

THE WILDERNESS SOCIETY * WYOMING OUTDOOR SCOUNCIL * NATIONAL AUDUBON SOCIETY

BLM Wyoming State Office
5353 Yellowstone Road
P.O. Box 1828
Cheyenne, Wyoming 82003

Via facsimile at: 307-775-6203

September 8, 2017

**Re: Protest of the December 14, 2017 Competitive Oil and Natural Gas Lease Sale for the
BLM Wyoming High Desert District**

To whom it may concern:

Please accept this protest of the above oil and gas lease sale that is filed by The Wilderness Society, Wyoming Outdoor Council, and the National Audubon Society. 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 45 parcels that would cover approximately 72,884 acres of public lands and minerals.

Founded in 1935, The Wilderness Society's mission is to protect wilderness and inspire Americans to care for our wild places. 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. 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 future generations.

I. INTERESTS OF THE PARTIES

The Wilderness Society, Wyoming Outdoor Council 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. As indicated, our missions are to work for the protection and enjoyment of the public lands for and by the public.

II. 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 have like authority to file this protest on behalf of the Wyoming Outdoor Council and National Audubon Society.

III. STATEMENT OF REASONS

In this protest, we will address five issues of concern to us. Our primary concern is the failure of the BLM in this proposed lease sale to adequately provide for conservation of the Greater sage-grouse. Consequently, we protest the sale of the eighteen parcels and eight partial parcels that would be located in sage-grouse priority habitat management areas (PHMA) and the sixteen parcels and eight partial parcels that would be located in sage-grouse general habitat management areas (GHMA). *See* Final Environmental Assessment at 7 (stating “forty-five (45) parcels would be offered at the December 14, 2017 Oil and Gas Lease Sale” and also mentioning the parcels in the PHMA and GHMA).¹

First in the draft environmental assessment (DEA) for this lease sale and now in the final environmental assessment (FEA) the BLM has failed to adequately provide for sage-grouse conservation. It has not met the requirements of the resource management plans (RMP) that govern this project and it has not met the requirements of its instruction memorandum (IM) that governs prioritization of oil and gas development in sage-grouse habitats. It has also improperly concluded that the Presidential Executive Order and Secretary of the Interior Secretarial Order that govern energy issues require the BLM to not defer leasing in sage-grouse habitats. The BLM has not considered an adequate range of alternatives in the EA, considering only two options: lease everything or lease nothing. These problems cause the finding of no significant impact (FONSI) for this project to be invalid, as will be discussed. Our comments on the DEA are included herewith and we ask that you consider them again.

1. The EA violates the Federal Land Policy and Management Act because it directly contravenes a clear and binding requirement of a governing land use plan.

As we discussed in our comments on the DEA, the FEA is legally flawed because it fails to comply with the direction established in the governing RMPs for sage-grouse conservation. It does not comply with the requirement to give “priority” to leasing outside of PHMA and GHMA.² Of the 45 parcels proposed for sale at this lease sale, twenty-six are in PHMA and twenty-four are in GHMA, and the BLM proposes to not defer the sale of any of these parcels. This does not comply with the ARMPAs, and thus, as discussed in the DEA comments, violates section 302(a) of the Federal Land Policy and Management Act and BLM’s land use planning regulations, which require management actions to abide by the provisions in an RMP.

In responding to these issues in our comments on the DEA the BLM said the following. The Pinedale, Kemmerer, and Rawlins RMPs make these areas available for oil and gas leasing

¹ More specifically, we protest the sale of lease parcels WY-1711-001 through WY-1711-050, inclusive, excluding parcels 006, 010, 041, 043, and 044, as shown in the Final Environmental Assessment Appendices A and B (including the Kemmerer, Pinedale, and Rawlins Field Offices). *See also* Final Environmental Assessment Table 3-1 and the Parcel Crossover List.

² BLM Casper, Kemmerer, Newcastle, Pinedale, Rawlins, and Rock Springs Field Offices Approved Resource Management Plan Amendments for Greater Sage-Grouse (Wyoming ARMPA). https://eplanning.blm.gov/epl-front-office/projects/lup/9153/63189/68431/002_Wyoming_ARMPA_Main-Body.pdf. Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region (Rocky Mountain ARMPA). https://eplanning.blm.gov/epl-front-office/projects/lup/9153/63287/68529/Rocky_Mountain_Region_ROD.pdf

and leasing is in conformance with the land use plans, with the authorized officer being allowed to make this decision. And under IM 2016-143, leasing in PHMA and GHMA is permitted subject to prioritizing sequencing, stipulations, required design features, and other management measures. BLM claims it has applied the provisions in IM 2016-143 and the stipulations that would be applied to the lease parcels provide for adequate protection of sage-grouse. And moreover, as noted by BLM, the IM "is not intended to direct the Authorized Officer to wait for all lands outside GRS habitat areas to be leased or developed before allowing leasing within GHMA, and then to wait for all lands within GHMA to be leased before allowing leasing or development within the next habitat area (PHMA, for example)." BLM went on to say there was no pending action it needed to complete prior to leasing and continued deferral was not contemplated; and that some decisions are not appropriate at this level of planning, including changing legal requirements and changing obligations under national policy. Based on this BLM concluded that it would lease the parcels and not defer the sale of any of them, as we had requested. See FEA at Appendix E unnumbered pages 14-22 (making these statements).

The FEA continues to take the same positions and make the same decisions that were apparent in the DEA. It continues to propose to offer for lease all of the parcels in PHMA and all of the parcels in GHMA.

The BLM continues to disregard and not comply with this provision in the governing RMPs: "Priority will be given to leasing and development of fluid mineral resources . . . outside of PHMA and GHMA." Wyoming ARMPA at 24 (emphasis added). See also Rocky Mountain ARMPA at 1-19 and 1-24 (making equivalent statements). Even if the BLM is not required to defer the sale of all parcels in PHMA and GHMA, it is impossible to see how some of these parcels would not be deferred, if the ARMPAs and IM 2016-143 were faithfully applied and complied with. "Priority" for leasing of fluid minerals outside of PHMA and GHMA would be demonstrated by deferring the sale of at least some lease parcels in PHMA and GHMA.

This is emphasized by the information shown in Table 3-1 of the FEA. There the BLM presents all the parcels that are in PHMA and GHMA. It also shows whether the parcels are located in sage-grouse or sharp-tailed grouse nesting habitat, dancing areas (leks), or winter concentration areas, which are crucial sage-grouse habitats. Many but not all of these essential habitat features are found on the parcels; some of the parcels in GHMA and PHMA have none or only a few of the essential habitat features. The BLM could show compliance with the ARMPAs if it sought to defer parcels with all of the essential habitat features and allowed for leasing where not all of the features are found.³

Moreover, at least one of the PHMAs (Fontenelle) is not "proximate or adjacent to existing production." FEA at 52-53; FONSI at 11. Parcels in the Fontenelle PHMA are "within 5 miles of existing leases." *Id.* Other PHMAs include Sage, Seedskaadee, and Greater South Pass. While the Sage PHMA has more than five percent cumulative disturbance, the Fontenelle, Seedskaadee, and Greater South Pass PHMAs are below 5 percent cumulative disturbance, a key

³ As Table 3-1 shows, five of the parcels do not have nesting habitat, ten do not have leks, and 20 do not contain winter concentration areas. Considering just the GHMA parcels, which under the ARMPAs and IM 2016-143 are more appropriate for leasing than PHMA parcels, two of the parcels do not have nesting habitat, five do not have leks on them, and 17 do not have winter concentration areas. Parcels 009 and 017, which are in GHMA, do not contain any of the crucial habitat features, and parcel 015 only contains nesting habitat, but not leks or winter concentration areas.

benchmark under BLM's and the state of Wyoming's conservation plans. FONSI at 11. Certainly, based on this information parcels worthy of deferral could be found.

The priority for leasing is clearly to be outside of PHMA and GHMA areas, yet BLM is ignoring this direction and doing exactly the opposite: it is prioritizing leasing inside of PHMA and GHMA. This does not comply with the ARMPAs, and thus violates the provisions in section 302(a) of FLPMA and BLM's land use planning regulations, as we argued in our comments on the DEA.

We also note that in our comments on the DEA we pointed out that the BLM invoked Executive Order (EO) No. 13783 (Promoting Energy Independence and Economic Growth) as mandating that deferral of these parcels not be contemplated or allowed. The BLM continues to make this claim. FEA at 7. *See also* FONSI at 4 (making this same claim). We discussed how this was inappropriate in our DEA comments because the EO left intact the ARMPAs and other BLM RMPs and did not presume to modify them. The BLM did not even address this issue in its response to our comments. FEA at Appendix E unnumbered pages 15-18.

We therefore again protest the sale of these lease parcels on the basis that EO 13783 did not modify the ARMPA provision to give priority to leasing outside of PHMA and GHMA. To claim that it did ignores the provisions in sections 1(c), 2(a), and 8(b) of the EO which provide that the EO does not apply to agency actions that are mandated by law. The ARMPA provisions are still in place and therefore under section 302(a) of FLPMA and BLMs' governing land use plan regulations they are governing law and they must continue to be complied with because the EO so provides.

In addition, the EO makes other provisions that show that deferral of leases is still appropriate under the EO. The EO contemplates "prudent development" of our energy resources. EO section 1(a). And it is national policy that any reductions in "energy burdens" must still consider the public interest and otherwise comply with the law. *Id.* section 1(c). It is national policy to promote clean air and clean water. *Id.* section 1(d). "Necessary and appropriate environmental regulations" can continue to be applied. *Id.* section 1(e). Given these provisions besides the provision that BLM cites in section 1(a), it is clear that deferral of the parcels at issue here is not inconsistent with national policy, as BLM claims.

2. The EA violates the March 28, 2017 Executive Order as well as the Interior Department's March 29, 2017 Secretarial Order # 3349.

In our comments on the DEA we also argued that refusing to defer leasing of parcels in sage-grouse habitat violated the terms of the EO as well as Secretarial Order (SO) 3349. We noted that both of these orders contained provisions stating that their provisions were not applicable if they were contrary to existing law. We specifically referenced section 2(a) and 8(b) of the EO and section 5 of the SO. We argued that refusing to consider deferral of the parcels was contrary to the provisions in FLPMA, BLM's planning regulations, and the ARMPAs. These are "applicable law" that was not affected by the orders because refusing to defer on the basis of these orders would be inconsistent with BLM's underlying legal mandates, which remain in place.

And yet, in the DEA, BLM declined to prioritize leasing outside of sage-grouse habitat specifically because doing so would "not be consistent" with objectives in the EO. This same

statement is made in the FEA and FONSI. FEA at 7, FONSI at 4. This directly conflicts with the EO and SO, which both require that inconsistencies between their provisions and existing laws be resolved in favor of existing laws. To the extent the leasing prioritization requirement conflicts with a policy statement in the EO, the prioritization requirement controls because it is "applicable law." Here, BLM wrongly gave precedence to the policy statement instead.

In BLM's response to these issues, it referred us to the non-response to this issue discussed in section 1 above, but it also said:

In general however, the decisions in an RMP are not "law" and do not rise to that level of legal authority. Future development must conform with an RMP for BLM to meet its regulatory requirements, but that development must also be consistent with the lease rights granted. The remainder of this comment is out of scope due to the legal arguments WOC appears to be making.

FEA at Appendix E unnumbered pages 18-19.

BLM's conclusion that decisions in an RMP are not law and are not legal authority is wrong. Under the Federal Land Policy and Management Act (FLPMA), when an RMP is developed, the Secretary of the Interior must manage the public lands "in accordance" with the RMP. 43 U.S.C. § 1732(a). And under BLM's land use planning regulations, BLM must make resource management authorizations and take management actions in a way that "shall conform to the approved plan." 43 C.F.R. § 1610.5-2033 (48 Fed. Reg. 20368 (May 5, 1983)). 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).

Thus, RMP decisions have been given legal status and force—there is no question the provisions of FLPMA are law and the same is true of the regulatory provisions developed pursuant to the Administrative Procedure Act. BLM cannot legally ignore the provisions in its RMPs; if it does so it is breaking the law. Thus, we were correct in our earlier comments when we said that BLM cannot elevate the terms of the EO and SO over the legal requirements in its RMPs, based on the explicit terms of the EO and SO. The BLM must reconsider this decision.

And while the BLM seems to agree that any future development on the leases must "conform" with the RMPs, as discussed above the decision to not defer any parcels in sage-grouse habitat clearly does not comply with the provision in the ARMPAs to prioritize leasing outside of PHMA and GHMA. And BLM is using the EO and SO to justify this decision in contravention of the ARMPAs, which the EO and SO do not allow. BLM's leasing decisions, not just its development decisions, must comply with the ARMPAs ("Priority will be given to leasing . . . of fluid mineral resources . . . outside of PHMA and GHMA."). And consistency with lease rights granted is irrelevant at this point—no lease rights have been granted yet. And even if ensuring development of a lease is consistent with lease rights, that only reemphasizes our point that these leases cannot be issued in contravention of the RMPs under the specific

terms of the EO and SO. These leases would be issued under the terms in the ARMPAs and other BLM RMPs and must abide by those terms.

We are not sure what to say about the statement that “[t]he remainder of this comment is out of scope due to the legal arguments WOC appears to be making.” Making legal arguments is a principal purpose of commenting on an EA as well as filing a protest of a BLM leasing proposal. BLM cannot ignore those legal arguments.

3. The EA fails to fully address or meaningfully apply the parcel-specific factors from IM 2016-143.

Here we expressed concerns about how the BLM had not fully complied with the provisions in IM 2016-143 that relate to applying a prioritization sequence to leasing in sage-grouse habitats. In our view BLM did not fully abide by or implement the seven parcel-specific factors that are to be considered in making decisions about leasing in GHMA and PHMA. Essentially, under this guidance, BLM is to seek to first lease outside of sage-grouse habitats, then lease in GHMA if needed, and only last consider leasing in PHMA.

The BLM did some analysis of the seven factors in the DEA but only had this to say:

Following a detailed review in consideration of the [IM 2016-143] factors, eighteen (18) whole and eight (8) partial parcels are located in PHMA, sixteen (16) whole and eight (8) partial parcels are located in GHMA and three (3) parcels are in neither PHMA nor GHMA as identified in the ARMPA ROD. The parcels located entirely or partially in PHMA...are proximate or adjacent to existing production (within 2 miles of leases currently held by production), have moderate to very high potential for oil and gas development, and eight have active GSG leks within their boundaries. These lands within the PHMA parcels may provide nesting, wintering, and/or breeding habitat for Greater Sage-grouse GSG...

The BLM had little more to say in the FEA. FEA at 52; FONSI at 11. In our view, this was an insufficient consideration of the parcel specific factors.

It is difficult to tell from this discussion whether lease parcels would be in critical sage-grouse habitats. It appears many would be. Areas with high habitat values such as leks, nesting, and winter concentration areas should be given less consideration for leasing. IM 2016-143 at page 4. And while development proximate to the lease parcels at issue here may be occurring within 2 miles in leases held by production, under the IM, this consideration of development should be focused on development that is “immediately adjacent to or proximate” to the lease parcels under consideration for sale. *Id.* (emphasis added). So again, BLM’s consideration of the prioritization factors in the EA was unclear and insufficient.

BLM’s response to these concerns was that it had reasonably and adequately considered them. FEA at Appendix E unnumbered page 20. It seemed to feel that development of Reasonably Foreseeable Development (RFD) projections as part of the development of RMPs was a sufficient way to consider the IM prioritization factors. *Id.* This even though these RFDs say nothing about the development level that exists “immediately adjacent to or proximate” to sage-grouse habitats.

As we discussed above, table 3-1 in the EA makes it clear there is a great deal of crucial sage-grouse habitat in the vicinity of the PHMA and GHMA. Nesting habitat, leks, and winter concentration areas are found in these parcels, and this information should have been factored more clearly into the consideration of the parcel specific factors. And as we also discussed above, the FEA makes it clear that not all of the PHMA and GHMA are close to existing development and in many of the PHMA the cumulative disturbance level is quite low. This information too should have been more explicitly considered in the parcel specific factor analysis. Had it been, at least some of these parcels would have been deferred.

4. BLM has failed to consider a reasonable range of alternatives in the EA.

NEPA requires that BLM analyze in detail “all reasonable alternatives.” 40 C.F.R. § 1502.14(a). 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 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. The EA for the Wyoming High Desert District December, 2017 lease sale fails to meet this requirement. It only analyzes two alternatives:

- The No Action alternative, which would not offer any lease parcels at this sale; and
- The Proposed Action where 45 lease parcels covering approximately 72,884 mineral estate acres would be offered (the Lease Everything Alternative).

FEA at 6-7.⁴

An EA offering a choice between leasing essentially every parcel nominated, and leasing nothing at all, does not present a reasonable range of alternatives. The BLM proposed to defer parcels in sage-grouse habitat in its August, 2017 lease sale. So it is clear there are options available besides the “all or nothing” approach BLM is using here. Additionally, as discussed above, not all of the parcels BLM is proposing to offer for lease are near existing development. The parcels in the Fontenelle PHMA are not proximate or adjacent to existing development. Many of the PHMA parcels have limited existing cumulative disturbance so offering all of them for lease and the possibility of new disturbance is not reasonable.

BLM must consider reasonable alternatives that fall between the two extremes. In particular, the agency should analyze one or more alternatives for prioritizing leasing outside of high-quality sage-grouse habitat. BLM should have considered an alternative that would not offer all the 45 lease parcels that overlap with PHMA and GHMA. At a minimum, parcels in PHMA could be deferred from leasing, especially if they contain nesting habitat, leks, and winter

⁴ We note that prior to the DEA three parcels and portions of another parcel were deferred from leasing because an RMP amendment was required due to their location in sage-grouse core areas identified by the state, and another parcel was deleted from the lease sale because it is located in the Mechanically Mineable Trona area and thus is not available for leasing under the terms of the Kemmerer RMP. FEA at 1-2. However, these parcels represent only an insignificant fraction (3 percent) of the nominated parcels. Thus, the EA only evaluates a choice between leasing nothing and leasing virtually everything BLM has the legal discretion to offer.

concentration areas (FEA Table 3-1). Failing to analyze such a middle-ground option violates NEPA. See *TWS v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider “middle-ground 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”).

Moreover, the FEA provides no meaningful analysis of what the impacts on these parcels will be if the leases do get developed. The FEA states that it cannot predict the impacts from development at the leasing stage. FEA at 4. BLM’s position illustrates why options that defer at least some of these parcels should have been considered. BLM has not done the analysis to determine what impacts are likely under the stipulations proposed for these leases, and whether those stipulations will be adequate to prevent significant adverse impacts to greater sage-grouse and other resources such as water supplies, public health and other resources. Nor can BLM conclude that the potential economic benefits of leasing these parcels outweigh the environmental and economic harms to the local community and other resources. But by leasing these lands now, BLM will make an irreversible commitment of resources limiting the government’s options if and when companies seek to drill for oil and gas in these areas. If leases are issued now, it becomes difficult or impossible for BLM to change course later.

The BLM attempts to take the position in the FEA that leasing is not an irreversible and irretrievable commitment of resources. It states, “[t]he administrative action of offering and issuing an oil and gas lease does not, in and of itself, directly result in an irreversible or irretrievable commitment of resources” FEA at 96. It attempts to make the claim that irreversible and irretrievable commitments only occur at the application for permit to drill (APD) stage when development is proposed. This is not the law.

As stated by the Tenth Circuit Court of Appeals,

. . . we first ask whether the lease constitutes an irretrievable commitment of resources. Just as we did in *Pennaco Energy*, 377 F.3d at 1160 and the D.C. Circuit did in *Peterson*, 717 F.2d at 1412, 1414, we concluded that issuing an oil and gas leases without an NSO stipulation constitutes such a commitment.

New Mexico v. Bureau of Land Management, 565 F.3d 683, 718 (10th Cir. 2009). Thus, it is clear that the leasing stage is when a full range of reasonable alternatives must be considered because this is when BLM is making an irreversible and irretrievable commitment of resources.

The BLM says it considered two additional alternatives but decided not to analyze them in detail. FEA at 7. See also FONSI at 4 (discussing one of the alternatives) One would have required a no surface occupancy (NSO) stipulation on all of the parcels and the other would have required deferral of all parcels in PHMA or GHMA. But even if the option of deferring all of the parcels would not have met the requirements of BLM’s RMPs, as it claims, it could have considered an alternative that provided for deferral of some parcels in the most critical sage-grouse habitats (as shown in Table 3-1). It is here the BLM also claims that the EO prohibits it from considering deferrals, a claim we have discussed and dismissed above.

In choosing alternatives to consider in a NEPA document, BLM is to ensure it can make a "reasoned choice." BLM NEPA Handbook H-1790-1 at 49. "In determining the alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. "Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant.'" *Id.* at 50 (citing the Council on Environmental Quality (CEQ) Forty Most Asked Questions Concerning CEQ's NEPA Regulations). Moreover, "[y]ou must consider alternatives if there are unresolved conflicts concerning alternative uses of available resources." *Id.* at 79 (citing 40 C.F.R. § 1508.9(b)). Under its own guidance, BLM clearly needed to consider more than just the all or nothing alternatives—it needed to also consider one or more deferral alternatives in PHMA and GHMA.

5. The finding of no significant impact does not show there will not be significant impacts to the environment.

In the FEA the BLM concludes that there will not be any significant environmental impacts resulting from leasing, and thus it has issued a finding of no significant impact. FONSI at 4. *See* 40 C.F.R. § 1508.13 (presenting the CEQ definition of FONSI which requires that in order to issue a FONSI the agency must validly conclude its project "will not" significantly affect the human environment). In reaching this conclusion the BLM considered the issue of the context of the project and the ten "intensity" factors specified in the CEQ regulations. *Id.* § 1508.27. The BLM's conclusion that there will not be significant impacts to the human environment is misplaced.

At least two of the intensity factors indicate there will be significant impacts. First, BLM claims that there are no unique characteristics of the area such as proximity to ecologically critical areas. FONSI at 6-7. It claims, "[w]hile certain parcels proposed to be offered at the December 14, 2017 oil and gas lease sale are located within areas with sensitive or important resources values, none have been determined to be within an ecologically critical area not previously analyzed."

This ignores the question of PHMA, which are not even mentioned in this section of the FONSI. PHMA are certainly a unique, ecologically critical area that must be specifically considered when considering this intensity factor. Any claim that PHMA are within an ecologically critical area that was previously analyzed misses the point. Where and when was this analysis done and what did it conclude about the ecologically unique values of PHMA? The FONSI says nothing about this. Certainly, PHMA have been determined to be ecologically critical as shown by the ARMPAs and a number of other BLM analyses. While leasing may not lead to immediate development, it is an irreversible and irretrievable commitment of resources that opens the door to disturbance of these critical areas. That should have been considered and analyzed in the FONSI if a "will not" determination is to be made.

Any claim in the FONSI that there is sufficient mitigation in the form of stipulations also misses the point. Under the ARMPAs and other BLM guidance, avoidance of leasing in PHMA

is what is called for, not stipulations if a “will not” have significant impacts on the human environment determination is to be made. If BLM is going to lease in PHMAs, it should recognize unique, ecologically critical areas are being put at risk, and thus a FONSI is inappropriate.

Secondly, the BLM’s consideration of intensity factor number nine, which relates to adverse effects on species listed under the Endangered Species Act or BLM-recognized sensitive species, also misses the mark. FONSI at 10-11. The BLM claims that it has properly applied IM 2016-143 and therefore the goal of the ARMPAs to avoid leasing in GHMA and PHMA has been met. As discussed above, there is no basis for this claim—IM 2016-143 has not been properly applied—and thus a “will not” have a significant impact on the human environment based on this intensity factor is unwarranted.

IV. CONCLUSION

Thank you for considering this protest of the December, 2017 competitive oil and gas lease sale proposed in the BLM’s Wyoming High Desert District.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Pendery", with a long horizontal flourish extending to the right.

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Re: **Fourth Quarter 2017 Lease Parcels (DOI-BLM-WY-D000-2017-0003-EA)**

Dear Mr. Morrison:

Thank you for the opportunity to comment on the draft environmental assessment (EA) for Wyoming's December 2017 High Desert District lease sale. The Wilderness Society, the National Audubon Society, and the Wyoming Outdoor Council are writing to express our concern that leasing parcels 1711-004, 005, 006, 007, 008, 009, 011, 012, 013, 014, 015, 016, 017, 018, 019, 020, 021, 022, 023, 024, 025, 026, 027, 028, 029, 030, 031, 032, 033, 034, 035, 036, 037, 038, 039, 040, 042, 045, 046, 047, 048, 049 and 050, which all fall within priority (PHMA) or general sage-grouse habitat (GHMA), would conflict with a key requirement in the record of decision (ROD) for the Rocky Mountain GRSG Sub-Regions (2015) ("Rocky Mountain Region ROD") and the Wyoming Greater Sage-Grouse Approved Resource Management Plan Amendments (ARMPA) (2015) ("Wyoming ARMPA")—namely, the requirement that the Bureau of Land Management (BLM) prioritize new leasing outside of sage-grouse habitat.

Founded in 1935, The Wilderness Society's (TWS) mission is to protect wilderness and inspire Americans to care for our wild places. 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. Founded in 1967, the Wyoming Outdoor Council is the state's oldest and largest independent conservation organization. Our mission is to protect Wyoming's environment and quality of life for future generations.

1. The EA violates FLPMA because it directly contravenes a clear and binding requirement of a governing land use plan.

FLPMA requires that BLM lease sales comply with their applicable land use plans. *See* FLPMA § 302(a), 43 USC § 1732(a) ("The Secretary shall manage the public lands...in accordance with land use plans developed by him under section 1712 of this title..."). *See also* 43 C.F.R. § 1610.5-3(a) (May 5, 1983; 48 Fed. Reg. 20,368) ("All future resource management authorizations and actions... shall conform to the approved plan."). Although the draft EA acknowledges that the Rocky Mountain Region ROD and Wyoming ARMPA govern this sale, BLM nonetheless declined to apply a key, controlling requirement from those plans and prioritize new leasing outside of sage-grouse habitat.

The draft EA acknowledges that 26 parcels overlap PHMA and 24 parcels overlap GHMA. EA, p. 2, 52. The "Conformance with BLM Land Use Plan" section of the EA also states that the "EA conforms to the...Wyoming Approved Resource Management Plan Amendment (ARMPA) Record of Decision for Greater Sage-Grouse (GRSG)." EA, p. 3. The EA also incorporates applicable stipulations

requiring application of a no surface occupancy (NSO) stipulation and requiring mitigation to achieve a net conservation gain, in accordance with these plans. EA, Appendix B.

Under the Rocky Mountain Region ROD, BLM must prioritize leasing outside of sage-grouse habitat:

In addition to allocations that limit disturbance in PHMAs and GHMAs, the ARMPAs 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 environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

Rocky Mountain Region ROD, p. 1-25 (emphasis added). The Wyoming ARMPA echoes this directive, including the following objective:

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 GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG. The implementation of these priorities will be subject to valid existing rights and any applicable law or regulation, including, but not limited to, 30 USC 226(p) and 43 CFR, Part 3162.3-1(h).

Wyoming ARMPA, p. 24 (emphasis added).

Although the EA recognizes that numerous parcels fall within sage-grouse habitat, and that the Rocky Mountain Region ROD and the Wyoming ARMPA govern this sale, it expressly declines to prioritize leasing and development outside of sage-grouse habitat, citing a policy statement from President Trump's March 28, 2017 Executive Order (EO):

[D]eferred parcels in PHMA and/or GHMA would not be consistent with the Presidential Executive Order (March 28, 2017) which specifies that: 'It is in the national interest to promote clean and safe development of our Nation's vast energy production, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.' A decision to defer parcels in PHMA and/or GHMA would not be consistent with these objectives.

EA, p. 7 (citing EO at § 1(a)).

To be sure, the March 28, 2017 EO did not rescind, suspend or revoke any portion of the Rocky Mountain Region ROD or the Wyoming ARMPA. Rather, the EO set out a 180-day schedule for federal agencies to review their existing rules, orders and actions and decide whether to rescind, revoke or suspend those that "potentially burden the development or use of domestically produced energy resources..." See EO, § 2. The EO did not reference - let alone rescind, revoke or suspend - the greater sage-grouse management plans or their prioritization requirements.

As the EA itself acknowledges, the Rocky Mountain Region ROD and the Wyoming ARMPA apply to this sale. Both plans require that BLM prioritize new leasing outside of greater sage-grouse habitat,

a requirement the March 28 EO left intact. By refusing to follow these prioritization requirements, BLM violated a clear, binding requirement of the ROD and ARMPA, thereby violating § 302 of FLPMA as well as section 1610.5-3(a) of its reinstated planning regulations. *See* FLPMA § 302(a), 43 USC § 1732(a) ("The Secretary shall manage the public lands...in accordance with land use plans developed by him under section 1712 of this title..."). *See also* 43 C.F.R. § 1610.5-3 (a) (May 5, 1983; 48 Fed. Reg. 20,368) ("All future resource management authorizations and actions . . . shall conform to the approved plan.).

Therefore, sale of the forty-three parcels identified in the introduction to these comments should be deferred at this time.

2. The draft EA violates the March 28, 2017 Executive Order as well as the Interior Department's March 29, 2017 Secretarial Order # 3349.

The EA also violates the EO itself as well as a March 29, 2017 Secretarial Order ("SO") (#3349) that implements the EO for the Interior Department. The EO and SO both require that agencies implement their provisions consistent with existing laws and regulations. By implementing the EO and SO in a way that conflicts with FLPMA, BLM's planning regulations, the Rocky Mountain Region ROD and the Wyoming ARMPA, BLM violated the EO and SO.

In § 8(b), the EO expressly requires that it be "implemented consistent with applicable law..." *See also* section 2(a) of the EO (stating that the review of energy burdens will not include agency actions "mandated by law"). Likewise, § 5 of the SO requires that, "[t]o the extent there is any inconsistency between the provision of this Order and any Federal laws or regulations, the laws or regulations will control." The Rocky Mountain Region ROD, the Wyoming ARMPA, as well as FLPMA, are all "applicable law" left intact by the EO and SO that, under § 8(b), 2(a) and § 5, control in the event of any inconsistency.

In the draft EA, however, BLM declined to prioritize leasing outside of sage-grouse habitat specifically because doing so would "not be consistent" with objectives in the EO. EA, p. 7. This directly conflicts with the EO and SO, which both require that inconsistencies between their provisions and existing laws be resolved in favor of existing laws. To the extent the leasing prioritization requirement conflicts with a policy statement in the EO, the prioritization (the law) requirement necessarily controls. Here, BLM wrongly gave precedence to the policy statement instead.

3. The draft EA fails to fully address or meaningfully apply the parcel-specific factors from IM 2016-143.

Lastly, BLM has issued guidance elaborating on the way agency staff are to comply with the requirement to prioritize leasing and development outside sage-grouse habitat in Instruction Memorandum (IM) 2016-143 Implementation of Greater Sage-Grouse Resource Management Plan Revisions or Amendments – Oil & Gas Leasing and Development Sequential Prioritization¹. IM 2016-143 provides the following, in making leasing decisions:

¹ Available at: https://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2016/IM_2016-143.html

Lands within PHMAs: BLM state offices will consider EOIs for lands within PHMAs after lands outside of GHMAs and PHMAs have been considered, and EOIs for lands within GHMA have been considered. When considering the PHMA lands for leasing, the BLM State Offices will ensure that a decision to lease those lands would conform to the conservation objectives and provisions in the GRSG Plans (e.g., Stipulations) including special consideration of any identified SFAs.

In undertaking the required prioritization, BLM must apply several specific factors identified in the IM, including whether parcels are "immediately adjacent or proximate to existing oil and gas leases and development" (described as "the most important factor to consider") and are "in areas with higher potential for development . . . [which] are more appropriate for consideration than parcels with lower potential for development."

Even though the draft EA claims that a policy statement from the EO precludes a decision to defer leasing within sage-grouse habitat, it nonetheless cites IM 2016-143 and briefly describes how the parcel-specific factors apply:

"Following a detailed review in consideration of the [IM 2016-143] factors, eighteen (18) whole and eight (8) partial parcels are located in PHMA, sixteen (16) whole and eight (8) partial parcels are located in GHMA and three (3) parcels are in neither PHMA nor GHMA as identified in the ARMPA ROD. The parcels located entirely or partially in PHMA...are proximate or adjacent to existing production (within 2 miles of leases currently held by production), have moderate to very high potential for oil and gas development, and eight have active GSG leks within their boundaries. These lands within the PHMA parcels may provide nesting, wintering, and/or breeding habitat for Greater Sage-grouse GSG..."

Based on this analysis, it is unclear which specific parcels fall on lands with moderate, high or very high development potential, which (of these) fall within active sage-grouse leks and which provide nesting, wintering or breeding habitat. Under IM 2016-143, a parcel that falls in an area with very high development potential but without valuable habitat features must be prioritized ahead of a parcel with moderate development potential that contains active leks and other important habitat features. However, without considering how the factors apply to each specific parcel, BLM cannot make these types of important distinctions necessary to prioritize leasing in accordance with the IM.

To compare, in the EA for Colorado's June 2017 lease sale, BLM analyzed how each factor applied to specific parcels and how the factors ultimately informed its final leasing decision. Colorado EA at pp. 103 – 110. Over the course of several pages, the Colorado EA describes in detail the nature and quality of the sage-grouse habitat within the parcels considered for leasing, the vicinity of specific parcels to active leks and other important habitat features, the oil and gas development potential on the lands encompassed by the parcels, and other parcel-specific factors. This reflects the type of detailed analysis envisioned by the IM.

To comply with the Rocky Mountain Region ROD, the Wyoming ARMPA and IM 2016-143, BLM must prioritize new leasing outside of greater sage-grouse habitat. In doing so, BLM must apply each of the parcel-specific factors to each of the parcels and prioritize leasing based on how the factors apply. Then, consistent with the analysis in other BLM lease sale EAs, BLM must explain how the totality of the factors inform its proposed action and final leasing decision.

This has not been done in the current Wyoming EA for the December lease sale in the High Desert District and must be corrected before these parcels are offered for sale.

Thank you for considering these comments.

Sincerely,



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