

July 13, 2006

Bob Bennett, State Director  
Bureau of Land Management  
5353 Yellowstone Road  
P.O. Box 1828  
Cheyenne, WY 82003

**RE: PROTEST OF PARCELS WY-0608-173, 174, 175, 181, 188, 189, 190,  
191, 192 AND 193 TO BE OFFERED AT BLM'S AUGUST 1, 2006  
COMPETITIVE OIL & GAS LEASE SALE**

Dear Mr. Bennett,

In accordance with 43 C.F.R. §§4.450-2 and 3120.1-3, the Wyoming Outdoor Council, et al. (the "Parties") protest the BLM's offering for sale lease parcels: WY-0608-173, WY-0608-174, WY-0608-175, WY-0608-181, WY-0608-188, WY-0608-189, WY-0608-190, WY-0608-191, WY-0608-192 and WY-0608-193 that will be offered at the August 1, 2006 Competitive Oil and Gas Lease Sale.

This protest is based on the Parties' contention that the BLM and the Forest Service are in violation of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. and the Endangered Species Act, 16 U.S.C § 1536(a)(2). Moreover, the Parties contend that the Forest Service is in violation of the National Forest Management Act regulations at 36 C.F.R. § 219.19 and the Bridger-Teton Land and Resource Management Plan. These violations are described below.

**I. THE PARTIES**

The **Wyoming Outdoor Council** (WOC) is Wyoming's oldest, statewide non-profit conservation organization with over 1000 members in Wyoming, other states and abroad. WOC is dedicated to the protection and enhancement of Wyoming's environment, communities and quality of life. WOC's members live in or near the Pinedale Field Office areas where lease parcels will be offered in the August 2006 lease sale. WOC's members utilize land and water resources within and near the Wyoming Range for hiking, fishing, camping, hunting, skiing, snowmobiling and other recreational and aesthetic uses. WOC is actively involved in BLM oil and gas activities in this region and participates in all NEPA stages of BLM oil and gas projects, by involving its staff and members in attending public meetings and submitting comments. WOC has a long-standing commitment to environmentally sound oil and gas leasing and development throughout Wyoming. Thus, WOC and its members would be adversely affected by the sale of the lease parcels at issue here.

Founded in 1935, **The Wilderness Society** (TWS) works to protect America's wilderness and to develop a nationwide network of wild lands through public education, scientific analysis and advocacy. Its goal is to ensure that future generations enjoy the

clean air and water, beauty, wildlife and opportunities for recreation and spiritual renewal provided by the nation's pristine forests, rivers, deserts and mountains. In addition, TWS works constantly to ensure proper care and management of our public lands. Headquartered in Washington, D.C., TWS has eight regional offices across the country, including an office in Bozeman, Montana that works on oil and gas issues in Montana and Wyoming. Nationally, there are over 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 or other needs. Therefore, TWS and its members would be adversely affected by the sale of the lease parcels at issue.

The **Biodiversity Conservation Alliance** (BCA) is a non-profit conservation organization with hundreds of members in Wyoming and other states. BCA is dedicated to protecting Wyoming's wildlife and wild places, with a particular emphasis on public lands. BCA's members live in the Pinedale Field Office area where the parcels will be offered in the August 2006 lease sale. BCA members utilize land and water resources within and near the Wyoming Range for recreational and aesthetic uses and for scientific study. BCA is actively involved in BLM oil and gas projects in this region and participates in all NEPA stages of oil and gas projects by involving its staff and members in submitting comments and attending public meetings. BCA has a long record of advocating for environmentally sound oil and gas development in Wyoming and throughout the West. Thus, BCA and its members would be adversely affected by the sale of the lease parcels at issue.

The **Greater Yellowstone Coalition** (GYC) was founded in 1983, and has over 12,000 members, many of whom regularly use and enjoy the Greater Yellowstone area, including Yellowstone National Park and its surrounding wild lands. GYC members' recreational activities include: hunting, fishing, birding, hiking, skiing, natural history field trips, resource research, wildlife observation and enjoying places of natural beauty. In addition, many GYC members reside, recreate and work in Wyoming. GYC's Wyoming membership is actively involved in working with federal agencies, including BLM, to ensure sound management principles with an emphasis on good stewardship over our natural resources. In many areas, such as National Forests and BLM lands, GYC's members are particularly concerned with the impacts of oil and gas activities on wildlife, open spaces and recreational uses. Consequently, GYC and its members would be adversely affected by the sale of the lease parcels at issue.

The **Wyoming Wilderness Association** (WWA) was reborn in 2003 as a 501(c)(3) educational organization to give Wyoming citizens a local voice in securing and protecting additional wild watersheds, intact ecosystems, old growth forests, important wildlife habitat, and wildlife migration corridors. WWA and its members believe that these wild landscapes truly deserve lasting protection as Wilderness, especially in the Wyoming Range. WWA also educates citizens about the history and legacy of our wilderness lands. The mission of WWA is to work to protect our public wild lands because present generations are responsible for ensuring a future of wild places for people and wildlife. Thus, WWA and its members will be adversely affected

by the sale of the lease parcels at issue.

The **National Wildlife Federation** (NWF) represents the power and commitment of four million members and supporters joined by affiliated wildlife organizations in 47 states and territories, including the State of Wyoming. NWF and its affiliates have a long history of working to conserve the wildlife and wild places of the Wyoming and the West. NWF and its affiliates are concerned about the impacts of energy development on wildlife habitats and have actively participated in many federal decision-making processes regarding this development in Wyoming. Many members of NWF and its affiliates use lands and resources for hunting, fishing, wildlife watching, and other outdoor recreation that will be impacted by a decision to lease these parcels in the Wyoming Range.

Since 1936, the **Wyoming Wildlife Federation** (WWF), Wyoming's oldest and largest sportsman's organization, has advocated for wildlife and sportsmen's issues in order to maintain our long standing heritage of hunting and fishing on public lands. Leasing these areas will further reduce the amount of hunting, fishing and recreation that our membership enjoys within the Wyoming Range and on the Bridger Teton National Forest in general. Our membership lives and recreates in Wyoming because of the ample opportunities provided by the wildlife resources, the amount of undeveloped public lands, and the quality of the experience that is encountered specifically in the places such as the Wyoming Range. To lease these parcels for energy development will negatively impact our membership when development occurs by reducing the ability of the habitat to maintain herd populations due loss of available forage, reducing elk, moose and mule deer parturition areas due to either noise disturbance or actual loss of habitat, reducing water quality in streams that contain genetically pure strains of Colorado River Cutthroat trout due to increased traffic and stream crossings, and will ultimately displace hunters and anglers to other areas, increasing the pressure on the wildlife resources outside of the lease areas, and therefore altering the nature of the experience for the sportsmen and women of our organization.

The **Hoback Ranches Service and Improvement District** (HRSID) is a political subdivision of the State of Wyoming. It was formed through a process described in the Wyoming Statutes and has all the powers given to it pursuant to Title 18, Chapter 12 of the Wyoming Statutes. The taxes that the county collects are used by the District to maintain roads and fences and to protect the wildlife in the District. The District operates under various covenants, the purpose of which is to "insure the use of the property for attractive residential purposes, to prevent nuisances, to prevent the impairment of the attractiveness of the property, to maintain the natural environment and to protect the ecology of the area." There are over 250 landowners in Hoback Ranches who feel passionately about the ecology of the Wyoming Range and surrounding areas. They understand that these areas are part of a larger ecosystem and feel it is their duty to be good stewards to the land and its inhabitants. One of the main reasons these individuals have chosen to live in Hoback Ranches is its close proximity to relatively pristine public lands. The acres proposed for leasing represent an area that many of the landowners have recreated in and traveled on. If the quality of the surrounding public lands are degraded

by activities associated with potential oil and gas development, then the landowners' quality of life, including their property values and the quality of life for the animals they consider their neighbors will be unacceptably compromised. They believe they cannot sit back and allow any impacts to occur to these acres that will in any way harm the human or natural environment. Thus, HRSID and the landowners in Hoback Ranches will be adversely affected by the sale of the lease parcels at issue.

## II. INTRODUCTION: THE WYOMING RANGE

The Wyoming Range is a spectacular portion of the Bridger-Teton National Forest and an integral part of the Greater Yellowstone Ecosystem. West of Pinedale, Wyoming, the rugged Wyoming Range has peaks that rise above 11,300 feet in elevation. It is home to four species of native cutthroat trout, provides crucial habitat for the rare Canada lynx and supports thriving populations of mule deer, elk and moose. One of the reasons the range can support such diverse wildlife species is that it contains one of the largest areas of roadless land in the Bridger-Teton National Forest. The Wyoming Range is also a popular area for residents from across the state and around the country. It provides opportunities to hike, camp, ski and find solitude amid the remote backcountry. It also offers people a place to ride off-road vehicles, snow machines and mountain bikes. Outfitters and hunters return year after year to the Wyoming Range for its abundance of big game species.

Lease parcels 173, 174, 175, 181, 188, 189, 190, 191, 192 and 193 (the "August parcels") comprise 11,262.74 acres and represent nearly a third of the 44,600 acres that the Forest Service authorized for lease sale in the Wyoming Range. The wildlife values present in this part of the range cannot be overstated. For instance, this area provides critical mule deer parturition habitat and contains corridors that facilitate big game migration. See Earthjustice "Bridger-Teton NF Area Lease Parcels—Big Game Crucial Range & Parturition Areas" map (Exhibit 1). In addition, the Forest Service has identified elk parturition areas in five of the ten August parcels, necessitating a brief hiatus in operations, if the sites are developed, between May 15 and June 30. See Timing Limitation Stipulation for parcels 174, 181, 188, 191 and 192 (Exhibit 2). Colorado river cutthroat trout exist in many of the streams located within the August parcels. The Colorado River cutthroat trout, one of four subspecies of native trout found in the Wyoming Range, is the most imperiled of the 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 3). The Wyoming Game and Fish Department recognizes that "[s]ome 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 4). Bighorn sheep are also present in the area; parcel 189 contains habitat where the sheep spend the winter and give birth to young. See No Surface Occupancy Stipulation for parcel 189. (Exhibit 5).

The Wyoming Range also supports threatened and endangered species. While many have acknowledged the suitable habitat available for Canada lynx in the Wyoming Range, recent studies have confirmed lynx presence near the very area slated for lease sale in August. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report (Exhibit 6). Grizzly bears are rare in the area, but have been found in the Wyoming Range. The August parcels fall just outside the “Suitable Grizzly Bear Habitat” designation, but exist within the “Conservation Strategy Area.” See 70 Fed. Reg. 69863, Nov. 17, 2005, Figure 1 (Exhibit 7).

The August lease parcels also offer exceptional recreational opportunities. For instance, parcels 175, 191 and 192 are adjacent to the Grayback Ridge roadless area; parcels 189, 190, 191 and 193 are adjacent to South Wyoming Range roadless area and parcel 190 is adjacent to the Lander Trail, a Wyoming Historic Trail. See Earthjustice “Bridger-Teton NF Area Lease Parcels—Land Ownership and Administration” map (Exhibit 8). Moreover, parcels 189 and 190 overlap part of the Wyoming Range National Trail and parcel 190 encompasses a portion of the crest of the Wyoming Range. See No Surface Occupancy Stipulation for areas within parcel 190 (Exhibit 9) and parcel 189 (Exhibit 5). The Forest Service stipulations ensure a 1/4 mile buffer on either side of the Wyoming Range National Trail and a 1/2 mile buffer on either side on the Wyoming Range crest and on either side of the Lander Trail. Id. The reason for this buffer is to “maintain the quality of recreational experiences.” See id. The quality of a person’s recreational experience, however, is based on one’s entire backcountry experience including the viewshed from the trail, not only the condition of the trail itself. If this area is leased and development occurs, the buffer will not remedy the fact that oil and gas development will negatively affect forest visitors’ backcountry experiences for years to come.

Oil and gas development in the Upper Green River Valley and surrounding lands is escalating at a pace and to a degree that few would have contemplated sixteen years ago. Yet, in making the decision to offer these lease parcels for sale, the Forest Service and the BLM relied on outdated environmental analyses that are tied to an even more outdated Forest Plan and its related NEPA documentation. Because the Bridger-Teton National Forest is currently in the process of revising its forest plan, it is appropriate for the agencies to postpone any lease sales until the Forest Service updates its oil and gas suitability and availability determinations. If the agencies opt instead to proceed with the lease sale, at minimum, they must remedy the federal law violations set forth below.

### **III. THE LEASE SALE VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.**

The August parcels represent the last of the 44,600 acres the Forest Service has stated it would consent to lease at this time. This acreage has been offered for lease sale in three prior sales: December 2005, April 2006 and June 2006; the August 1, 2006 sale is the fourth and final sale. The NEPA violations the Parties alleged in the three prior protests are the very ones we raise in this instance.

The BLM dismissed the Parties' December 2005 and April 2006 lease sale protests. See BLM April 5, 2006 Dismissal of December 2005 Lease Sale (Exhibit 10); see also BLM May 30, 2006 Dismissal of April 2006 lease sale (Exhibit 11). Three of the parties who protested the December lease sale then timely appealed BLM's dismissal and submitted a petition for stay pending appeal to the Interior Board of Land Appeals. On July 10, 2006, the Board granted the stay petition. Wyoming Outdoor Council, et. al. IBLA 2006-184, July 10, 2006 Order (Exhibit 12). In light of this decision, in which the Board found that appellants were "likely to succeed on the merits of their appeal regarding NEPA compliance by BLM" we urge the BLM to withdraw the August parcels from the upcoming lease sale. Id. at 10. The Board's decision should be the necessary impetus for the BLM to halt the new August sales in the Wyoming Range as well as to retract the sales that occurred in April and June.<sup>1</sup>

For the record, however, we will reiterate our concerns regarding the Forest Service's and the BLM's deficient NEPA analysis. Neither the BLM nor the Forest Service took the legally required "hard look" at the impacts associated with oil and gas development prior to offering the August parcels for competitive lease sale. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). In the oil and gas leasing context, NEPA requires an agency to adequately assess the environmental impacts of reasonably foreseeable post-leasing oil and gas development before any leases are issued. See Pennaco Energy, Inc. v. U.S. Dept. of Interior, 377 F.3d 1147 (10th Cir. 2004); Park County Resource Council v. U.S. Dept. of Agriculture, 817 F.2d 609 (10th Cir. 1987), Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988); Colorado Env'tl. Coalition, 149 I.B.L.A. 154 (1999).

The Forest Service prepared Environmental Assessments (EAs) for Management Areas 24 and 25, the areas in which the August parcels reside, over thirteen and sixteen years ago respectively.<sup>2</sup> See Environmental Assessment for Making the Oil and Gas Leasing Decision for Specific Lands Within the Horse Creek (MA 24) Management Area ("MA-24 EA") and the Decision Notice ("DN") and FONSI, 1993. (Exhibit 13); see also Environmental Assessment for Making "Object" or "No Object" Decisions About Oil and Gas Leasing Within Management Areas 25 and 26 and the Decision Notice and FONSI, 1990 (Exhibit 16). The EAs state that they are tiered to the Final Environmental Impact Statement and Record of Decision that accompany the Bridger-Teton Land and Resource Management Plan from 1990. See id.

In 2003, the Forest Service gathered an Interdisciplinary Team of its own employees to look over the environmental assessments for the nine management areas where leasing was authorized potentially to occur. Management Areas 24 and 25 are two

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<sup>1</sup> Issuance of the December lease is stayed by the IBLA's July 10, 2006 order.

<sup>2</sup> Phone conversation with Big Piney District Ranger Greg Clark, June 6, 2006 confirmed that the August parcels fall within Management Areas 24 and 25. It appears from the maps, however, that in addition some parcels may also fall within Management Areas 12, 23 and 26. The EAs for MAs 12 and 23 were finalized in 1991. (Exhibits 14 and 15). Management Area 26 was analyzed in conjunction with MA 25 and the EA was finalized in 1990. (Exhibit 16).

of those nine areas.<sup>3</sup> As a result 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 17). In the very next sentence, however, the Forest Service concedes that three major changes not even contemplated, let alone analyzed in the original EAs, “warrant 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 current development exceeded the Reasonably Foreseeable Development (RFD) assessment from 1987. *Id.* These changed circumstances not only warrant “review,” but require the agencies to prepare a supplemental NEPA analysis.

**a. The Forest Service and the BLM violated NEPA by failing to subject the August lease parcels to full, pre-leasing NEPA analyses.**

The Forest Service has repeatedly justified its decision to delay additional NEPA analysis until the Application for Permit to Drill (“APD”) stage by asserting that the leasing phase of oil and gas development is no more than a paper transaction that has no on the ground impacts. *See, e.g.*, SIR at 2, 3 (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 and that “a more detailed NEPA analysis will be required if the Forest Service is ever presented with an APD”); Forest Service Supplemental Biological Assessment for Oil and Gas Leasing, Kemmerer, Big Piney, Grey’s River and Jackson Ranger Districts (“Supplemental BA”) (Jan. 15, 2004) at 7 (Exhibit 18) (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 19) (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”).

Like the Forest Service, the BLM downplays the need for further pre-leasing environmental analyses. In an EA for a non-Forest Service surface parcel that was sold in the December 6, 2005 lease sale, the BLM states, “[A]dditional NEPA documentation would be prepared at the time an APD(s) is (are) submitted.” EA for parcel WY-0512-175) at 2 (Aug. 16, 2005) (Exhibit 20) (stating also that on-the-ground impacts would potentially occur when a lessee applies for and receives approval to explore, occupy and/or drill on the lease and that site-specific NEPA analysis is not possible absent concrete proposals). Although this approach arguably does not constitute a “hard look”, at least the BLM attempted to comply with NEPA prior to the sale of this parcel. In contrast, the BLM has not prepared any NEPA analysis for the August parcels. It relies on the Forest Service to be responsible for any pre-leasing NEPA documentation on its

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<sup>3</sup> Management Areas 12, 23 and 26 were also part of the nine MAs considered appropriate for oil and gas leasing.

surface lands. Phone conversation with Margaret Lucero, BLM Division of Minerals and Lands (Nov. 1, 2005).

Contrary to the BLM's current operating procedures, the BLM does have an independent responsibility to determine whether it will lease the August parcels and thus it also 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") (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"); 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 responsibilities with respect to the proposal—has an independent legal obligation to comply with NEPA."). Thus, the BLM, too, violates NEPA if it makes leasing decisions in reliance on an inadequate Forest Service NEPA analysis.

**i. Issuance of a non-"no surface occupancy" lease represents an irretrievable commitment of resources that requires full NEPA compliance.**

The August 1, 2006 Competitive Oil and Gas Lease Sale offers ten lease parcels in the Wyoming Range, all of which are located on Forest Service land. Of these ten parcels, two are non-no surface occupancy ("non-NSO") leases: 173 and 175. The remaining eight parcels contain areas in which no surface occupancy ("NSO") stipulations apply. This does not mean, however, that of these eight parcels each is entirely covered by a NSO stipulation. For example, parcels 174, 181, 188, 191, 192 and 193 preclude surface occupancy only on slopes that measure greater than forty percent and on administrative sites. In parcels 189 and 190, no surface occupancy is allowed within 1/4 mile of the Wyoming Range National Trail and within a 1/2 mile on either side of the Lander Trail (a historic trail) and the crest of the Wyoming Range. Because there remain areas within each parcel that allow for some amount of surface occupancy, none of the parcels are entirely NSO leases.

The Parties realize that issuance of the lease itself usually does not create immediate surface disturbances; however, the agencies' statements fail to acknowledge the significant commitment to development that arises upon issuance of a non-NSO federal oil and gas lease. 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. 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 resource 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, at 1 and 2 § 6 (Exhibit 21) (conveying “exclusive right to drill for, mine, extract, remove and dispose of” oil and gas, subject to “reasonable measures . . . consistent with lease rights granted”). 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 22) (“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.”)

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. In contrast, non-NSO leases, like the August parcels, create 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.

The United States District 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 biological impacts.” Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983). In that case, it found that the decision to allow surface disturbing activities for non-NSO leases was made *at the leasing stage*. See id. at 1414. 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).

The IBLA also has supported the assertion that NEPA requires full pre-leasing NEPA compliance for non-NSO oil and gas leases. In Southern Utah Wilderness Alliance, the IBLA 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).

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 offered at the December 6, 2005 lease sale 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.”) 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 23). This position is bolstered by an order of the Secretary of Interior, holding that “[IBLA] is not necessarily bound to apply a circuit 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).

Even under the narrowest reading of 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 the August parcels then, is not necessarily whether the agencies should have prepared an EIS rather than an EA. The issue is that the agencies have failed entirely to take the “hard look” that NEPA

requires in either a supplemental EA or an EIS. Instead, the agencies attempt to rely on the Forest Service SIR, which in turn relied on the woefully out of date Environmental Assessments from the early 1990s. 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.

**b. The Forest Service and the BLM violated NEPA by failing to prepare a supplemental NEPA analysis.**

An agency must prepare supplemental 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). If the Forest Service had found that no new circumstances had arisen over the last thirteen years since it prepared the MA-24 EA (fifteen years since it prepared MA-12 and MA-23 EAs and sixteen years since it prepared the MA-25/26 EA), it and the BLM, may have been correct to rely on it without supplementation. The opposite was true, however. The Forest Service acknowledged three new issues that "warranted review": 1) air quality; 2) the presence of Canada lynx, now a listed species under the Endangered Species Act; and 3) whether current development exceeded the Reasonably Foreseeable Development (RFD) assessment from 1987. SIR at 1.

Instead of preparing a supplemental EA to address these 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. This will not suffice for NEPA compliance. 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"); see also Pennaco, 377 F.3d at 1162 (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). The Forest Service's candid acknowledgement of these significant new circumstances supports the Parties' contention that supplemental NEPA analysis is required. 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).

**i. Neither the Forest Service nor the BLM prepared a supplemental NEPA analysis to address the changed circumstances related to air quality.**

Both the Forest Service and the BLM have 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 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 Supplemental Information Report (“Air Quality SIR”) for Gas 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 24) at 1. In fact, the EAs for Management Areas 12, 23, 24, 25 and 26 do not address air quality issues at all.

Perhaps the old environmental assessments cannot be faulted for failing to address a concern that was simply not an issue sixteen years ago. It is an issue today, however, and the agencies are responsible for supplementing outdated analyses when new circumstances arise. The Forest Service concedes 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.” Id.

a. **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, approximately 25 air miles east of the August parcels. See Pinedale Anticline Draft EIS excerpt (Exhibit 25). 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>4</sup> (Exhibit 26). Today, there are 3,102 oil and gas wells in Sublette County.<sup>5</sup> See Data from Wyoming Oil and Gas Conservation Commission, June 20, 2006; <http://wogcc.state.wy.us/CntySummary.cfm?oops=ID82631> (Exhibit 27). Thus, to date, the Pinedale Anticline EIS’s reasonably foreseeable development scenario of 1,944 new

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<sup>4</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>5</sup> The total 3,102 represents the 2,753 completed wells and 349 spuds.

and/or replacement wells has already been exceeded by 1,158 wells based on already existing development in Sublette County alone.

The Forest Service and the BLM are not unfamiliar with the duty to supplement outdated analyses. Just last year, the agencies mandated that a supplement be added to the NEPA analysis contained in the Riley Ridge EIS partly based on the fact that present NOx emissions were far in excess of those analyzed in the Pinedale Anticline EIS. See Letters from Kniffy Hamilton and Prill Meham to ExxonMobil Oil Corporation (Dec. 8, 2004 & June 7, 2005) (Exhibit 28). Thus, it defies reason that the Forest Service consented to lease parcels in the Wyoming Range 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, it has gone on record stating that the Pinedale Anticline EIS is outdated. The Forest Service simply may not tier its air quality analysis to a document it admits no longer accurately reflects the impacts to air quality in the Pinedale Area.

The Forest Service also improperly characterized EPA’s position with regard to the level of analysis required to authorize leasing in the Wyoming Range. In the Air Quality Supplemental Information Report, 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 have a significant impact on air quality by tiering our discussions to the Pinedale Anticline EIS.” (Exhibit 24) 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 Mr. Svoboda’s prior documented concern that the Questar Supplemental EA exposed “important new information on the status of air quality in the Pinedale area.” Letter from Larry Svoboda, EPA to Don Simpson, Deputy State Director BLM (Dec. 21, 2004) (Exhibit 30). Mr. Svoboda expressed EPA’s position that given the “rate at which wells [are] being drilled and the resulting increases in NOx emissions over what was predicted in by the [Pinedale Anticline] EIS

analysis....” EPA is “concerned that the [Pinedale Anticline] EIS continues to be used as a 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 keenly aware 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 31). 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 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. Phone conversation with Matt Anderson, BLM (March 15, 2006) confirming that an updated air analysis will be included in the Draft EIS. 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 32). The lack of updated air quality data is one of the reasons the BLM is preparing a supplemental EIS for the Pinedale Anticline. New leasing decisions should not go forward until this updated information is acquired and analyzed.

In addition to NOx 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 locations. 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 33). 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).

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 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. Moreover, the EIS only analyzed 20 wells in these two areas, not the 90 wells expected from leasing in the nine enumerated areas. 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 in 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.

Moreover, 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 almost 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 Forest Service 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 (addressing air quality) (Exhibit 34).

**b. The Jonah Infill Project Air Quality Analysis cannot save the lack of analysis in the Pinedale Anticline Air Quality Analysis.**

In the SIR and Air Quality SIR brief passing mention is made to the fact that the BLM had initiated preparation of the Jonah Infill Drilling Project EIS when the Forest Service was preparing its SIRs. See SIR at 3-4, 5 (Exhibit 17); Air Quality SIR at 2 (Exhibit 24). All that is said is that the Forest Service was "assured [by the consultant preparing the Jonah Infill EIS] . . . that the 90 wells from the nine Management Areas will be included in their modeling as [Reasonably Foreseeable Development] sources." SIR at 3-4, Air Quality SIR at 2. It was claimed that the Jonah Infill EIS would be released in the spring 2004. SIR at 5. These passing mentions of an upcoming NEPA

analysis cannot make up for the lack of a currently valid analysis in the Pinedale Anticline EIS because: 1) the Jonah Infill EIS did not inform the Forest Service's and BLM's decision-making regarding whether the leases at issue here should be offered for sale and under what conditions they should be offered; and 2) in any event the Jonah Infill EIS did not consider the environmental impacts of potential oil and gas development on these parcels.

As noted, the Forest Service claimed that the Jonah Infill EIS would be released in the spring of 2004, just after the Forest Service prepared the February 6, 2004 Air Quality SIR and the February 25, 2005 SIR. In fact, the Jonah Infill Draft EIS was not released until a year later in February 2005 and the final EIS was not released until January 2006, with the Record of Decision not signed until March 2006. See <http://www.wy.blm.gov/nepa/pfodocs/jonah/index.htm> (BLM's Jonah Infill EIS website). Clearly the Jonah Infill EIS did not inform either the Forest Service's or BLM's NEPA analysis regarding the potential air quality impacts of development on the lease parcels at issue here. It did not even exist when the SIRs were prepared, did not exist in draft form until a year after the SIRs were prepared, and was not finalized until shortly before the actual sale of the leases. Invoking the Jonah EIS as providing supplemental NEPA analysis for the deficient Pinedale Anticline EIS would be nothing but a post hoc rationalization entitled to little or no respect from this board.

The Jonah EIS, finalized over two years after the SIRs that analyzed sale of these lease parcels, did not and could not have provided any environmental analysis regarding air quality impacts because it was not even in existence at the time the SIRs were prepared. Moreover, it did not and could not have informed any decisions regarding the need for stipulations on the parcels, or any other consideration regarding environmental impacts and how or whether to mitigate them. As discussed above, a NEPA analysis must be prepared prior to decision-making, not invoked post hoc two years after the NEPA analysis and leasing decision is made. See, e.g., Wyoming Outdoor Council et al. (on reconsideration), 150 IBLA 259 (2002). Consequently, the Jonah Infill EIS in no way supplements the Pinedale Anticline EIS relative to the decision to sell the lease parcels at issue here.

If BLM or the Forest Service wants to use the Jonah Infill EIS as part of their NEPA compliance relative to these lease parcels, they should have waited for some level of NEPA analysis to be complete—at a minimum release of the Jonah Infill Draft EIS—and then conducted an analysis to determine if this NEPA document did in fact supplement the deficient Pinedale Anticline EIS, and if it did, whether its findings revealed environmental impacts not previously considered or of a magnitude not previously revealed, and whether additional stipulations or other mitigation were required. This was not done. Instead, if the Jonah EIS is invoked as a means to meet the agencies' NEPA obligations the agencies must have assumed the as-yet-unprepared Jonah Infill EIS would serve as a valid supplement and that it would lead to no different conclusions than had already been reached. This cart before the horse approach is impermissible.



Even if it is assumed for purposes of argument that the Jonah Infill EIS serves as an attempt to supplement the Pinedale Anticline EIS, the Jonah Infill EIS nevertheless ignored many relevant environmental impacts with respect to the Management Areas where the lease parcels at issue here are located. The ninety wells that are projected to be drilled in the Forest Service Management Areas were considered in the Jonah Infill Final EIS as reasonably foreseeable development (RFD) only for purposes of analyzing the cumulative impacts of nitrogen oxides (NO<sub>x</sub>). 1 Final Air Quality Technical Support Document for the Jonah Infill Drilling Project Environmental Impact Statement (“Final Air Quality TSD”) at C-40 (Exhibit 35). This means that the cumulative impacts of NO<sub>x</sub> resulting from these wells as well as the other emissions sources considered in the Jonah Infill EIS (including from the Jonah Infill Project itself) received some consideration in the Jonah Infill EIS. See id. at 16 (discussing regional emissions inventory), 49-55 (discussing input of Appendix C data into modeling).

But considering just the cumulative impacts of NO<sub>x</sub> is far off the mark in terms of representing a comprehensive analysis of the air quality impacts of development on the April lease parcels. As Table C.12 makes clear, the Jonah Infill EIS totally ignored the impacts of sulfur dioxide (SO<sub>2</sub>), and particulate matter (both coarser PM<sub>10</sub> and very fine PM<sub>2.5</sub>). Final Air Quality TSD at C-40. This means that the acid deposition and visibility degradation issues resulting from wells on the Forest Service Management Areas that the Forest Service itself views as significant issues were not considered with respect to these pollutants, not to mention the human health consequences of these pollutants. Air Quality SIR at 1 (identifying these issues as significant). See, e.g., Final Air Quality TSD at 64-66 (noting that deposition of pollutants causing acidification includes both nitrogen (N) and sulfur (S) compounds and that PM<sub>2.5</sub> and sulfate, SO<sub>4</sub>, contribute to visibility degradation). Furthermore, the Jonah Infill EIS totally failed to consider the consequences of ozone pollution other than the direct impacts resulting from the Jonah Infill Project itself (“near field” impacts of ozone in the Jonah Field itself and immediately surrounding areas were the only impacts considered). Id. at 19, 41, 57. Ozone is an important contributor to degradation of visibility and other air quality related problems in Class I areas. See U.S. Environmental Protection Agency, Six Common Air Pollutants (Exhibit 36). Clearly the Jonah Infill EIS does not provide anything but the most minimal analysis of air pollution issues relative to the lease parcels under consideration here, and in fact it totally ignored most air quality impacts and issues with respect to these lease parcels.

At most, all the Jonah Infill EIS did was consider the cumulative impacts of the wells likely to be drilled on these leases, and then only with respect to NO<sub>x</sub>. But the Jonah Infill EIS provides no analysis of the direct or indirect effects of the wells that might be drilled on these parcels. See 40 C.F.R. § 1508.8 (defining environmental effects to include direct and indirect effects). An EIS that provides no analysis of the environmental impacts of the action under consideration does not meet NEPA requirements. In fact, the only analysis of the impacts of the action appears in the Air Quality SIR where the near field and far field impacts of the “project alone” are mentioned. Air Quality SIR at 2 (Exhibit 24). Yet this analysis is not based at all on the

Jonah Infill EIS, relying solely on the out-of-date Pinedale Anticline EIS.<sup>6</sup> The Jonah Infill EIS also provides no consideration of the impacts from hazardous air pollutants that might result from the development of oil and gas wells in these Management Areas. It is silent regarding whether violations of the incremental increases in SO<sub>2</sub> and PM that are allowed under the Clean Air Act in Class I and Class II areas will be violated or not as a result of any oil and gas development in Management Areas 12, 23, 24, 25 and 26.

Given all of these shortcomings, the Jonah Infill EIS cannot save the NEPA deficiencies evident in the Pinedale Anticline EIS and it provides no more support for BLM and the Forest Service's decision to sell these parcels than does the Pinedale Anticline EIS. The agencies erred in not preparing a supplemental environmental assessment to address the likely effects that proposed oil and gas development in the Wyoming Range will have on air quality. To remedy this situation, a supplemental air quality analysis must be prepared that will accurately reflect these changed circumstances.

**ii. Neither the Forest Service nor the BLM prepared a supplemental NEPA analysis to address the changed circumstances related to new threatened and endangered species.**

Neither agency has taken a “hard look” at the impacts to threatened Canada lynx and other wildlife species that will likely result from leasing and subsequent oil and gas development. The Forest Service acknowledged that the EAs for oil and gas leasing that it prepared in the early 1990s did not address the lynx or several other plant and wildlife species. SIR at 2. For this reason, the Forest Service addressed these species in a Supplemental Biological Assessment. The problem with this assessment is that it limited the analysis only to the “leasing portion” of the oil and gas development process. Supplemental BA at 5 (Exhibit 18). The Forest Service defines this 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 the manner in which the Forest Service has characterized the leasing stage, it is not surprising that it found that leasing will have “no effect” on the lynx, nine other threatened and endangered species and two experimental species.

The agencies have a duty to consider the probable 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. It is not sufficient to postpone analysis by arguing that any development is too speculative at the leasing stage where a non-NSO lease parcel is at

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<sup>6</sup> And with respect to the Pinedale Anticline EIS, there is no basis for the assertion that just because well density may prove to be less in Management Areas 12, 23, 24, 25 and 26 than in the Pinedale Anticline “the reasonable assumption is that with wells spaced further apart, there would be less emissions and less impact.” Air Quality SIR at 2 (Exhibit 24). This unsupported assertion requires at least some support. The level of air pollution does not depend just on well density, it is also influenced by many other factors, such as wind and weather conditions, which may or may not be equivalent in the low-lying, relatively flat Pinedale Anticline desert environment and the higher elevation, forested, mountain terrain in the Wyoming Range where Management Areas 12, 23, 24, 25 and 26 are located.

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 has already developed projections indicating that 90 oil and gas wells will result from the proposed leasing, the action is arguably not too speculative to require full NEPA compliance. See Air Quality SIR at 1 (Exhibit 24) (illustrating 90 wells authorized in 9 management areas by the Bridger-Teton NF forest plan). Neither the SIR nor the Supplemental BA even attempted to determine the likely impacts that these projected 90 wells will have on the lynx, grizzly bear, gray wolf and other species. In addition, neither document acknowledges the critical areas for elk and mule deer parturition present in the August parcels. With the anticipated spacing of one well per 640 acres, these projected wells could impact nearly 58,000 acres of wildlife habitat on the Bridger-Teton National Forest. Nowhere in the documents does the Forest Service discuss the impacts to wildlife that will likely result from roads, well pads, pipelines, vehicular traffic and human presence.

Because the Forest Service may not rely on the SIR or the Supplemental BA to satisfy its duties under NEPA, the BLM, in turn, may not rely on the Forest Service’s inadequate documentation. Neither the SIR nor the Supplemental BA constitutes a NEPA document. 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). 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.”) Consequently, not only do the SIR and the Supplemental BA fail to meet the Forest Service’s NEPA obligations, they also fail to meet the BLM’s independent duty to ensure adequate NEPA compliance before offering lease parcels for sale.

In Idaho Sporting Congress, the court found that “the Forest Service’s SIRs [were] devoted in part to discussing information that was truly new.” 222 F.3d at 567 n.3.

The court found that it was “inconsistent with NEPA for an agency to use an SIR, rather than a supplemental EA or EIS, to correct this type of lapse.” *Id.* at 567. It reasoned that if agencies were allowed to cure deficiencies in an EA or EIS through SIRs or other non-NEPA documents, the requirements under NEPA would be “superfluous.” *Id.* Here, in order to comply with NEPA, the agencies must prepare a supplemental environmental document, i.e. an EA or EIS to address the likely impacts of the proposed oil and gas development on wildlife species not considered in the environmental assessments for Management Areas 24 and 25.

**iii. Neither the Forest Service nor the BLM prepared a supplemental NEPA analysis to address the changed circumstances regarding the impacts oil and gas development have had on the Sublette mule deer herd.**

The Sublette herd unit is a population of mule deer that use areas of the Wyoming Range, including the Management Areas in which the August parcels are located for its summer range.<sup>7</sup> Phone conversation with Dean Clause, WGFD Wildlife Biologist, June 7, 2006; see also Bridger-Teton NF Area Lease Parcels Map: “Big Game Crucial Range and Parturition Areas,” (showing mule deer parturition areas overlapping the August lease sale area) (Exhibit 1). This herd winters on lower elevations on BLM lands on “the Mesa”, also known as the Pinedale Anticline, one of Wyoming’s largest active natural gas fields.

In the late 1990s, because of the increased energy development that the Pinedale Anticline was slated to experience and out of concern for resident ungulate populations who rely on this area for their survival, the Sublette mule deer herd became the subject of a multi-phased study. The first part of the study was initiated at the request of several interested parties in order to gather baseline or “pre-development” data.<sup>8</sup> See Sawyer, Hall and Fred Lindzey “Sublette Mule Deer Study”, Wyoming Cooperative Fish and Wildlife Research Unit, March 2001 at 1 (Exhibit 37). Findings from this report were published in a peer-reviewed publication. See Wildlife Society Bulletin 2005, 33(4): 1266-1273 (Exhibit 38).

The study emphasized the importance of summer, transition, winter and severe winter relief ranges, stating:

The relative importance of each [seasonal range] will likely change annually but loss or degradation of one will not be compensated for by the others, and the mule deer population will suffer in the long run. Managers should recognize the importance of all seasonal ranges for maintaining

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<sup>7</sup> The Wyoming Game and Fish Department classifies groups of mule deer by geographic area into “herd units;” a herd unit is a distinct group of animals that represents no more than 10% interchange with nearby populations. Phone conversation with Dean Clause, WGFD Wildlife Biologist, June 7, 2006.

<sup>8</sup> The Final Report was prepared for Ultra Petroleum, which contributed the majority of the study’s funding, Wyoming Game and Fish Department, the BLM, the Forest Service, the Mule Deer Foundation and the Rocky Mountain Elk Foundation.

healthy and productive mule deer populations.

Sawyer, Hall and Fred Lindzey “Sublette Mule Deer Study”, Wyoming Cooperative Fish and Wildlife Research Unit, March 2001 at 43. The wildlife biologist authors tracked the movements of 157 radio-collared deer between February 1998 and October 2000. *Id.* at 4. They found that most deer from the Sublette herd (96 percent) seasonally migrated between 40-100 miles north from the Pinedale Anticline to portions of five different mountain ranges, including the Wyoming Range in the summer months. *Id.*

In 2005, Phase II of the Sublette Mule Deer Study was released. *See* Sawyer, Hall et al., “Sublette County Mule Deer Study (Phase II): Long-Term Monitoring Plan to Assess Potential Impacts of Energy Development on Mule Deer in the Pinedale Anticline Project Area (October 2005) (Exhibit 39). This report documented a “disconcerting” 46 percent decline in mule deer populations within the Sublette mule deer herd between 2002 and 2005 in the Pinedale Anticline project area, with no drop in the nearby control area population where oil and gas development is not occurring. *Id.* at 44-46. This herd is presently experiencing severe declines based on disruption of its winter habitat largely due to oil and gas development, yet to date neither the Forest Service nor the BLM has considered the impact that simultaneous oil and gas development on the herd’s summer and winter ranges could have on this population.

Recent surveys by the Wyoming Game and Fish Department documented a 42 percent fawn mortality in the Sublette mule deer herd over the winter of 2005-2006. Pinedale Roundup article “42% of Sublette Herd Fawns Presumed Dead,” May 25, 2006 (Exhibit 40). “The loss is the third highest recorded in the past fourteen years, and the highest loss during a mild winter.” *Id.* The article states, too, that this data will be shared with researchers studying the effects of oil and gas development on the Sublette herd and that because of these sharp declines, future hunting quotas will have to be adjusted. *Id.*; *see also* Pinedale Roundup article “Deer herds down nearly 30%,” April 6, 2006 (explaining that Wyoming Game and Fish biologists point to oil and gas development as playing a role in the Sublette herd decline) (Exhibit 41). Thus, the state’s biologists are on record expressing concern about the cumulative impacts oil and gas development is having on the region’s mule deer populations. These documented declines are a significant new circumstance that warrants supplemental NEPA analysis.

The agencies have failed completely to address significant new circumstances like the cumulative impacts increased regional oil and gas development has had and could continue to have on mule deer populations. The Forest Service and the BLM are responsible for thoroughly analyzing direct and indirect impacts that oil and gas development could have on wildlife species like mule deer. *See* 40 C.F.R. §§ 1508.8(a) (defining direct effects as those “caused by the action” and occurring “at the same time and place”); 1508.8(b) (defining indirect effects as those “caused by the action” and although “later in time or farther removed in distance” the effects are still “reasonably foreseeable.”) NEPA also requires the agencies to consider any cumulative impacts oil and gas development might have on wildlife species. *See* 40 C.F.R. § 1508.7 (defining a cumulative impact as one that “results from the incremental impact of the action when

added to other past, present and reasonably foreseeable future actions....”).

The agencies have not considered how other actions in the vicinity of the August lease parcels, like the full field development slated for the Pinedale Anticline, could impact the Sublette deer herd prior to making their decision in 2005 to lease the 44,600 acres in the Wyoming Range (including the August parcels) even though the studies have shown that the mule deer population in the Wyoming Range and the Pinedale Anticline is inextricably linked. This is a violation of NEPA that can only be remedied by preparing a supplemental NEPA analysis. A cumulative impacts analysis is particularly necessary in this instance because mule deer are a migratory species that require geographically distinct habitat at different times during the year for their survival.

In Natural Resources Defense Council v. Hodel, the court found that the FEIS at issue was inadequate in that it failed to address the cumulative impacts to migratory species from proposed oil and gas development. 865 F.2d 288 (D.C. Cir. 1988). Petitioners in that case argued that had Secretary of Interior Hodel considered the “synergistic” effect of development in two regions where off-shore oil and gas lease sales were proposed, he might have “cancelled or deferred some of the lease sales in the two regions so that migratory species [whales and salmon] would not be exposed to maximum risks throughout their habitat simultaneously.” Id. at 297. The court found that the FEIS only devoted a few conclusory sentences to the “inter-regional” cumulative impacts to migratory species. Id. at 299. It required the Secretary to rewrite this section of the document, suggesting that in order to comply with NEPA the Secretary should

[I]dentify the various migratory species and the full routes of migration, describe the [oil and gas and non-oil and gas] activities along those routes, and state the synergistic effect of those activities on the migratory species. The Secretary could support such a presentation with references to scientific studies and other materials so that a decisionmaker would have ready access to the information underlying the Secretary’s findings and conclusions. Finally, the Secretary could, consistent with NEPA’s requirement that he consider alternatives to the proposed action, examine alternatives to simultaneous development that would mitigate any synergistic impacts on migratory species, such as staggering development.

Id. at 300.

While the court found the analysis of cumulative impacts inadequate in the Hodel case, the cumulative impacts analysis is wholly absent from any NEPA documents or supporting documents that the Forest Service prepared here. Nowhere did the Forest Service or the BLM attempt to address the cumulative impacts that oil and gas development might have on the Sublette mule deer herd unit that is now threatened by loss of habitat on both its winter and summer ranges. In the early 1990s, when the EAs for Management Areas 12, 23, 24, 25 and 26 were prepared, the Anticline was not experiencing the extensive energy development it is today; it was nearly vacant relative to oil and gas development at that time. Because recent studies have documented

startling declines in this herd resulting in large part from recent, explosive energy development on the Pinedale Anticline, the herd's winter range, it is imperative that the agencies supplement their NEPA documentation to consider what effect proposed energy development on the August parcels, the herd's summer range, coupled with the development on the Anticline and the transitional ranges might have on this population. Failure to do so violates NEPA.

**iv. Neither the Forest Service nor the BLM prepared a supplemental NEPA analysis to address the changed circumstances in the Reasonably Foreseeable Development assessment.**

The final issue the Forest Service noted might "warrant review" was whether the Reasonably Foreseeable Development ("RFD") assumptions made in the original Assessment of Oil and Gas Potential from July 30, 1987 remained accurate. SIR at 4 (Exhibit 14). The Forest Service decided, based on a review conducted by the BLM in 2003, that "the assumptions made in the analysis are still accurate and could be used to revalidate the NEPA decisions [made in the early 1990s] for oil and gas leasing." *Id.* at 5. As a result of this finding, the Forest Service declined to "correct, supplement or revise the environmental documents or decisions." *Id.* at 5-6. Although the BLM did determine that "most of the assumptions made in the analysis . . . are still accurate" it found that there was "no discussion" of the potential for coalbed methane development in the 1987 assessment. Letter from Asghar Shariff to Brent Larson (Sept. 18, 2003) (emphasis added) (Exhibit 42).

The Forest Service appears to have misunderstood the BLM's findings. The BLM did not conclude that all of the assumptions in the analysis were still accurate. To the contrary, the BLM identified a glaring omission, i.e. the lack of any analysis related to potential coalbed methane development. The BLM cited recent data published by the U.S. Geological Survey that indicated that a potential coalbed gas resource lies "in the eastern-most parts of management areas 22, 23, 24, 25, and 26." *Id.* This is particularly relevant to the August lease parcels, as they definitely lie in Management Areas 24 and 25 (and possibly 23 and 26).

The impacts of coalbed methane development are notably different from those of conventional oil and gas development in that coalbed methane extraction requires large amounts of groundwater to be discharged from the underground coal seams and disposed on the surface. The average coalbed methane well in Wyoming dewater aquifers at the rate of 15,000 to 20,000 gallons of water per day. In areas of high coalbed methane production, wells, seeps and springs can run dry, with devastating impacts on people's livelihoods and species' survival. Moreover, the enormous volumes of discharged water that is usually high in salt concentration threaten soils. This discharged water eventually reaches creeks, streams and rivers with potentially significant effects on fisheries, recreation, wildlife and livestock. Coalbed methane development also poses threats to air quality as the operation of natural-gas fired compressors, which are required to move the gas from the wellhead to the pipelines, release a number of omissions. Last, coalbed

methane development can result in methane migration to the surface, which poses a serious health risk to humans as well as wildlife, soils and vegetation, and can increase the risk of underground fires sparked by spontaneous combustion.

The IBLA repeatedly has recognized the unique and severe environmental impacts associated with coalbed methane extraction. See, e.g., Wyoming Outdoor Council, 156 IBLA 347, 358 (2002); Wyoming Outdoor Council, et. al., 158 IBLA 384, 390 (2003) (explaining the “unique problems created by the magnitude of water production from CBM extraction”) and at 394 (stating that the “unique effects of CBM extraction” include “discharge water with moderately high total-dissolved-solids concentrations and a relatively high sodium-adsorption ratio”). And, in Pennaco Energy, the Tenth Circuit Court of Appeals affirmed the conclusions of IBLA, holding “the record contain[ed] substantial evidence to support the IBLA’s conclusion that CBM development poses unique environmental concerns related to water discharge. . . .” 377 F.3d at 1159.

Because coalbed methane development is a reasonably foreseeable event within Management Areas 23, 24, 25 and 26 that poses significant environmental impacts not considered in any environmental documents related to the leasing of the August parcels, the agencies must prepare a supplemental analysis. Failure to do so violates NEPA.

Furthermore, it is highly unlikely the RFD from the 1987 Assessment is even remotely accurate today. The BLM now anticipates 12,872 wells as a reasonably foreseeable level of development by the year 2020. BLM, “A Reasonable Foreseeable Development Scenario for an Area With Large Active Gas Plays” (Exhibit 43) (full report available at <http://www.wy.blm.gov/fluidmineral04/presentations/NFMC/058DeanStilwell.pdf>). The Jonah Infill is poised to see 3,100 wells more than what was anticipated just a few years ago. The recently released proposal to infill the Pinedale Anticline field will lead to approximately 7,200 additional wells. See Greater Yellowstone Area Air Quality Assessment Update (April 2005) (Exhibit 44). Thus, the 1987 Assessment is wildly out of date, and the Forest Service should have prepared a supplemental NEPA analysis to update the RFD assessment in the outdated EAs.

Both agencies have a duty to supplement existing EAs in response to “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii); see also Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1152 (9th Cir. 1998) (explaining that the standard for supplementing an EA is the same as the standard for supplementing an EIS). In its February 25, 2004 SIR, the Forest Service identified three new issues that warranted review. Although the use of an SIR to review old analyses is proper, it is only the first step towards full NEPA compliance. After issues are identified, an agency must take the next step of supplementing the original analyses with updated EAs or EISs. Here, the agencies must consider air quality, wildlife species—especially those, like the lynx that are now federally listed species known to occur in the area proposed for leasing—and reasonably foreseeable development projections. Neither agency has addressed these



changed circumstances. Both the BLM and the Forest Service must meet their NEPA obligations.

#### **IV. THE LEASE SALE VIOLATES THE ENDANGERED SPECIES ACT.**

There are 10 federally listed threatened or endangered species that 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. Supplemental BA at 4 (Exhibit 8). In addition, there are two experimental populations: gray wolf and whooping crane. *Id.*

In situations where listed species “may be present” an agency must prepare a biological assessment (“BA”) in order to meet the obligations of section 7(a)(2) of the Endangered Species Act (“ESA”). 16 U.S.C. § 1536(c)(1). 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) (emphasis added).

Recognizing that any biological assessments prepared in conjunction with the 1990 Forest Plan and the 1990-93 EAs were badly outdated and did not include some now-listed species, the Forest Service issued a supplemental BA in 2004. *See* Supplemental BA (Exhibit 15). Agencies have a duty to analyze the “potential effects of the action” on listed species; however, the effects will vary based on the manner in which the agency characterizes the action. Here, the Forest Service improperly characterized the action as “just the leasing portion” of the proposed project. *Id.* at 5. According to the Forest Service, “There is not any ground disturbance in this phase . . .” *Id.* at 7. As a result, it found that leasing would have “no effect” on any of the listed species. *Id.* at 4.

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”).

In contrast, if an agency determines that an action “may affect” a listed species, then consultation is required. The Fish and Wildlife Service 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”) xvi (1998) at <http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm> (emphasis in original) (Exhibit 45). “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).

**a. The Forest Service and the BLM violated the ESA by 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 Endangered Species Act (“ESA”) on March 24, 2000. 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 Areas 12, 23, 24, 25 and 26. There are three identified lynx analysis units (LAUs) in MA 24: Middle Beaver Creek, Horse Creek North and Horse Creek South; one LAU in MA 25: Cottonwood Creek; two LAUs in MA 26: South Beaver and Birch-South Beaver; two LAUs in MA 12: LaBarge Creek and Fontenelle Creek; and one LAU in MA 23: Upper Hoback South. Supplemental BA at 7-10. 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, not only does habitat exist, but this area and its environs are “generally regarded as the best lynx habitat anywhere in the state [of Wyoming]; namely, USDA Forest Service (Bridger-Teton National Forest) holdings on the Overthrust Belt/Wyoming Range in northern Lincoln and western Sublette counties.” 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 46).

The Wyoming Range not only contains habitat suitable for lynx, but in fact supports actual individuals. Between January 2004 and June 2005, biologists documented lynx presence along Horse Creek and South Fork Beaver Creek—near the very area slated for lease sale in August. See Endeavor Wildlife Research Foundation, The Greater Yellowstone Lynx Study, 2004/2005 Annual Report at 11 (Exhibit 6). 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 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.*

The Forest Service was wrong to conclude in its supplemental BA that leasing would have “no effect” on the lynx. Supplemental BA at 4. Although this conclusion comes as no surprise, given the agency’s characterization of the action as encompassing little more than a paper transaction, it is nevertheless in error. The “no effect” determination is a difficult standard to meet. 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...”).

Here, the Forest Service states, “There is some slight potential for displacement [to the lynx] during the mapping, looking and purchase phase of the project.” Supplemental BA at 18. There is no doubt that potential displacement of the lynx, even if the displacement will likely be “incidental rather than chronic and very seasonal (summer) rather than year round” requires a “may affect” determination. *Id.* However, the Forest Service apparently thinks its failure to consult is justified by its own policy directives and the ESA itself. It states, “In accordance with the Endangered Species Act (ESA), its implementing regulations, and FSM 2671.4, the Bridger-Teton National Forest is not required to request written concurrence from the U.S. Fish and Wildlife Service (FWS) with respect to determinations of potential effects on any Threatened, Endangered and Propose (sic) Species.” *Id.* at 4 (emphasis added).

Although it is not clear what iteration of directive 2671.44 the Forest Service is referring to, the language in two versions does not support the assertion that the Forest Service may disregard its legal obligations under Section 7.<sup>9</sup> In one version of 2671.44, the directive simply encourages Forest Service personnel to “seek to improve efficiency and effectiveness of consultations and conferences under Section 7” by “streamlining” the process, which “is accomplished through a higher level of coordination and communication in informal consultation.” Forest Service Manual, Rocky Mountain Region, Chapter 2670 Threatened, Endangered and Sensitive Plants and Animals (May 17, 2005) (Exhibit 47). Because the Supplemental BA was prepared prior to this date, however, it is likely that the Forest Service is referring to an older version of directive 2671.44 that states, “Do not request formal consultation on potential adverse effects until informal consultation has exhausted all alternatives for reaching a determination of ‘no

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<sup>9</sup> The Forest Service cites FSM 2671.4, however, upon inspection this is merely a chapter title: “Cooperation with Fish and Wildlife Service and National Marine Fisheries Service. FSM 2671.44 addresses the Determination of Effects on Listed or Proposed Species. Forest Service Manual, Washington, Title 2600 Wildlife, Fish and Sensitive Plant Habitat Management (June 23, 1995).

adverse effect.” Forest Service Manual, Washington, Title 2600 Wildlife, Fish and Sensitive Plant Habitat Management (June 23, 1995) (Exhibit 48). This directive discusses the timing of consultation; it is not an instruction to not consult at all.

Even if one or both of these versions purported to absolve the Forest Service of its duties under federal law with regard to “potential effects”, nothing in the ESA itself or its implementing regulations supports this. In fact, the language describing the purpose of biological assessments explains that a BA “[s]hall evaluate the potential effects of the action on listed and proposed species . . . .” 50 C.F.R. § 402.12(a) (emphasis added). The very intent of consultation under the ESA is to determine and mitigate potential effects to listed and proposed species. The Forest Service’s statement that it is not required to request written concurrence with respect to determinations of potential effects is thus without any support in its own directives and is contrary to any reasonable understanding of the ESA and its implementing regulations.

The Forest Service made an erroneous “no effect” determination and the BLM relied on the flawed assessment. For this reason, neither agency initiated the required formal consultation with the FWS despite an explicit statement in the BA that “there is some slight potential for displacement during mapping, looking and purchase phase of the project,” i.e. act of leasing alone “may affect” the lynx. Supplemental BA at 18. To remedy this error, prior to the lease sale, the Forest Service or the BLM must formally 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.<sup>10</sup> See 50 C.F.R. § 402.14(a), (b)(1).

**b. Both the Forest Service and the BLM violated the ESA by failing to use the best available scientific and commercial data.**

Both agencies failed to consider the impacts of post-leasing development on the ten federally listed species that may be present in the nine Management Areas. This omission 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); see also Conner v. Burford, 848 F.2d 1451-58 (requiring consideration of likely post-leasing development in ESA analysis of oil and gas leasing impacts). Instead of assessing the likely effects of post-leasing oil and gas development, the Forest Service and the BLM only considered the effects that will likely result from the act of leasing itself. 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. This argument is simply not credible.

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<sup>10</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.

In this case, the Forest Service knows 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 already exist. Thus, it is not so inconceivable that development might actually occur. Moreover, the agencies can draw on commercial data to estimate the potential impacts that would likely result from well pad and road construction. The Forest Service is certainly capable of drawing conclusions from the readily available, existing scientific information about the lynx and its habitat.<sup>11</sup> If the Forest Service would have relied on this scientific and commercial data, it would have undoubtedly determined that 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 is ratifying this decision by offering the lease parcels for sale without further ESA compliance.

Had the agencies complied with the ESA and found that the proposed action “may affect” the lynx, formal consultation would have been required. When agencies comply with the ESA, the proposed action will occur in a manner that considers and takes steps to protect imperiled species. Under the current procedures of both the Forest Service and the BLM, the law is violated and species like the lynx are not given the protections they need to survive. The Forest Service and the BLM must remedy these ESA violations prior to lease sale.

## **V. THE CONSENT TO LEASE VIOLATES THE NATIONAL FOREST MANAGEMENT ACT AND THE BRIDGER-TETON FOREST PLAN.**

The Forest Service’s consent to lease violates both the National Forest Management Act (“NFMA”) and the Bridger-Teton National Forest’s Land and Resource Management Plan (“LRMP”). Although these Forest Service specific violations are not attributable to the BLM in the same way the NEPA and ESA violations are, they nevertheless illustrate additional problems associated with leasing the August parcels. Not only must the Forest Service and the BLM remedy the NEPA and ESA violations, but the Forest Service must also remedy its failure to follow its own regulations. The BLM should refuse to offer the August parcels for lease sale until the Forest Service does so.

“The National Forest Management Act directs the Forest Service to develop Land and Resource Management Plans (‘Forest Plans’) by which to manage each National Forest under principles of ‘multiple use’ and ‘sustained yield.’” Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999) (quoting 16 U.S.C. § 1604).

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<sup>11</sup> The Supplemental BA does reference three documents considered to be part of the best scientific information available: “The Scientific Basis for Lynx Conservation” (Ruggerio et. al., 2000)l the “Lynx Conservation Assessment and Strategy” (LCAS; USFS, 1999); and a Lynx Conservation Agreement (CA) between the FWS and the Forest Service (USFS and USFWS, 2000). This information is not applied to an assessment of post-leasing development, however. Thus, the best available data is referenced, but the agencies did not “use” or apply the data to a post-leasing development scenario as required by the ESA.

Among other things, Forest Plans must “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” *Id.* at 1168 (quoting 16 U.S.C. § 1604(g)(3)(B)). All permits, contracts “and other instruments for the use and occupancy of National Forest System land” (such as oil and gas leases) “shall be consistent” with the Forest Plan. 16 U.S.C. § 1604(i).

NFMA also requires the Forest Service to adopt regulations “specifying guidelines” for Forest Plans. 16 U.S.C. 1604(g)(3), (h). As applicable to the 1990 Bridger-Teton Forest Plan, these regulations are codified at 36 C.F.R. part 219 (1982). The regulations governing fish and wildlife resources address the requirement to identify and monitor management indicator species (“MIS”). MIS are representatives for a class or guild of species that rely on a certain habitat type. Using MIS to determine species viability saves the Forest Service from having to evaluate each species individually. *See Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 762 n.11 (9th Cir. 1996). The regulations require:

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. . . . (a)(1) In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species and the reason for their selection will be stated. These species shall be selected because their population changes are believed to indicate the effects of management activities. . . . (6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined.

36 C.F.R. § 219.19.

Not only do these regulations govern the development of Forest Management Plans, but they also apply to project level activities. The Tenth Circuit Court of Appeals recently affirmed this. The plaintiffs in *Utah Env'tl. Congress v. Bosworth* (“UEC I”) argued that the Forest Service’s obligations under a Forest Plan continue as long as the Plan is in existence. 372 F.3d 1219, 1224 (10th Cir. 2004). As such, the Forest Service is required to evaluate planning alternatives under § 219.19 prior to authorizing specific projects. The court agreed. It explained that because the “Forest Service implements the Forest Plan through individual projects and [because] . . . these projects must be consistent with the Forest Plan”, § 219.19 was applicable to project level actions. *Id.* at 1224-25.

The regulations also require that “inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present conditions.” 36 C.F.R. § 219.26. In *Utah Env'tl. Congress v. Bosworth* (“UEC II”), The Tenth Circuit Court of appeals affirmed its holding in UEC I, that the “Forest Service must use ‘actual,

quantitative population data' to meet MIS monitoring obligations under § 219.19." 21 F.3d 1105 (10th Cir. 2005).

On January 5, 2005, the Forest Service revised its forest planning regulations. See 70 Fed. Reg. 1023. Under the new regulations, the Forest Service is no longer required to identify and monitor MIS. These new regulations are inapplicable to this project for two reasons. First, the Forest Service consented to lease the August parcels on April 8, 2004, prior to the changes in the regulations. Second, the Forest Service's decision to lease is based on EAs from the early 1990s that are tiered to the 1990 Bridger-Teton Forest Plan. Because all project level activities must be consistent with the Forest Plan, the Forest Service may not consent to lease without having met its substantive obligations under NFMA to identify and monitor MIS.

The Forest Plan acknowledges the agency's responsibility to identify and monitor MIS. See Bridger-Teton National Forest LRMP (1990) at 34-35 (Exhibit 49). In the Plan, the Forest Service identified two MIS: the pine marten for old growth forest habitat and the Brewer's sparrow for sagebrush habitat. See id. It also stated that additional MIS would be selected and validated for four other habitats i.e., riparian, aspen, mountain meadow and wetland, as part of the Forest Plan implementation process. See id. Despite the fifteen years since the Plan was implemented, the Forest Service has failed to collect the most basic monitoring data on the marten and Brewer's sparrow, its two identified MIS. Even more troubling is the fact that the Forest Service waited fifteen years to even identify the four remaining MIS.

**a. The Forest Service violated NFMA and the Bridger-Teton LRMP by failing to monitor the pine marten and Brewer's sparrow.**

In 2002, the Forest Service issued a report that admitted the failure of the Forest Service to monitor the two named MIS on the Bridger-Teton National Forest. U.S. Forest Serv., Monitoring Category Reporting Form, Fiscal Years 2000 & 2001, Wildlife & Fishery Program Area, at 14 (Exhibit 50). The report states that the required monitoring information "would normally be systematic and repeatable field surveys couple[d] with vegetation data compiled in a retrievable manner. These have not been done by the Forest." Id. (emphasis added). In another assessment, the Forest Service notes only two isolated seasonal efforts to monitor for pine marten, each occurring within a single year in limited areas of the forest and concluding that "there are no population or trend inferences that can be made from survey data gathered in a single year." Reply to: Unclassified Wildlife Biologist Reassigned Tasks (Dec. 12, 2002), at 3 (Exhibit 51). With regard to the Brewer's sparrow, the assessment notes only a single year's effort to monitor the species in the Jackson district of the forest and observes that "the points have not been resurveyed, thus, no trend data specific to the area is available." Id. at 4. The Forest Service has violated its legal obligation to monitor the pine marten and the Brewer's sparrow. Without this data, the Forest Service is not able to estimate the impacts on wildlife population trends in the areas to be leased.

**b. The Forest Service violated NFMA and the Bridger-Teton LRMP by failing to identify and monitor the management indicator species that represent wetland, riparian, mountain meadow and aspen habitats.**

It was not until June 26, 2005 that the Forest Service even identified MIS for wetland, riparian, mountain meadow and aspen habitats. It named boreal toad and boreal chorus frog for wetland habitats, three cutthroat trout species for riparian areas, bighorn sheep for mountain meadows and aspen itself for aspen habitat. U.S. Forest Serv., Ecological Indicators—Forest Plan Update (“Ecological Indicators”) (June 26, 2005) (Exhibit 52). Because these species were just recently identified as MIS, it is unlikely that any data collected on these species to date would meet the requirements of § 219.19. Indeed, much of the language in the document uses the future tense, indicating that monitoring is anticipated, but has not yet occurred.

The MIS for wetland habitats are the Boreal toad and the Boreal chorus frog. Id. at 16 (no scientific names for these species are mentioned). The Forest Service has only baseline data on these species from a species distribution study on amphibians done in 1999. Id. at 17. No monitoring program is underway for these species. In fact, no monitoring program has even been designed. Id. (explaining that “[a] monitoring program detailing sample design is in the process of being designed . . .”).

The Forest Service has named three cutthroat trout species as MIS for riparian habitats. Several subspecies of cutthroat trout occur on the Bridger-Teton National Forest. These include Snake River fine spotted cutthroat trout (*Oncorhynchus clarki ssp.*), Bonneville cutthroat trout (*Oncorhynchus clarki utah*), and Colorado River cutthroat trout (*Oncorhynchus clarki pleuriticus*). Id. at 8. Although Bonneville cutthroat trout were not present in Management Area 24 in 1993, Colorado cutthroat trout have been documented in North Horse creek, South Fork of North Horse creek, Lead creek, South Horse creek, Dead Cow creek and Elk creek. MA-24 EA at 8 (Exhibit 9). The Fine spotted cutthroat trout “may be present in North Horse creek drainage, especially in the lower reaches.” Id. It is not clear from the “Ecological Indicators” document to what extent actual, quantitative data have been collected on these species in Management Areas 12, 23, 24, 25 and 26.

Bighorn sheep (*Ovis canadensis canadensis*) were selected as MIS for mountain meadow habitat. Bighorn sheep exist in the Wyoming Range and at some point a herd was augmented or reestablished there. Ecological Indicators at 13. The Forest Service’s baseline data on bighorn sheep exist as a result of the monitoring conducted by Wyoming Game and Fish; population and trend data “will continue to be collected by the Wyoming Game and Fish.” Id. at 14, 15. Mountain meadow habitat consists of grassland and tall forbs. Although bighorn sheep utilize grassland more frequently and only sometimes utilize tall forbs as forage, the Forest Service plans to monitor only the tall forb habitat. Id. This “will begin” in 2005 or 2006 depending on the baseline data available to each district. Id. at 15.



The Forest Service selected aspen (*Populus tremuloides Michx.*) as the MIS for the aspen community. Selecting aspen to be the MIS for the aspen habitat type violates the clear directive of the 1982 NFMA regulations, which requires the Forest Service to select wildlife, i.e., an animal species as MIS. The regulations state, “In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species.” 36 C.F.R. § 219.19 (1982). As aspen are clearly plant species, the naming of aspen to be MIS is contrary to law, arbitrary and invalid. In addition to the failure of the Forest Service to choose an animal species to represent other species that rely on the aspen community for their habitat, the Forest Service has not conducted any updated inventory on aspen populations. It explains that although “inventories have been conducted across the forest to varying degrees” any actual, quantitative “updated information” however, “will not be available for 2-3 years.” Ecological Indicators at 4, 7.

Absent compliance with the MIS requirements imposed by the NFMA regulations and the Bridger-Teton LRMP, the Forest Service may not lawfully consent to leasing in the Wyoming Range. The Forest Service has not taken the basic steps necessary to determine that wildlife in the leased area may require protection, or what stipulations may be appropriate. Without “actual, quantitative population data” on MIS in each of the habitat types found in the Management Areas proposed for leasing, the Forest Service may not authorize oil and gas leasing. Utah Env'tl. Congress, 21 F.3d at 1112 (quoting Utah Env'tl. Congress, 372 F.3d at 1226. Without lawful consent by the Forest Service, the BLM is precluded from offering the August parcels for sale.

## **VI. CONCLUSION AND REQUEST FOR RELIEF**

The sale of the August lease parcels will violate the National Environmental Policy Act, the Endangered Species Act, the National Forest Management Plan regulations and the Bridger-Teton National Forest LRMP. As such, the Parties request the following relief: the withdrawal of parcels 173, 174, 175, 181, 188, 189, 190, 191, 192 and 193 from the August 1, 2006 Competitive Oil and Gas Lease Sale until the agencies fully comply with NEPA, ESA, NFMA and the Bridger-Teton LRMP.

Respectfully submitted,

Lisa McGee  
National Parks & Forests Program Director  
Wyoming Outdoor Council

And on behalf of:

Peter Aengst  
Energy Campaign Coordinator  
The Wilderness Society

Erik Molvar  
Executive Director  
Biodiversity Conservation Alliance

Stephanie Kessler  
Lander Representative  
Greater Yellowstone Coalition

Liz Howell  
Executive Director  
Wyoming Wilderness Association

Kathleen Zimmerman  
Senior Land Stewardship Policy Specialist  
National Wildlife Federation

Ben Lamb  
Western Field Director  
Wyoming Wildlife Federation

Judith Adler  
Chairman of the Board of Directors  
Hoback Ranches Service and Improvement District

cc: Kniffy Hamilton, Bridger-Teton National Forest Supervisor  
Brent Larson, Assistant Supervisor  
Greg Clark, Big Piney District Ranger  
Jack Troyer, Regional Forester  
Mark Rey, Undersecretary, US Department of Agriculture  
Dave Freudenthal, Governor of Wyoming  
Senator Craig Thomas  
Senator Mike Enzi  
Representative Barbara Cubin

