right to file an additional Statement of Reasons within 30 days of this Appeal, as allowed by the rule. See 43 C.F.R. § 4.412. This Petition for Stay and the accompanying Notice of Appeal are filed within 30 days of service of the challenged decision, and are therefore timely. See 43 C.F.R. § 4.411.

## **I. BACKGROUND**

In 2004, the Forest Service proposed to lease more than 157,000 acres in the Wyoming Range portion of the Bridger-Teton National Forest for oil and gas development. In response, the public voiced strong opposition. A diverse constituency comprised of Wyoming’s governor, Dave Freudenthal, Senator Craig Thomas (R-WY), homeowners, outfitters, hunters, anglers, local business owners, recreational users and conservationists petitioned the Forest Service, urging the agency to withdraw its consent to lease in this special area. They encouraged the Forest Service to find that in this portion of the forest, the scenic, recreational and wildlife values far exceeded any short-term economic gain that energy development might bring. Given the rampant energy development on surrounding BLM lands in northwestern Wyoming, many believed the damage that oil and gas development inevitably would impose on this sensitive and popular forest landscape was unacceptable.

The Forest Service relied on outdated analyses in making its decision to lease; twelve years have passed since the Forest Service conducted its initial and to date only

NEPA analysis for Management Area 24, where parcel 176 is found. See Environmental Assessment for Making the Oil and Gas Leasing Decision for Specific Lands Within the Horse Creek (MA 24) Management Area, 1993. (“MA-24 EA”) (Exhibit 2). The Decision Notice and FONSI were issued for MA-24 EA on August 5, 1993. See Notice of Decision Finding No Significant Impact (Exhibit 3). The parties represented in this appeal and others advocated that a supplemental environmental analysis was needed to adequately address new circumstances such as impacts to air quality from nearby oil and gas drilling operations and the potential impacts that drilling would have on listed species like the Canada lynx, an animal that was not protected under the ESA until six years ago. See Letters from Tim Preso, Earthjustice to Jack Troyer, Regional Forester, USFS (Aug. 18, 2004 & Sept. 9, 2004) (Exhibits 4, 5) and Letters from Tim Preso, Earthjustice to Kniffy Hamilton, Bridger-Teton National Forest Supervisor (April 1, 2005 & May 12, 2005). (Exhibits 6, 7).

The Forest Service gathered an Interdisciplinary Team of its own employees to look over the environmental assessments (“EAs”) for the nine management areas where leasing was slated to occur.<sup>1</sup> At the conclusion of two meetings where the employees “discussed the current documents, identified issues, and internally scoped the proposed oil and gas leasing process” the Forest Service concluded that the NEPA analysis completed over a decade ago was “still current.” Supplemental Information Report (“SIR”) (Feb. 25, 2004) at 1 (Exhibit 9). In the very next sentence of its SIR, however, the Forest Service conceded

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<sup>1</sup>In the 1990 Bridger-Teton National Forest Land and Resource Management Plan (“Forest Plan”) the Forest Service designated thirty Management Areas (“MAs”). Together with areas that were designated wilderness or wilderness study areas, these MAs represented units upon which the Forest Service assigned “desired future conditions” and “management prescriptions” setting forth the general standards and guidelines for managing these areas. Parcel 176 is located in MA-24. See Bridger-Teton Forest Plan at 249, 308-09 (Exhibit 8).

that three major changes not even contemplated, let alone analyzed in the original EAs, “warranted review.” Id. These were: 1) air quality concerns; 2) the listing in 2000 of the Canada lynx under the Endangered Species Act; and 3) whether the current development exceeded the Reasonably Foreseeable Development (“RFD”) assessment from 1987. See id.

Despite the presence of these new circumstances, the Forest Service prepared no supplemental NEPA documentation. Instead, it relied on the sufficiency of its SIR, a non-NEPA document and on the fact that project level environmental analyses would be conducted if any future ground-disturbing activity is proposed. See Letter from Jack Troyer, Regional Forester to Tim Peso [sic], Earthjustice (Sept. 23, 2004) (Exhibit 10) and Letter from Kniffy Hamilton, Bridger-Teton National Forest Supervisor to Tim Preso, Earthjustice (June 30, 2005) (Exhibit 11). The Forest Service downplayed the significance of each of the three new issues by relying on inaccurate data and incomplete analyses to support its decision not to supplement. For example, as will be explained in more detail below, the Forest Service misrepresented the statements of EPA officials and cited a NEPA document that the BLM, the EPA and the Forest Service itself admitted on record is outdated to support the conclusion that “no negative air quality impacts will occur from processing leases . . . .” SIR at 4. In the case of the Canada lynx, the Forest Service failed entirely to consider a recent study from the winter of 2004-2005 that documents actual lynx presence in the areas offered for lease sale. It also limited consideration of the scope of the action to the leasing stage alone in order to conclude in its biological assessment that the action would have “no effect” on the Canada lynx, thus avoiding altogether the requirement to consult with the U.S. Fish and Wildlife Service (“FWS”).

Although the Forest Service ultimately scaled back the amount of land offered for lease sale to 44,600 acres, which includes the 1280 acres in parcel 176 that are at issue here, this decision did not remedy the fact that the new circumstances identified in the SIR warranted a supplemental NEPA analysis and the known presence of lynx required consultation with the FWS. The BLM, in turn prepared no NEPA analysis of its own, relying instead on the Forest Service's determination that its twelve year-old NEPA compliance was sufficient. Similarly, the BLM relied on the Forest Service's unsupportable conclusion that leasing would have "no effect" on the lynx and thus failed to consult with the FWS. Contrary to the BLM's apparent view that it can release responsibility to the Forest Service for any pre-leasing NEPA analysis and ESA consultation when Forest Service surface lands are at issue, the BLM has an independent obligation to determine whether it will offer lease parcels for sale and thus an independent responsibility to ensure that the requirements of NEPA and the ESA are met.

## **II. INTERESTS OF THE PARTIES AND SHOWING OF ADVERSELY AFFECTED PARTY STATUS**

The **Wyoming Outdoor Council** is a non-profit conservation organization with approximately 1,000 members in Wyoming, other states and abroad. Based in Lander, Wyoming, the Wyoming Outdoor Council is dedicated to the protection of Wyoming's environment and quality of life. Many of its members live near the Wyoming Range. They and other members regularly use and enjoy the Wyoming Range for hiking, fishing, skiing, snowmobiling, camping, hunting and other recreational and aesthetic uses.

Founded in 1935, **The Wilderness Society** works to protect America's wilderness and to ensure the wise and balanced management of our public lands through public education, scientific analysis and advocacy. Nationally, there are more than 200,000

members of the Wilderness Society, with several hundred members in Wyoming. Several of these members have a direct personal stake in the management of the Wyoming Range. They use the area and the wildlife it supports for business, recreational, spiritual and other needs.

The **Greater Yellowstone Coalition** was founded in 1983 and has more than 12,000 members, many of whom regularly use and enjoy the Greater Yellowstone area, including the Wyoming Range. Its members' recreational activities include: hunting, fishing, hiking, birding, skiing, natural history field trips, resource research, wildlife observation and enjoying places of natural beauty. It is dedicated to the protection of the land, air and waters of the Greater Yellowstone Ecosystem and its members are particularly concerned with the impacts of oil and gas activities on wildlife, open spaces and recreational uses.

To bring this appeal Appellants must (1) be a party to the case; and (2) be adversely affected by the decision being appealed. 43 C.F.R § 4.410(a); National Wildlife Federation v. BLM, 129 IBLA 124, 125 (1994). To be a party to the case, a person or group must have actively participated in the decision-making process regarding the subject matter of the appeal. See 43 C.F.R. § 4.410(b) (defining "party to a case"). Here all Appellants timely protested the sale of parcel 176. Appellants' protest is attached as Exhibit 12. Thus, Appellants satisfy the "party to a case" qualification. See id. ("party to a case" includes "one who has ... participated in the process leading to the decision under appeal ... by filing a protest to a proposed action.").

To demonstrate that it will "be adversely affected by the decision being appealed," a party must demonstrate a legally cognizable "interest" and that the decision appealed has

caused or is substantially likely to cause injury to that interest. Glenn Grenke v. BLM, 122 IBLA 123, 128 (1992); 43 C.F.R. § 4.410(d). This requisite “interest” can be established by cultural, recreational, or aesthetic uses as well as enjoyment of the public lands. Southern Utah Wilderness Alliance, 127 IBLA 325, 326 (1993); Animal Protection Institute of America, 117 IBLA 208, 210 (1990). This Board does not require a showing that an injury has actually occurred. Rather, a colorable allegation of injury suffices. Powder River Basin Resource Council, 124 IBLA 83, 89 (1992).

Moreover, it is not necessary for parties to show that they have actually set foot on an impacted parcel to establish use or enjoyment for standing purposes. Rather, “one may also establish he or she is adversely affected by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests.” The Coalition of Concerned National Park Retirees, et al., 165 IBLA 79, 84 (2005).

Attached as Exhibit 13 is the declaration of Linda Baker. It shows she is a member of the Wyoming Outdoor Council, The Wilderness Society and the Greater Yellowstone Coalition. Her declaration also shows that she has visited parcel 176 first as an employee of the Bridger-Teton National Forest and more recently for her own personal, aesthetic and recreational enjoyment. Ms. Baker’s declaration establishes that the Wyoming Outdoor Council, The Wilderness Society and the Greater Yellowstone Coalition would be adversely affected by the BLM’s decision to lease parcel 176.

Attached as Exhibit 14 is the declaration of Molly Absolon, a member of the Wyoming Outdoor Council. Ms. Absolon’s declaration shows that she has visited parcel 176 as an instructor for the National Outdoor Leadership School where she received a

great deal of personal benefit from her time in the area. Her future enjoyment of the area would be destroyed by oil and gas development. Ms. Absolon's declaration establishes that the Wyoming Outdoor Council would be adversely affected by the BLM's decision to lease parcel 176.

### **III. THE BOARD SHOULD STAY ISSUANCE OF THE LEASE FOR PARCEL 176.**

The Board should stay issuance of the oil and gas lease for parcel 176 on the bases set forth below. To receive a stay, the Appellants must show sufficient justification based on the following standards:

- (i) The relative harm to the parties if the stay is granted or denied,
- (ii) The likelihood of appellant's success on the merits,
- (iii) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (iv) Whether the public interest favors granting the stay[.]

43 C.F.R. §§ 4.21(b)(1). In determining whether an appellant has met the criteria for a stay, the IBLA has stated that:

In balancing the movant's likelihood of success on the merits against the potential impact of an injunction on the parties, we have also noted that the appellant's probability of prevailing on the merits need not be free from doubt to justify at least an interim stay.

Jan Wroncy, 124 IBLA 150, 152 (1992).<sup>2</sup> Here, Appellants more than satisfy this governing standard.

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<sup>2</sup>Wroncy was decided shortly before the current stay regulations were finalized. See 43 C.F.R. § 4.21. However, the Board's holding relied on the draft proposed regulations, which tracked the current regulations in all significant respects. See Wroncy, 124 IBLA at 152 n.5.



**A. Appellants Are Likely To Succeed On The Merits.**

**1. The BLM violated the National Environmental Policy Act.**

**a. Air quality and wildlife issues are significant new circumstances that require preparation of a supplemental NEPA analysis.**

The Forest Service relied on a 1993 environmental assessment prepared for Management Area 24 (where parcel 176 is located) (“MA-24 EA”) to make its 2005 decision to offer 44,600 acres of National Forest land, including parcel 176, for lease sale. See (Exhibit 2). It did this despite the fact that it identified in the SIR three issues not considered in the MA-24 EA that “warranted review.” SIR at 1 (Exhibit 9). These issues include: 1) current impacts to air quality; 2) the listing of the Canada lynx under the ESA; and 3) whether the Reasonably Foreseeable Development (“RFD”) scenario was still accurate. Id. Instead of preparing a supplemental EA or EIS to address these significant new circumstances, the Forest Service simply acknowledged the presence of the new circumstances in the SIR and postponed further NEPA analysis to the APD stage. The BLM in turn, relied improperly on the Forest Service’s decision not to prepare supplemental NEPA analysis in making its decision to lease parcel 176.<sup>3</sup> See BLM’s Protest Dismissal at

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<sup>3</sup> As the leasing agency, the BLM may not rely on another agency’s erroneous conclusions to authorize lease sales. The BLM has an independent obligation to ensure the requirements of NEPA are met. See 43 C.F.R. § 3101.7-2(a) (“The authorized officer may add additional stipulations” to lease parcel offerings), (b) (stating with respect to lands where consent to leasing has been provided, “The Secretary has the final authority and discretion to decide to issue a lease.”). See also 40 C.F.R. § 1501.4 (requiring that an EA be prepared unless an action is categorically excluded or is subject to an EIS), § 1506.3(a) (allowing agencies to adopt an EIS prepared by another agency “provided that the statement of portion thereof meets the standards for an adequate statement”), § 1506.3(c) (allowing agencies to adopt an EIS “after an independent review of the statement”) (emphasis added); Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations (46 Fed. Reg. 18026), question 30 (stating “A cooperating agency with jurisdiction by law—e.g. an agency with independent legal

15 (April 5, 2006) (explaining that the SIR found no new issues or information that would change the current leasing decisions and that the SIR stated that a more detailed NEPA analysis will be required if the [Forest Service] is presented with an Application for Permit to Drill) (Exhibit 15). The new circumstances identified by the agencies are significant, and should have been thoroughly analyzed in a supplemental EA or EIS prior to leasing.

An agency must prepare supplemental NEPA analyses in two situations: 1) “if the agency makes substantial changes in the proposed action that are relevant to environmental concerns;” or 2) 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)(i), (ii). While supplementation is not required “every time new information comes to light after the [NEPA document] is finalized,” the agency must apply a “rule of reason” which will “turn[] on the value of the new information to the still pending decisionmaking process.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74 (1989). The test whether to supplement is similar to the test whether to prepare an EIS in the first place. Id. A new circumstance warrants supplementation if it “will affect the quality of the human environment ‘in a significant manner or to a significant extent not already considered.’” National Committee for the New River v. F.E.R.C., 373 F.3d 1323, 1330 (D.C. Cir. 2004) (citing Marsh, 490 U.S. at 374).

The Council of Environmental Quality (“CEQ”) regulations implementing NEPA explain the meaning of “significantly” as used in the Act requires consideration of both context and intensity. 40 C.F.R. § 1508.27. With regard to context, the “significance of the

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responsibilities with respect to the proposal—has an independent legal obligation to comply with NEPA.”). Thus, the BLM violates NEPA if it takes leasing actions in reliance on an inadequate Forest Service NEPA analysis.

action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). Intensity “refers to the severity of the impact” and ten issues should be considered when assessing intensity. 40 C.F.R. § 1508.17(b). These include:

- 1) Impacts may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes 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 historical or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers or ecologically critical areas.
- 4) The degree to which the effects of 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 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.
- 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.

40 C.F.R. § 1508.27 (b)(1-10).

The ten factors listed above assist agencies in determining whether a project significantly affects the quality of the human environment. These factors also help agencies assess whether a new circumstance will affect the quality of the human environment “in a significant manner or to a significant extent not already considered,” thus requiring supplemental NEPA analysis. Marsh, 409 U.S. at 374. When examined, air quality impacts

and impacts to threatened and endangered species and other fish and wildlife species not considered in the 1993 MA-24 EA meet many of the enumerated criteria. Thus, supplemental NEPA analysis was required before parcel 176 was offered for sale.

For example, impacts to air quality were not observed in the area in 1993, but these impacts are present and well known today. See Air Quality Supplemental Information Report (“Air Quality SIR”) for as Leasing in MAs 12, 22, 23, 24, 25, 26, 31, 32 and 49 on the Bridger-Teton National Forest, Terry Svalberg, (Feb. 6, 2004) (Exhibit 16). Air quality degradation poses risks to public health and threatens violation of state air quality standards. See 40 C.F.R. § 1508.27(b)(2),(10). Reduced visibility due to haze threatens the unique characteristics of the Class I airsheds of nearby wilderness areas and Grand Teton and Yellowstone National Parks and is a highly controversial issue for local communities.<sup>4</sup> See C.F.R. § 1508.27(b)(3),(4). Air quality degradation from surrounding oil and gas development combined with new proposals to drill creates a cumulative impacts problem.<sup>5</sup> See C.F.R. § 1508.27(b)(7). Further, the decision to issue new leases based on inaccurate

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<sup>4</sup> There are several “Class I” areas in the vicinity of parcel 176, including Yellowstone and Grand Teton National Parks and the Bridger, Fitzpatrick, Teton, and Washakie Wilderness Areas. See Final Environmental Impact Statement, Jonah Infill Drilling Project, Sublette County, Wyoming at 4-12 (Exhibit 17). Class I areas required special consideration and protection under the Clean Air Act. 42 U.S.C. § 7470(2) (a purpose of the prevention of significant deterioration program is to preserve, protect, and enhance air quality in national parks and wilderness areas), § 7491(a) (the national goal is “the prevention of any future, and remedying of any existing, impairment of visibility” in Class I areas). The Forest Service as the federal land manager with authority over the Class I wilderness areas in the region has an “affirmative responsibility” to protect air quality related values, including visibility, in these areas. See id. § 7475(d)(2)(b).

<sup>5</sup> The BLM has predicted that the Bridger Wilderness Area will see 95 days per year of significantly increased haze due to the nearby Jonah Infill project coupled with other emissions sources in the area, and that Grand Teton National Park will see 26 days per year of significantly increased haze. Final Air Quality Technical Support Document for the Jonah Infill Drilling Project Environmental Impact Statement (Vol. 2) at G-E-30 (Table G-E-8.4) (Exhibit 18).

and outdated air quality modeling threatens to establish a precedent for future actions that could have significant, continued negative effects on air quality. See C.F.R. § 1508.27(b)(6). Impacts to wildlife species, particularly threatened and endangered species like the Canada lynx, are also significant and warrant an updated NEPA review. See C.F.R. § 1508.27(b)(9). Because these new circumstances implicate many of the criteria used to determine significance, the agencies should have prepared a supplemental NEPA analysis in this situation.

The Forest Service wrongly concluded in its SIR that the three new issues not considered in the 1993 MA-24 EA were not so significant as to warrant supplemental NEPA review. As will be explained in more detail below, this conclusion was based on incomplete information with regard to lynx and inaccurate information with regard to air quality. The BLM in turn simply adopted the erroneous conclusions of the Forest Service. By attempting to minimize the significance of these new issues in the SIR, the agencies impermissibly avoided their responsibility under NEPA to supplement outdated analyses.

The Forest Service's SIR cannot serve as a substitute for updating its NEPA analysis; it also does not satisfy the BLM's responsibility to comply with NEPA. See Idaho Sporting Congress v. Alexander, 222 F.3d 562, 566 (9th Cir. 2000) (holding that "once an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute"); Pennaco Energy, Inc. v. U.S. Dept. of Interior, 377 F.3d 1147, 1162 (10th Cir. 2004) (explaining that reviewing documents like DNAs, which are akin to SIRs, are not sufficient to satisfy NEPA's "hard look" standard as they are not mentioned in NEPA or its implementing regulations); Southern Utah Wilderness Alliance, 166 IBLA 270, 283 (stating that DNAs cannot be used to supplement previous EAs or EISs

or to address site-specific environmental effects not previously considered in them). The BLM, as the agency charged with the authority to lease, must comply with its independent obligations under NEPA.

**b. Appropriate NEPA analysis is required prior to leasing.**

The BLM also reasons that any new circumstances not considered at the pre-leasing stage will be later addressed in a more detailed NEPA analysis at the APD stage. See BLM's Protest Dismissal at 15 (April 5, 2006) (explaining a more detailed NEPA analysis will be required if the [Forest Service] is presented with an Application for Permit to Drill) (Exhibit 15). It uses this rationale to avoid supplemental NEPA now. This is contrary to the proper procedure outlined in the prevailing case law, this Board's rulings and national BLM policy, all of which require full NEPA compliance prior to leasing non-No Surface Occupancy ("non-NSO") leases. The reason for this is because issuance of a non-NSO federal oil and gas lease commits the leased lands to oil and gas exploration and development at the election of the leaseholder, with limited exceptions. Lease parcel 176 is a non-NSO parcel.<sup>6</sup> See BLM December 6, 2005 Notice of Lease Sale for parcel 176 and attached stipulations (Exhibit 19).

The United States Court of Appeals for the District of Columbia long ago rejected the argument that "leasing is a discrete transaction which will not result in any physical or

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<sup>6</sup> In contrast, surface disturbance may be denied where a lease includes a specific NSO stipulation. 43 C.F.R. § 3101.1-2. The distinction between an NSO lease and a non-NSO lease is significant. A lease that includes a NSO stipulation prohibits all surface operations on the lease such as building well pads and roads, but allows for extraction of oil and gas through directional drilling from adjacent lands. A non-NSO lease, like parcel 176, creates a right in the lessee to conduct surface disturbing activities. Once a lease is issued, the agency no longer retains the authority to prevent surface disturbing activities, even if the agency later learns that the environmental impact will be significant.

biological impacts.” Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983). In that case, the court found that the decision to allow surface disturbing activities for non-NSO leases was made at the leasing stage. See id. at 1414 (emphasis in original). For this reason, prior to leasing, agencies must fully comply with NEPA for non-NSO proposed oil and gas leases as they represent a full and irreversible commitment of resources. Id. at 1415; see also Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) (holding the issuance of leases without “no surface occupancy” stipulations requires the preparation of an EIS).

This Board also requires full pre-leasing NEPA compliance for non-NSO oil and gas leases. In Southern Utah Wilderness Alliance, this Board stated,

BLM regulations, the courts and our precedent proceed under the notion that the issuance of a lease without an NSO stipulation conveys to the lessee an interest and a right so secure that full NEPA review must be conducted prior to the decision to lease. The courts have held that the Department must prepare an EIS before it may decide to issue such “non-NSO” oil and gas leases. The reason, according to the Ninth Circuit, is that a “non-NSO” lease “does not reserve to the government the absolute right to prevent all surface disturbing activities” and thus its issuance constitutes “an irretrievable commitment of resources” under section 102 of NEPA. Friends of Southeast’s Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1988) quoting Conner v. Burford, 848 F.2d 1441, 1448-51 (9th Cir. 1988). This commitment is reflected as well in BLM regulations.

159 IBLA 220, 241 (2003). This Board reiterated its position just last year.

[T]he appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposed to lease public lands for oil and gas purposes, because leasing without NSO stipulations constitutes an irreversible and irretrievable commitment to surface-disturbing activity, in some form and to some extent.

Southern Utah Wilderness Alliance, 166 IBLA 270, 276-77 (2005).

The BLM often cites Park County Resource Council v. U.S. Dept. of Agriculture, 817 F.2d 609 (10th Cir. 1987), to support the assertion that site-specific NEPA is not

possible or required at the leasing stage. See BLM Environmental Assessment for parcel WY-0512-175 at 2; (Aug. 16, 2005) (Exhibit 20) (stating that “[a]ccording to the Tenth Circuit Court of Appeals, site-specific NEPA analysis is not possible absent concrete proposals. Filing of an APD is the first useful point at which site-specific environmental appraisal can be undertaken.”)<sup>7</sup> BLM’s understanding of the Park County holding is wrong on two accounts.

First, the question in Park County was not whether NEPA analysis is required prior to leasing, but what level of NEPA is required. Although the court did find that an EIS was not necessary in all pre-leasing circumstances, it did so in response to the specific facts before it. In that case, the agency had prepared an extensive, 100-page EA that adequately covered the leases in question. In a recent case, the court reiterated that its holding in Park County is limited to situations in which a detailed pre-leasing environmental assessment had been prepared pursuant to NEPA. Pennaco Energy, Inc. v. U.S. Dept. of the Interior, 377 F.3d 1147, 1162 (10th Cir. 2004).

Second, several years after both the Park County and Conner decisions, the BLM issued a nationwide policy statement opting to follow the holding in Conner. Information Bulletin 92-198 is applicable to all BLM State Directors: “The simple rule coming out of the Conner v. Burford case is that we will comply with NEPA and ESA prior to leasing.” (IB 92-198 (BLM 1992)) (emphasis added) (Exhibit 21). This position is bolstered by an order of the Secretary of Interior, holding that “[IBLA] is not necessarily bound to apply a circuit

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<sup>7</sup> This EA, prepared by the BLM Pinedale Field Office where parcel 176 is located, is interesting because it shows that the BLM recognizes the level of NEPA compliance that is necessary prior to a lease sale, yet parcel 176 is not evaluated in this EA.



court decision to other BLM actions, even actions within the Tenth Circuit.” Michael Gold, 115 IBLA 218 at \*8 (1991) (Decision of Secretary on Review).

Thus, even under Park County, agencies must adequately assess the environmental impacts of post-leasing development prior to leasing. The agency in Park County did so in an extensive EA. The issue with parcel 176 is not necessarily whether the BLM should have prepared an EIS rather than an EA. The issue is that it failed entirely to take the “hard look” that NEPA requires in either a supplemental EA or an EIS. Instead, the BLM attempts to rely on the Forest Service’s SIR, which in turn relied on the woefully out of date MA-24 EA from 1993. This is an inappropriate use of the SIR, both relative to the Forest Service’s responsibility to comply with NEPA and the BLM’s independent NEPA obligations.

For purposes of this appeal, Appellants will only address the BLM’s failure to analyze in a supplemental EA or EIS: 1) air quality impacts associated with the proposed project; and 2) the impacts that development might inflict on the Canada lynx, a threatened species recently documented residing in and around parcel 176 and impacts to other wildlife species. Each is a significant new circumstance warranting an updated NEPA analysis.

**c. Air quality impacts are a significant new circumstance.**

Both the Forest Service and the BLM failed to take the required “hard look” at the air quality impacts that are likely to result from the proposed leasing. Section 165(d) of the Clean Air Act imposes on the Forest Service, as a Federal Land Manager, “an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a Class I area.” 42 U.S.C. § 7475(d)(2)(B). NEPA requires the Forest Service as the

land managing agency and the BLM as the leasing agency to determine whether the indirect and cumulative impacts of development resulting from the proposed leasing, together with other existing and reasonably foreseeable oil and gas development, threatens to harm visibility in Class I airsheds. See 40 C.F.R. § 1508.7. Neither agency has undertaken this analysis. The Forest Service reasoned that “in the early 1990’s air quality was considered a minor issue, and not much attention was given to the subject in the NEPA analysis . . . .” Air Quality SIR (Exhibit 16) at 1. In fact, the EA for Management Area 24 does not address air quality issues at all. See MA-24 EA (Exhibit 2).

Perhaps the 1993 MA-24 EA and FONSI cannot be faulted for failing to address a concern that was simply not an issue twelve years ago. It is an issue today, however, and the agencies are responsible for supplementing outdated analyses when circumstances arise that are new and environmentally significant. The Forest Service explains that “air quality in the area surrounding the Bridger-Teton NF has emerged as a key issue mainly because of the proximity of the area to six Prevention of Significant Deterioration (PSD) Class I Areas in northwest Wyoming that were identified in the Clean Air Act of 1977.” Air Quality SIR at 1.

The Forest Service and the BLM improperly relied on the outdated Pinedale Anticline EIS to conclude that new leasing would not affect air quality. The Pinedale Anticline EIS is a NEPA document the BLM prepared in November 1999 in connection with a proposed 700-well oil and gas development project on 900 well pads in Sublette County, Wyoming. See Pinedale Anticline Draft EIS excerpt (Exhibit 22). The EIS set forth a reasonably foreseeable development scenario, which in February 2004 when the Forest Service issued its SIR, was already badly outdated. See id. at 5-1 to 5-4 . The

scenario failed to encompass even the amount of oil and gas development that already existed in the area surrounding the proposed leasing, much less properly considered reasonably foreseeable future development. The Pinedale EIS concluded that “[r]easonably foreseeable development over the next 10-15 years in the RMP [i.e., Pinedale Resource Management Plan] area is projected to be 1,944 new and/or replacement producing oil and gas wells.” *Id.* at 5-4. However, as of the end of July 2004, there were 2,393 oil and gas wells in Sublette County, Wyoming—and Sublette County represents only a portion of the area considered in the Pinedale Anticline EIS’ reasonably foreseeable development scenario. See Data from Wyoming Oil and Gas Conservation Commission, July 30, 2004.<sup>8</sup> (Exhibit 23). Today, there are 3,002 oil and gas wells in Sublette County.<sup>9</sup> See Data from Wyoming Oil and Gas Conservation Commission, May 5, 2006; <http://wogcc.state.wy.us/CntySummary.cfm?oops=ID82631> (Exhibit 24). Thus, to date, the Pinedale Anticline EIS’s reasonably foreseeable development scenario of 1,944 new and/or replacement wells has already been exceeded by 1,058 wells based on already existing development in Sublette County alone.

The Bridger-Teton National Forest and the BLM are not unfamiliar with their duty to supplement outdated NEPA analyses relative to air quality. Just last year, for example, the agencies mandated that an air quality supplement be added to the NEPA analysis contained in the Riley Ridge EIS partly based on the fact that present nitrous oxide (NOx) emissions were far in excess of those analyzed in the Pinedale Anticline EIS.<sup>10</sup> See Letter

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<sup>8</sup> The total of 2,393 represents the 2,230 completed wells and 163 “spuds,” meaning a well for which drilling has been approved and has begun.

<sup>9</sup> The total 3,002 represents the 2,720 completed wells and 282 spuds.

<sup>10</sup> The Riley Ridge Natural Gas Project is located on BLM and Forest Service lands in the Wyoming Range.

from Kniffy Hamilton, Bridger-Teton National Forest Supervisor and the Wyoming BLM State Director to ExxonMobil Oil Corporation (June 7, 2005) (Exhibit 25) (stating that air quality impacts are significantly different than those previously analyzed necessitating a supplemental EIS); see also Letters from Kniffy Hamilton and BLM Pinedale Field Office Manager Priscilla Meham (Dec. 8, 2004) (same) (Exhibits 26, 27). Thus, it defies reason that the Forest Service consented to lease parcels in the Wyoming Range and that the BLM then offered parcel 176 for sale, based on a determination that “the impacts to air quality could be demonstrated to not have a significant impact on air quality” by tiering to the Pinedale Anticline EIS—SIR at 3—when, with respect to the nearby Riley Ridge project, the agencies have gone on record stating that the Pinedale Anticline EIS is outdated in terms of its air quality analysis. The agencies may not tier their air quality analysis to a document they admit no longer accurately reflects the impacts to air quality in the Upper Green River Valley.

The Document of NEPA Adequacy (“DNA”) prepared by the BLM to support its decision to not allow further approval of oil and gas development in the Riley Ridge Project Area until a supplemental EIS is prepared further documents that the Pinedale Anticline EIS cannot be used for tiering purposes and that supplemental NEPA analysis is needed. The DNA states that NO<sub>x</sub> emissions in the Pinedale Field Office are “beyond what has been analyzed in any existing documents . . . .” Documentation of Land Use Plan Conformance and NEPA Adequacy (March 23, 2005) at 3 (Exhibit 28). “In recent discussions between Forest Service and BLM personnel, it has become apparent that new circumstances as well as current conditions and potential impacts warrant additional [NEPA] analysis,” including updated air quality analysis. Id. at 4. In fact, the 1999 analysis in the Pinedale Anticline

EIS, adjusted to 2004 conditions, shows “we are above the threshold for additional cumulative Air Quality impact analysis in the original Pinedale Anticline EIS.” Id. at 5-6.

In addition to relying on data and analysis it has admitted is outdated, the Forest Service improperly characterized EPA’s position that supplemental NEPA analysis was not necessary at this time. In the Air Quality SIR, Terry Svalberg, USFS Air Quality Specialist, states,

In preparation for doing this report, I discussed the level of analysis necessary for this SIR with Regional Air Quality staff (R2/R4), and the Environmental Protection Agency (EPA). After much discussion, we decided that given the programmatic level of this analysis . . . that the impacts to air quality could be demonstrated not to not to have a significant impact on air quality by tiering our discussions to the Pinedale Anticline EIS.

(Exhibit 16) at 2. In fact, this was not the conclusion EPA reached. In an email correspondence from EPA’s Larry Svoboda clarifying EPA’s actual position, he stated,

In that memorandum [the Air Quality Supplemental Information Report], (page 2) there is reference to a discussion FS staff had with unnamed EPA staff implying that EPA agreed with the statement: ‘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.’ The contact referred to in the memo was informal discussion with an EPA employee, which does not necessarily represent the official position of the Agency on this matter. In fact, my inquiries into this issue discovered that more than one perspective was provided by EPA staff to the USFS on this matter. Consequently, please acknowledge that we are not prepared to support your decision at this time.

See email correspondence from Larry Svoboda, EPA to Barry Burkhardt, USFS (Dec. 16, 2005) (Exhibit 29). This position echoes the EPA’s prior documented concern that the Questar Supplemental EA exposed “important new information on the status of air quality

in the Pinedale area.”<sup>11</sup> Letter from Larry Svoboda, EPA to Don Simpson, Deputy State Director BLM (Dec. 21, 2004) (Exhibit 32). Mr. Svoboda expressed EPA’s position that given that the “rate at which wells [are] being drilled and the resulting increases in NOx emissions per year is much larger than was anticipated in the [Pinedale Anticline] EIS,” the EPA is “concerned that the [Pinedale Anticline] EIS continues to be used as the reference document for the direct and cumulative analysis for other projects in Southwest Wyoming.” Id.

Both the Forest Service and the EPA have acknowledged the futility of relying on the Pinedale Anticline EIS as a measure of present air quality impacts. The BLM, too, is on record stating that the Pinedale Anticline EIS is outdated. In the Questar Year-Round Drilling Project Supplemental EA, the BLM documented the estimated emissions of nitrogen oxides (“NOx”) in the Pinedale Anticline project area at more than two and a half times the level analyzed in the Pinedale Anticline EIS (“PAPA EIS”). BLM, Environmental Assessment for the Questar Year-Round Drilling Proposal, Sublette County, Wyoming (Nov. 2004), at 3-20 to 3-21 (Exhibit 30). The BLM stated:

Projected air pollutant emissions from construction and operation of the Pinedale Anticline development project were based upon the analysis assumptions contained in the Pinedale Anticline EIS and Technical Report.... However, actual emissions from construction have most likely exceeded those proposed in the PAPA EIS. For example, the PAPA EIS

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<sup>11</sup> The Questar EA was prepared in response to a proposal to engage in year-round drilling on the Pinedale Anticline. This EA documented that the levels of NOx emissions had reached approximately two-and-a-half times the levels analyzed in the Pinedale Anticline EIS. BLM, Environmental Assessment for the Questar Year-Round Drilling Proposal, Sublette County, Wyoming (Nov. 2004) at 3-21 (Exhibit 30). Under the Record of Decision for the Pinedale Anticline EIS, if emissions of NOx reached 693.5 tons per year, additional NEPA analysis of cumulative impacts was required. Pinedale Anticline Record of Decision at 16 (Exhibit 31). The Questar EA shows that this rate has already been greatly exceeded.

assumed that there would be eight drilling rigs operating in the PAPA at any one time. In the summer of 2004, there were 32 rigs operating in the PAPA. In addition, drilling rig horsepower exceeds that assumed in the PAPA EIS for a single rig. The PAPA EIS assumed that a single drilling rig would require 1,000 horsepower and it is now estimated that a single drilling rig horsepower in the PAPA ranges from 3,000 to 5,000 horsepower.

Id. at 3-20. As further proof that the Pinedale Anticline EIS is outdated, the BLM is currently preparing a supplemental EIS for the Pinedale Anticline, which will include an updated comprehensive air quality analysis. In its scoping notice, it states, “Since the [PAPA EIS] Record of Decision (ROD) was issued in July 2000, natural gas development in the PAPA occurred at a pace greater than was analyzed in the PAPA EIS.” Scoping Notice, Pinedale Anticline Supplemental Environmental Impact Statement, BLM Pinedale Field Office (Exhibit 33). The lack of updated air quality data is one of the reasons the BLM is preparing a supplemental EIS for the Pinedale Anticline. Given this evidence, it is therefore impossible for the BLM to claim, “Impacts to air quality have been analyzed in the Pinedale Anticline EIS and should not be significant.” BLM’s Protest Dismissal at 15 (April 5, 2006) (Exhibit 15). Parcel 176 should not be leased until this updated information is acquired and analyzed in a NEPA document.

In addition to NO<sub>x</sub> levels, the modeling conducted for the Pinedale Anticline EIS illustrated that the level of oil and gas development in the Upper Green River Basin (a level of development that has already been exceeded on the ground) threatens to increase particulate matter concentrations in the Washakie Wilderness and other Class I areas to impermissible levels. See BLM Draft EIS for the Pinedale Anticline Oil and Gas Exploration and Development Project, Sublette County, Wyoming, CALMET/CALPUFF Modeling Technical Report, at 5-15, 5-17 (Nov. 1999) (Exhibit 34). The Clean Air Act prohibits increases in concentrations of certain pollutants in excess of established maximum

increment limits for Class I areas. See 42 U.S.C. § 7473(b)(1). For particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers (PM-10), increases in pollution concentration over baseline concentrations may not exceed 8 micrograms per cubic meter in Class I areas in a 24-hour period. See 40 C.F.R. § 51.166(c). Given that development in the Pinedale Anticline and the Upper Green River Valley generally has greatly outstripped predictions and given that the Pinedale Anticline EIS documented that exceedances of particulate matter standards were possible, the BLM cannot rely on the Pinedale Anticline EIS to meet its NEPA obligations relative to particulate matter.

Even if the Pinedale Anticline EIS was not outdated, it is improper for the agencies to rely on it in order to avoid conducting a supplemental analysis. The Forest Service contends that the Pinedale Anticline Draft EIS evaluated the air quality impacts that would likely result from 90 proposed wells in Management Areas 12, 22, 23, 24, 25, 26, 31, 32 and 49. SIR at 3. In fact, the Pinedale Anticline EIS never evaluated these wells. The Pinedale Anticline EIS only considered the cumulative impacts from reasonably foreseeable oil and gas development in Management Areas 21 and 72 and did not consider Management Area 24, where parcel 176 is located. See BLM, Draft EIS for the Pinedale Anticline Oil and Gas Exploration And Development Project (Nov. 1999) at 5-4 (Exhibit 22); see also id. at 5-2 (Figure 5-1 depicting anticipated development in MAs 21 and 72), 5-6 (Table 5-2 listing only MAs 21 and 72 as Bridger-Teton National Forest areas included in reasonably foreseeable oil and gas development projects located on “BLM Pinedale Field Office Area and Adjacent USFS Lands”). Moreover, the EIS only analyzed 20 wells in these two areas, not the 90 wells expected from leasing in the nine enumerated areas. Id. Because there has never been any analysis of the air quality impacts from these projected wells, much less a



determination that the wells would not significantly impact air quality and Class I airsheds, the Forest Service's attempt to tier to the Pinedale Anticline EIS to avoid further NEPA analysis is improper and the BLM's reliance on the Forest Service's analysis is likewise improper due to the BLM's independent obligation to ensure adequate NEPA analysis before offering lease parcels for sale.

Furthermore, NEPA requires agencies to analyze the impacts resulting from the incremental impact of the proposed action (i.e. 90 new wells in the Wyoming Range) when added to other past, present and reasonably foreseeable future actions regardless of what agency undertakes such actions. 40 C.F.R. § 1508.7. Here, the agencies have relied exclusively on the Pinedale Anticline EIS without considering cumulative air quality impacts from other proposed projects outside the Pinedale area that are likely to impact Class I airsheds. The BLM has the responsibility, for example, to consider the 51,000 new wells anticipated in the Powder River Basin and how the impacts from that development will affect air quality in the Bridger and Fitzpatrick Wilderness areas, both Class I airsheds. See BLM, Final EIS and Proposed Plan Amendment for the Powder River Basin Oil and Gas Project, Vol. II, at 4-386 to 4-392 (Jan. 2003) and Vol. III, App. F (showing significant impacts to visibility in the Class I areas) (Exhibit 35).

In addition, in January 2003, the BLM estimated current projections for the Pinedale Resource Management Area at 6,900 new wells to be drilled through the year 2020. See BLM, Management Situation Analysis, Pinedale Resource Management Plan, Table 4.0-1 (Jan. 2003) (Exhibit 36). This level of currently foreseeable development represents more than three times the amount of foreseeable development analyzed in the Pinedale Anticline EIS—and, as discussed, the foreseeable development analyzed in the Pinedale Anticline EIS

has already been exceeded by existing development alone. See also Documentation of Land Use Plan Conformance and NEPA Adequacy (March 23, 2005) at 3, 5 (Exhibit 28) (noting that increased well spacing density is being pursued in the Jonah and Pinedale Anticline fields and that two unanticipated projects—the Jonah Infill and South Piney Project—are being developed). A legitimate NEPA analysis of cumulative impacts to Class I airsheds must consider the current level of anticipated oil and gas development, not outdated projections from seven years ago.

The agencies erred in not preparing a supplemental EA or EIS to address the likely effects that potential oil and gas development in the Wyoming Range, specifically in parcel 176, could have on regional air quality. By accepting the Forest Service’s decision to tier the SIR to the Pinedale Anticline EIS, a document that the Forest Service, EPA and the BLM have acknowledged is outdated and flawed, the BLM violated NEPA. To remedy this situation, a supplemental EA or EIS should be prepared that accurately analyzes the significant changed circumstances in the region’s air quality prior to issuing parcel 176.

**d. The listing of the Canada lynx and impacts to other fish and wildlife species represent significant new circumstances.**

Neither agency took a “hard look” at the impacts to the threatened Canada lynx and other fish and wildlife species that will likely result from leasing and subsequent oil and gas development. This is despite the fact that in 2003-2004 there was probably a female lynx with two kittens in the vicinity of parcel 176 and in 2004-2005 there was a documented male lynx in this area.<sup>12</sup> See Endeavor Wildlife Research Foundation, The Greater

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<sup>12</sup> Parcel 176 is located in township 35 North Range 114 West (6<sup>th</sup> Principal Meridian) and includes all of sections 20 and 29. Parcel 176 is located at the head of Beaver Creek and Horse Creek where numerous lynx occurrences have been documented. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study,

Yellowstone Lynx Study, 2004/2005 Annual Report at unnumbered page 6 (Exhibit 37). There are probably two lynx in this area. Id. at 7. As recently as 1999-2001 radio collared lynx were definitely present in this area. Supplemental Biological Assessment (Exhibit 38) at 16. Historically, lynx have been “fairly common” in this area. Id.

The Forest Service acknowledged that the EAs for oil and gas leasing that it prepared in the early 1990s, which included the MA-24 EA, did not address the lynx or several other wildlife species. SIR at 2. For this reason, the Forest Service addressed the threatened and endangered species in a Supplemental Biological Assessment (“BA”). The problem with the BA is that it limited the analysis only to the “leasing portion” of the oil and gas development process; it ignored the potential effects of development. Supplemental BA at 5. The Forest Service defines the leasing phase as one “for the potential purchaser reviewing maps, field surveys and offering bids on areas that they will drill for oil and gas.” Id. at 7. Given this impermissibly foreshortened characterization of the action being taken and its implications, it is not surprising that it found that leasing would have “no effect” on the lynx and other species.

The agencies have a duty to consider the potential direct, indirect and cumulative impacts that oil and gas drilling and extraction will have on wildlife species. See 40 C.F.R. §§ 1508.7, 1508.8; see also Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988) (discussing the importance of identifying potential conflicts between the protected species and post-leasing activities due to the cumulative impact of oil and gas activities); Thomas v. Peterson, 753 F.2d 754, 757 (9th Cir. 1985) (explaining that an EIS must cover subsequent phases of development when “[t]he dependence is such that it would be

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2004/2005 Annual Report at 11 (Exhibit 37).

irrational, or at least unwise to undertake the first phase if subsequent phases were not also undertaken“) (quoting Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974)). The Forest Service may not rely on the SIR and the Supplemental BA to satisfy its duties under NEPA because they are not NEPA documents. The BLM, in turn, may not rely on the Forest Service’s inadequate documentation to meet its own NEPA obligations. See Pennaco Energy, 377 F.3d at 1162 (explaining that unlike EAs and FONSIIs, internal agency documents or worksheets that assess whether previous NEPA documents are sufficient to satisfy the “hard look” requirement are not NEPA documents themselves); Idaho Sporting Congress, 222 F.3d at 566 (same). See also 40 C.F.R. § 1508.10 (defining an “environmental document” as an environmental assessment, environmental impact statement, a finding of no significant impact and notice of intent).

Further, neither the SIR nor the Supplemental BA was made available to the public for comment. See 40 C.F.R. § 1506.6 (stating that “Agencies shall . . . make diligent efforts to involve the public in preparing and implementing their NEPA procedures[,] . . . [p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected[,] [and] . . . [s]olicit appropriate information from the public.”). Reliance on the SIR to meet NEPA duties ensured the public was excluded from any meaningful role in the decision to offer parcel 176 for sale, especially since the 1993 EA did not even consider the lynx. See Lynn Canal Conservation, Inc., 167 IBLA 136, 145 (2005) (holding that completion of an EA and FONSI without public notice and an opportunity to comment and challenge the decision would “diminish[] or render[] meaningless” these provisions of NEPA).

In Idaho Sporting Congress, the court determined that SIRs could be used to evaluate the significance of new information (and thus whether supplemental NEPA analysis was required) but could not be used to present information and analysis that should have been included in the original NEPA document. 222 F.3d at 566-67. In order for the “new” information of the listing and presence of lynx to be deemed non-significant, and thus not requiring updated NEPA analysis, the Forest Service and the BLM were required to rationally determine “the value of the new information to the still pending decisionmaking process.” Marsh, 490 U.S. 360, 374 (1989). If the agency decides not to supplement, the courts must “satisfy[] themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information.” Id. at 378.

It is not reasonable to postpone NEPA analysis to the APD stage by arguing that any development is too speculative at the leasing stage where a non-NSO lease parcel is at issue. In Sierra Club v. Peterson, the court explained,

The conclusion that no significant impact will occur is improperly based on a prophecy that exploration activity on these lands will be insignificant and generally fruitless. While it may well be true that the majority of these leases will never reach the drilling stage and that the environmental impacts of exploration are dependent upon the nature of the activity, nevertheless NEPA requires that federal agencies determine at the outset whether their major actions can result in ‘significant’ environmental impacts.

717 F.2d at 1413-14. Where, as here, the Forest Service developed projections indicating that 90 oil and gas wells will result from the proposed leasing, the action is not too speculative to require full NEPA compliance. See Air Quality SIR at 1 (Exhibit 16) (illustrating 90 wells anticipated in nine management areas by the Bridger-Teton NF Forest plan). Neither the SIR nor the Supplemental BA even attempted to determine the

potential impacts that these projected 90 wells will have on the lynx, grizzly bear, gray wolf and other species, nor could they for purposes of NEPA since they are not NEPA documents.

The agencies have a duty to supplement outdated NEPA analyses when “significant new circumstances or information” become known. 40 C.F.R. § 1502.9(c)(1)(ii). In this case, the listing of the Canada lynx in 2000 as threatened under the ESA is a significant new circumstance. *Id.* § 1508.27(b)(9) (when potential adverse impacts on listed species or their critical habitat are implicated in a project, that project is likely significant). And, as mentioned above, the agencies failed to consider significant new information from recent studies that documented actual lynx presence in the very areas the Forest Service has offered for lease sale. *See* Endeavor Wildlife Research Foundation, *The Greater Yellowstone Lynx Study, 2004/2005 Annual Report* at 11 (Exhibit 37). Given that lynx actually occur in the area of parcel 176, the BLM cannot cite the conclusory statement from the Forest Service’s Supplemental BA that leasing would have “no effect” on the lynx and other threatened and endangered species to satisfy its NEPA obligations. The SIR should have been the first step in determining that supplemental NEPA analysis was required, not the final determination upon which the agencies defend the decision not to prepare a supplemental NEPA review.

In addition, neither the MA-24 EA from 1993, the supplemental BA nor the SIR took a hard look at the impacts that roads, well pads, pipelines, vehicular traffic and human presence created by oil and gas development could have on wildlife species not listed under the ESA. For instance, nowhere do the agencies acknowledge that lease parcel 176 lies almost entirely within a mule deer parturition area. *See* Bridger-Teton NF

Area Lease Parcels Map: “Big Game Crucial Range and Parturition Areas,” Earthjustice (Exhibit 39). Preparation of a NEPA document would have allowed the agencies to thoroughly assess the impacts that the proposed project would likely have on mule deer in the area. The agencies would have had the opportunity to consider, for example, a recent study that suggests oil and gas development in surrounding areas has contributed to a 46% decline in regional mule deer herds. See Sawyer, Hall et al. “Sublette County Mule Deer Study, Long-Term Monitoring Plan to Assess Potential Impacts of Energy Development on Mule Deer in the Pinedale Anticline Project Area” at 45 (October 2005) (Exhibit 40).

Preparing a supplemental EA or EIS also would have prompted an updated analysis of the impacts that the proposed development could have on native cutthroat trout fisheries. The Wyoming Range supports four subspecies of Wyoming’s native cutthroat trout: Bonneville River, Snake River fine-spotted, Yellowstone and Colorado River cutthroat trout. Phone conversation with Mark Sowden, Assistant Chief of Fisheries, Wyoming Game and Fish Department, Cheyenne Wyoming (May 5, 2006); see also The Wilderness Society, “The Wyoming Range, Wyoming’s Hidden Gem” at 11. (Exhibit 41). The Colorado River cutthroat trout is the most imperiled of the four subspecies and is considered sensitive by both federal and state wildlife agencies. See “Conservation Agreement and Strategy for Colorado River cutthroat trout (*Oncorhynchus calrki pleuriticus*) in the States of Colorado, Utah and Wyoming” Colorado Division of Wildlife, Fort Collins, Heggenes et al. 1991; Quinlan 1980, Miller 1957, at 11, 20 (Exhibit 42). “Some of the healthiest and purest populations of this subspecies [Colorado River cutthroat trout] occur in small stream tributaries of . . . the Wyoming

Range of Sublette County.” Wyoming Game and Fish Department, “Comprehensive Wildlife Conservation Strategy” July 12, 2005, App. II, at 475-76 (Exhibit 43). Located in parcel 176, Dry Beaver Creek is a tributary of the Green River and supports healthy populations of Colorado River cutthroat trout. Phone conversation with Mark Sowden, Assistant Chief of Fisheries, Wyoming Game and Fish Department, Cheyenne Wyoming (May 5, 2006).

Neither the MA-24 EA, the SIR nor the Supplemental BA addresses the probable impacts that can result to streams and fish from road building and oil and gas development. See MA-24 EA (Exhibit 2), SIR (Exhibit 9), Supplemental BA (Exhibit 38). Road construction can cause increased sedimentation in streams, which reduces dissolved oxygen, raises stream temperature and often covers or buries trout spawning grounds, removing any reproduction potential. See Copstead, Ronald, “Summary of Historical and Legal Context for Water/Road Interaction” Technology and Development Program, USDA, December 1997 at 2 (discussing a range of studies that documented impacts that road building has on streams) (Exhibit 44). Other risks to fisheries include actual oil spills, which can decimate entire populations of fish. In the 1970s, an oil spill along a tributary of LaBarge Creek in a nearby area of the Wyoming Range destroyed a population of pure strain Colorado River cutthroat trout, a population that was never recovered. See Binns, N.A. “Present Status of Indigenous Populations of Cutthroat Trout, *Salmo clarki*, in southwest Wyoming”, Wyoming Game and Fish Department, Cheyenne. Fisheries Technical Bulletin 2 (1977) at 28 (Exhibit 45); see also id. at 29 (explaining that “[s]pecial attention is needed to prevent future habitat degradation . . . .” and “oil exploration activities” are an “active source[] of habitat deterioration, as well as



potential mortality sources, for this trout.”).

Oil and gas development in this area of Wyoming is escalating at a pace and to a degree that few could have contemplated twelve years ago. See Greater Yellowstone Area Air Quality Assessment Update (April 2005) at unnumbered page 2 (Exhibit 46) (stating that “[o]il and gas development is rapidly expanding in south-central and southwest Wyoming.”). In deciding to offer more areas for leasing, the agencies relied on EAs that are over a decade old and that never considered the manner or extent of the environmental impacts of oil and gas development on lynx, mule deer or native cutthroat trout. The impacts to wildlife simply have not been adequately considered in a NEPA document. Given the significant and potentially severe impacts to wildlife in the area and the new information available to the agencies, particularly with regard to the mule deer and Canada lynx studies, the agencies erred by not preparing a supplemental NEPA analysis. Instead, they impermissibly relied on the SIR to avoid their NEPA obligations. Only with an updated and thorough NEPA analysis can agencies “insure a fully informed and well-considered decision.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

## **2. The BLM violated the Endangered Species Act.**

Section 7(a)(2) of the ESA requires that in preparation for authorizing any action, an agency must prepare a biological assessment (“BA”) in situations where a threatened or endangered species “may be present.” 16 U.S.C. § 1536(a)(2). A BA “shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitats are likely to be adversely

affected by the action and is used in determining whether formal consultation or a conference is needed.” 50 C.F.R. § 402.12(a).

Recognizing that any BAs prepared in conjunction with the 1990 Forest Plan and the 1990-93 EAs were badly outdated and did not include some now-listed species, such as the lynx, the Forest Service prepared a supplemental BA in 2004. See Supplemental BA (Exhibit 38). It found that ten federally listed threatened or endangered species may exist within the nine management areas proposed for oil and gas leasing on the Bridger-Teton National Forest. These include: Canada lynx, grizzly bear, bald eagle, black-footed ferret, Kendall warm springs dace, humpback chub, bonytail chub, Colorado pikeminnow, razorback sucker and Ute lady’s tresses. Id. at 4. In addition, there are two experimental populations: gray wolf and whooping crane. Id. The Forest Service concluded that issuance of oil and gas leases would have “no effect” on these listed species. Id.

A “no effect” finding “obviates the need for consultation” with the appropriate federal fish and wildlife agency—in this case the U.S. Fish and Wildlife Service. Habitat Educ. Center, Inc. v. Bosworth, 363 F.Supp.2d 1090, 1110 (E.D. Wis. 2005) (quoting Newton County Wildlife Ass’n v. Rogers, 141 F.3d 803, 810 (8th Cir. 1998); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (explaining that “if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered”).

A “no effect” determination is, however, a very difficult conclusion to sustain. If any effects can be shown to result to the listed species as a result of the project, the agency may not legally conclude that there will be “no effect” on that species. Thus, if any effects can be shown, the agency must enter a “may affect” determination and consult with the Fish

and Wildlife Service. See 51 Fed. Reg. 19,926 (explaining that “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement . . . ; see also Florida Key Deer v. Stickney, 864 F.Supp.1222, 1228 (S.D. Fla. 1994) (stating that “the applicable threshold for triggering formal consultation is very low.”).

If an agency determines that an action “may affect” a listed species, then consultation is required. As noted, the consultation requirement is easily triggered. The Fish and Wildlife Service (“FWS”) explains that the “may affect” conclusion is appropriate “when a proposed action may pose any effects on the listed species or designated critical habitat.” United States Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook (“Consultation Handbook”) at xvi (1998) at <http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm> (emphasis in original) (Exhibit 47). “When the Federal agency proposing the action determines that a ‘may affect’ situation exists, then they must either initiate formal consultation or seek written concurrence from the Services that the action ‘is not likely to adversely affect’ the listed species.” Id.; see also 50 C.F.R. § 402.14(a), (b)(1).

It is important to note that the ESA and its implementing regulations do not limit the agencies’ consultation obligations only to those situations where the proposed actions are likely to jeopardize the continued existence of a species. Instead, the requirement is that agencies must consult with the FWS on any actions that may affect a listed species. See 50 C.F.R. § 402.14(a). This allows the expert agency (i.e. FWS) to provide suggestions for reasonable and prudent measures and other steps that can be taken to reduce adverse impacts to a listed species totally aside from and in addition to preventing the extinction of a species.

See 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.13(b), 402.14(g)(6). The issuance of an oil and gas lease may not rise to the level of jeopardizing a species, but it nevertheless may affect a species and therefore consultation is required. Courts have emphasized the importance of following proper consultation procedures. “Congress has assigned to the agencies and to the Fish & Wildlife Service the responsibility for evaluation of the impact of agency actions on endangered species, and has prescribed procedures for such evaluation. Only by following the procedures can proper evaluations be made.” Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985).

**a. The Forest Service and the BLM improperly limited the scope of the proposed action to the leasing stage and failed to consider the best available data in making a “no effect” determination for the Canada lynx (*Felis lynx canadensis*).**

The lynx is a historic and current resident in the Wyoming Range portion of the Bridger-Teton National Forest and an important member of the native ecological community. This rare and beautiful animal is also one of the most severely imperiled mammals in the continental United States. The Fish and Wildlife Service listed the lynx as threatened under the ESA on March 24, 2000. See 65 Fed. Reg. 16052 (March 24, 2000); 50 C.F.R. part 17. The Fish and Wildlife Service identified the Northern Rocky Mountains/Cascades lynx population as “distinct” from other populations in the United States. 65 Fed. Reg. at 16054, 16057, 16060, 16071-16082. The Northern Rocky Mountains/Cascades area, which includes Wyoming, is “the most likely stronghold for lynx populations in the contiguous U.S.” Id. The majority of verified occurrences of lynx in the U.S. and confirmed resident populations occur in this geographic area. Id. at 16057, 16072, 16082.

There is no question that high quality lynx habitat exists in and around

Management Area 24 and that lynx are actually present in the area. There are three identified lynx analysis units (LAUs) in MA 24: Middle Beaver Creek, Horse Creek North and Horse Creek South.<sup>13</sup> Supplemental BA at 9. The Forest Service acknowledges lynx presence stating, “Lynx occupy portions of the analysis area, definitely in some of the Management Areas.” *Id.* at 17. Notably, this area and its environs [i.e. the Bridger-Teton National Forest holdings on the Overthrust Belt/Wyoming Range in northern Lincoln and western Sublette counties] are “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—Bureau of Land Management in Wyoming at 9 (Oct. 10, 2001) (Exhibit 48).

Recent biological surveys in the Wyoming Range between January 2004 and June 2005 confirmed the actual presence of lynx along Horse Creek and South Fork Beaver Creek—the very vicinity of parcel 176. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report at 11 (Exhibit 37). In the winter of 2004/2005 four “definite (DNA-based) Canada lynx detections” and “one probable lynx track and one possible lynx track” were found in the Wyoming Range/Hoback Rim sector. *Id.* at 6, 7. The biologists noted that snowshoe hares, the primary prey source for lynx, were commonly encountered on snow tracking surveys and that “[s]nowshoe hare activity in the drainages west of Merna Junction in the Wyoming Range/Hoback Rim appeared to be particularly high.” *Id.* at 7. Moreover, they stated

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<sup>13</sup> The Forest Service along with the FWS, BLM and the National Park Service delineated 55 LAUs in the Greater Yellowstone Area. These indicate boundaries and lynx habitat. Supplemental BA at 13.

that “forest structure in the Wyoming Range/Hoback Rim sector might be somewhat unique when compared to other sectors on the B-TNF. The Wyoming Range appears to have a larger subalpine fir component, with perhaps a thicker understory than the other forest sectors.” Id.

Instead of assessing the likely effects of potential post-leasing oil and gas development on the lynx, the Forest Service and the BLM only considered the effects that will likely result from the act of leasing itself. Notably, the Forest Service determined that even during the leasing stage, “There is some slight potential for displacement [to the lynx] during the mapping, looking and purchase phase of the project.” Supplemental BA at 18. “Slight potential for displacement” is an effect that triggers the consultation requirement, even if, as the Forest Service opines, the displacement will likely be “incidental rather than chronic and very seasonal (summer) rather than year round.” Id. A slight effect is not “no effect” and thus the BLM cannot totally avoid consultation. The agencies erred in not initiating consultation with the FWS based on this assessment.

The agencies’ focus on the effects to lynx from leasing alone violates the ESA’s requirement to “use the best scientific and commercial data available” in its biological assessments. 16 U.S.C. § 1536(a)(2). The agencies also have a responsibility to provide the FWS with the best scientific and commercial data available so that the FWS can properly perform an “adequate review of the effects that an action may have upon a listed species or critical habitat.” 50 C.F.R. § 402.14(d). They failed to do so here.

The agencies have long relied on the argument that at the leasing stage potential development is simply too speculative to warrant a meaningful review of impacts. See SIR at 2, 3 (Exhibit 9) (stating that the first phase of oil and gas leasing, exploration,

survey, inventory, mapping and purchase would have “no effect” on lynx or its habitat); Supplemental BA (Exhibit 38) (claiming that leasing merely involves the purchaser “reviewing maps, field surveys and offering bids on areas that they will drill for oil and gas”); Forest Service officials’ statements to Rebecca Huntington, “Conservationists Battle National Forest Drilling Leases,” Jackson Hole News & Guide, July 21, 2004 (Exhibit 49) (asserting that “[t]he act of leasing does not result in surface disturbance”; “it has no effect on the environment”; and that leasing “does not necessarily give [the lease holder] the right to adversely affect the environment”). This argument is simply not credible.

In this case, the agencies know that within Management Area 24 the “potential for the occurrence of hydrocarbons is high” and that potential development would include drilling of a discovery well and “up to ten wells within the Thrust Belt and five wells on 640 acres in Hoback Basin.” Supplemental BA at 9. These projections by the agencies already exist. Thus, it is not speculative to conceive of development actually occurring following leasing. Booming development on surrounding BLM, Forest Service and private lands near parcel 176 also illustrates that development on parcel 176 is fairly likely to occur. Therefore, it is certainly possible for the agencies to draw some conclusions about post-development impacts on lynx and other listed species.

In early 2006, for example, the Forest Service issued a Notice of Intent to prepare an EIS in response to an oil and gas company’s proposal to drill three exploratory wells in the South Rim Unit—an area less than 10 miles from parcel 176. See 71 Fed. Reg. 1731 (Jan. 11, 2006); see also Skytruth map (showing proximity between proposed exploratory wells and parcel 176) (Exhibit 50). Even without any exploratory activity,

the oil and gas company that owns the lease knows enough about the area to compare its geologic structure to the nearby successfully producing Jonah Field and boast that because of the promising geologic structure, they hope to “develop a nice field right in the middle of the forest.” Pinedale Roundup article “Plains CEO Compares Eagle Prospect to Jonah,” April 27, 2006 (Exhibit 51). The company itself is using the best scientific and commercial data to decide that \$6 million is not too much to spend to drill its first wildcat well in the South Rim Unit. See id. It is inappropriate and a violation of the ESA for the agencies, who have access to this same data, to argue that the possible impacts to listed species from post-leasing oil and gas development are too speculative at this stage so as not to warrant consultation with the FWS.

The agencies are certainly capable of drawing useful and meaningful conclusions from readily available, existing scientific information about the lynx, its habitat and the impacts of oil and gas development on the lynx. For example, the supplemental BA referenced three documents considered to part of the best scientific information available: “The Scientific Basis for Lynx Conservation” (Ruggerio et. al., 2000) the “Lynx Conservation Assessment and Strategy” (LCAS; USFS, 1999); and Lynx Conservation Agreement (CA) between the FWS and the Forest Service (USFS and USFWS, 2000) (Exhibits 52, 53, 54). Supplemental BA at 14. While this information is referenced, there is no evidence to suggest that the agencies used or applied the data to a post-leasing development scenario as required by the ESA. Moreover, a new study documenting actual lynx presence in the vicinity of parcel 176 was not considered. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report at 11 (Exhibit 37).



Had the Forest Service or the BLM considered this scientific and commercial data, they would have undoubtedly determined that the act of leasing and potential subsequent development “may affect” the lynx. Instead, the Forest Service postponed the very question of whether lynx may be affected by oil and gas development until the APD stage. The BLM ratified this impermissible decision by offering parcel 176 for sale and by now proceeding to issue the lease.

In Conner v. Burford, the Ninth Circuit Court of Appeals refused to allow the BLM, Forest Service and FWS to look only at the leasing stage and not “assess the potential impact that post-leasing oil and gas activities might have on protected species.” Id. at 1452. It recognized that while information regarding post-leasing activities was incomplete, there nevertheless was substantial information available that would allow consideration of the full potential impacts of leasing based on the best available science. Id. at 1453-54. Id. The “scope of the agency action is crucial,” it explained, “because the ESA requires the biological opinion to analyze the effect of the entire agency action.” 848 F.2d 1441, 1453 (9th Cir. 1988). Notably, the BLM responded to the Conner decision by issuing a nationwide policy statement. Information Bulletin 92-198 is applicable to all BLM State Directors: “The simple rule coming out of the Conner v. Burford case is that we will comply with NEPA and ESA prior to leasing.” (IB 92-198 (BLM 1992)) (emphasis added) (Exhibit 21). Although the BLM has acknowledged the need to engage in consultation at the leasing stage, it failed to comply with the ESA and its own policy directives in this instance.

The district court for the District of Columbia reached a different conclusion than the Ninth Circuit Court of Appeals did in Conner. It found that plaintiffs’ challenge to

the Forest Service's and the BLM's failure to initiate formal consultation with the FWS prior to issuing oil and gas leases was not ripe for review at the lease issuance stage. Wyoming Outdoor Council v. Bosworth, 284 F.Supp.2d 81 (D.D.C. 2003). It reasoned that because stipulations were in place that allowed the agencies to condition and even deny use of the leased property if the ESA required it, and because future events were not certain to occur on the leased parcels, the proper time to challenge the alleged violations was at the site-specific APD stage. Id. at 92. This lone district court decision does not obviate the importance of the Conner and in fact conflicts with other precedent.

In Sierra Club v. U.S. Dep't of Energy, the court determined that a challenge to the issuance of a road easement associated with a mine was ripe for adjudication when the plaintiffs raised the procedural claim that the Department of Energy had failed to enter into Section 7 consultation with the FWS. 287 F.3d 1256 (10th Cir. 2002). The court made its finding despite the fact that the road was subject to "such rules and regulations as may be prescribed" and where an agreement existed that no mining operations were to occur for the next twenty years. Id. at 1264. The court determined that an ESA procedural claim is ripe at the time the agency fails to comply with the procedural requirement. Certainly the selling and issuance of an oil and gas lease where no consultation whatsoever has occurred is just as ripe for adjudication by this Board as the granting of an easement where the consequences are not fully known.

Furthermore, in a recent case, the D.C. district court addressed again the issue of ripeness in the context of an agency's failure to consult with the FWS as required by Section 7(a)(2) of the Endangered Species Act. See National Wildlife Federation v. Brownlee, 402 F.Supp.2d 1 (D.D.C. 2005). The Army Corps of Engineers admitted that

some activities under the series of general, nationwide dredge-and-fill permits it issued “may affect” listed species, but it planned to consult with the FWS for each specific dredge-and-fill activity, rather than consult at the general permit issuance stage. It reasoned that it was not required to consult at this stage because no activities could proceed without site-specific Corps approval. The court disagreed and found plaintiff’s complaint ripe for review. Thus, even in the D.C. Circuit, the district court is not united in its view regarding when consultation is required.

The Forest Service made an erroneous “no effect” determination based on its decision to limit the scope of the action solely to the leasing stage and based on its failure to assess the impacts by using the best scientific and commercial data available. The BLM relied on this flawed assessment. For this reason, neither agency initiated the required formal consultation with the FWS. To remedy this error, the agencies must consult with the FWS and it must issue a biological opinion or a written concurrence that the proposed action is not likely to affect the lynx before parcel 176 can be offered issued.<sup>14</sup> See 50 C.F.R. § 402.14(a), (b)(1).

Both the NEPA and ESA violations described above are procedural in nature. Issuance of an oil and gas lease without the required supplemental NEPA analysis addressing impacts to air quality and wildlife, particularly the Canada lynx was an arbitrary and capricious agency action. Moreover, the agencies’ failure to consult with

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<sup>14</sup> Section 7(a)(2) imposes a duty on federal agencies that have discretionary involvement or control over an action to insure that actions by the agencies are not likely to jeopardize the continued existence of any endangered or threatened species. See 16 U.S.C. § 1536(a)(2); 50 C.F.R § 402.03. In this case, the BLM retains discretion over the lease sale and the Forest Service retains discretion to withdraw its consent to lease prior to the sale. As such, both the BLM and the Forest Service have independent obligations under the ESA.

the FWS based on an erroneous determination that the action would have “no effect” on lynx was contrary to the Forest Service’s own findings that even during the leasing phase there could be some effects to lynx and contrary to the mandate to use the best available scientific and commercial data. Based on the above, Appellants are likely to succeed on the merits.

**B. Appellants will suffer immediate and irreparable harm unless a stay is granted.**

Issuance of lease parcel 176 will inflict immediate and irreparable harm on the Appellants’ interests. Appellants have an interest in ensuring that the agencies conduct adequate pre-leasing NEPA analysis and ESA consultation so that decisions affecting the environment are well informed. “[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.” Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) (quoting Commonwealth of Massachusetts v. Watt, 716 F.2d 946, 952-53 (1st Cir. 1983)). For this reason, although the purchaser of lease parcel 176 is not allowed to drill immediately and must submit further paperwork prior to any actual development, the harm the Appellants would suffer absent a stay happens at this stage.

Once a non-NSO lease is issued, the question is not whether the parcel will be developed, but to what degree ground-disturbing activities may occur. The BLM’s oil and gas leasing regulations state: “A lessee shall have 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 resources in a leasehold,” subject only to lease stipulations, nondiscretionary statutory restrictions, and limited reasonable measures that would impose post-leasing mitigation. 43 C.F.R. § 3101.1-2. This means that unless drilling would violate an existing lease

stipulation or a specific, non-discretionary statutory restriction, it must be permitted once a lease is issued subject only to certain “reasonable measures” that a federal surface managing agency may, in its discretion, impose at the drilling stage to mitigate environmental harm. It should be noted; however, that all such “reasonable measures” must be “consistent with lease rights granted”—i.e., the right to fully develop and extract the leased resource. Id.; see also BLM Form 3100-11, Offer to Lease and Lease for Oil and Gas (conveying “exclusive right to drill for, mine, extract, remove and dispose of” oil and gas, subject to “reasonable measures . . . consistent with lease rights granted”) (Exhibit 55). Thus, surface exploration and development generally must be allowed, if requested by the leaseholder, once the lease is issued. See Oil and Gas Resources, 55 Fed. Reg. 10,423, 10,430 (March 21, 1990) (preamble to final Forest Service leasing regulations, stating “[t]his Department has determined that leases that are issued for National Forest Service System lands should vest the lessee with the right to conduct oil and gas operations somewhere on the lease”); BLM Land Use Planning Handbook, App. C at 16 (2000) (Exhibit 56) (“A determination that lands are available for leasing represents a commitment to allow surface use under standard lease terms and conditions unless stipulations constraining development are attached to leases.”) It is at the time of lease issuance then, that irreparable harm occurs to Appellants.

If this Board denies the Appellants’ petition for stay yet later orders the BLM to prepare a supplemental EA or EIS, the harm will have already been inflicted. To illustrate, the purchaser of the lease

would have committed time and effort to planning the development of the blocks they had leased, and the Department of the Interior and the relevant state agencies would have begun to make plans based upon the leased tracts. Each of these events represents a link in the chain of bureaucratic commitment that will become progressively harder to undo the longer it continues. Once large bureaucracies are committed to a course of action,

it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to ‘redecide.’ It is this type of harm the plaintiffs seek to avoid, and it is the presence of this type of harm that courts have said merit an injunction in an appropriate case.

Marsh, 872 F.2d at 500 (quoting Watt, 716 F.2d at 952-53.). It is thus appropriate for this Board to “recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based—a theory aimed at presenting government decision-makers with relevant environmental data before they commit themselves to a course of action.”

Id.

Declarant Linda Baker articulates the harm that she will suffer if parcel 176 is leased.

Should this parcel be leased for oil and gas development and fall to the drone of drill rigs and the incessant lights, noise and traffic of new gas wells, my enjoyment of the adjacent public acres visible from this parcel, and on the parcel itself, would be lost. The large herds of elk and mule deer that calve, nurse and summer on these quiet sections of land would fail to find refuge, and the enjoyment I find in watching this wildlife would disappear. In addition, I would be adversely impacted should there be a diminishment from drilling emissions of the hundred-mile views possible from this location.

Declaration of Linda Baker (Exhibit 13). Thus, Appellants have shown that absent a stay, their interests will be immediately and irreparably harmed.

**C. The relative harm to Appellants’ interests is significantly greater than any harm to the lease purchaser or the agencies.**

The balance of harms favors granting a stay. As discussed above, the Appellants’ harm will be immediate and irreparable absent a stay. In contrast, the purchaser of lease parcel 176 has a purely economic interest in drilling in the Wyoming Range. This should not outweigh the environmental interests advanced by the Appellants. See Idaho Sporting

Congress, 222 F.3d at 569 (finding “possible financial hardship” outweighed by irreparable environmental harms); Washington Toxics Coalition v. Environmental Protection Agency, 413 F.3d 1024, 1035 (9th Cir. 2005) (stating that “Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species.”) (internal citation omitted). Moreover, any inconvenience or delay that the BLM or the Forest Service may experience by this Board granting a stay does not constitute harm for the purposes of examining the merits of a stay. See Native Ecosystems Council v. Reese, 212 F.Supp.2d 1227, 1234 (D. Mont. 2002) (no harm to Forest Service, in preliminary injunction context, from delay occasioned by failing to comply with its own regulations); Davis v. Mineta, 302F.3d 1104, 1116 (10th Cir. 2002) (where harms are self inflicted or where “defendants are largely responsible for their own harm” the balance of equities tips toward the Appellants). A stay would protect the areas offered for lease sale from development until this Board has the opportunity to fully review the issues on the merits.

**D. The public interest weighs in favor of granting a stay.**

“The preservation of our environment, as required by NEPA and the [National Forest Management Act], is clearly in the public interest.” Earth Island Institute v. United States Forest Service, 442 F.3d 1147 (9th Cir. 2006) (granting a preliminary injunction based on the likelihood of showing success on the merits, irreparable harm and the importance of safeguarding the public’s interest in “preserving precious, unreplenishable resources”) (internal citation omitted). There is local, statewide and national interest in protecting areas of the Wyoming Range from further leasing absent updated environmental analyses. A Special Values Report in which the unique and outstanding qualities of the

Wyoming Range were highlighted was released at the beginning of 2006. See The Wilderness Society “The Wyoming Range, Wyoming’s Hidden Gem” (Exhibit 41). Diverse local stakeholders were interviewed; all testified to the remarkable values of the area. The report illustrates the tremendous public interest in keeping the Wyoming Range the way it is today—a place where multiple use values such as hunting, fishing, wildlife watching, recreation and tourism may continue to thrive and contribute to a sustainable local economy. Senator Thomas (R-WY) recently expressed his opposition to opening this pristine area to oil and gas leasing. “If I could have it my way, leasing in the Wyoming Range would have been eliminated completely. . . . I really think we should be concentrating on areas there that are already available for drilling, like the Jonah and Anticline, rather than rushing into the forested areas. I really don’t see what the rush is to get into the forest.” Pinedale Roundup article, “Senator Thomas Says Cooperation & Planning Needed to Manage Boom,” (April 19, 2006) (Exhibit 57). The state and the nation also benefit from protecting parts of the Greater Yellowstone Ecosystem, which is a national treasure and a region of the country where people come from around the world to visit and witness its many wonders.

The public interest favors a “look before you lease” approach—especially when leasing threatens the existence of other important values like abundant wildlife populations, clear trout streams and clean air. Here, the agencies have failed to take the required “hard look” prior to offering parcel 176 for lease sale. The Wyoming federal district court recently articulated the importance of NEPA’s “hard look” requirement with regard to public land management decisions in areas of special concern.

The Court is cognizant of the importance of mineral development to the economy of the State of Wyoming. Nevertheless, mineral resources should



be developed responsibly, keeping in mind those other values that are so important to the people of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle. The purpose of NEPA . . . is to require agencies . . . to take notice of these values as an integral part of the decisionmaking process.

Wyoming Outdoor Council v. U.S. Army Corps of Engineers, 351 F.Supp.2d 1232, 1260 (D.Wyo. 2005). Because the Wyoming Range is without question a special place in which the public has expressed its sincere interest and concern, it deserves cautious treatment. The widespread public interest in safeguarding this area counsels in favor of this Board in granting the stay request.

#### **IV. CONCLUSION**

For all the foregoing reasons, Appellants request that the Board grant this Petition for Stay Pending Appeal and issue a stay of BLM's decision to issue lease parcel 176 pending a decision on the merits of this appeal by the Board.

Respectfully submitted this 8<sup>th</sup> day of May, 2006.

BY:

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\* I have signed with authorization from Bruce Pendery, Attorney for Appellants. I have taken and passed the February 2006 Wyoming Bar Exam and have been recommended for admittance into the Wyoming State Bar Association. I anticipate being sworn in and admitted to the Wyoming Bar by the end of May 2006.

