

**National Audubon Society  
The Wilderness Society  
Wyoming Outdoor Council  
Wyoming Wilderness Association**

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Via electronic mail at <https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=119669>

March 27, 2018

**Comments on the Second Quarter Competitive Oil and Natural Gas Lease Sale Environmental Assessment of the BLM Wyoming State Office**

Dear Merry Gamper:

Please accept these comments on the above oil and natural gas lease sale environmental assessment that are submitted by The Wilderness Society, Wyoming Outdoor Council, Wyoming Wilderness Association, and the National Audubon Society. Under the Proposed Action Alternative, the BLM plans to offer 160 parcels totaling approximately 227,826.2 acres of federal minerals.

The Environmental Assessment (EA) prepared for this lease sale is numbered DOI-BLM-WY-0000-2019-0005-EA.

The Proposed Alternative offers parcels in sensitive wildlife habitat. Approximately 84 percent of offered parcels are located within designated Greater sage-grouse habitat. 73 parcels totaling 153,829.2 acres are wholly located within Priority Habitat Management Areas (PHMA) and 47 whole parcels totaling 37,183.1 acres are in General Habitat Management Areas (GHMA). Additionally, the EA contemplates leasing six parcels in mule deer crucial winter range.

**I. ISSUES OF CONCERN**

The parties are concerned that BLM has violated NEPA by failing to analyze a reasonable range of alternatives, failing to take a hard look at impacts, and failing to adequately analyze cumulative impacts. We are concerned that BLM has violated FLPMA by the agency's failure to adhere to the Wyoming BLM Approved Resource Management Plan Amendments (ARMPA) for Greater-sage grouse, and by failing to manage for multiple use. BLM's proposal does not prioritize leasing outside of Core Greater sage-grouse habitat, in opposition to the Core Area Protection Strategy. We are particularly concerned about parcels sage grouse habitat in the context of the ongoing sage grouse revisions for RMPs, which weaken the strategy and risk the species' survival. We are also concerned about the lack of effective protections for mule deer crucial winter range in the face of dramatic population level declines. Furthermore, we are concerned about leasing near ACEC's, near WSAs, near National Historic Trails, and within LWCs, and the values this would put at risk. Finally, the EA fails to incorporate the best available science on greenhouse gas emissions and climate change and to effectively mitigate these impacts.

## II. INTERESTS OF THE PARTIES

The Wilderness Society, Wyoming Outdoor Council, Wyoming Wilderness Association, and National Audubon Society have a long-standing interest in the management of BLM lands in Wyoming and we engage frequently in the decision-making processes for land use planning and project proposals that could potentially affect our public lands and mineral estate, including the oil and natural gas leasing process and lease sales. Our members and staff enjoy a myriad of recreational, scientific and other opportunities on BLM-managed public lands, including hiking, biking, nature-viewing, photography, and quiet contemplation in the solitude offered by wild places. Our missions are to work for the protection and enjoyment of the public lands for and by our members and the public.

The National Audubon Society's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity.

The mission of the Wilderness Society is to protect wilderness and inspire Americans to care for our wild places.

Founded in 1967, the Wyoming Outdoor Council is the state's oldest and largest independent conservation organization. Its mission is to protect Wyoming's environment and quality of life for present and future generations.

The Wyoming Wilderness Association is a non-profit organization created in 1979 by a group of wilderness advocates and outdoors people who envisioned the Wyoming Wilderness Act. Our mission is to defend Wyoming's magnificent wild landscapes from the pressures of development, mismanagement, and commodification. We represent the values and interest of nearly 2,000 Wyoming members.

Although our organizations generally support the judicious leasing and responsible development of the public's oil and gas resources when done in the right place and after full disclosure of the environmental impacts that will result from development, we have concluded that with respect to this proposal, none of those basic guiding tenets have been achieved.

## III. STATEMENT OF CONCERNS

### A. BLM Has Not Complied with the National Environmental Policy Act.

#### 1. *The EA fails to analyze a reasonable range of alternatives.*

NEPA generally requires the BLM to conduct an alternatives analysis for "any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The regulations further obligate BLM to "rigorously explore and objectively evaluate all reasonable alternatives" including those "reasonable alternatives not within the jurisdiction of the lead agency," so as to "provid[e] a clear basis for choice among options." 40 C.F.R. § 1502.14. The range of alternatives is the heart of a NEPA document because "[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of [a NEPA analysis] to inform agency deliberation and facilitate public involvement would be greatly degraded." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009). That analysis must cover a reasonable range of alternatives so that an agency can make an informed choice from the spectrum of reasonable options.

By contrast, in evaluating oil and gas lease sales, BLM frequently analyzes only two alternatives: a no action alternative, which would exclude all lease parcels from the sale; and a lease everything

alternative, which would offer for lease nearly all proposed parcels. An EA offering a choice between leasing every proposed parcel, and leasing nothing at all, does not present a reasonable range of alternatives. See *TWS v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider “middleground compromise between the absolutism of the outright leasing and no action alternatives”); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9<sup>th</sup> Cir. 1999) (NEPA analysis failed to consider reasonable range of alternatives where it “considered only a no action alternative along with two virtually identical alternatives”).

In the June 2019 EA, BLM continues to ignore NEPA’s mandate to analyze a reasonable range of alternatives by once again presenting only a no action alternative and a lease everything alternative. EA at 13. Proposed alternatives deferring parcels in sage grouse habitats and offering parcels subject to certain stipulations were eliminated from further analysis. EA at 15, 16. BLM’s statements in the EA that deferring parcels in PHMA and GHMA was not considered as an alternative because such deferrals would not conform with the applicable RMPs is simply wrong. EA at 16. Designating lands as open to leasing in an RMP makes them *available* to lease but does not *require* that they be leased. Even if lands at issue here are open for leasing under the RMPs, it would be entirely reasonable for BLM to consider deferring parcels with important sage-grouse habitat. The vast majority of parcels in this sale are in sage-grouse habitat, and many parcels overlap the famed “Golden Triangle” near South Pass, which contains the most robust populations of Greater sage-grouse on the planet. This area, known for its rich biodiversity, is threatened by previous BLM oil and gas lease sales from earlier this year, such that additional leasing risks severe cumulative impacts. See Exhibit 1, Golden Triangle Parcels - Letter to Governor Gordon (Feb. 22, 2019). Given the importance of the Golden Triangle for the survival of the imperiled sage-grouse and for the success of the broad collaborative efforts to protect the bird, the EA should have at minimum considered an alternative that defers leasing in at least some of the Greater sage-grouse’s most important habitat. BLM’s decision not to do so violates NEPA.

## *2. BLM has failed to take the necessary “hard look” at potential environmental impacts.*

BLM has not taken the required “hard look” at potential environmental impacts, as required by NEPA. Under NEPA, BLM must evaluate the “reasonably foreseeable” site-specific impacts of oil and gas leasing prior to making an “irretrievable commitment of resources.” *New Mexico ex rel. Richardson*, 565 F.3d at 718; see also *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10<sup>th</sup> Cir. 1988) (agencies are to perform hard look NEPA analysis “before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values”); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978) (stating NEPA “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action”). Courts have held that BLM makes such a commitment when it issues an oil and gas lease without reserving the right to later prohibit all development. *New Mexico ex rel. Richardson*, 565 F.3d at 718; *Pennaco Energy, Inc. v. United States Dep’t of the Interior*, 377 F.3d 1147, 1160 (10<sup>th</sup> Cir. 2004).

Here, BLM is in fact proposing to make an “irretrievable commitment of resources” by offering leases without reserving the right to prevent future development; the site-specific impacts are “reasonably foreseeable” and should be analyzed in this EA, rather than waiting until a leaseholder submits an application for permit to drill (APD).

The parties are particularly concerned with the EA’s weak analysis of potential impacts to sage-grouse, given BLM’s ongoing and sweeping changes to federal sage-grouse policy through Washington Office (WO) IM No. 2018-026 and the 2019 Greater sage-grouse RMP revisions. BLM has grossly mischaracterized the affected environment for Greater sage-grouse by failing to analyze the potential impacts of these changes, which have implemented since the notice for this lease sale was issued. As BLM notes in the EA, IM 2018-026 rescinded and replaced IM 2016-143, ostensibly eliminating BLM’s

requirement to prioritize oil and gas leasing outside of designated sage-grouse habitat. EA at 35. The 2018 IM claims that, “In effect, the BLM does not need to lease and develop outside of GRSG habitat management areas before considering any leasing and development within GRSG habitat.” *Id.*

This new policy stance, which undercut the collaborative West-wide effort to conserve Greater-sage grouse without any public process, explicitly conflicts with Wyoming’s Sage-grouse Executive Order (SGEO) and the Protection Strategy it implements. BLM’s EA states that the agency “adopted the State’s Greater Sage-Grouse conservation strategy by revising and amending its RMPs,” yet BLM is not adhering to the strategy’s prioritization provisions. The SGEO states that “To ensure continued sustainability of Wyoming’s economy, *all efforts* to encourage, enhance, and prioritize development outside of Core Population Areas *shall be made.*” EO 2015-4 (2015) at 5 (emphasis added). As to Federal agencies, the SGEO requires that “State and Federal agencies, including... Bureau of Land Management... *shall work collaboratively* to ensure a uniform and consistent application of this Executive Order to *maintain and enhance* Greater sage-grouse habitats and populations.” *Id.* at 5, 6 (emphasis added). BLM’s failure to prioritize leasing outside of sage-grouse habitat violates the SGEO and risks severe potential impacts that are not considered in the EA. This departure from previous policy is a significant new factor that must be analyzed. Moreover, BLM’s decision to abdicate its prioritization duties in the face of conflicting land use plans is a clear violation of FLPMA. This legal issue is discussed separately below.

BLM’s 2019 RMP revisions undermine Wyoming’s Strategy further, though they purport to bring federal policy in sync with state strategies. The 2019 revisions, which went into effect on March 15, removed a number of important federal protections for sage-grouse and their habitat. The removal of these protections and the associated risks are discussed at length in our comments on, and protest of, the 2019 amendments, incorporated fully by reference herein. Briefly, those revisions weaken the 2015 plan by:

- eliminating net-conservation gain as the required mitigation standard for projects located within core population areas;
- eliminating federally-required compensatory mitigation and relying on state mitigation plans that i) may not be legally enforceable, and ii) unlike the exiting plans, only require compensatory mitigation for projects in core area when density/disturbance thresholds are exceeded, or to support requests for waivers, exceptions, or modifications of lease stipulations;
- eliminating the requirement to prioritize oil and gas leasing and development outside greater sage-grouse habitat;
- eliminating SFAs and associated locatable mineral withdrawals on 252,160 acres of key habitat in the South Pass core area;
- expanding opportunities for exceptions, modification and waivers of the most essential conservation measures while at the same time constraining the public’s ability to participate in and monitor those decisions;
- authorizing the disposal of public lands within core areas if “that disposal is in the public’s best interest” rather than determining that the disposal “will provide a net conservation gain to Greater sage-grouse” as required by the 2015 plans;
- removing the management tool provided in the 2015 plans that allows BLM to reject or defer a project approval (errata sheet, C-11);
- replacing a standard that prohibits declines to core sage-grouse populations with a new and undefined standard: “no undue harm” (errata sheet, C-10);
- eliminating monitoring and reporting tools and a web-based implementation tracker;
- eliminating the existing requirement that BLM must prepare the Density Disturbance Calculation Tool (DDCT) for activities proposed on federal lands (errata sheet C-4 at p. 33);

- making the application of Required Design Features (RDF), which were required in the 2015 plans, discretionary (i.e., “as necessary and when appropriate”);
- eliminating noise restrictions in general habitat (non-core) areas;
- removing the requirement for mandatory noise restrictions in core habitat and replacing with a loophole which provides that “measures would be *considered* at the site-specific project level *when and where appropriate*,” and
- failing to disclose through the NEPA process the negative environmental effects of these changes.

Additionally, BLM’s abandonment of its authority to require compensatory mitigation is a radical change to one of the cornerstones of the 2015 Sage-grouse Plans and the agreements with the states that will significantly alter the cumulative impacts of leasing in sage grouse habitat. BLM must account for this policy change and its impacts as it evaluates impacts from the June lease sale. As discussed in detail in our comments and protest of the 2019 revisions, BLM’s conclusion that FLPMA does not provide authority to require compensatory mitigation is without basis. However, setting aside BLM’s ultimate ability to sustain its legal position, the function of the 2015 Sage-grouse Plans depends on the agency’s commitment to carrying out compensatory mitigation. The states’ plans, incorporated into the BLM plans, rely on compensatory mitigation to address residual impacts and/or to justify waivers, exceptions or modifications from oil and gas lease stipulations. In addition, the FWS cited compensatory mitigation as one of the “regulatory mechanisms and conservation efforts” that justified its finding the 2015 Sage-grouse Plans provided sufficient certainty the greater sage-grouse no longer warranted listing under the ESA. BLM’s new legal interpretation and guidance (set out in Instruction Memorandum 2019-018) represents the very sort of “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that demand further analysis. As reiterated by the U.S. Court of Appeals for the Tenth Circuit, where the BLM makes significant changes to the approach it is taking, and those changes “may produce wildly different impacts,” even those impacts are of a similar type, then “NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide them from the public.” *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009). Yet BLM’s EA fails to consider these significant new circumstances, instead focusing its cumulative impacts analysis for sage-grouse on the success of the Core Area Strategy, which the agency has just undermined through its radical reinterpretation of policy in IMs and the 2019 revisions. EA at 72 (“leasing in PHMA units has declined 74% since the implementation of the Core Area Strategy in 2008”).

BLM avoids discussing any of these changes in this EA by acknowledging the revisions, then promptly ignoring their implications for sage-grouse. “Until the RMPs are amended,” the agency explains “the BLM will continue to ensure its implementation decisions (including this lease sale) conform to the approved RMP.” EA at 66. Here, BLM intends to apply the 2015 ARMPA *until* the 2019 revisions are improved. But, as the 2019 revisions were approved during the public comment period for this lease sale, the public is left with an impacts analysis based on the 2015 protections, protections which have since been stripped away by the 2019 revisions - before the lease sale goes into effect. BLM cannot rely on a suite of protections designed to mitigate the very environmental impacts it is analyzing, then remove those protections without considering how those adverse impacts may change. The dramatic shifts in federal sage-grouse policy from BLM’s 2018 IM and the 2019 RMP revisions seriously jeopardize the Wyoming’s Core Area Protection Strategy’s ability to effectively conserve the bird and its most vital habitat. BLM’s failure to analyze the potentially severe impacts of these changes cannot satisfy NEPA’s hard look mandate.

Furthermore, BLM cannot shirk its responsibilities under NEPA by deferring its analysis of potential impacts until the APD stage, or by simply dismissing any possible analysis of impacts as

speculative. Nonetheless, BLM consistently claims that impacts are not reasonably foreseeable when the agency has ample data to analyze a range of potential impacts. *See e.g.* BLM’s Protest Decision for the March 2019 lease sale at 9 (“Even where leases have been issued by the BLM and project-specific operations are proposed. . . the actual operations carried out under such projects is still not always certain to a high degree of confidence). Of course, certainty to a high degree of confidence is not the legal standard, “reasonably foreseeable” is, and BLM must evaluate reasonably foreseeable potential impacts prior to any irrevocable commitment of resources, as case law consistently holds.

In a recent case challenging BLM’s failure to evaluate impacts of greenhouse gas emissions across nine oil and gas lease sale EAs, the court applied the longstanding rule from the *Peterson* and *Conner* cases to hold that BLM’s FONSI for those sales were inadequate, because the agency failed to consider the lease sales’ reasonably foreseeable impacts. *Wildearth Guardians et al. v. Zinke* (2019) Case No.: 16-1724 (RC) (D.C. Mar. 19, 2019) at 50. In that case, BLM argued that “the leasing stage is a preliminary step towards oil and gas leasing, but that specific drilling projects are not guaranteed to move forward simply because a given lease was sold,” dismissing leasing as a mere “administrative action, which, in and of itself, does not cause or directly result in any surface disturbance,” and delaying analysis until the APD stage. *Id.* at 11.

Conversely, the plaintiffs argued that BLM could not defer analyzing impacts past the lease sale stage, because those impacts are reasonably foreseeable. *Id.* at 25. On summary judgment, the court agreed with the plaintiffs, applying the decades-old rule that leasing parcels without NSO stipulations is an “irrevocable commitment to allow *some* surface disturbing activities” and the agency must therefore analyze the impacts of those activities “before it could no longer preclude them.” *Id.* At 26. The court made clear that, while BLM need not evaluate the “site-specific” impacts of particular future drilling projects at the lease sale stage, the agency “could reasonably foresee and forecast the impacts of oil and gas drilling across the leased parcels as a whole” and must “engage in ‘reasonable forecasting and speculation’ with *reasonable* being the operative word.” *Id.* at 29 (internal citation omitted). The court further observed that the administrative record was “replete with information” on GHG emissions and their impacts, that the EAs “included raw data that would allow BLM to project the pace and scope of oil and gas development on the leased parcels,” and that the EISs to which the EAs tiered contained even more information to aid in evaluating impacts. *Id.* at 30, 31. While the scope of development and its impacts was *uncertain*, impacts were still reasonably foreseeable. BLM argued that, despite the available information, impacts were too difficult to analyze at the leasing stage. The court held otherwise, explaining that

BLM could have expressed the forecasts as ranges, and it could have explained the uncertainties underlying the forecasts, but it was not entitled to simply throw up its hands and ascribe any effort at quantification [of GHG emission impacts] to “a crystal ball inquiry.”

*Id.* at 33. The same is true here, and BLM must provide an analysis of reasonably foreseeable impacts at the leasing stage.

Yet here, BLM attempts to justify its lack of analysis at the lease sale stage using the exact same arguments. As in the above case, BLM’s EA describes leasing as an “administrative action, which, in and of itself, does not cause or directly result in any surface disturbance,” and tells the public that “BLM cannot determine at the leasing stage whether or not a nominated parcel will actually be leased, or if it is leased, whether or not the lease would be explored or developed.” EA at 8. As *Wildearth Guardians* makes clear, this lack of certainty does not absolve BLM of its NEPA responsibilities. Here, as in the above case, the EA and EISs to which it tiers contain raw data that would allow BLM to project the scope and pace of development and its impacts. *See, e.g.* 2008 Record of Decision (ROD) for the Approved Rawlins RMP at A33-3 (tabling reasonably foreseeable development of mineral and associated surface

disturbance based on figures supplied by RMG); 2-22 (classifying federal lands open to leasing, acreage of each classification, and their various constraints); at 2-62,63 (offering a detailed table of hydrocarbon potential across federal subsurface acres with various conditional requirements); and at A4-11 (forecasting air quality impacts in the absence of certainty based on reasonable, enumerated assumptions). Similarly, although the exact scope of development is uncertain, BLM could have expressed forecasted impacts as ranges and explained the uncertainty. Instead, BLM chose to ignore its responsibility to analyze reasonably foreseeable impacts, electing instead to potentially make an irrevocable commitment of resources by leasing parcels without NSO stipulations in some of the world's best sage grouse habitat before informing the public of the potential environmental repercussions. BLM's NEPA analysis in this EA is therefore inadequate, just as it was in *Wildearth Guardians*. In that case, the court remanded nine EAs to the agency for supplemental NEPA analysis and enjoined BLM from processing APDs associated with those lease sales until the court in its continuing jurisdiction approves BLM's supplemental analysis. BLM should avoid a similar result here by sufficiently analyzing impacts before it makes an irrevocable commitment of public resources, as NEPA requires.

### *3. BLM has failed to consider the cumulative impacts of leasing.*

BLM has not adequately considered the cumulative impacts of leasing on the affected environment, because it has failed to consider the impacts of several large projects in Wyoming and lease sales in neighboring states that would cumulatively impact wildlife habitat in Wyoming. NEPA requires BLM to evaluate the cumulative impacts of this lease sale "resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.27(b)(7); *Kern v. Bureau of Land Management*, 282 F.3d 1062, 1075-77 (9th Cir. 2002). To satisfy this requirement, BLM's NEPA analysis must consider the cumulative impact of all the recent and currently-planned oil and gas auctions in which BLM has offered hundreds of leases affecting sage grouse habitat protected under the RMPs.

Lease sales in Nevada, Utah, Colorado, and Montana have proposed to sell hundreds of parcels and hundreds of thousands of acres in sage-grouse habitats, and all of them except for the sales in Nevada are in states that border Wyoming. Yet none of these sales are considered in the EA, which violates the obligation to consider cumulative impacts.

This EA acknowledges two major projects in Wyoming, the Moneta Divide and Converse County projects, which are undergoing an EIS analysis, and assures the public that "cumulative impacts to resources are being evaluated within these documents." EA at 73. The fact that these projects will produce NEPA documents does not excuse BLM from its statutory duty to analyze cumulative impacts in *this* lease sale. These two projects alone would approve 9,250 new wells that would contribute to cumulative impacts, particularly to sagebrush obligate species as much of those project areas overlaps sagebrush habitat. Further, the EA entirely fails to consider other massive projects in the state including the Normally Pressured Lance Project (proposing 3,500 new wells), the Continental Divide-Creston Oil and Gas Project (proposing 8,950 new wells), and the Greater Crossbow Oil and Gas Project (proposing 1,500 new wells).

These massive projects – which together will involve drilling over 23,000 new oil and gas wells and constructing thousands of miles of new roads and pipelines in Wyoming, will have significant impacts on sage-grouse and sage-grouse habitats. *See, e.g.*, Converse County Oil and Gas Project Draft EIS at 3.18-57 (estimating that 54 leks will be abandoned due to project activities; "[d]espite the recent upward trend in peak male attendance, all greater sage-grouse leks in the analysis area are at risk of being abandoned as development continues to increase."). These projects need to be considered as part of a cumulative impacts analysis.

BLM must analyze and disclose the cumulative impacts of this wave of leasing and oil and gas projects on the Greater sage-grouse and its habitat. BLM (in the Rocky Mountain Region Record of Decision and the Wyoming “Nine Plan” Amendments and Revisions) and numerous authorities, have recognized the importance of addressing sage-grouse conservation on a comprehensive range-wide basis, and accounting for connectivity between state and regional populations and habitats, habitat fragmentation, and other impacts. As stated in the Rocky Mountain ROD, for the grouse plans collectively: “The cumulative effect of these measures is to conserve, enhance, and restore GRS habitat across the species’ remaining range in the Rocky Mountain Region and to provide greater certainty that BLM resource management plan decisions in GRS habitat in the Rocky Mountain Region can lead to conservation of the GRS and other sagebrush-steppe-associated species in the region.” Rocky Mountain ROD at S-2.

Under NEPA, BLM cannot lease hundreds of parcels covering many thousands of acres in Montana, Wyoming and other states without considering the cumulative and trans-boundary impacts to the greater sage-grouse and other resources. It also cannot ignore the cumulative impacts of 23,000 new oil and gas wells that are proposed to be drilled in Wyoming.

The cumulative (as well as direct and indirect) impacts from issuing these leases and permitting these wells may result in significant impacts to the environment. It is not plausible for BLM to assert that leasing 227,826.2 acres (over 350 square miles), in addition to BLM’s numerous other recent and planned large lease sales, will not have any significant impact. Thousands of new oil and gas wells will also have significant impacts. Properly analyzing those impacts will require a full environmental impact statement (EIS), not just an EA. Issuing a finding of no significant impact (FONSI) for this lease sale would be arbitrary and capricious and violate NEPA.

The aforementioned *Wildearth Guardians* case also assessed BLM’s duty to analyze cumulative impacts under NEPA. In that case, BLM’s refusal to quantify cumulative impacts rendered the challenged EAs inadequate. *Wildearth Guardians* at 44. The court found that BLM’s lease sales included parcels from several planning areas across several RMPs, and that some RMPs did not “quantify and forecast GHG emissions.” Because BLM lacked quantitative data comparing GHG emissions from leased parcels to regional and national emissions

The public and agency decisionmakers had no context for the EAs conclusion that GHG emissions from the leased parcels would represent only an “incremental” contribution to climate change. Likewise, they could not conceptualize the extent to which lease sales would contribute to local, regional, and global climate change.

*Id.* at 45.

Accordingly, the court found that NEPA required BLM to

quantify emissions from each leasing decision – past, present, or reasonably foreseeable – and compare those emissions to regional and national emissions, setting forth with reasonable specificity the cumulative effect of the leasing decision at issue. To the extent other BLM actions in the region – such as other lease sales – are reasonably foreseeable when an EA is issued, BLM must discuss these as well.

*Id.* at 46.

Here, in the context of sage grouse, BLM again refuses to consider the cumulative impacts of other BLM actions in the region, saying only “Impacts (direct and/or indirect) beyond those analyzed in



the underlying RMP FEIS' and the ARMPA FEIS, are not expected due to the continual expiration of existing federal leases whether because they lack production in paying quantities or are never explored." EA at 72. BLM claims that the "RMP FEISs to which this EA tiers address potential cumulative effects, including as a result of other reasonably foreseeable future actions outside of their respective planning areas." EA at 72. But the RMPs did not consider the impacts of these specific leases—no leasing was even proposed in these areas when the RMPs were developed. The RMPs only considered leasing in a general sense, and not in the context of other local and regional lease sales and projects. As in *Wildearth Guardians*, this paltry analysis is insufficient. The impacts of this lease sale on sage grouse must be analyzed in the context of other local and regional development. BLM may determine that this lease sale has a *de minimis* impact on sage grouse, but it cannot come to that conclusion without considering the broader context of impacts from other past, present, and reasonably foreseeable federal actions. Otherwise, the public and decisionmakers have no context for BLM's conclusion that impacts beyond those analyzed in RMPs are not expected. BLM must set forth with reasonable specificity the cumulative effect of the leasing decision. Therefore, BLM needs to improve the cumulative impacts analysis in this EA and make decisions accordingly.

On a final note, BLM has previously denied elements of our protests of lease sales on the grounds that the protest exceeds the scope of the NEPA analysis at hand. *See, e.g.* BLM's Protest Decision for the March 2019 lease sale at 8 (refusing to consider WOC et al.'s complaints referencing the 2018 Proposed RMP Amendments, since approved in 2019, and IM 2019 – 018). These actions are absolutely critical to an informed cumulative impacts analysis, given that they fundamentally change the very policy framework that BLM's analysis relies upon. Denying the relevance of these decisions to on-the-ground impacts on sage grouse from lease sales would be willfully obtuse.

#### *4. BLM's lack of protocols for ambient noise monitoring artificially minimizes impacts to sage-grouse*

BLM has not considered the best available science on noise impacts, so that the agency regularly improperly records baseline noise levels, artificially inflating the noise thresholds for operations in core sage grouse habitat in violation of the Core Area Protection Strategy. BLM has not developed protocols for measurement of ambient background noise in sage grouse habitat, despite demands from conservation organizations and industry alike. Clear measurement protocols are necessary in order to comply with Wyoming's Sage Grouse Executive Order and Core Area Strategy, which provide that noise levels, either individual or cumulative, should not exceed 10 decibels (as measured by L50) above baseline noise at the perimeter of a lek from 6:00pm to 8:00am during the breeding season (March 1 to May 15). WY Executive Order 2015-4, Attachment B, at 8.

When consultants hired by project proponents are permitted to measure ambient (baseline) noise levels for NEPA analyses, they invariably report higher levels. ("Baseline noise data was collected in 2012 using a protocol that is inconsistent with current guidance. The proposed ambient noise level of 25.1 dBA is likely inaccurate and inappropriate to use as a baseline across the NPL project area.")<sup>1</sup> Without protocols, suspect methods have been used to skew data and avoid the monetary costs of muffling operations. Microphones are often either the wrong type (incapable of recording ultra-low noise levels common in rural areas of Wyoming), or placed at higher distances from the ground than is appropriate (picking up wind sounds), or placed in locations where noise from ongoing industrial activity is present, leading to inflated ambient readings. These problems are compounded by BLM itself when it publishes erroneous information in NEPA documents reporting much higher ambient noise levels, as it did recently in the EA prepared for a well proposed in the Greater Little Mountain Area in Sweetwater County,

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<sup>1</sup> Letter from John Kennedy, Deputy Director, WGFD to Phillip Blundell, Rock Springs Field Office, re: PDEIS for the NPL project, dated April 15, 2016.

Wyoming; "The BLM has estimated that an average noise level in Wyoming rural areas is between 30 and 40 decibels on the A-weighted scale (dBA) (BLM 1997)." *See* Environmental Assessment for the North Dutch John Unit Well #1, DOI-BLM-WY-D040-2015-0065-EA (December 2018), at 16, available at: <https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=112337>

These estimates are magnitudes higher than the best available science suggests. As discussed at length in our August 2, 2018 letter on the BLM's draft plan and DEIS, a noise study commissioned by the Wyoming Game and Fish Department to resolve ongoing controversy regarding this topic measured ambient, or natural baseline, noise in several rural areas of Wyoming.<sup>2</sup> The levels of ambient noise measured by Ambrose, et al., at multiple locations averaged 15.4 dBA (L<sub>50</sub>). Sound levels recorded in the study were frequently close to the lower limit, or "noise floor" of the monitoring equipment used (13.5 dBA), such that actual background noise was lower than reported. When more sensitive microphones were used, they detected L<sub>90</sub> and L<sub>50</sub> levels of 7.2 and 14 dBA respectively in Wyoming sagebrush habitat, suggesting sound levels in undeveloped areas are actually lower than the study indicates.

To ensure scientific integrity, the study followed certain protocols, which BLM should adopt: First, monitoring equipment must be sensitive enough to accurately record background noise levels. When sound levels are recorded close to the noise floor of monitoring equipment (i.e. within 10 dBA of the noise floor), the recorded levels will be inaccurate and lower than reported. BLM must use appropriate equipment to obtain valid results. Second, microphone height should be at 12" to approximate the ear height of Greater sage-grouse and to reduce the impact of wind, which can artificially inflate background noise levels. During periods of high winds, microphones at higher heights will record higher noise levels. Third, American National Standards Institute (ANSI) standards require that windspeed data be collected at the measurement location, and that 1-second wind speed data be matched with 1-second dB data, and when winds exceed 5m/s for each second, those data should not be used in analysis. If wind speeds were recorded off site, for instance relying on wind speed data from nearby airports, those data do not meet ANSI standards and are not appropriate when correcting for wind speeds greater than 5 m/s. Finally, ambient noise levels should not be recorded during hours of operation, so that truck traffic and other industrial noise do not artificially inflate background noise levels. Additionally, the best available science suggests that the best management strategy is not to exceed 10 dBA over background noise levels, and not to exceed an L<sub>50</sub> of 26 dBA. Ambrose et al. recommend keeping noise levels below 10 dBA over background at all hours rather than just lekking hours.<sup>3</sup> Outside the lekking period, noise may impact foraging, roosting, nesting, and brood-rearing.

A 2014 study conducted by Hayden-Wing Associates at the request of WGFD and the Petroleum Association of Wyoming (PAW) echoes the need for clear protocols. That study notes that "noise levels were close to the floor of our microphones (<17.5 dBA), suggesting that actual sound levels were lower than what our SLMs reported," that microphone height has an impact on noise measurements," that

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<sup>2</sup> Ambrose, S., C. Florian, and J. MacDonald. 2014a. Ambient Sound Levels in Sage Habitats in Wyoming, April 2014. Unpublished report to Wyoming Department of Game and Fish, Cheyenne, WY.

<sup>3</sup> Ambrose et al. Sound Levels in Sagebrush in Wyoming, and Acoustic Impacts to Greater Sage-grouse. April 2014 Presentation to SGIT.

“ANSI standards do recommend placing microphone height in response to what is being measured,” and suggests “a protocol that promotes standards for replication is needed.”<sup>4</sup>

BLM must develop and apply a standard protocol for establishing background noise levels and for monitoring. Wyoming noise restrictions cannot be effectively implemented absent reliable background noise levels, tested using protocols based on the best available science. We suggest a statewide presumption of ambient noise levels at 16 dBA based on the best available science, and ensuring that noise levels do not exceed 26dBA during lekking hours, which is a 10 dBA increase over background noise as mandated by Wyoming’s Core Area Protection Strategy. This presumption would decrease cost to industry by eliminating the need for baseline measurements and reduce the risk of inaccurate measurements from flawed studies. Outside of lekking hours, reasonable efforts should be made to keep noise levels as close to these limits as possible. Compliance should be monitored with equipment capable of accurately measuring background noise levels, at a microphone height of 12”, during lekking hours, during the breeding season, for a minimum of 7 days. Sounds of strutting birds should not be considered background noise. Measurement methods should follow published ANSI standards. BLM must accurately record ambient noise levels and accurately monitor compliance to ensure the prescribed standards are met.

## **B. The BLM is Violating the Federal Land Policy and Management Act and the Mineral Leasing Act**

1. *The EA is not consistent with the Wyoming BLM Approved Resource Management Plan Amendments (September 2015) Prioritization Mandate, as required by FLPMA.*

BLM has not prioritized leasing outside of sage-grouse PHMA and GHMA, as required by the Rocky Mountain Region ROD, the Wyoming BLM ARMPA, and the Buffalo Field Office RMP. Under FLPMA, BLM must manage public lands “in accordance with the [applicable] land use plans . . .” 43 U.S.C. § 1732(a); *see also* 43 C.F.R. § 1610.5-3(a) (“All future resource management authorizations and actions . . . shall conform to the approved plan.”). Commenting on these provisions, the Supreme Court said,

The statutory directive that BLM manage “in accordance with” land use plans, and the regulatory requirement that authorizations and actions “conform to” those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan.

*Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 68 (2004).

Here, the leasing EA is not consistent with provisions of the Rocky Mountain ROD and Wyoming BLM ARMPA, which require the “prioritization” of oil and gas leasing outside of PHMAs and GHMAs. Under the Rocky Mountain Region ROD, BLM must:

prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs . . . to further limit future surface disturbance and to encourage new development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and, as such, protect important habitat and reduce the time and cost associated with oil and gas leasing development. It would do this by avoiding sensitive areas, reducing the complexity of

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<sup>4</sup> Noise Monitoring in the Pinedale and Jeffery City Area (2014). Hayden-Wing Associates LLC. Prepared for Wyoming Game and Fish Department.

environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

Rocky Mountain Region ROD at 1-25.

The Wyoming BLM ARMPA echoes this directive and includes the following objective: “Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMAs and GHMAs.” ARMPA Management Objective No. 14, at 24. The Buffalo Field Office ARMP/ROD makes the same provision. Buffalo ARMP/ROD at 50.

In addition, the Lander RMP ROD states that:

In order to avoid surface-disturbing activities in Core Areas, priority will be given to development of oil and gas and other mineral resources outside Core Areas, subject to applicable stipulations. When authorizing development of oil and gas and other mineral resources in core habitat, subject to applicable stipulations for the conservation of greater sage-grouse, priority will be given to development in non-habitat areas first and then in the least suitable habitat for sage-grouse.

Lander RMP ROD at 68, decision # 4120. See also decisions 4087-4115 in the Worland RMP ROD and decisions 4088-4116 in the Cody RMP ROD. “The LUPs in BLM Wyoming direct the priority for leasing of fluid mineral resources to be outside of sage-grouse habitat areas.” Wind River/Bighorn Basin WY-183Q Third Quarter Oil and Gas Lease Sale EA at 3-34.

The prioritization mandate applies even when lands are designated as open for leasing under the applicable RMP. Thus, the fact that these lands are open to leasing does not excuse compliance with the prioritization requirement, as BLM asserts in the EA. EA at 35. In addition, BLM cannot rely on stipulations as a substitute for compliance with the RMP prioritization mandate. *See id.* (stating “appropriate” stipulations have been applied). The RMP requirement is to apply certain stipulations *in addition to* prioritization, not instead of it. They are separate RMP provisions that both must be satisfied.

BLM’s now-replaced IM 2016-143 also put in place many provisions to guide prioritization of leasing outside of sage-grouse habitats. While IM 2016-143 has been replaced with IM 2018-026, which states, “[i]n effect, the BLM does not need to lease and develop outside of GRSG habitat management areas before considering any leasing and development within GRSG habitat,” this mere IM cannot supersede the statutory obligation for BLM to manage public lands “in accordance with the [applicable] land use plans . . . .” And the RMPs are clear, BLM must “prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs” and “[p]riority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMAs and GHMAs.” The prioritization requirement applies as much to leasing as specific development plans. BLM’s claims that IM 2018-026 allows it to ignore the prioritization requirement at this leasing stage are misplaced. EA at 35.

To the extent IM 2018-026 can be read as purporting to remove any requirement to limit leasing in sage-grouse habitat management areas, and the requirement to prioritize leasing outside those areas, it is inconsistent with the Rocky Mountain ROD, ARMPA, and Buffalo and Lander RMPs. The entire point of the prioritization objective is to limit development and surface disturbance in important sage-grouse habitat—not simply to order BLM’s administrative paperwork. Nor is the prioritization requirement satisfied by “encourag[ing] lessees to voluntarily prioritize leasing” outside habitat management areas. IM 2018-026 at 3. The prioritization objective applies to BLM’s decisions about where to offer leases—not the business choices of companies with no stewardship obligations—and it is binding on the agency.

BLM is planning to lease the vast majority of parcels this lease sale in sage-grouse habitats where industry has expressed an interest. It is planning to offer 145 parcels totaling over 191,408 acres in designated sage grouse habitat including 153,829.2 acres in PHMA. EA at 35. This is an affront to sage-grouse conservation and will help ensure that the Fish and Wildlife Service (FWS) is forced to change its “not warranted” decision and be pushed to move to list the sage-grouse under the Endangered Species Act. BLM is showing that in Wyoming at least there are not “adequate regulatory mechanisms” to protect the sage-grouse, as the FWS relied on for its not warranted finding. Leasing nearly 150 parcels in sage grouse habitat that cover almost 200,000 acres is not in compliance with the prioritization requirement in BLM’s RMPs. The BLM’s failure to prioritize leasing outside of sage-grouse habitats is a violation of FLPMA.

According to the EA, there are currently approximately 1.62 million acres of federal leases in PHMA. EA at 36. BLM boasts a 74 percent reduction in the acreage under lease in PHMAs between when implementation of the core area strategy began in 2008 and April of 2018. *Id.* 3-22. Yet now BLM is proposing to lease an additional 153,829.2 acres in PHMA. In addition, pursuant to the lease sale proposals for the first, second, and third quarter 2018 lease sales in Wyoming, and the first quarter 2019 sale this March, BLM proposed to offer an additional 398 parcels in PHMA, representing about an additional 492,865 acres in PHMA.<sup>5</sup> Coupled with the acreage that BLM deferred from the fourth quarter 2018 lease sale due to the decision in the Idaho court case, since offered at a special February 2019 lease sale, where 365,902 acres (on 302 parcels) were offered in PHMA, this would bring the total increase in PHMA leasing up by 858,797 acres since April. That represents about a 65% increase in leasing in PHMA in the past year alone. Clearly this level of leasing in PHMAs is not meeting the prioritization requirement, or the conservation objectives of the 2015 sage-grouse plans.

2. *The BLM is not complying with FLPMA’s multiple-use mandate.*

Under FLPMA, BLM is required to manage the public lands on the basis of multiple use and sustained yield. 43 U.S.C. § 1732(a). As the Supreme Court has noted, “[m]ultiple use management is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 58 (internal quotations omitted).

In recognition of the environmental components of the multiple use mandate, courts have repeatedly held that under FLPMA’s multiple use mandate, development of public lands is not required, but must instead be weighed against other possible uses, including conservation to protect environmental values. *See, e.g., New Mexico ex rel. Richardson*, 565 F.3d at 710 (“BLM’s obligation to manage for multiple use does not mean that development *must* be allowed. . . . Development is a possible use, which BLM must weigh against other possible uses — including conservation to protect environmental values, which are best assessed through the NEPA process.”); *Rocky Mtn. Oil & Gas Ass’n v. Watt*, 696 F.2d 734, 738 n.4 (10th Cir. 1982) (“BLM need not permit all resource uses on a given parcel of land.”). And, just as BLM can deny a project outright in order to protect the environmental uses of public lands, it can also condition a project’s approval on the commitment to mitigation measures that lessen environmental impacts. *See, e.g., Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1300-01 (10th Cir. 1999) (“FLPMA unambiguously authorizes the Secretary to specify terms and conditions in livestock grazing permits in accordance with land use plans”); *Grynberg Petro*, 152 IBLA 300, 306-07 (2000) (describing how appellants challenging conditions of approval bear the burden of establishing that they are “unreasonable or not supported by the data”).

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<sup>5</sup> The exact acreage in PHMAs is not clearly indicated in all of the EAs for the first three quarter lease sales, so this is an estimate that may be not be completely accurate.

The multiple use framework's emphasis both on environmental resources and on the need to balance between present and future generations are highly relevant to consideration of impacts to wildlife and recreation. For example, multiple use includes "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources . . . ; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment. . . ." 43 U.S.C. § 1702(c).

The mere fact an RMP makes lands *available* for leasing does not mean that actually leasing the lands meets BLMs' multiple use obligations. Given BLM's acknowledged discretion to engage in leasing, or not leasing, under the Mineral Leasing Act, it is clear the leasing stage, as much as the planning stage, is when multiple use decisions should be made. Since land use plan decisions only set a basic framework for land management, and do not make project-specific decisions, it is clear the leasing stage is when decisions should be made about whether issuing a lease parcel would meet BLM's multiple use responsibilities, and this must be reflected in the NEPA analysis at the leasing stage, which has not occurred here.

None of the overarching legal mandates under which BLM operates – be it multiple-use or non-impairment – authorize the Department of the Interior (DOI) to establish energy development as the dominant use of public lands. On our public lands, energy development is an allowable use that must be carefully balanced with other uses. Thus, any action that attempts to enshrine energy development as the dominant use of public lands is invalid on its face and inconsistent with the foundational statutes that govern the management of public lands. As discussed above in the Prioritization section, the courts have held unequivocally that BLM must meet its statutory obligations prior to erecting any administrative walls to meeting the statutory mandate.

Federal courts have consistently rejected efforts to affirmatively elevate energy development over other uses of public lands. In the seminal case, *New Mexico ex rel. Richardson v. BLM*, the Tenth Circuit put to rest the notion that BLM can manage chiefly for energy development, declaring that "[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses." 565 F.3d 683, 710 (10th Cir. 2009); *see also S. Utah Wilderness Alliance v. Norton*, 542 U.S. 52, 58 (2004) (defining "multiple use management" as "striking a balance among the many competing uses to which land can be put"). Other federal courts have agreed. *See, e.g., Colo. Envtl. Coalition v. Salazar*, 875 F. Supp. 2d 1233, 1249 (D. Colo. 2012) (rejecting oil and gas leasing plan that failed to adequately consider other uses of public lands). And now in *Wild Earth Guardians v. Zinke*, Case No. 16-1724(RC) (D.C. Mar. 19, 2019), the court has reaffirmed that energy dominance cannot form the basis for public lands management, insisting that other issues, in this case climate change and Greenhouse Gas Emissions (GHG), must be considered. Thus, any action by BLM that seeks to prioritize oil and gas leasing and development as the dominant use of public lands would violate FLPMA. BLM must therefore consider a reasonable range of alternatives for this lease sale that considers and balances the multiple uses of our public lands, consistent with NEPA and FLPMA.

BLM's energy dominance thrust removes the public from decision making. Moreover, it fails to recognize that natural resources protection, particularly for support hunting opportunities, is a multi-billion-dollar industry in Wyoming. Elevating energy development to the level that BLM is engaging in ignores past agreements to avoid leasing in sensitive areas and ignores current research regarding the impacts of oil and gas activities on wildlife and wildlife habitats. Across the West oil and gas companies hold leases that they are not developing. About 50 percent of currently approved federal oil and gas leases are not producing energy. Yet this push by industry, which is being accommodated by BLM, locks up our

public lands and prevents them from being managed for multiple use. If BLM listened to the public, it would scale back this massive leasing rush so that multiple use values could be more fully recognized and accommodated, and it particularly must prevent the rush to garner noncompetitive leases at rock-bottom prices by avoiding bidding at competitive sales. *See* Exhibit 2 (New York Times article on massive increase in speculators garnering huge lease holdings through unscrupulous noncompetitive sale gambits).<sup>6</sup>

In setting out Congress' vision for public lands management, FLPMA directs land managers to, among other objectives, "provide for outdoor recreation and human occupancy and use." 43 U.S.C.A. at §§ 1701(a)(8). The recent, bipartisan John D. Dingell Jr. Conservation, Management, and Recreation Act (formerly known as the Natural Resources Management Act), which passed the Senate on a 92-8 vote and the House on a margin of 362-62, strengthens FLPMA's multiple use provisions by requiring land managers to facilitate and enhance outdoor recreation. S.47, signed into law March 12, 2019 ("It is the policy of the United States that Federal departments and agencies... shall - (1) facilitate the expansion and enhancement of hunting, fishing, and recreational shooting opportunities on Federal land, in consultation with the Wildlife and Hunting Heritage Conservation Council, the Sport Fishing and Boating Partnership Council, State and Tribal fish and wildlife agencies, and the public; (2) conserve and enhance aquatic systems and the management of game species and the habitat of those species on Federal land, including through hunting and fishing, in a manner that respects - (A) State management authority over wildlife resources; and (B) private property rights; and (3) consider hunting, fishing, and recreational shooting opportunities as part of all Federal plans for land, resource, and travel management.)

The fact that an RMP makes certain lands available for leasing does not compel BLM to lease those lands. And even if multiple use decisions identifying lands available for leasing were made in the RMPs, that planning level decision does excuse BLM from compliance with FLPMA's multiple use mandate as it goes about the important task of implementing the RMP. The BLM is to "*manage*" the public lands to achieve multiple use, 43 U.S.C. § 1732(a) (emphasis added), not just *plan* for multiple use. *See also id.* at § 1702(c) (defining multiple use as "the management of the public lands"). Decisions to lease or not to lease lands for oil and gas development should be screened via a multiple use filter, and certainly new policies, such as the energy dominance theory of the President were not considered in the RMPs, so they must be considered now in the context of meeting BLM's multiple use mandate, which has not occurred. Therefore, BLM is in violation of FLPMA's multiple use mandate.

3. *Facilitating speculative leasing is inconsistent with the MLA and FLPMA, and there is a need to consider option value before leasing.*

The MLA is structured to facilitate actual production of federal minerals, and thus its faithful application should focus on areas with known potential for development while discouraging speculative leasing of low potential lands. BLM's June 2019 lease sale would violate this core principle in three ways: (1) the sale continues a long-extant trend of leasing lands with little or no potential for productive mineral development; (2) as a result, the sale encourages speculative, noncompetitive leasing, which creates administrative waste, not oil; and (3) it would destroy important option value by hamstringing decisional flexibility in future management.

The June 2019 sale would violate the MLA's core purpose by offering land with low mineral potential. The MLA directs BLM to hold periodic oil and gas lease sales for "lands... which are known or believed to contain oil or gas deposits..." 30 U.S.C. § 226(a). The Interior Department has, through its internal administrative review body, recognized this mandate. *See Vessels Coal Gas, Inc.*, 175 IBLA 8, 25 (2008) ("It is well-settled under the MLA that competitive leasing is to be

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<sup>6</sup> <https://www.nytimes.com/2018/11/27/business/energy-speculators-public-land-leases.html>

based upon reasonable assurance of an existing mineral deposit.”). Here, however, BLM has provided no evidence that the proposed parcels contain oil or gas deposits, as the MLA requires. See 30 U.S.C. § 226(a) (stating that lands subject to oil and gas leasing must be “known or believed to contain oil or gas deposits”). In fact, based on the pattern of lease sales in Wyoming, there is evidence to the contrary – that the lands encompassed by the parcels generally lack oil and gas resources. *See, e.g.* EA at 47 (“most (58%) of Federal oil and gas leases in Wyoming do not have active wells located within their boundaries).

The June 2019 lease sale would encourage noncompetitive, speculative leasing. Besides being wasteful and contrary to the MLA’s purpose, the ongoing leasing of lands with little or no potential creates another related problem: it facilitates, and perhaps even encourages, below-market, speculative leasing by industry actors who don’t actually intend to develop the public lands they lease. This problem creates more administrative waste, and also fails to uphold the MLA’s core purpose. Going back to the MLA’s language, lease sales are intended to foster responsible oil and gas development, which lessees must carry out with “reasonable diligence.” 30 U.S.C. § 187; *see also* BLM Form 3100-11 § 4 (“Lessee must exercise reasonable diligence in developing and producing...leased resources.”). However, BLM Wyoming’s oil and gas leasing program does not accomplish this goal. Instead, it has facilitated a surge in noncompetitive lease sales – sales that do not enjoy the benefits of market forces, and which rarely result in productive development.

BLM must analyze the “option value” of offering parcels with low or nonexistent development potential. In addition to the concerns above, leasing lands with low potential for oil and gas development gives preference to oil and gas development at the expense of other uses while handcuffing BLM’s ability to make other management decisions down the road. This is because the presence of oil and gas leases can limit BLM’s willingness to manage for other resources in the future. For example, in the Colorado River Valley RMP, BLM decided against managing lands for protection of wilderness characteristics in the Grand Hogback lands with wilderness characteristics unit based specifically on the presence of oil and gas leases, even though the leases were non-producing:

The Grand Hogback citizens’ wilderness proposal unit contains 11,360 acres of BLM lands. All of the proposed area meets the overall criteria for wilderness character... There are six active oil and gas leases within the unit, totaling approximately 2,240 acres. None of these leases shows any active drilling or has previously drilled wells. The ability to manage for wilderness character would be difficult. If the current acres in the area continue to be leased and experience any development, protecting the unit’s wilderness characteristics would be infeasible...

Proposed Colorado River Valley RMP (2015), p. 3-135.

Similarly, in the Grand Junction Resource Management Plan, BLM expressly stated that undeveloped leases on low-potential lands had effectively prevented management to protect wilderness characteristics, stating:

133,900 acres of lands with wilderness characteristics have been classified as having low, very low, or no potential... While there is not potential for fluid mineral development in most of the lands with wilderness characteristics units, the majority of the areas, totaling 101,100 acres (59 percent), are already leased for oil and gas development.

Proposed Grand Junction Proposed RMP (2015), pp. 4-289 – 4-290.

The presence of leases can also limit BLM’s ability to manage for other important, non-wilderness values, like renewable energy projects. *See, e.g.*, Proposed White River Resource Management Plan, p. 4-498



(“Areas closed to leasing...indirectly limit the potential for oil and gas developments to preclude other land use authorizations not related to oil and gas (e.g., renewable energy developments, transmission lines) in those areas.”). In offering the leases involved in this sale, BLM runs a similar risk of precluding future management decisions for other resources and uses such as wilderness, recreation and renewable energy development.

In this context, BLM can and should apply the principles of option value or informational values, which permit the agency to look at the benefits of delaying irreversible decisions. *See* Jayni Foley Hein, Harmonizing Preservation and Production at 13 (June 2015) (“Option value derives from the ability to delay decisions until later, when more information is available. . . . In the leasing context, the value associated with the option to delay can be large, especially when there is a high degree of uncertainty about resource price, extraction costs, and/or the social and environmental costs of drilling.”). It is well-established that issuance of an oil and gas lease is an irreversible commitment of resources. As the U.S. Court of Appeals for the D.C. Circuit held in the context of considering the informational value of delaying leasing on the Outer Continental Shelf, “[t]here is therefore a tangible present economic benefit to delaying the decision to drill for fossil fuels to preserve the opportunity to see what new technologies develop and what new information comes to light.” *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 610 (D.C. Cir. 2015). Thus, in the EA for this lease sale, BLM must evaluate “option value” – the economic benefits that could arise from delaying leasing and/or exploration and development based on improvements in technology, additional benefits that could come from managing these lands for other uses, and additional information on the impacts of climate change and ways to avoid or mitigate impacts on the environment. This is essential, in particular, for lands with low or nonexistent development potential.

BLM has the ability and obligation to undertake an analysis of the benefits of delaying leasing, which can be both qualitative and quantitative, considering both economic and environmental needs, as shown by a recent federal court decision. In *Wilderness Workshop v. Bureau of Land Management*, the plaintiffs proposed a land use planning alternative where low and medium potential lands would be closed for leasing. BLM declined to consider the alternative, claiming it had already considered and discarded a “no leasing” alternative. The court found: “This alternative would be ‘significantly distinguishable’ because it would allow BLM to consider other uses for that land.” *Wilderness Workshop v. Bureau of Land Management*, No. 1:16-cv-01822-LTB, Memorandum Opinion and Order, (D. Colo., October 17, 2018), p. 38 (attached as Exhibit 3). Considering such an alternative would permit BLM to consider the option value of delaying leasing on low potential lands.

### **C. The EA Has Not Adequately Addressed Lands with Wilderness Characteristics, in Violation of NEPA and FLPMA.**

The EA has not adequately addressed Lands with Wilderness Characteristics, in violation of NEPA and FLPMA. Parcels 124 and 170 overlap the eastern portion of Citizen Identified Lands with Wilderness Characteristics Unit WY 040-2011-089. This LWC unit was submitted to the BLM office in the fall of 2014. *See* Exhibit 4 – WWA, Citizen Identified Lands with Wilderness Characteristics. These parcels will destroy wilderness quality lands and also occur in an area that has an ongoing plan amendment. Due to the irreparable harm that leasing would have on this area, we request that the BLM defer leasing in this LWC unit until the completion of the RMP revision in the RSFO.

The RSFO does not have management direction for the LWCs. The field office is undergoing a management revision process that will decide their future management. Pursuant to NEPA and the BLM’s Land Use Planning Handbook, the BLM may defer leasing to avoid limiting the range of alternatives in an ongoing planning process. *See*, 40 C.F.R. § 1506.1; Land Use Planning Handbook 1601-1, § VII (E). While we understand that the BLM has discretion in this regard, the current RMP went into effect in 1990—almost

40 years ago—and never evaluated options to protect LWC because these inventories did not exist. Inventories submitted in 2014 are considered new information.

The BLM must review significant new information submitted by the public; otherwise the BLM fails to take the requisite “hard look” at how the sale of the parcels would affect the Wilderness resources as required by NEPA. In order to evaluate impacts under NEPA, the BLM must analyze those impacts from an accurate understanding of conditions on the ground. 40 C.F.R. § 1502.15 (agencies must “describe the environment of the areas to be affected or created by the alternatives under consideration.”); see also *Half Moon Bay Fisherman’s Marketing Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.”). The BLM should therefore defer leasing these parcels until the agency has updated its inventory for these areas in response to the information submitted to the agency.

We also request that the BLM use wise discretion to not lease LWCs and allow the planning process for the Rock Springs RMP to determine the future their management. These areas provide wildlife essential habitat and visitors a rare opportunity for solitude on BLM lands. We respectfully ask that you do not take away the opportunity for the public to decide how these lands should be managed in the next plan. The Green River RMP is over 20 years old and does not contain management direction for LWCs. The LWCs inventories are new information that should be considered during this lease sale and incorporated in the next plan.

#### **D. BLM Has Not Adequately Considered Impacts to Big Game Crucial Winter Range**

This lease sale does not offer any parcels in designated mule deer migration corridors, but offers six parcels in mule deer crucial winter range. We applaud BLM’s decision not to offer leases in mule deer corridors this quarter, but question BLM’s conclusion that despite extensive leasing in both mule deer migration corridors (including stopovers – the most important “vital” habitat) and crucial winter range in the agency’s recent past lease sales, there will be no cumulative impacts to mule deer. See BLM’s EAs for, and WOC et al.’s comments on, BLM’s 3<sup>rd</sup> Quarter 2018, Supplemental February 2018, and 1<sup>st</sup> Quarter 2019 lease sales. We have commented in depth on BLM’s failure to incorporate the best available science in our comments and protests of these previous lease sales, and in our December 3, 2018, letter to Wyoming BLM State Director Mary Jo Rugwell Re: Ensuring Functionality of Wildlife Corridors by Using the Best Available Science to Implement Secretarial Order 3362 (on file with BLM and incorporated by reference herein). The failure of these previous EAs to analyze impacts using the best available science renders the cumulative impacts analysis of this EA implausible.

In the instant EA, BLM incorporates some of the science that commenters have been submitting to the agency for at least four previous lease sales, yet the agency still insists that “no significant cumulative impacts are expected from the offering of the 6 parcels located in mule deer CWR or to migrating animals, and/or to the continued use and function of the Platte Valley or RD2H MDC’s [sic] from offering the proposed parcels for sale” and that “[o]ffering parcels in . . . CWR is not expected to result in new impacts beyond those identified in the base RMPs.” EA at 74, 66. Those RMPs were released when mule deer science was nascent, and the best available science now indicates that impacts would be far greater than those anticipated in the RMPs. Petitioners have pointed out to BLM time and time again in their letters to the agency and in their comments on BLM’s leasing EAs that oil and gas leasing and development in these crucial habitats could have significant, potentially devastating impacts to Wyoming’s mule deer herds, but for some reason the agency is not listening. The agency continues to offer oil and gas leases in crucial habitats without properly disclosing the cumulative impacts, without analyzing the effectiveness of mitigation, and without including adequate stipulations on leases that would permit BLM to deny operations if impacts to mule deer were deemed unacceptable.

BLM assures the public that “[b]est management practices will be considered and where required by stipulation, a mitigation plan will be developed to ensure RMP objectives are achieved” and that “[m]aster development plans will be considered as appropriate.” EA at 74. These assurances are inadequate. Mitigation measures must be developed to a reasonable degree and supported by evidence. Here, BLM has merely listed potential measures with no analysis of their potential efficacy and no supporting evidence. Courts have held that mere listing of mitigation measures is inadequate. *See, e.g.* HCPC I, Case No. 3:11-cv-00023-PK, slip copy at 26-27 (USFS’s wetland/springs mitigation was insufficiently developed to justify a CE, to support a FONSI “proposed mitigation measures must be ‘developed to a reasonable degree’ and supported by analytical data.”), citing *Bosworth*, 510 F.3d at 1029 (citing *Nat’l Parks&Conservation Ass’n*, 241 F.3d 722, 734 (9th Cir. 2001); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473-75 (9th Cir. 2000). While “a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements’[,] a ‘perfunctory description’ or ‘mere listing’ of mitigating measures is inadequate to satisfy NEPA’s requirements.” *Id.* (citing *Neighbors of Cuddy Mtn. v. USFS*, 137 F.3d 1372, 1380 (9th Cir. 1998); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).

Not only are BLM’s proposed mitigation measures insufficient, the existing protections for mule deer are deeply flawed. The existing stipulation for crucial winter range, a Timing Limitation Stipulation (TLS), is based on WGFD’s admittedly outdated Recommendations for Development of Oil and Gas Resources within Crucial and Important Habitat” (2010). Responding to a decade of new science, WGFD now recognizes that the TLS recommended in 2010 to protect crucial winter range are not effective to protect that vital designated habitat. Yet, because BLM has not *analyzed* their own proposed mitigation measures and considered their ability to maintain corridor functionality based on the available *evidence*, the agency has not reassessed its approach to mitigation. BLM must develop its mitigation measures further, supporting its contention that they will protect crucial winter range with analytical data. Additionally, thus far no stipulation whatsoever exists for leases in corridors, and no master development plan has been proposed, all of which will cumulatively impact the health of our herds. To ensure corridor functionality, BLM should develop a statewide RMP amendment with strong stipulations for mule deer corridors and crucial winter range, based on the best available science. The public cannot rely on baseless and speculative mitigation measures to protect our mule deer.

#### **E. The EA Does Not Take a Hard Look at GHG Emissions**

According to BLM, “this EA will only address those resources and impacts where the BLM has determined there are new circumstances or information, or where we believe it will be helpful to inform the public about actions that may occur on public lands.” EA at 47. It is unclear then why BLM does not consider the most comprehensive reports on climate change from the world’s most reputable sources on the topic to be informative or helpful. In October 2018, the Intergovernmental Panel on Climate Change released a landmark report warning that the 2 degree Celsius threshold previously considered for the most severe impacts of climate change was higher than accurate, and that warming of 1.5 degrees Celsius beyond preindustrial levels will cause severe social and economic damage. “Global Warming of 1.5 degrees C,” Intergovernmental Panel on Climate Change Special Report, October 2018. Then, in November, The National Oceanic and Atmospheric Association released the 2018 National Climate Report, a major scientific report by 13 federal agencies saying that climate change could shrink the US economy by 10% if significant steps are not taken to address emissions. The assessment predicts devastating impacts to the economy, public health, and the environment including falling agricultural yields, longer fire seasons, disrupted export and supply chains, threats to water supplies, flooding, and outbreaks of disease, among other adverse impacts. NOAA National Centers for Environmental Information, State of the Climate: National Climate Report for November 2018, published online December 2018, retrieved on December 10, 2018 from <https://www.ncdc.noaa.gov/sotc/national/201811>.

Later in November, The Wilderness Society and Taxpayers for Common Sense released a report on the economic impact of lost methane from venting and flaring on federal lands. That report found the cost of lost gas on federal lands in eight Western states to be \$807 million. "The State of Methane," The Wilderness Society and Taxpayers for Common Sense, November 27, 2018.

These reports emphasize the need to take immediate action to mitigate climate change. Despite new data on the risks of climate change from the most reliable scientific sources, our national energy dominance policy continues to prioritize fossil fuel production and expand drilling on federal lands. BLM's new methane rule eliminates the prior Obama era rule requiring increased inspection and reporting requirements and reduces methane capture requirements. Methane is a particularly potent contributor to climate change, roughly 30 times more effective as a heat trapping gas than CO<sub>2</sub>. BLM must consider the impacts of leasing within this context.

BLM must take a hard look at the impacts of climate change – informed by the best available science, quantify and forecast drilling-related emissions, consider the impacts of their downstream use, and compare those emissions to other forecasts and other reasonably foreseeable projects. The above referenced *Wildearth Guardians* case dealt with this very issue, remanding nine EAs to BLM for supplemental NEPA on the grounds that BLM

- (1) Failed to quantify and forecast-drilling related GHG emissions; (2) failed to adequately consider GHG emission from the downstream use of oil and gas produced on the leased parcels; and (3) failed to compare those GHG emissions to state, regional, and national GHG emissions forecasts, and other foreseeable regional and national BLM projects.

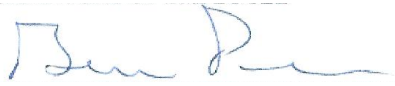
*Wildearth Guardians* at 56.

BLM has repeated some of the same errors here. The EA makes the same arguments as the remanded EAs in *Wildearth Guardians*, claiming leasing is a mere administrative action, and noting the uncertainty associated with emissions estimates. BLM does quantify estimates of potential direct and indirect emissions, and provides an estimate of potential emissions from downstream use. This is a laudable improvement over previous EAs. However, the EA fails to compare those GHG emissions to state, regional, and national emissions forecasts. Without this comparison, the public and decisionmakers do not have the information necessary to understand the cumulative impacts of GHG emissions from this lease sale in the context of other local, regional, and national development. As *Wildearth Guardians* makes clear, this failure is a violation of NEPA.

#### IV. CONCLUSION

Thank you for considering these comments on the June 2019 oil and gas lease sale environmental assessment. As indicated, we have strong concerns that many of the lease parcels are located in crucial sage-grouse habitats. There is a need to provide for better protection for this species by prioritizing leasing outside of GHMA and PHMA, as FLPMA, and Wyoming's Core Area Protection Strategy require. In addition, the proposed leasing is not based on a reasonable range of alternatives, the EA does not provide a "hard look" at environmental impacts or consider the cumulative impacts of leasing, and the leasing would not comply with the FLPMA multiple use mandate. There is also a need for better analysis of Lands with Wilderness Characteristics and impacts to Wilderness Study Areas. Finally, there is an immediate need for legally enforceable protections for big game migration corridors and crucial winter ranges.

Sincerely,



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#### **List of Exhibits**

1. Exhibit 1: Golden Triangle Parcels - Letter to Governor Gordon (Feb. 22, 2019).
2. Exhibit 2: NYT Article on Speculative Leasing
3. Exhibit 3: Wilderness Workshop v. Bureau of Land Management
4. Exhibit 4: WWA, Citizen Identified Lands with Wilderness Characteristics