March 2019 Oil Gas Lease Sale EA_1.31

Submission Successful
Your Submission ID is: Protest-1-445255

Names & Addresses

Mr. Bruce M. Pendery
440 East 800 North
440 East 800 North
Logan, Utah 84321, United States
Email Address: bruce_pendery@tws.org
Day Phone: 1435-760-6217
Evening Phone: 435-760-6217
Fax Number:
Other Phone:
Agency: Public Web Page
Organization/Group: The Wilderness Society Position: Litigation & Energy Policy Specialist

Comments

Comment ID: 1
Comment Title: BLM Montana March 2019 Lease Protest
Comment: Attached
Attachment: BLM Montana 19Q1 Lease Protest 02-26-19.docx

Comment ID: 2
Comment Title: March 2019 Lease Protest Exhibits
Comment: Attached
Attachment: Exhibit 1 Montana 19Q1 Lease Protest.xls

Comment ID: 3
Comment Title: March 2019 Lease Protest Exhibits
Comment: Attached
Attachment: Exhibit 2 Montana 19Q1 Lease Protest.pdf

Comment ID: 4
Comment Title: March 2019 Lease Protest Exhibits
Comment: Attached
Attachment: Exhibit 3 Montana 19Q1 Lease Protest.pdf

Comment ID: 5
Comment Title: Lease protest
Comment: Done

Submission Classification

Response Type:	Front Office Submission Form
Delivery Type:	Front Office Submission Form
Receipt Date:	02/27/2019
Status:	ACTIVE

Agreements

No - Withhold personally identifying information from future publications on this project?
Yes - Please include me on the mailing list for this project?

Original Submission Files

The Wilderness Society * National Audubon Society * Montana Wilderness Association * National Wildlife Federation * Montana Wildlife Federation * Montana Audubon

BLM Montana/Dakotas State Director
5001 Southgate Drive
Billings, MT 59101

Via e-mail at: https://eplanning.blm.gov/epl-front-office/eplanning/comments/commentSubmission.do?commentPeriodId=74422

February 27, 2019

Re: Protest of the March 25-27, 2019 BLM Montana Competitive Oil and Natural Gas Lease Sale

To whom it may concern:

Please accept this protest of the above oil and natural gas lease sale that is filed by The Wilderness Society, National Audubon Society, Montana Wilderness Association, National Wildlife Federation, Montana Wildlife Federation, and Montana Audubon. This protest is filed pursuant to the provisions at 43 C.F.R. § 3120.1-3. In this lease sale, the Bureau of Land Management (BLM) is proposing to sell 305 parcels that would cover approximately 167,113 acres of federal minerals.

The environmental assessment (EA) prepared for this lease sale is DOI-BLM-MT-0000-2018-0007-EA.

It appears that 287 out of the 305 parcels would intersect Greater sage-grouse general habitat management areas (GHMA), priority habitat management areas (PHMA), or restoration habitat management areas (RHMA), which is a principal concern of this protest. All but 16 of the parcels would intersect sage-grouse habitat, and 95 percent of the parcels are located in designated sage-grouse habitat. EA at 71, 72.

I. ISSUES OF CONCERN

We have a number of concerns with the proposed action including, in particular, the potential for significant impacts to Greater sage-grouse and other sagebrush-obligate species. In addition, the environmental analysis fails to satisfy the basic requirements of the National Environmental Policy Act (NEPA) by failing to analyze a reasonable range of alternatives and by failing to take a hard look at the full range of direct, indirect and cumulative environmental impacts that will result from reasonably foreseeable development on the parcels. The proposed lease sale is also contrary to the multiple use–sustained yield principles embodied in the Federal

Land Policy and Management Act (FLPMA). There other concerns related to leasing in areas with minimal development potential and compliance with the Federal Antideficiency Act.

II. LEASE PARCELS PROTESTED

We protest the proposal by BLM to sell the 305 parcels listed under its 03 27 19 Sale Notice and List. *See* Notice of Competitive Oil and Gas Internet Based Lease Sale March 27, 2019 (listing and describing lease parcels 03-19-01 through 03-19-306, including stipulations, all of which are protested). https://eplanning.blm.gov/epl-front-office/projects/nepa/114348/165523/201901/03_27_19_SALE_NOTICE_AND_LIST.pdf.

III. INTERESTS OF THE PARTIES

The Wilderness Society, National Audubon Society, Montana Wilderness Association, National Wildlife Federation, Montana Wildlife Federation, and Montana Audubon have a long-standing interest in the management of BLM lands in Montana 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.

For 60 years years, the Montana Wilderness Association, a 501(c)(3) organization, has worked with communities across the state to protect Montana's wilderness heritage, quiet beauty, and outdoor traditions, now and for future generations. Our commitment to grassroots conservation was instrumental to the passage of the 1964 Wilderness Act and the designation of all 15 Wilderness area in Montana, and we continue to advocate for the protection of Montana's wildest places.

The National Wildlife Federation (NWF), America's largest conservation organization, has worked across the country to unite Americans from all walks of life in giving wildlife a voice for over eighty years. NWF has 51 state and territorial affiliates and more than 6 million members and supporters, including hunters, anglers, gardeners, birders, hikers, campers, paddlers, and other outdoor enthusiasts residing in Montana, who regularly rely on BLM lands to engage in these activities. NWF works to protect the 600 million acres of public lands owned by all Americans and has a longstanding interest in ensuring these lands are managed properly for fish, wildlife, and communities.

Montana Audubon is a statewide grassroots non-profit organization made up of supporters from across the state of Montana and beyond. Our mission is to promote appreciation, knowledge and conservation of Montana's native birds, other wildlife, and natural ecosystems to safeguard biological diversity for current and future generations.

The Montana Wildlife Federation (MWF) is a grassroots organization that works to protect Montana's wildlife, public lands, clean waters, and access to the outdoors for hunting, angling, and other outdoor recreation. MWF was founded in 1936 by a group of dedicated Montana hunters, anglers, landowners, and birdwatchers, and our membership today consists of thousands of members across Montana who recreate on public lands and waters across the Treasure State. MWF also fosters collaboration across a network of affiliated wildlife and hunting conservation organizations.

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.

IV. AUTHORIZATION TO FILE THIS PROTEST

As an attorney and Litigation and Energy Policy Specialist for The Wilderness Society, I am authorized to file this protest on behalf of The Wilderness Society and its members and supporters, and I have like authority to file this protest on behalf of the National Audubon Society, Montana Wilderness Association, National Wildlife Federation, Montana Wildlife Federation, and Montana Audubon.

V. STATEMENT OF REASONS

A. The BLM has not Prioritized Leasing Outside of Sage-Grouse Habitats as Required by its Land Use Plans and it has not Required Compensatory Mitigation.

1. <u>The BLM has not Prioritized Leasing Outside of Sage-Grouse Habitats.</u>

BLM has not prioritized leasing outside of PHMA and GHMA, as required by the Rocky Mountain Region Record of Decision (ROD) and Montana BLM Approved Resource Management Plan Amendments (ARMPA). 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).

The EA does not satisfy the prioritization requirement set out in the Resource Management Plans (RMP). Leasing is proposed in the Billings, Glasgow, Havre, Miles City and South Dakota Field Offices, all of which are governed by 2015 sage-grouse land use plans.[1] These plans state that priority will be given to leasing outside of GHMA and PHMA. The plans state that BLM will "Prioritize the leasing and development of fluid mineral resources outside GRSG habitat."[2] More specifically the plans provide that,

> Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMA and GHMA, and 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 Greater Sage-Grouse. The implementation of these priorities will be subject to valid existing rights and any applicable law or regulation, including, but not limited to, 30 U.S.C. 226(p) and 43 C.F.R. 3162.3-1(h).

HiLine District Office Greater Sage-Grouse Approved Resource Management Plan at 2-9 and 3-13 to -14. The Miles City plan makes almost identical provisions. Miles City Field Office Approved Resource Management Plan at 2-8.

The Rocky Mountain plan provides that,

> In addition to allocations that limit disturbance in PHMAs and GHMAs, the ARMPs and ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs. This is to further limit future surface disturbance and 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 by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.[3]

Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region at 1-25.

Further, the U.S. Fish and Wildlife Service (FWS) specifically identified the prioritization requirement as one of the new "regulatory mechanisms" that allowed it to determine that sage-grouse did not warrant listing under the Endangered Species Act (ESA). *See* 80 Fed. Reg. 59858, 59981 (Oct. 2, 2015) ("The Federal Plans prioritize the future leasing and

[1] We will not consider parcels that are proposed for sale in the South Dakota Field Office in this protest.
[2] HiLine District Office Greater Sage-Grouse Approved Resource Management Plan at 2-5; Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region at 1-19; Miles City Field Office Approved Resource Management Plan at 2-5.
[3] The plan also states, "[t]he ARMPs and ARMPAs will also prioritize future oil and gas leasing and development outside of identified GRSG habitat management areas (i.e., SFAs, PHMAs, and GHMAs) to reduce the potential for future conflict with GRSG." Rocky Mountain Plan at 1-36.

development of nonrenewable-energy resources outside of sage-grouse habitats"). By ignoring this requirement in the context of this and other oil and gas lease sales, BLM would be undermining FWS's determination and moving sage-grouse closer to an ESA listing.

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 its response to comments on the EA and in the EA itself. EA App. F at 26 and EA at 19. In addition, BLM cannot rely on stipulations as a substitute for compliance with the RMP prioritization mandate, as BLM seeks to do. EA at 69, 75, and 80. 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 Instruction Memorandum (IM) 2016-143 also put in place many provisions to ensure 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 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 . . . outside of PHMAs and GHMAs."

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 and the BLM Montana ARMPAs. 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 has not complied with this requirement. Claims by the BLM that IM 2018-026 allows it to ignore the prioritization requirement and to lease in sage-grouse habitats with impunity are misplaced. *See* EA at 66-67 (making the claim the IM has opened areas to leasing despite the prioritization requirement).

In this lease sale BLM is proposing to offer for lease 305 parcels covering 167,113 acres, virtually all of which is in sage-grouse PHMA or GHMA. According to the EA, 95 percent of the lease parcels are located in designated sage-grouse habitat. EA at 72. And all but 16 of the parcels contain sage-grouse habitat. *Id.* at 71. Our analysis shows 287 out of the 305 parcels are located in sage-grouse habitat with 115,709 acres in GHMA, 35,611 acres in PHMA, and 1,498 acres in RHMA. *See* Exhibit 1 (tables showing parcels in PHMA and GHMA).

Of the 305 parcels the BLM is planning to offer for sale, the number of parcels in each Montana field office, the development potential of the parcels, and the estimated number of wells that will be drilled are as follows:

Field Office	Number of Parcels	Very Low Develop. Potential	Low Development Potential	Moderate Development Potential	Medium Development Potential	High Development Potential	Predicted number of wells
Billings	12			12			20
Glasgow and Havre	19	12	3	1			3
Miles City	271		184		69	10	29
Total	**302**	**12**	**187**	**13**	**69**	**10**	**52**

EA at 17-18 (Table 2). Thus, it is clear the vast majority of these parcels have a low or very low development potential and only a limited number of wells are predicted to be drilled.

Moreover, if the Miles City Field Office is considered, 165 of the parcels (more than half of all the Montana parcels) are located in sage-grouse GHMA in areas with no existing disturbance and a low Reasonable Foreseeable Development (RFD) potential, and they are within the 3.1 mile sage-grouse lek buffer. EA at 67 (Table 13). And another 9 parcels are located in PHMA in areas with no existing disturbance and a low RFD, although they are outside the 3.1 mile lek buffer. *Id.* "In the Miles City Field Office, 227 of 233 parcels are located in designated RHMA, GHMA, or PHMA, of which 194 parcels (85%) are located within 3.1 miles of a lek." *Id.* at 68. Of the 305 total parcels, all but 16 have sage-grouse habitat (7 in the Havre Field Office, 6 in the Miles City Field Office, and 3 in South Dakota). *Id.* at 71.

The implications of these data are that they show there is no reason not to defer lease parcels that are located in GHMA and PHMA, as BLM's plans mandate. Most parcels have low or very low development potential and very few of them will have wells drilled on them. The majority of parcels are located in undeveloped areas where sage-grouse habitats are intact. And the majority of parcels are located near sage-grouse breeding areas, leks, which need to be avoided. Under these conditions, BLM's sage-grouse plans mandate that leasing be deferred in GHMA and PHMA areas. As Table 13 shows, if BLM confined leasing to areas with existing disturbance and a high or medium RFD, and to areas outside of the 3.1 mile lek buffer, there would still be lease parcels available for sale, which complies with the RMPs, as BLM is concerned about.

Yet BLM is moving ahead with potentially leasing 305 parcels, largely because it says the applicable RMPs have opened these areas to leasing, and it is applying the stipulations that are specified for sage-grouse protection. EA at 69, 71, 72-73, 75, and 80. Thus it claims "there are adequate regulatory mechanisms in place to conserve sage-grouse habitat across all lands in Montana" *Id.* at 80. It says "[i]t is an important distinction to note that the prioritization objective is not a resource allocation or management decision." *Id.* BLM claims that leasing creates no disturbance and that any issues can be dealt with at the application for permit to drill (APD) stage. *Id.* at 71, and 72-73.

But BLM acknowledges "[d]evelopment of parcels, including off site development, where there is currently no existing disturbance and [no] high or medium development potential has a greater chance of impacting sage-grouse habitat compared to development of parcels with

existing disturbance or low development potential." EA at 72. It also cites the numerous studies that have shown significant impact to sage-grouse and sage-grouse habitat from oil and gas leasing and development. *Id.* at 70. This development "may negatively affect sage-grouse habitat at various spatial scales" and the impacts extend to effects on "lek persistence and attendance, nesting, brood-rearing and winter habitat selection, chick survival, and population growth rates." *Id.* And "[a]s the map shows, there is potential for sage-grouse habitat to be impacted from multiple years of oil/gas leasing." *Id.* at 80. Thus, it is clear that *leasing* has impacts that cannot be ignored—BLM acknowledges there will be development on the lease parcels. *See id.* at 17 (Table 2) and 60 (presenting the number of wells that will be drilled and the RFD in the Field Offices).[4]

BLM also acknowledges the prioritization requirement established by the Rocky Mountain sage-grouse plan. EA at 5, 65, and 66. Yet it then goes on to say that Instruction Memorandum (IM) 2018-026 (as well as the prior IM 2016-143) allow for leasing in sage-grouse habitats as long as stipulations are applied. But it then says the IM provides for this: "where the BLM has a backlog of Expressions of Interest for leasing, the BLM will prioritize its work first in non-habitat management areas, followed by lower priority habitat management areas (e.g., GHMA) and then higher priority habitat management areas (i.e., PHMA, then SFA)." *Id.* at 67. If there is a backlog, as appears to be the case, leasing should not take place in sage-grouse habitat.

Leasing in sage-grouse habitats at this level is an affront to sage-grouse conservation and will help ensure that the FWS is forced to change its "not warranted" decision and be forced to move to list the sage-grouse under the ESA. BLM is showing that there are not "adequate regulatory mechanisms" to protect the sage-grouse, as the FWS relied on for its not warranted finding, despite its claims to the contrary. EA at 69, 71, 75, and 80. *See also* 80 Fed. Reg. 59856 (Oct. 2, 2015) (FWS not warranted finding). Leasing over 300 parcels that cover well over 100,000 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.

BLM's response to these concerns, which we expressed in our comments on the EA when it was open for public comment, are unavailing and do not change the fact BLM is not complying with the prioritization requirement. In this response the BLM says it considered deferring parcels in sage-grouse habitats with no existing disturbance and which are close to sage-grouse leks but then dismissed that idea. EA App. F at 94. It added Alternative C to the EA, which would defer leasing 17 parcels and parts of 4 parcels that are in sage-grouse habitat, but this is at most a minor adjustment to the "lease everything" alternative (Alternative B), which would pursue leasing all 322 parcels that are under consideration. This response does not show that BLM has "prioritized" leasing outside of sage-grouse habitats.

This response ignores the plain language of the prioritization requirement, which is to "prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs." Prioritize means to deal with things in their order of importance (and priority means "precedence, especially established by the order of importance or urgency"). The American Heritage Dictionary of the English Language, 4th ed. Not leasing in sage-grouse habitats has been made a first priority under the RMPs, but BLM is ignoring that direction. Even if the RMPs

[4] This discussion is also cited and referenced in the discussion of the NEPA hard look requirement on pages 13-15.

make areas *available* for leasing that does not mean they *must* be offered for lease if an expression of interest is filed, particularly when *the RMP contains other direction*, as it does here, which under FLPMA, BLM must abide by. "Proposals for future actions, such as oil and gas leasing . . . will be reviewed against these RMP decisions to determine if the proposal is in conformance with the plan." Rocky Mountain ROD at 1-39.

We would also note that the RMPs did not consider these particular lease parcels, they only considered leasing at a very broad, field office-wide level. But the validity of leasing these *particular* parcels, which are located in the most important of sage-grouse habitats, must be considered in this EA, and it has not been.

And the discussion in the EA basically says nothing about prioritization. It is mostly built around claiming the RMPs make these areas available for leasing, stipulations have been attached to the leases, and any impacts can be dealt with at the APD stage. EA at 69, 71, 72-73, 75, and 80. But as mentioned, IM 2018-026 cannot overrule the statutory command of FLPMA and BLM's duly adopted planning regulations which state unequivocally that BLM will abide with the direction in an RMP. "An agency's decision cannot prevail if it violates a federal statute, and no agency can override statutory requirements by enacting a contradictory agency rule." *Ohio v. U.S. Army Corps of Eng'rs*, 259 F. Supp. 3d 732, 746 (N.D. Ohio, 2017). "Nor can an agency excuse its failure to obey the statute on the ground that the "procedures were adopted to enable the agency better to fulfill, not to frustrate the statutory mandate."" *U.S. v. Fed. Commc'n Comm'n*, 652 F.2d 72, 123 n.154 (D.C. Cir., 1980) (citation omitted). "[S]o-called considerations of "demonstrable urgency" do not make statutory requirements any more flexible." *Id.* Clearly a summarily issued IM has even less stature than a regulation that was adopted through Administrative Procedure Act public notice and comment procedures, yet BLM seems to impermissibly be giving the IM greater status than managing the public lands "in accordance with the land use plans" BLM has developed, as mandated by the statute. 43 U.S.C. § 1732(a). Accordance means "agreement, conformity." The American Heritage Dictionary of the English Language, 4th ed. And there is no doubt the RMP prioritization requirements are mandatory ("Priority *will* be given to leasing and development of fluid mineral resources . . . outside of PHMAs and GHMAs." (emphasis added)). So there is no choice but for BLM to comply with the prioritization requirement, which it has not done here, IM 2018-026 notwithstanding.

2. <u>The BLM must Incorporate Requirements for Compensatory Mitigation into the Leases.</u>

One of the key requirements of the 2015 Sage-grouse Plans is that when BLM "authorize[s] third-party actions [that] result in habitat loss and degradation" of sage-grouse habitat, the agency must require "compensatory mitigation projects . . . to provide a net conservation gain to the species." Rocky Mountain ROD at 1-27.

There is now a new IM on compensatory mitigation, IM 2019-018, issued December 6, 2018, but that IM continues to conclude that BLM cannot require compensatory mitigation under FLPMA and relies on a Solicitor Memorandum M-37046, Withdrawal of M-37039, "The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations Through Mitigation." (June 30, 2017)." Solicitor Memorandum M-37046 withdraws a previous Solicitor

Opinion that confirmed BLM's authority to address land use authorizations through mitigation but did not conclude BLM did not have the subject authority; rather, it "attempted to answer an abstract question." In actuality, the direction in IM 2019-018 is arbitrary and capricious, and in violation of law. Consequently, BLM must include requirements for compensatory mitigation in any leases issued in PHMA and GHMA.

FLPMA unquestionably provides BLM with ample support for requiring compensatory mitigation, including its direction to manage public lands in a manner to ensure the protection of ecological and environmental values, preservation and protection of certain public lands in their natural condition, and provision of food and habitat for wildlife;[5] and to "manage the public lands under principles of multiple use and sustained yield".[6] The principles of multiple use and sustained yield pervade and underpin each of BLM's authorities under FLPMA, including the policies governing the Act,[7] the development of land use plans,[8] the authorization of specific projects,[9] and the granting of rights of way.[10] While FLPMA does not elevate certain uses over others, it does delegate discretion to the BLM to determine whether and how to develop or conserve resources, including whether to require enhancement of resources and values through means such as compensatory mitigation.[11] In sum, these statutory policies encompass the protection of environmental and ecological values on the public lands and the provision of food and habitat for fish and wildlife and are furthered by the implementation of the mitigation hierarchy, including compensatory mitigation, to protect and preserve habitat for the sage grouse.

Additional authority also exists for the use of the mitigation hierarchy in issuing project-specific authorizations. For example, project-specific authorizations must be "in accordance with the land use plans,"[12] so if the land use plans adopt the mitigation hierarchy or other mitigation principles for the sage grouse under the various authorities described above, the project authorization must follow those principles. Moreover, in issuing project-specific authorizations, BLM may attach "such terms and conditions" as are consistent with FLPMA and other applicable law.[13] This general authority also confers broad discretion on BLM to impose mitigation requirements on project applicants, including compensatory mitigation in appropriate circumstances.[14]

---

[5] 43 U.S.C. § 1701(a)(8). Among other things, public resources should be managed to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values" and "provide food and habitat for fish and wildlife".
[6] 43 U.S.C. § 1732(a).
[7] 43 U.S.C. § 1701(a)(7).
[8] 43 U.S.C. § 1712(c)(1).
[9] 43 U.S.C. § 1732(a).
[10] 43 U.S.C. § 1765(a)(i).
[11] P. L. 94-579 (Oct. 21, 1976) (stating an intent "[t]o establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, *and enhancement of the public lands;* and for other purposes." (emphasis added)).
[12] 43 U.S.C. 1732(a).

[13] 43 U.S.C. § 1732(b).
[14] BLM also has authority and/or obligations to ensure that all its operations protect natural resources and environmental quality, through statutes such as the Mineral Leasing Act of 1920, 30 U.S.C. 181 et seq.; *see also Independent Petroleum Assn. of America v. DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002) (Act grants "rather sweeping authority" to BLM), or NEPA, 42 U.S.C. 4321; *see also* 40 C.F.R. § 1505.2(c), which requires consideration of mitigation alternatives where appropriate. In addition, BLM's authority under FLPMA is

Finally, as a distinct authority, BLM also has the obligation to ensure that project-specific authorizations do not result in undue or unnecessary degradation. FLPMA states that BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[15] A number of cases have found that BLM met its obligation to prevent unnecessary or undue degradation based, in part, on its imposition of compensatory mitigation. *See e.g., Theodore Roosevelt Conservation Partnership v. Salazar ("TRCP")*, 616 F.3d 497, 518 (D.C. Cir. 2010) (BLM decision to authorize up to 4,399 natural gas wells from 600 drilling pads did not result in "unnecessary or undue degradation" in light of substantial mitigation required from permittees, including prohibition of new development outside core area until comparable acreage in the core was restored to functional habitat, and a monitoring and mitigation fund of up to $36 million); *see also Gardner v. United States Bureau of Land Management*, 638 F.3d 1217, 1222 (9th Cir. 2011) (FLPMA provides BLM "with a great deal of discretion in deciding how to achieve the objectives" of preventing "unnecessary or undue degradation of public lands.")

BLM's implementation of a standard requiring compensatory mitigation was recently confirmed in *Western Exploration, LLC v. U.S. Department of the Interior*, 250 F.Supp.3d 718 (D. Nev. 2017). In considering the argument that a net conservation gain standard for compensatory mitigation violated FLPMA, the court stated:

> The FEIS states that if actions by third parties result in habitat loss and degradation, even after applying avoidance and minimization measures, then compensatory mitigation projects will be used to provide a net conservation gain to the sage-grouse. The Agencies' goals to enhance, conserve, and restore sage-grouse habitat and to increase the abundance and distribution of the species, they argue, is best met by the net conservation gain strategy because it permits disturbances so long as habitat loss is both mitigated and counteracted through restorative projects. If anything, this strategy demonstrates that the Agencies allow some degradation to public land to occur for multiple use purposes, but that degradation caused to sage-grouse habitat on that land be counteracted. The Court fails to see how BLM's decision to implement this standard is arbitrary and capricious. Moreover, the Court cannot find that BLM did not consider all relevant factors in choosing this strategy…
>
> In sum, Plaintiffs fail to establish that BLM's challenged decisions under FLPMA are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Western Exploration, LLC v. U.S. Department of the Interior, 250 F.Supp.3d at 747.

---

broader than that exercised by purely land use or regulatory agencies such as EPA or zoning boards, because BLM [has authority] to act as both a regulator and as a proprietor. Accordingly, BLM can take action using all the tools provided by FLPMA for managing the public lands, including issuing regulations, developing land use plans, implementing land use plans or in permitting decisions. 43 U.S.C. §§ 1712(a), 1732(a), 1732(b).

[15] 43 USC § 1732(b).

BLM's conclusions in IM 2019-018 cannot be supported by applicable law, as reviewed in Solicitor's Opinion M-37039 (Dec. 21, 2016) (attached and incorporated by reference as Exhibit 2). As detailed in M-37039, FLPMA and other applicable laws allow BLM to require compensatory mitigation. Taking the opposite approach based on a misreading of the law is both arbitrary and capricious and contrary to law, and moreover may violate FLPMA's requirement to avoid unnecessary or undue degradation (UUD). Abandoning compensatory mitigation as a tool to prevent habitat degradation would violate this requirement. As noted above, the UUD standard prohibits degradation beyond that which is avoidable through appropriate mitigation and reasonably available techniques. *TRCP*, 661 F.3d at 76-77; *Colo. Env. Coal*, 165 IBLA at 229. Offsite compensatory mitigation is a well-established, reasonable and appropriate tool that has long been used to limit damage to public lands. Refusing to use that tool fails to meet FLPMA's requirement that BLM avoid unnecessary or undue degradation.

Because many of the proposed lease parcels in the March 2019 lease sale cover PHMA and GHMA, BLM must attach a stipulation to those leases imposing a net conservation gain/compensatory mitigation requirement in PHMA and GHMA. Applying these requirements as terms of the leases is necessary to prevent unnecessary or undue degradation of the PHMA and GHMA lands being leased and to meet BLM's obligation to prioritize leasing outside of sage-grouse habitats.

The BLM recognizes in the EA that "[t]he BLM would coordinate any development with the Montana Sage-Grouse Program to implement the State's compensatory mitigation requirements." EA at 13. And there is no doubt the State of Montana requires compensatory mitigation. Under the Montana Executive Order (EO), the state will "provide compensatory mitigation for any remaining impacts, including those that are indirect or temporary." EA at 67. Thus, even under the terms of IM 2019-018 compensatory mitigation is required, and therefore a a requirement must be attached as a lease stipulation to parcels in PHMA and GHMA that requires such.

B. Development Potential Should Inform BLM's Leasing Decisions.

The Mineral Leasing Act (MLA) is structured to facilitate actual production of federal minerals, and thus its faithful application should discourage leasing of low potential lands. 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). These sales are supposed to foster responsible oil and gas development, which lessees must carry out with "reasonable diligence." *Id.* § 187; *see also* BLM Form 3100-11 § 4 ("Lessee must exercise reasonable diligence in developing and producing . . . leased resources."). However, BLM's oil and gas leasing program facilitates, and perhaps even encourages, speculative leasing, leading to unproductive leasing of public lands which does not carry out the provisions or intentions of the MLA or FLPMA. *See* 43 U.S.C. § 1701(a)(9) (providing that the U.S. is to "receive fair market value for the use of the public lands and their resources"). *See also Vessels Coal Gas, Inc.*, 175 IBLA 8, 25 (2008) ("It is well-settled under the MLA that competitive leasing is to be based upon reasonable assurance of an existing mineral deposit").

Yet in Montana we are seeing extensive speculative leasing and abuse of the competitive lease sale system. As shown in the attached article from the New York Times, as a result of the December 2017 lease sale a speculator in the Miles City Field Office was able to nominate about 200,000 acres for the lease sale but when the lease sale took place he offered no competitive bids, instead sitting idly by and then snapping up nearly 67,000 acres the next day via a noncompetitive sale where he only had to pay $ 1.50 an acre. *See* Exhibit 3 (New York Times article). As noted in the article, this is "one of many loopholes that energy speculators . . . are using as the Trump administration undertakes a burst of lease sales on federal lands in the West." These speculators are then often unable to muster the financial resources to develop the lands they have leased so they sit idle. And according to a study by Taxpayers for Common Sense, these noncompetitive sales have surged to the highest level in over a decade. This has led to "major drops in the price companies pay per acre in certain states, like Montana, where the average bid has fallen by 80 percent compared to the final years of the Obama administration." This is cutting taxpayers out of the royalties they should be getting, often leaving them with only trivial rent payments. It has led to more than 11 million acres of leased land sitting idle, about half of all the leased land. And this prevents many lands from being used for other multiples uses, as discussed in another section of these comments.

Above we showed that by the BLM's own estimates the majority of the parcels being offered in this lease sale in Montana have a low or very low development potential. The likelihood of more speculative leasing where bids are not offered and the lands are then put up for noncompetitive sale where they can be bought at fire sale prices is evident. The BLM cannot allow this. Proceeding with leasing lands with low potential for development is inconsistent with the direction set in the MLA. This is not leasing on lands "which are known or are believed to contain oil and gas deposits", it is speculative leasing. BLM would best serve the public interest by deferring these lease parcels unless and until the agency determines that these lands have a reasonable potential for oil and gas development.

In response to this concern BLM said it is abiding by regulations and the MLA. EA App. F at 27. It claimed that even low development potential lands might have oil and gas and that development potential can change. *Id.* Yet it acknowledged the RFDs which have assigned these development potential scores is "based on historical drilling, geologic data, resource expertise, and current development potential n the area." *Id.* For low and very low potential areas this is more than enough evidence to show the area is not "known or believed to contain oil and gas deposits", and thus these areas should not be offered for lease if the MLA is to be complied with.

C. The BLM has not Considered a Reasonable Range of Alternatives in the EA in Violation of the National Environmental Policy Act.

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 evaluation 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.

Here, the BLM is only considering three alternatives. The No Action Alternative where no lease parcels would be offered for sale, and two action alternatives, one where all 322 parcels would be offered, and the other (the selected alternative) where 305 parcels would be offered. This is not a reasonable range of alternatives as it differs little from a "lease everything" and "lease nothing" approach. This does not meet BLM's obligations under NEPA. *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 (9th 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").

For this lease sale, BLM has not analyzed any alternatives that fall between the two extremes. BLM's preferred alternative would offer for sale 305 parcels covering 167,113 acres, as shown in the Notice of Competitive Oil and Gas Lease Sale. This represents the large majority of the 322 parcels that are available. Choosing between leasing over 300 parcels, or leasing nothing at all, is not a reasonable range of alternatives.

BLM is failing to consider reasonable middle-ground alternatives. For example, the EAs fail to evaluate an alternative that would defer leasing a significant number of the PHMA and/or GHMA parcels, despite a legal obligation to do so under the Rocky Mountain ROD and the Montana ARMPAs ("Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMAs and GHMAs."); s*ee also* ROD and ARMPA for the Rocky Mountain Region at 1-25 ("the ARMPs . . . prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs. . . . This objective is intended to guide development to lower conflict areas and as such protect important habitat. . . ."). Because BLM has not evaluated "middle-ground" alternatives, it has violated NEPA.

As discussed above in the prioritization section, designating lands as open to leasing in an RMP makes them *available* to lease but does not *require* that they be leased. Moreover, the prioritization requirement of the RMPs applies here, and clearly requires deferring leasing in sage-grouse habitat. And again, under the Rocky Mountain ROD, "[p]roposals for future actions, such as oil and gas leasing . . . will be reviewed against these RMP decisions to determine if the proposal is in conformance with the plan." Rocky Mountain ROD at 1-39.

And as we noted above on page 7, BLM's claims that it considered not leasing in areas that do not have disturbance and the adoption of Alternative C which defers leasing of only 17 parcels and parts of 4 parcels does not alleviate this problem. Alternative C is still virtually a "lease everything" proposal that differs hardly at all from Alternative B where all 322 parcels would be offered for sale.

BLM seems to believe the stipulations it has attached to the lease parcels meet its obligations because the applicable RMPs have not closed these areas to leasing. EA at 19 and 80. It believes environmental analysis can wait until the APD stage. *Id.* at 19, 71 and 72-73. But designating lands as open to leasing in an RMP only makes them *available* to lease; it does not *require* that they be leased. It is entirely reasonable to consider an alternative that defers those parcels. This is especially true in light of the prioritization requirement of the RMPs, which is intended to "guide development to lower conflict areas and as such protect important habitat. . . . ." Because BLM has not evaluated these or any other "middle ground" alternatives, it has violated NEPA.

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. Virtually all of the 322 parcels considered for sale are in sage-grouse habitat. Given the importance of these areas to the conservation of this imperiled species, the EA should have analyzed an alternative that deferred leasing in PHMA and GHMA.

D. BLM has not Taken a Hard Look at Environmental Impacts in the EA.

BLM has not taken the required "hard look" at potential environmental impacts in the EA. 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 (10th 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"); *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983) ([o]n land leased without a No Surface Occupancy Stipulation the Department cannot deny the permit to drill; it can only impose 'reasonable' conditions which are designed to mitigate the environmental impacts of the drilling operations.). Courts have held that BLM makes such a commitment when it issues an oil and gas lease without reserving the right to later prohibit development. *New Mexico ex rel. Richardson*, 565 F.3d at 718.

Here, BLM is in fact making an "irretrievable commitment of resources" by offering leases without reserving the right to prevent all 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). Unfortunately, the EA takes exactly the wrong approach and does not adequately evaluate impacts. The EA claims that leasing is merely an administrative action and entails no environmental impacts or consequences. EA at 19; App. F at 13-14. Therefore, BLM expressly defers a site-specific analysis on key resource values, including wildlife, recreation, visual resources, and useable water resources. This approach violates NEPA, and BLM must take the site-specific impacts of leasing into account at this stage.

NEPA requires that BLM analyze and disclose all reasonably foreseeable impacts from development before it issues the leases. The environmental effects of reasonably foreseeable future actions analyzed in the 2015 ARMPAs were premised on the implementation of the conservation measures contained in the plan amendments, including, importantly, prioritizing oil

and gas leasing and development outside of PHMAs and GHMAs, implementing the net conservation gain requirement, requiring compensatory mitigation, requiring effective noise controls in GHMA as wells as PHMA, mineral withdrawals in sagebrush focal areas, compliance with required design features, etc. The EA has not evaluated the impacts that could result where the BLM has given companies a right to pursue development.

Moreover, BLM cannot rely for this sale on the plan-level analysis conducted for the ARMPA. Tiering is only appropriate when a subsequent NEPA document incorporates by reference earlier general matters into a subsequent narrower statement; but it does not allow a subsequent analysis to ignore the *specific* environmental issues that are presented in the later analysis. 40 C.F.R. § 1508.28. The ARMPAs do not address the site-specific impacts associated with issuing these particular lease parcels. On the contrary, by requiring a prioritization analysis the ARMPAs contemplate that such an analysis will occur at the leasing stage. *See S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (holding that while tiering is sometimes permissible, "the previous document must actually discuss the impacts of the project at issue").

BLM responded to these concerns in the Response to Comments, EA App. F at 13-14. It essentially says the RMPs make these areas available for leasing, and needed stipulations have been attached. It says site-specific analysis cannot occur until the APD stage, and the EA considered indirect impacts. Yet this ignores the fact BLM has projected the likely numbers of wells that will be drilled on the leases, which would allow for a more complete analysis of environmental impacts. It knows the development potential of the leases—very low, low, moderate, medium, or high. And as discussed above, in the paragraph referenced in footnote 4, the BLM recognizes numerous times the potential impacts of leasing and development to sage-grouse and sage-grouse habitat. Therefore, a more complete environmental analysis is readily available.

Overall, it is clear that BLM could provide a hard look at potential environmental impacts that could result from leasing, but it has refused to do so. For example, BLM has extensive data on existing wells and it has projections of the likely level of well drilling. It also knows whether there is existing development on leases. EA at 60 and 69 (Table 13). An assessment of existing wells would allow BLM to forecast the number of wells likely to be drilled, the well spacing likely to occur in those areas, and make a forecast of reasonably foreseeable impacts, which BLM must do to meet its hard look obligation.

E. BLM has Failed to Consider the Cumulative Impacts of Leasing.

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. These sales include, but are not limited to:

• December 2017 and March, June, and December 2018 Montana sales;[16]

• December 2017 and March, June and September 2018 Wyoming sales, as well as the special February 2019 sale and March 2019 sale;[17]

• Utah 2018 and 2019 lease sales;[18] and

• Nevada 2018 and 2019 lease sales.[19]

These lease sales have proposed to sell hundreds of parcels and hundreds of thousands of acres in sage-grouse habitats. Yet none of these sales are considered in the EA, which violates the obligation to consider cumulative impacts. There are also numerous massive oil and gas projects involving the drilling of thousands of wells that are proposed, especially in Wyoming.

BLM must analyze and disclose the cumulative impacts of this wave of leasing and oil and gas projects on the sage-grouse and its habitat. BLM (in the Rocky Mountain Region ROD and the Montana ARMPAs) has 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 GRSG habitat across the species' remaining range in the Rocky Mountain Region and to provide greater certainty that BLM resource management plan decisions in GRSG habitat in the Rocky Mountain Region can lead to conservation of the GRSG and other sagebrush-steppe-associated species in the region." Rocky Mountain ROD, p. S-2. BLM's pending July 2019 lease sale in Montana has recognized the value of sage-grouse connectivity habitats in the decision to no offer several lease parcels in these areas due to a lack of adequate protections.

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 sage-grouse and other resources. It also cannot ignore the cumulative impacts of thousands of new oil and gas wells that are proposed to be drilled in Wyoming, especially when coupled with the extensive development occurring in the Miles City Field Office.

Moreover, 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 over 167,000 acres (over 25 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.

---

[16] https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/montana-dakotas.
[17] https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/wyoming.
[18] https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/utah.
[19] https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada.

F. BLM has not Complied with the Multiple Use Mandate of the Federal Land Policy and Management Act.

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").

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- or site-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, Reasonable Range of Alternatives, and Hard Look sections, 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). 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. 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 3 (New York Times article on massive increase in speculators garnering massive lease holdings through unscrupulous noncompetitive sale gambits).

Here BLM is not meeting its multiple use obligation by insisting on potentially leasing almost all of the parcels that are in sage-grouse habitat, even critically important PHMA. Additionally, leasing lands with low (or very low) potential for oil and gas development violates FLMPA's multiple use mandate, and the requirements of the MLA. Leasing in low potential areas gives preference to oil and gas development at the expense of other uses because the

presence of leases can limit BLM's ability to manage for other resources that may have higher—and more certain—value, in violation of FLMPA's multiple use mandate.

BLM can only say in its response to comments on this issue that it has "considered and complied with all applicable laws and regulations" of the underlying RMPs. EA App. F at 26. This is nothing more than an assertion. BLM has not shown that it has fully considered wildlife protection, watershed protection, and other uses as co-equal considerations with oil and gas leasing. Adding stipulations and lease notices to a lease and deferring environmental review until the APD stage does not meet the multiple use mandate. Treating RMP provisions that make areas available for leasing as creating a mandate to lease flies in the face of multiple use management.

G. The BLM Must Ensure It Does Not Violate the Antdeficiency Act and it Cannot Allow the Government Shutdown Affect this Lease Sale.

1. The BLM Must Ensure the Government Shutdown has not Impermissibly Affected this Lease Sale.

The BLM needs to ensure that it has sufficient time to develop this lease sale and consider public comments on the lease sale in light of the recent government shutdown. We ask that the BLM provide the public with assurance, and evidence, that it has fully considered the issues necessary to put these lease parcels forward for possible sale, including on the ground reviews of the lease parcels that have been nominated and assurance of RMP compliance under the restrictions it faced during the shutdown. The BLM should provide evidence that the government shutdown did not prevent it from conducting the necessary reviews.

While not explicitly part of the decision in *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB at 55-56 (D. Idaho Sept. 21, 2018), this issue is not entirely divorced from the reasoning in that case. Fundamentally the court decided that under both NEPA and FLPMA the BLM must ensure it provides sufficient opportunities for public engagement before it proceeds with a lease sale. The BLM must ensure that is the case here and that the government shutdown did not hamper this process in a way that requires correction.

2. The BLM Must Comply with the AntiDeficiency Act.

The Antideficiency Act prohibits officers or employees of the United States from making or authorizing "an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Additionally, the United States government may not "employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." *Id.* § 1342. This term "does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." *Id.* An officer or employee of the United States who violates sections 1341(a) or 1342 "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." *Id.* § 1349(a).

In 1981 the Attorney General determined that this statutory language requires there to be "some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property." U.S. Dep't of Justice, Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations at 1 (Jan. 16, 1981), https://www.justice.gov/file/22536/download. Also, "there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question." *Id.*

Congress amended the Antideficiency Act in 1990 to provide explicitly that "[a]s used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342. This was apparently "to guard against what the conferees believe might be an overly broad interpretation" of the statute. *See* U.S. Dep't of Justice, Government Operations in the Event of a Lapse in Appropriations at 6 (Aug. 16, 1995), https://goo.gl/yZCfrj. Accordingly, the standard of a "reasonable likelihood" of danger to human life or property serves as the outer limit of excepted government service under the Antideficiency Act.[20]

The federal government was shut down from December 22, 2018 until January 25, 2019. News reports indicate that during the shutdown, BLM offices were partially staffed for emergencies. *See, e.g.*, Heather Richards, *Shutdown won't delay oil and gas sale in Wyoming, conservationists condemn 'rush'*, Casper Star-Tribune (Feb. 3, 2019), https://goo.gl/yFgPCR. Following pressure from oil and gas trade groups, BLM staff began processing applications for oil and gas drilling permits and preparing authorizations for the March 2019 lease sale, including addressing public comments. *Id.* BLM has acknowledged that "some exempted employees worked during the shutdown to address comments" on the Wyoming draft environmental assessment (EA) for the March 2019 lease sale. *Id.*

The timing of the March Monatana sale documents make clear that BLM Montana staff also must have worked during the shutdown to prepare for this lease sale. The deadline for comments fell on December 21, 2018—just one day before the shutdown began. Late in the evening on Friday, January 25, 2019, President Trump ended the shutdown by signing a continuing resolution funding government operations. Only three business days later, on January 31, BLM released a 100-page response to comment document (EA App. F), along with a revised EA for the lease sale. Preparation of these materials clearly took more than four business days, and must have required BLM staff time during the five-week shutdown.

This work would have violated the Antideficiency Act, because oil and gas leasing is not an essential government activity under the terms of the statute, even under the broad "reasonable likelihood" standard set forth in the 1981 Attorney General's opinion. There is no reasonable likelihood that BLM's work during the shutdown to respond to public comments on a proposed lease sale was an emergency "involving the safety of human life or the protection of property." 31 U.S.C. § 1342.

[20] For example, employees required to work during past shutdowns have "necessarily included prison guards, Federal air marshals, [and] border patrols"—that is, employees actually necessary for the express purpose of the statute—the "safety of human life or the protection of property." *See Martin v. United States*, 117 Fed. Cl. 611, 627 (2014) (quoting 31 U.S.C. § 1342).

Oil and gas leasing is not essential to the safety of human life, because human life and public safety are not threatened in its absence. Moreover, oil and gas leasing is unnecessary for the protection of property. First, there are no private interests in the unleased federal mineral estate. BLM itself has stated, it "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."

Second, federal property to be leased would not be threatened by a delay in leasing due to a shutdown. In fact, the lack of any threat to federal property from delaying work on a proposed lease sale starkly contrasts with the situation in our national parks, which suffered significant damage during the shutdown. *Cf.* M. Cuniff, J. Waters, & J. Achenbach, *In shutdown, national parks transform into Wild West – heavily populated and barely supervised*, Washington Post (Jan. 1, 2019), https://goo.gl/B6LFVM. The Interior Department's apparent decision to press ahead with oil and gas leasing in violation of the Antideficiency Act, while turning a blind eye to vandalism and other impacts to the parks, provides yet another example of the Department's misplaced priorities.

Any work on quarterly oil and gas lease sales during the shutdown violated 31 U.S.C. § 1342 because it was not an emergency involving the protection of human life or property. Instead, it was an "ongoing, regular function[] of government the suspension of which would not imminently threaten the safety of human life or the protection of property"—precisely the type of activity the Antideficiency Act prohibits during a lapse in appropriations. *See* 31 U.S.C. § 1342. If BLM in Montana attempted to move ahead with leasing during the shutdown, it likely violated the Antideficiency Act or other federal appropriations laws, putting agency employees in legal jeopardy. *See* 31 U.S.C. § 1349(a).

BLM should postpone the March 2019 lease sale until it can complete an environmental analysis and other necessary preparations in compliance with all federal statutes, including the Antideficiency Act.

H. The BLM Must Ensure that Leasing is Appropriate In The Miles City Field Office in Light of the Plan to Potentially Amend the Resource Management Plan for that Office.

The BLM has announced that it will prepare a supplemental environmental impact statement for the Miles City Field Office RMP, which may lead to amendment of the RMP. 83 Fed. Reg. 61167 (Nov. 28, 2018). The scoping period for that NEPA analysis closed on December 28, 2018. The need to consider amending the plan was brought about by the decision in *Western Organization of Resource Councils v. BLM*, 2018 U.S. Dist. LEXIS 48500 (D. Mont, Mar. 23, 2018), where the court found that several aspects of the BLM's climate change and greenhouse gas emissions analysis were deficient and needed to be rectified.

To comply with the court's opinion the BLM will be reconsidering the amount of coal potentially available for leasing; provide an analysis of the environmental consequences of downstream combustion of coal, oil and natural gas that is open for development under the RMP; and present an "analysis of global warming potential over an appropriate planning period consistent with evolving science." 83 Fed. Reg. 61167.

The need to conduct this additional analysis raises the question of whether oil and gas leasing is appropriate in the Miles City Field Office at this time. The RMP could be amended in a way that affects leasing and the BLM should not assume that leasing will not be changed by conducting lease sales while the amendment process in underway. The BLM previously deferred leasing at the June 2018 lease sale due to this decision. https://eplanning.blm.gov/epl-front-office/projects/nepa/93141/142341/174749/Dear_Reader_Letter_June_12,_2018_deferral.pdf (presenting the deferral decision). That direction would seem to be even more relevant and appropriate now.

Responding to this concern, the BLM said it remains in compliance wit the *WORC* decision. EA App. F at 22. It says there will be no alternative considered that "would change the area or amount of oil and gas potentially available for leasing." But the BLM cannot presuppose the course of its NEPA analysis. It cannot prejudice the selection of an alternative before making a final decision. 40 C.F.R. § 1502.2(f). It must include appropriate mitigation that is not included in the proposed action or other alternatives. *Id.* § 1502.14(f). And until a ROD is issued, the agency cannot take any action that would limit the choice of reasonable alternatives. *Id.* § 1506.1(a)(2). Thus, the BLM should consider whether leasing is appropriate in the Miles City Field Office while this potential RMP amendment is underway.

VI. CONCLUSION.

For the reasons stated above, we protest the sale of all 305 parcels proposed for sale at the BLM Montana March 2019 oil and gas lease sale, principally because these parcels are located in crucial sage-grouse habitats and leasing has not been prioritized outside of these habitats. The environmental assessment prepared for this lease sale includes many other flaws, including not considering a reasonable range of alternatives, not providing a hard look at environmental impacts, a failure to consider cumulative impacts, and a failure to meet the multiple use obligation of the Federal Land Policy and Management Act. The environmental assessment would also consider leasing in low and very low development potential areas in violation of the Mineral Leasing Act, and the BLM must consider whether it has met the requirements of the Antideficiency Act during the government shutdown.

Sincerely,

Bruce Pendery
The Wilderness Society
440 East 800 North
Logan, Utah 84321
(435)-760-6217
bruce_pendery@tws.org
Attorney at Law

List of Exhibits:

Exhibit 1: Tables of GHMA and PHMA parcels.
Exhibit 2: Solicitor's Opinion M-37039.
Exhibit 3: New York Times article.