

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

Delivered via USPS Express Mail

February 25, 2019

State Director
Bureau of Land Management
Wyoming State Office
5353 Yellowstone Rd.
Cheyenne, WY 82009

Re: Protest of the March 19-20, 2019 BLM Wyoming Competitive Oil and Natural Gas Lease Sale (DOI-BLM-WY-0000-2019-0001-EA).

Dear State Director:

Please accept this protest of the above oil and natural gas lease sale that is filed by Wyoming Outdoor Council, National Audubon Society, The Wilderness Society and Wyoming Wilderness Association. 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 140 parcels encompassing approximately 148,909 acres of federal lands/minerals.¹

According to the environmental assessment (EA) prepared by BLM for this sale,² nearly all of the proposed parcels are located within habitat of the greater sage-grouse. The EA states that “[a]pproximately 65% of the proposed parcels are located within Priority Habitat Management Areas (PHMAs). Almost all of the remainder are located in General Habitat Management Areas (GHMAs), with only two parcels (1,170.78) located in non-Greater sage-grouse habitats.” EA at 4-22.

In addition, the BLM is proposing to sell fourteen parcels covering approximately 30,125 acres that intersect designated mule deer migration corridors. EA at 2-2; BLM – Wyoming Response to Public Comments for the First-Quarter 2019 Competitive Oil and Gas Lease Sale (2019Q1 Sale), response to comment #2. Approximately 6,478 acres of those fourteen parcels fall directly within the designated migration corridors. *Id.* The agency’s response to public comments explains that the BLM is deferring six entire parcels and portions of two others originally proposed for leasing based on requests from the Wyoming Game and Fish Department (WGFD), and states that the remaining migration corridor parcels would include a “special lease notice to facilitate development of avoidance and other mitigation measures to protect the corridor.” *Id.* Although not disclosed in the EA, the BLM also proposes to offer sixteen (16) parcels overlapping mule deer crucial winter range.³

¹ See Wyoming BLM Notice of Competitive Oil and Gas Lease Sale, March 19-20, 2019, available at: https://eplanning.blm.gov/epl-front-office/projects/nepa/117392/165109/201786/Final_Book.pdf.

² DOI-BLM-WY-0000-2019-0001-EA.

³ The EA does not identify parcels that intersect mule deer crucial winter ranges. Our information shows that fourteen (14) parcels intersect these WGFD-designated vital habitats. Those parcels are listed here: WY-191Q-122, -123, -124, -125, -126, -127, -128, -129, -130, -132, -133, -134, -137, and -140.

As discussed further below, the parcels intersecting migration corridors and crucial winter habitats for mule deer should be deferred from leasing as they lack effective stipulations needed to ensure that the functionality of these crucial habitats is maintained.⁴ These parcels are listed and attached as Exhibit 1.

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, and undisclosed yet potentially widespread and significant impacts to big game migration corridors and crucial winter ranges. In addition, the environmental analysis prepared by BLM fails to meet the basic requirements of the National Environmental Policy Act (NEPA) by failing to analyze a reasonable range of alternatives to the lease everything – lease nothing approach described in the EA, 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 absence of the requisite hard look is worsened by BLM’s failure to consider new science relating to both mule deer and greater sage-grouse. The proposed lease sale is also contrary to the multiple use–sustained yield principles embodied in the Federal Land Policy and Management Act (FLPMA). In addition, the proposed lease parcels raise concerns regarding impacts to wilderness resources. Finally, the lease sale is void because it violates the Antideficiency Act.

II. LEASE PARCELS PROTESTED

We protest the proposal by BLM to sell the 140 parcels listed in its Notice of Competitive Oil and Gas Lease Sale, March 19-20, 2019 (listing and describing lease parcels WY-191Q-001 through WY-191Q-140). The protested lease parcels are also listed in Appendix A appended to this protest.

III. INTERESTS OF THE PARTIES

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

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

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

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

The Wyoming Wilderness Association is a non-profit organization created in 1979 by a group of wilderness advocates and outdoors people who envisioned the Wyoming Wilderness Act. Our mission is to

⁴ Based on information and belief, the Wyoming BLM is currently developing a migration corridor stipulation for inclusion in the Rock Springs draft Resource Management Plan (RMP)/draft environmental impact statement (DEIS). This stipulation would authorize the BLM to deny lease operations if corridor functionality could not be protected.

defend Wyoming's magnificent wild landscapes from the pressures of development, mismanagement, and commodification. We represent the values and interest of nearly 2,000 Wyoming members.

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

IV. AUTHORIZATION TO FILE THIS PROTEST

As an attorney for the Wyoming Outdoor Council, I am authorized to file this protest on behalf of the Wyoming Outdoor Council and its members and supporters, and I have like authority to file this protest on behalf of The Wilderness Society, National Audubon Society, and Wyoming Wilderness Association.

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. The BLM has not Prioritized Leasing Outside of Sage-Grouse Habitats.

BLM has not prioritized leasing outside of priority habitat management areas (PHMA) and general habitat management areas (GHMA), as required by the Rocky Mountain Region Record of Decision (ROD) and Wyoming 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).

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

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

Rocky Mountain Region ROD at 1-25. The Wyoming BLM ARMPA echoes this directive and includes the following objective: "Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMAs and GHMAs." ARMPA Management Objective No. 14, at 24.

The prioritization mandate applies even when lands are designated as open for leasing under the applicable Resource Management Plan (RMP). Thus, the fact that these lands are open to leasing does not

excuse compliance with the prioritization requirement. In addition, BLM cannot rely on stipulations as a substitute for compliance with the RMP prioritization mandate. *Id.* 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 response to these issues, raised in our comments on the EA, will be discussed further below.

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 in part that “[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 Wyoming ARMPA. The entire point of the prioritization objective is to limit development and surface disturbance in important sage-grouse habitat—not simply to manage 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 sensitive sage-grouse habitats with impunity are misplaced. *See* EA at 3-22 (repeating that “in effect, the BLM does not need to lease and develop outside of GRSG habitat management areas before considering any leasing and development within GRSG habitat. This policy should allow for the BLM to efficiently conduct lease sales and permit oil and gas development while still protecting GRSG and GRSG habitat.”) In reality, this policy unlawfully circumvents existing and critical RMP requirements.

In this lease sale BLM is proposing to offer for lease 140 parcels covering 148,908 acres, virtually all of which, according to the EA, encompass sage-grouse PHMA or GHMA. Approximately 65% of the proposed parcels are located within PHMA and “almost all” of the remainder are located in GHMA. EA at 4-22. (Due to the EA’s failure to identify the specific parcels intersecting PHMA and the specific parcels intersecting GHMA, we protest all parcels offered by BLM in the March 2019 lease sale that overlap and/or intersect general and/or priority habitat for Greater sage-grouse which, on information and belief, includes WY-191Q-001 through WY-191Q-140, as listed in Appendix A.⁵)

Leasing in important sage-grouse habitats at this level is an affront to sage-grouse conservation and may compel the Fish and Wildlife Service (FWS) to change its “not warranted” decision and move to list the sage-grouse under the Endangered Species Act (ESA). BLM is showing that in Wyoming at least there are not “adequate regulatory mechanisms” to protect the sage-grouse, as the FWS relied on for its not warranted finding. 80 Fed. Reg. 59856 (Oct. 2, 2015) (FWS not warranted finding). Leasing 140 parcels that cover over 148,000 acres in greater sage-grouse habitat is not in compliance with the prioritization requirement in

⁵ In response to public comments, the BLM claims that this sort of information is presented in the EA Section 5.4. *See* response to comment #23. This is not correct. Section 5.4 displays small (8.5” x 11”) “Greater Sage-Grouse Habitat Maps” (Maps 8-11) that show only the general location of parcels in GHMA and PHMA. Importantly, Parcel ID numbers and parcel acreage are not provided. Moreover, adding to the confusion, EA Section 5.2 Parcel Resource Values/Stipulation Summary Tables are incomplete and riddled with errors. For example, 41 of the 96 High Plains District parcels lack any type of GRSG stipulation even though all but two parcels of the 140 offered for sale are in sage grouse habitat. EA at 4-22.

BLM's RMPs. The BLM's failure to prioritize leasing outside of sage-grouse habitats is a violation of FLPMA.

The inappropriateness of BLM not prioritizing leasing outside of PHMA and GHMA is discussed in the comments of Dr. Matt Holloran, who is a technical advisor on the Governor's Sage-Grouse Implementation Team, which are included here as Exhibit 2.⁶ Among other things, he points out that not prioritizing means BLM is not meeting the first mitigation obligation, avoidance. He also notes that relying on the 2015 ARMPA is not a valid basis for analysis, and an analysis of these specific lease parcels is needed.

Numerous public commenters expressed these concerns, but BLM replied with various facts and figures that didn't directly respond to the core issue. The time period in question is the past two years, beginning with the Presidential Executive Order on Promoting Energy Independence and Economic Growth, March 28, 2017⁷ and encompasses actions by the Department of Interior and BLM to implement the administration's energy dominance agenda. The main issue brought forward in public comments is the concern over the substantial increase during the past two years in federal oil and gas leasing inside greater sage-grouse habitat, including PHMA (Wyoming core area), and how those actions run afoul of the 2015 plan prioritization requirements. Simply put, the data from this period show a fire sale of federal oil and gas leases inside sage-grouse habitat. Clearly this level of leasing in PHMAs is not meeting the prioritization requirement, or the conservation objectives of the 2015 sage-grouse plans.

BLM's responses ignore 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 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 PHMA, the most important of sage-grouse habitats, must be considered in this EA, and it has not been. *See* Exhibit 2 (Dr. Holloran's comments).

Neither the discussion in the EA (at 3-22) nor the BLM's responses to public comment directly address these points. *See, e.g.*, response to comment #22 ("The EA addresses the prioritization objective in the approved RMPs (at pages 3-22)."). The BLM simply repeats the argument that IM 2018-026 allows the agency to avoid the 2015 prioritization requirements. But as mentioned, this IM cannot overrule the statutory command of FLPMA and BLM's duly adopted planning regulations which both state unequivocally that BLM will abide with the direction in an RMP. "An agency's decision cannot prevail if it violates a federal

⁶ Dr. Holloran's report was based on a review of the EA prepared for the Wyoming BLM Supplemental February 2019 oil and gas lease sale. The deficiencies and omissions evidenced in the EA prepared for the March 2019 lease sale are nearly identical to those identified and discussed by Dr. Holloran in his January 15, 2019 review, and we therefore adopt and incorporate by reference his January 15th report in its entirety and include it for consideration by BLM in this protest review.

⁷ *See*: <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/>

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. Comm’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. The BLM must Incorporate Requirements for Compensatory Mitigation into the Leases.

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. The Plan expressly requires such mitigation to achieve net conservation gain when oil and gas development is authorized in PHMA in Wyoming and prescribes use of offsite mitigation/compensatory mitigation in GHMA, as well, to address impacts that cannot be fully resolved onsite. *Id.* at 1-30 to -31; Wyoming ARMPA, p. 35.

BLM, however, has now proposed to eliminate the ARMPA’s requirement to use compensatory mitigation. Under the December 2018 Proposed RMP Amendment and Final Environmental Impact Statement (EIS), compensatory mitigation would no longer be required. Wyoming Proposed RMP Amendment and Final EIS at ES-7 to ES-8 and 2-18 to 2-22. BLM states that:

. . . following extensive review of FLPMA, existing regulations, orders, policies, and guidance, the BLM has determined that FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of BLM-administered lands (Instruction Memorandum 2018-093, Compensatory Mitigation, July 24, 2018).

Id. at ES-7.

First, we would note that there is now a new IM on Compensatory Mitigation, IM 2019-018, issued December 6, 2018, but that IM still concludes 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 both IM 2019-018 and the Proposed RMP Amendment are 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,⁸ and to “manage the public lands under principles of multiple use and sustained yield”.⁹ The principles of multiple use and sustained yield pervade and underpin each of BLM’s authorities under FLPMA, including the policies governing the Act,¹⁰ the development of land use plans,¹¹ the authorization of specific projects,¹² and the granting of rights of way.¹³ 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.¹⁴ 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,”¹⁵ 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.¹⁶ This general authority also confers broad discretion on BLM to impose mitigation requirements on project applicants, including compensatory mitigation in appropriate circumstances.¹⁷

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.”¹⁸ 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*

⁸ 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”.

⁹ 43 U.S.C. § 1732(a).

¹⁰ 43 U.S.C. § 1701(a)(7).

¹¹ 43 U.S.C. § 1712(c)(1).

¹² 43 U.S.C. § 1732(a).

¹³ 43 U.S.C. § 1765(a)(i).

¹⁴ 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)).

¹⁵ 43 U.S.C. 1732(a).

¹⁶ 43 U.S.C. § 1732(b).

¹⁷ 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 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 regulatory 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).

¹⁸ 43 USC § 1732(b).

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).¹⁹ 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.

BLM’s conclusions in the 2018 Proposed RMP Amendment and Final EIS, and 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 3). 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 the net conservation gain/compensatory mitigation requirement in PHMA and providing for use of compensatory mitigation in GHMA that may soon be eliminated from the Wyoming ARMPA. The need to address compensatory mitigation was also addressed by Dr. Holloran. Exhibit 2 at 5-6. 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.

¹⁹ BLM cited this case in its determination to issue its Notice of Intent to open the RMP amendment process. See Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments. 82 Fed. Reg. 47248 (October 11, 2017). Docket No.: LLWO200000/LXSGPL000000/17x/L11100000.PH0000

B. BLM has not Taken a Hard Look at Impacts to Mule Deer.

1. Impacts to Mule Deer Migration Corridors and Crucial Winter Ranges are not Adequately Disclosed.

The BLM's analysis of the environmental consequences to mule deer is insufficient to properly inform the public and agency decision-makers of the impacts to Wyoming's mule deer herds likely to result from the proposed action.²⁰ The EA's failure to disclose the direct, indirect, and cumulative effects from the sale and potential development of these parcels, and its reliance on outdated, incomplete and largely irrelevant RMP-level analysis to support the sale of these parcels necessitates the preparation of additional environmental analysis and public comment opportunities. To ensure the integrity of the environmental review process, parcels offered at this sale should be deferred pending the development of such additional analysis.

The Wyoming BLM is proposing in the First Quarter 2019 oil and gas lease sale to offer a total of 14 lease parcels in two different state-designated mule deer migration corridors: thirteen parcels in the Red Desert to Hoback (a.k.a. Sublette) corridor and one parcel in the Platte Valley corridor. BLM also proposes to offer fourteen leases covering approximately 17,875 acres of crucial winter range, habitat that is essential for mule deer survival.²¹

As an initial matter, the BLM's failure to adequately disclose the impacts from the proposed action stems in part from an inaccurate and incomplete description of the affected environment in the EA. The BLM asserts that EA Section 3.1 "describes the present conditions of various environmental resources that could be affected under the action alternatives, if lands are leased, and if oil and gas exploration and development operations are eventually authorized by the BLM." EA at 3-1. And it suggests that "[f]or a complete and detailed description of the affected environment, please refer to the applicable RMP FEISs." *Id.* Neither claim is correct.

First, the "applicable RMP FEISs" do not describe the Red Desert to Hoback and Platte Valley migration corridors. Those FEISs were completed many years before the identification of these corridors and therefore fail to contain any detailed information about these wildlife migrations. Second, although the EA summarizes –referencing WGFD assessments– the declining condition of the Sublette mule deer herd, critical information about the reason for the decline and resource conditions within the migration corridor itself is completely absent. The EA simply notes the total acreage comprising the corridor (834,143 acres), lands within the corridor where BLM manages surface operations (461,680 acres), and lands closed or subject to no surface occupancy (NSO) stipulations (347,489 acres). *See* EA Table: Sublette Herd Migration Corridor, on page 3-25. Two maps show the relative location of parcels within the corridors. EA Map 6 and EA Map 7. And the EA discloses that "[e]nergy development activities on private and state lands within the corridor are likely to occur..." but fails to provide any information about the possible location, nature and extent of that development.

With respect to the Platte Valley mule deer herd, the EA again references a WGFD assessment which, like the Sublette herd, discloses population levels well below WGFD's population objectives, but fails to describe any useful existing resource information that could aid the assessment of impacts from leasing in the Platte Valley migration corridor. The EA simply notes that "25% of the area is currently closed to leasing or requires NSO stipulations." EA at 3-25. And that "the single proposed parcel intersecting the Platte Valley migration corridor is located adjacent to existing wells in the northern portion of the corridor, within the only small areas identified as 'high' or 'moderate' oil and gas potential near the corridor." *Id.*

²⁰ Our December 13, 2018 comment letter on the Wyoming BLM First Quarter 2019 oil and gas lease sale EA, incorporated herein by reference, discussed in detail the specific flaws in the BLM environmental analysis.

²¹ The parcels intersecting mule deer migration corridors include WY-191Q-094, -108, -110, -111, -113, -114, -115, -116, -117, -118, -119, -120, -121, and -122.

And the EA provides no information whatsoever regarding the condition and uses of crucial winter ranges where proposed parcels are located.

The gross absence of important baseline environmental information prevents informed agency decision-making. The present condition of lands comprising mule deer migration corridors and crucial winter range, and activities taking place or proposed in those habitats, is not provided. Information on the number of mule deer utilizing these corridors is absent, as is information concerning the timing of migration, and use of specific habitats within the corridors such as stopover sites and crucial winter ranges. Specifically, with respect to migration corridors, exiting threats and barriers, such as fencing, roads, energy and mineral developments, drought, the effects of climate change, existing mineral and oil and gas leases, invasive species, energy/mineral and residential development on private lands, etc., are not disclosed; yet this information is essential to understanding the potential environmental consequences of the BLM's leasing proposal. Moreover, the specific functional attributes of habitats within the corridors, such as stopovers, high use areas, movement corridors, topography, and plant phenology are not disclosed, even though several parcels are located within such habitats.

There is no justification for BLM's failure to include more specific and detailed information in the EA about the specific conditions, features and characteristics of the migration corridors and crucial winter ranges at issue here. The agency has access to all of this information either directly through its own internal databases and files, or from various public data bases such as WYGIS and cooperating agencies including WGFD. In addition, Petitioners have provided BLM on many occasions copies of scientific reports and research papers, direct links to pertinent Wyoming Migration Initiative web pages, and detailed letters containing numerous exhibits outlining our concerns. *See, e.g.*, WOC's December 3, 2018, letter to Wyoming BLM State Director Mary Jo Rugwell Re: Ensuring Functionality of Wildlife Corridors by Using the Best Available Science to Implement Secretarial Order 3362, which was attached to our comments on the EA and is attached again here as Exhibit 4. To understand the environmental effects of leasing these lands, the BLM must provide environmental baseline information including, *e.g.*, description of their present condition, uses, threats, etc. The EA does not do this.

The lack of detailed and parcel-specific baseline information in the EA concerning the uses, conditions and threats of lands comprising mule deer migration corridors and crucial winter range leads directly to the next problem: the BLM's failure to take a hard look at the environmental impacts of leasing in these WGFD-designated vital habitats.

Significantly, the EA fails to adequately disclose impacts to mule deer from leasing and potential development in WGFD-designated migration corridors. The relevant disclosure in the EA, contained in Section 4.2.8.3 Impacts to Mule Deer Migration Corridors, consists entirely of the following statement:

If the proposed parcels located in the designated mule deer migration corridors are leased, and if operations are authorized by the BLM, oil and gas activities may adversely affect use of the migration corridors by mule deer. Consistent with DOI Secretary's Order No. 3362, "Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors" (February 9, 2018), the BLM may require, in coordination with the WGFD, additional measures at the time operations are authorized to mitigate impacts to mule deer migration corridors. These measures may include those described in the WGFD's "Recommendations for Development of Oil and Gas Resources within Crucial and Important Habitat" (2010).

As explained previously (Section 3.10.3), about 75% of the lands within the Sublette mule deer herd's migration corridor where the BLM manages surface operations associated with Federal oil and gas activities are either closed to leasing or require an NSO under the approved RMPs. A smaller proportion of the Platte Valley mule deer herd's migration corridor is similarly encumbered, though the potential for oil and gas development in the vicinity of the corridor is

lower. Thus, the current land use allocations and/or limits to potential economically-recoverable oil and gas resources provide a degree of protection from oil and gas operations for much of the migration corridors, though barriers to migration could still occur in portions of the corridors because of land use activities on Federal and non-Federal lands (including energy development, residential construction, recreation, and other uses). Under the Proposed Action Alternative, a total of 21 parcels would be offered that intersect the migration corridors, with 16,988 acres of the proposed lease sale located within the corridors.

EA at 4-22, 23.

The only statement that can be construed as a disclosure of impacts to mule deer is presented in the first sentence, and it simply acknowledges what is already widely known among wildlife managers and informed members of the public, which is that “oil and gas activities may adversely affect the use of migration corridors by mule deer.”²² Certainly, to ensure informed decision-making, NEPA requires more than simply a general statement that impacts to mule deer migrations may occur as a result of energy development. We already know that. What is not known, and not disclosed in the EA, is the nature, duration and extent of the impacts of potential development of the parcels offered in BLM’s March 2019 lease sale, and precisely how the BLM intends to mitigate impacts in order to maintain functionality of the migration corridors.

To underscore this point, we refer you to *Wild Migrations: Atlas of Wyoming’s Ungulates*, written by Dr. Matthew Kauffman and his team of researchers at the University of Wyoming’s Wildlife Migration Initiative. This Atlas was submitted to Wyoming BLM as an exhibit to our protest of the Wyoming BLM’s Supplemental February 2019 oil and gas lease sale, and is hereby incorporated by reference into this protest as if fully set forth below. (Exhibit 5).²³ A summary of the Atlas is available at <https://migrationinitiative.org>. Among the many topics discussed, it is noteworthy that energy development in migration corridors is identified a significant challenge to migration. For example, the discussion on pages 100-101 reveal that energy development in migration corridors may cause migrating animals to “hurry past prime stopover locations, loos[ing] access to the best forage and thus the benefit to migration.” Unfortunately, this documented response to oil and gas development is not disclosed in the EA.

Instead of taking a hard look at impacts at a point where disclosure could be useful for informing the agency’s leasing decisions, the BLM has deferred analysis to the drilling (application for permit to drill--APD) stage, claiming that “[w]ithout a site-specific proposal for lease operations, it would be speculative for the EA to assume whether, how, and to what extent oil and gas operations may affect big game on the proposed lease sale parcels.” *See* BLM’s response to public comment #5. But this misses the point. As Dr. Matt Holloran advised BLM earlier,

BLM postpones analyses of potential impact to the APD stage because “the uncertainty [in infrastructure configuration and placement] that exists at the time the BLM offers a lease for sale includes crucial factors that will affect potential impacts” (EA at 4-1). However, as noted above, development is reasonably foreseeable given leasing of a parcel. Any uncertainty in surface disturbance levels and infrastructure can be dealt with analytically through an investigation of potential development scenarios and a weight of evidence approach to estimating potential impacts by parcel given these scenarios (see footnote 1). It is worth noting that BLM’s NEPA Handbook H-1790-1 (as quoted in EA at 4-1) establishes the need to perform analyses focused on the effects of individual actions not analyzed in a

²² *See, e.g.*, Wyoming Action Plan for implementing SO [Secretarial Order] 3362 (identifying oil and gas leasing and development as specific threats to the Baggs and Sublette (Red Desert to Hoback) mule deer migration corridors.

²³ By mutual agreement of the parties, the Wyoming migration Atlas was timely delivered to a Wyoming BLM State Office official during the government shutdown in Cheyenne, Wyoming.

broader EIS, and that analyses included in an EA should concentrate on issues specific to subsequent actions. In the case of this Lease Sale, the EA fails to address potential impacts specific to the foreseeable actions resulting from the sale.

See Review of sage-grouse impact assessments and decision making in the FONSI and EA used in support of BLM's Wyoming February 25 – March 1, 2019 Competitive Oil and Gas Lease Sale, Matt Holloran, January 15, 2019, Exhibit 2.²⁴

In addition, there is no disclosure in the EA of impacts from the potential development of the fourteen lease parcels offered in this sale that overlap crucial winter range, despite the fact that timing limitation stipulations (TLS) typically attached to leases in mule deer crucial winter range have been shown by research conducted in Wyoming (referenced in our EA comments) to be ineffective. *See* Exhibit 6 (maps showing location of proposed lease parcels overlapping crucial winter habitats for mule deer).

Mule deer depend entirely on these “vital” habitats to survive Wyoming’s harsh winters, yet the EA fails to assess impacts in even the most general way. The absence in the EA of any analysis of impacts from leasing in mule deer crucial winter range is a significant and glaring omission that must be corrected in a supplemental NEPA document, particularly in light of new information showing that mitigation measures implemented by BLM to avoid or minimize impacts to wintering mule deer are ineffective. Our December 13, 2018 letter to BLM on the EA discussed this issue in detail at pages 15-20. Yet BLM’s response to comments insists that impacts to crucial wildlife habitats have been adequately addressed in the EA and underlying RMPs. But in truth, there simply is no analysis anywhere in the EA or any underlying RMP EIS of impacts to crucial winter ranges that takes into account the new science. *See, e.g.*, BLM Response to Comment #6: “Impacts to crucial winter habitats is addressed in the EA (see EA at Sections 3.10, 4.2.8, and 4.3.2). Impacts to crucial wildlife habitats are also addressed in detail in the RMP EISs to which the EA tiers.” The Wyoming Migration Atlas, discussed further below, contains a section titled Energy Development in Winter Ranges (pp 98-99) describing the devastating effects of oil and gas development to mule deer on the Mesa from drilling in crucial winter range. Given the state of the science and easy access to this information, there is simply no justification for BLM’s failure to disclose the effects of leasing and potential development in crucial winter habitats essential to mule deer.

Finally, there is no disclosure of the combined effect of development on these fourteen crucial winter range leases and on other pre-existing and proposed leases that may now or in the near future encumber these crucial habitats.

Instead of providing an assessment of potential impacts of development on these parcels, BLM simply allows that it “*may* require, in coordination with the WGFD, additional measures at the time operations are authorized to mitigate impacts to mule deer migration corridors.” EA at 4-22. NEPA requires more than this, particularly where issues are complex, where unresolved controversies exist, where resources are both sensitive and scarce, and where the actual on-the-ground impacts could be significant and potentially irreversible. The BLM claims that the implementation of unspecified and unanalyzed mitigation measures, together with the deferral of certain leases and consultation with the WGFD “will ensure operations mitigate potential impacts to wildlife, including migrating big game...” but fails to provide in the EA any support for that claim or any information regarding how the mitigation measures will achieve the WGFD’s mitigation policies for vital habitats (“The Department is directed by the Commission to recommend no significant declines in species distribution or abundance or loss of habitat function.”)²⁵

²⁴ Dr. Holloran’s report was submitted to Wyoming BLM as an exhibit to our protest of the BLM’s Supplemental February 2019 oil and gas lease sale and is hereby incorporated by reference as if fully set forth below.

²⁵ See Wyoming Game and Fish Commission Mitigation Policy, Policy Number VII H, Issued January 28, 2016.

Petitioners have pointed out to BLM time and time again in their letters to the agency and in their comments on BLM's leasing EAs that oil and gas leasing and development in these crucial habitats could have significant, potentially devastating impacts to Wyoming's mule deer herds, but for some reason the agency is not listening. The agency continues to offer oil and gas leases in crucial habitats without properly disclosing the impacts, without analyzing the effectiveness of mitigation, and without including adequate stipulations on leases that would permit BLM to deny operations if impacts to mule deer were deemed unacceptable.

The BLM's response to public comments claims that impacts to vital mule deer habitats from the sale of March 2019 lease parcels have been adequately address in the EA and underlying RMPs. As discussed above, that claim is not true. Simply stating that "oil and gas activities may adversely affect the use of migration corridors by mule deer" (EA at 4-22) does not come close to satisfying the "hard look" demanded by NEPA. We have reviewed the specific pages in the underlying RMPs that BLM cites in its response to comments. BLM Wyoming Response to Public Comment, Comment No. 3. BLM claims these pages "analyzed and disclosed potential impacts to big game and evaluated alternatives to address balancing the various multiple uses on the public lands." *Id.* The referenced pages do nothing of the sort. For instance, the Green River RMP, released in 1997, makes no mention of migration corridors, stopovers, or bottlenecks. Green River RMP at 347. This is unsurprising, as those vital designated habitats had yet to be identified. The RMP entirely fails to address the dramatic population level declines mule deer have experienced in recent decades. The lack of available data in 1997 is clearly reflected in the potential impacts the Green River RMP contemplates. *Id.* at 441. In the environmental consequences section cited by BLM's response, the RMP discusses impacts from oil and gas only in terms of increasing competition between mule deer and cattle for vegetation. In the cited Wildlife Management section, the RMP describes its support for the WGFD's 1989 Strategic Plan. It is ludicrous to suggest this outdated document and its ilk provide a sufficient description of the affected environment, much less a thorough analysis of potential impacts to mule deer herds.

The cited pages in the Jack Morrow Hills Coordinated Activity Plan (CAP) fare little better. The FEIS mentions population declines, attributing them to drought and a harsh winter with no mention whatsoever of impacts from development. Jack Morrow Hills CAP Final EIS at 3-17. When potential impacts from drilling are discussed in a subsequent section, there is no distinction between impacts to different species of big game, though we know that ungulates' fidelity to migration corridors and adaptability to development varies dramatically across species such that impacts to mule deer would be much worse than impacts to elk or pronghorn resulting from the same activity. *Id.* at 4-61. The CAP relies on an old model of habitat *connectivity* for migrations, where the issue, and WGFD's stated goal, is habitat *functionality*. Without an understanding of mule deer behavior grounded firmly in the best available science, the CAP does not even accurately describe the management goal, much less evaluate the risks to corridor functionality. We know that mere connectivity does not ensure a functional corridor, especially for our vulnerable and declining mule deer herds.

The most recent referenced document is the 2008 ROD for the Rawlins RMP. BLM claims that the Rawlins ROD and Green River RMP provide lease stipulations to protect big game, citing specific pages in its response to comments. Having reviewed these pages, there are no provisions whatsoever for lease stipulations for big game. When we reviewed referenced pages in the underlying FEIS for the Rawlins RMP, it became clear why stipulations were not a priority. That document claims that "mule deer populations across the RMPPA are being maintained or increased through reduced harvest" and fails to even note the possibility of impacts from industrial development in its description of the resource. FEIS Rawlins RMP at 3-147. That FEIS specifically cites the supporting scientific literature used to evaluate potential displacement of big game. Four mule deer studies are cited: from 1976, 1986, 1986, and 1991 respectively. *Id.* at 4-452. These studies are clearly not indicative of the best available science, much of which has been published in the past decade and has seriously reframed our understanding of mule deer behavior and the potential impacts of energy development.

The RMPs that BLM relies on to describe the affected environment and potential impacts to mule deer are based on decades-old science and an accordant lack of understanding of mule deer behavior and habitat functionality. They fail to even articulate the right management goal, focusing on connectivity rather than functionality. They describe potential impacts from oil and gas development in a cursory way if they even bother to mention them. They make no mention of stopovers, bottlenecks, and other habitat areas that WGFD has designated “vital.” They often fail to distinguish between ungulate species despite important behavioral differences and habitat needs. These RMPs cannot satisfy BLM’s statutory duty to take a hard look at potential impacts in the face of steep population declines.

The agency claims that its actions will ensure that WGFD’s mule population objectives will be achieved, notwithstanding the fact that mule deer population levels have plummeted in areas experiencing intensive oil and gas development, and despite the implementation of extraordinary mitigation measures. The BLM claims that any impacts from subsequent development activity on the parcels will be adequately mitigated, yet fails to describe, discuss or indeed, even identify, what those measures may include. And it claims that reasonable measures, “such as those contained within the Wyoming Game and Fish Commission Migration Corridor Strategy” will allow BLM to maintain the functionality of big game migration corridors, yet fails to disclose that the Commission’s migration corridor strategy does not describe or contain any specific measure that would avoid or reduce impacts. In effect, the BLM is selling the public a bill of goods. Trust us, we’ve got this covered, is what the agency seems to be saying, yet we have example after example where BLM—despite similar promises— has failed its stewardship responsibilities. The Wyoming State Office should not accept this type of weak analysis and instead should remand this EA to the agency’s professional wildlife biologists for a proper analysis of impacts and potential mitigation measures.

2. The EA fails to disclose cumulative impacts to mule deer.

With respect to the disclosure of cumulative impacts to mule deer, the EA simply states – without referencing or citing to any specific section of the documents— that “[t]he cumulative effects are described in the RMP FEISs to which this EA tiers (see Section 1.4).” EA at 4-27. The EA adds –as if repeating a falsehood will make it true-- that “[t]he RMP FEISs to which this EA tiers address potential cumulative effects, including as a result of other reasonably foreseeable future actions outside of their respective planning areas. For additional information regarding potential cumulative effects, please refer to the applicable RMP FEISs.” *Id.* The truth is that the underlying RMP FEISs to which this EA tiers simply do not consider the cumulative effects of oil and gas leasing and development on the Red Desert to Hoback and Platte Valley mule deer migration corridors. The EISs cited by BLM in its response to public comment simply could not have analyzed the effects of oil and gas development in these two migration corridors because those corridors were neither identified nor designated when the RMP EISs were completed.

For it to be of any use at all, the cumulative effects analysis for the leases offered in the Platte Valley and Red Desert to Hoback migration corridors must, at a minimum, take a hard look at existing conditions in the corridors (the environmental baseline) as well as the specific areas of the corridors where the proposed leases are located, disclose the past, present and reasonably foreseeable actions (such as, for example, other past and future lease sales and oil and gas drilling projects) that may impact the functionality of the corridors, examine the health, condition and population trends of the mule deer herds that use the corridors and the habitat they rely on, not only within the corridors, but also summer, winter and transitional ranges. We have included a series of maps showing recently offered and proposed oil and gas leases within the Hoback and Platte Valley migration corridors. These maps also show lease parcels located in crucial winter ranges. *See* Exhibit 6. Although far from complete in terms of presenting an adequate assessment of cumulative impacts, these maps at least provide a starting point for analyzing the potential cumulative effects of BLM’s leasing decisions.

With leases from the BLM’s September 2018 and Special February 2019 sale added to the map, the public can begin to see that the risk of development and resultant impacts inside the corridors is much greater

than from just the proposed action. Other essential information necessary to understand potential cumulative impacts to mule deer is missing, such as fences, roads, gravel quarries, housing developments, etc., but it is not the public's job to provide it. As we said before, the BLM has access to all the information it needs to prepare a useful and scientifically defensible NEPA document that fully discloses the impacts from potential development on the offered parcels. The fact that additional coordination with WGFD may occur at the APD stage does not absolve BLM of properly disclosing environmental effects and analyzing the effectiveness of potential mitigation measures prior to offering these parcels.

The EA does not indicate whether any of the offered parcels are located within crucial winter habitats for mule deer. If so, the EA provides no analysis of potential cumulative impacts to mule deer crucial winter ranges. The EA provides no information about the condition or quality of the habitat, no information discussing the number or condition of mule deer that utilize these areas during the winter, no information about existing and proposed federal mineral and oil and gas leasing activities and/or other federally-permitted uses of those lands, no information on population trends or wildlife counts, and no information on other activities that could be cumulatively impacting mule deer on these winter ranges. Given the steep declines in mule deer populations statewide, the failure to consider these impacts in the EA is inexcusable.

3. The EA merely lists mitigation measures with no analysis or evidence of how those measures would reduce adverse impacts to the affected environment.

BLM has failed to analyze how its proposed mitigation measures will protect the functionality of mule deer migration corridors and thereby comply with WGFD's Ungulate Migration Corridor Strategy. BLM's EA lists several potential mitigation measures as best management practices (BMPs). EA at 4-21. However, the EA contains no analysis of those mitigation measures or their potential to ensure habitat functionality in the context of the proposed action. Instead, BLM defers that analysis to the APD stage, writing "If operations are proposed, the BLM may require additional mitigation measures in order to manage plant and wildlife habitats on public lands in support of the applicable State or Federal management objectives." EA at 4-20. On the following page, after a generic list of wildlife impacts, BLM writes:

As required by the applicable RMPs, wildlife impacts are mitigated through NSO, TLS, and/or CSU stipulations. See Attachment 5.1. In the event the proposed leases are issued and lease operations are proposed, BMPs such as directional and/or horizontal drilling, habitat avoidance, and consolidation of infrastructure may be implemented to mitigate site-specific impacts to wildlife and their habitats. Additionally, the BLM would coordinate with the WGFD and consider their recommendations (such as those in "Recommendations for Development of Oil and Gas Resources within Crucial and Important Habitat" (2010)).

Id. at 4-21.

BLM's failure to take a hard look at its listed mitigation measures, and consider how effective those measures would be in achieving the management goal of corridor functionality, violates NEPA. First, it is well established in case law that merely listing mitigation measures is insufficient NEPA analysis. Mitigation measures must be developed to a reasonable degree, supported by evidence, and compensate for potential environmental impacts. Second, the 2010 WGFD Recommendations BLM references are admittedly insufficient to maintain corridor functionality, are in the process of being revised, and should not be the basis of any mitigation measures as they suggest an outdated development density threshold derived from a coalbed methane study that would have dire impacts on mule deer populations if implemented in the context of this lease sale.

Mitigation measures must be developed to a reasonable degree and supported by evidence. Courts have held that mere listing of mitigation measures is inadequate. *See, e.g. HCPC I*, Case No. 3:11-cv-00023-

PK, slip copy at 26-27 (USFS's wetland/springs mitigation was insufficiently developed to justify a categorical exclusion (CE), to support a finding of no significant impact (FONSI)--"proposed mitigation measures must be 'developed to a reasonable degree' and supported by analytical data."), citing *Bosworth*, 510 F.3d at 1029 (citing *Nat'l Parks & Conservation Ass'n*, 241 F.3d 722, 734 (9th Cir. 2001)); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473-75 (9th Cir. 2000). While "a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements"[.] a 'perfunctory description' or 'mere listing' of mitigating measures is inadequate to satisfy NEPA's requirements." *Id.* (citing *Neighbors of Cuddy Mtn. v. USFS*, 137 F.3d 1372, 1380 (9th Cir. 1998); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).

BLM has a responsibility to ensure any anticipated mitigation measures will compensate for potential adverse environmental effects, and cannot issue a FONSI without evidence that they will do so. *See, e.g. Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (holding that where an EA relies on mitigation measures to reach a FONSI, those measures must be assured to occur and must "completely compensate for any possible adverse environmental impacts."); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1985) (holding that courts will not accept conclusory statements that mitigation measures are effective. The agency must be able to support its conclusions with information in the administrative record.); *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2nd Cir. 1997) (noting "[W]e emphasize the requirement that mitigation measures be supported by substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS."). *See also Friends of the Ompopomposuc v. FERC*, 968 F.2d 1549, 1556-57 (2nd Cir. 1992).

If BLM cannot ensure the effectiveness of its mitigation measures, it cannot sign a FONSI and must instead prepare an EIS. *Foundation for North American Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982); *Steamboaters v. FERC*, 777 F.2d 1384 (9th Cir. 1985) (holding that if the plaintiff "raises substantial questions whether a project may have a significant effect, an EIS must be prepared."). Here, BLM has merely listed potential measures with absolutely no analysis and no supporting evidence.

Additionally, because BLM has not analyzed their listed mitigation measures based on the abundantly available evidence from peer reviewed science, the agency improperly relies on WGFD's 2010 Recommendations for Development of Oil and Gas Resources within Crucial and Important Habitat. Responding to a decade of new science, WGFD now acknowledges these recommendations are insufficient to maintain corridor functionality. In particular, the recommendations contain a development density threshold derived from a coalbed methane study. This threshold would allow 4 well pads, or 60 acres of disturbance, per square mile in vital mule deer habitat which would not ensure corridor functionality. Similarly, WGFD now recognizes that the Timing Limitation Stipulations (TLS) recommended in 2010 to protect crucial winter range are not effective to protect that vital designated habitat. Yet, because BLM has not *analyzed* their own proposed mitigation measures and considered their ability to maintain corridor functionality based on the available *evidence*, the agency has not reassessed its approach to mitigation. This willful ignorance, despite consistent demands from the public for a thorough evaluation of the best available science, violates NEPA. BLM must develop its mitigation measures further, supporting its contention that they will protect corridor functionality with analytical data, and ensuring they prevent significant adverse impacts.

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

NEPA 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.

By contrast, in evaluating lease sales, BLM frequently analyzes alternatives that essentially boil down to only considering a no action alternative, which would exclude all lease parcels from the sale; and a lease everything alternative, which would offer for lease all or nearly all proposed parcels. An EA offering a choice between leasing every proposed parcel, and leasing nothing at all, does not present a reasonable range of alternatives. See *TWS v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider a “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”).

1. Additional alternatives needed to conserve Greater sage-grouse.

With respect to the management of greater sage-grouse, BLM has not analyzed any alternatives that fall between the two extremes. The EA describes a No Action Alternative under which BLM would not offer the 146 nominated parcels, and a Proposed Action Alternative wherein BLM would offer those same 146 parcels.²⁶ An EA that presents an “all or nothing” approach for analysis fails to satisfy the most basic requirements of NEPA. Choosing between leasing 146 parcels, or leasing nothing at all, does not constitute a reasonable range of alternatives.

As evidenced in the EA, BLM is failing to consider reasonable middle-ground alternatives. For example, the EAs fail to evaluate an alternative that would defer leasing in PHMA and/or GHMA for Greater sage-grouse, despite a legal obligation to do so under the Approved RMP Amendments (September 2015) and associated policy guidance. See Wyoming BLM ARMPA at 24, Management Objective No. 14 (“Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMAs and GHMAs.”); see 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. . .”).

BLM’s statements in the EA that deferring parcels in PHMA and GHMA was not considered as an alternative because such deferrals would not conform with the applicable RMPs is simply wrong. EA at 2-9 (Section 2.5 Alternatives Considered and Eliminated from Further Analysis). 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 at least some leasing in sage-grouse habitat, particularly in PHMA. 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.

²⁶ Due to deferral of several parcels, disclosed in BLM’s response to public comment #2, the current number of parcels being offered by BLM at its March 2019 oil and gas lease sale is 140. See EA at 2-2 to 2-4; and BLM Response to Public Comment #2.

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. *See* Exhibit 2 (Dr. Holloran’s comments) In this March 2019 lease sale, virtually all of the 140 parcels offered for sale are in sage-grouse habitat. Given the importance of these areas to the conservation of this imperiled species, the EA should have at least analyzed an alternative that deferred leasing in PHMA (Wyoming core areas).

Also, as discussed in more detail on page 22, we are requesting deferral of the 31 parcels located in the most important of sage-grouse habitats that are known, parcels in the “golden triangle.” The BLM should consider an alternative in the EA where these parcels are deferred. The need to defer the leasing of these parcels was discussed in a letter we sent to Governor Mark Gordon, incorporated by reference herein. Exhibit 8.

2. Alternatives needed to protect Mule Deer Migration Corridors and Crucial Winter Ranges.

The EA presents a third alternative: the BLM-Modified Alternative, which reflects a request by WGFD to defer “two entire parcels in the RSFO and portions of the two parcels in the PFO and RFO that intersect designated big game migration corridors.” EA at 2-2. This “catch all” alternative would also defer a parcel that “conflicts with coal leasing and mining operations.” *See* EA Table: BLM-Modified Alternative Deferrals, at 2-3. In all other respects, the BLM has determined that this modified alternative is “identical” to the Proposed Action Alternative. EA at 2-2.

Given the intense debate taking place in Wyoming regarding management of big game migration corridors, and heightened public concern about potential impacts of oil and gas development within these corridors, the BLM should have analyzed an alternative that deferred leasing in the Red Desert to Hoback migration corridor and the Platte Valley migration corridor.²⁷ Instead, rejecting widespread calls for lease deferral, the BLM proposes to offer thirteen parcels in the Red Desert to Hoback corridor, and an additional parcel in the Platte Valley corridor. *See* BLM’s response to public comments #2 through 5. All fourteen of these parcels allow for surface occupancy and development and all of them lack a lease stipulation – currently being developed by BLM for inclusion in the Rock Springs RMP/DEIS— that would help to ensure adequate protection of corridor functionality.

We appreciate that BLM accepted WGFD’s recommendation to defer six entire parcels and portions of two others located inside the corridors, but that still leaves open the possibility that intensely disruptive, industrial-scale oil and gas development will occur on the remaining fourteen parcels. Although BLM would attach a special lease notice to the remaining parcels intersecting migration corridors, the EA fails to disclose the substantive and procedural limitations of the lease notice including, most importantly, that it –unlike a lease stipulation - cannot serve as a basis for denial of lease operations. 43 C.F.R. § 3101.1-3. This needlessly narrow approach to a pressing resource management concern fails to satisfy NEPA’s requirement to analyze alternatives to “any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). Quite clearly, the BLM should have considered an alternative that deferred leasing inside the migration corridors.

Similarly, BLM should have considered an alternative that deferred leasing in crucial winter range. Although not disclosed in the EA, independent GIS analysis commissioned by our groups reveals that fourteen parcels would be offered in crucial winter range: WY-191Q-122, -123, -124, -125, -126, -127, -128, -129, -130, -132, -133, -134, -137, and -140. As discussed in our EA comments, new and significant peer reviewed science from Wyoming suggests the adverse impacts to ungulates from oil and gas leasing and development are more far reaching and longer term than BLM’s scant NEPA analysis presumes. BLM should

²⁷ *See, e.g.*, letter from Sweetwater County requesting deferral of all parcels in the Red Desert to Hoback migration corridor pending revision of Rock Springs RMP. EA Public comment #2.

have evaluated an alternative that defers leasing in this vital habitat type until the best available science can be incorporated into NEPA reviews and planning documents.

Finally, the BLM should have considered an alternative that deferred the leasing of parcels within the Rock Springs Field Office (RSFO) – including migration corridor and crucial winter range parcels- in order to preserve decision space for the upcoming RMP revision in that Field Office,.

In its response to comments on the EA, the BLM dismisses calls for deferral of migration corridor parcels, including multiple requests from Sweetwater County. The BLM’s response suggests that it believes it has satisfied its obligations under 40 C.F.R. § 1606.1 by deferring six entire parcels and portions of two others, yet it fails to disclose that the BLM is actively working to develop a migration corridor lease stipulation for inclusion in the Rock Springs draft RMP/DEIS, and that leasing these RSFO parcels now would preclude the application of the lease stipulation once the offered leases have been issued. Moreover, the BLM apparently fails to appreciate that adoption of the recommendations of a state wildlife agency does not in and of itself satisfy the independent duty to ensure compliance with NEPA, including proper analysis of a reasonable range of alternatives. Lastly, the BLM’s responses do not satisfy the agency’s obligation to provide a response to concerns raised regarding the EA.

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 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” which entails no environmental impacts or consequences (EA at 1-3 and 4-1) while at the same time acknowledging that “the issuance of an oil and gas lease, however, does grant to the lessee the rights to ... develop oil and gas resources from the lease ... which can result in surface-disturbance and other impacts.” EA at 1-3. Asserting that development on the lease is uncertain, BLM expressly defers a site-specific analysis on key resource values, including sage-grouse, mule deer, outdoor recreation, visual resources, and wilderness resources. *See e.g.*, BLM’s response to comments #5, #15, #18, and #19. This approach violates NEPA, and BLM must take the site-specific impacts of leasing into account at this stage.

On the other end of the spectrum, the EA also failed to consider the *landscape scale* impacts to sage-grouse, as scientists say is needed. Exhibit 2 at 1-2. At a minimum, if BLM used the AIM Strategy and the Greater Sage-Grouse Monitoring Framework it could provide an analysis of landscape scale impacts. *Id.*

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 ARMPA 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 well as PHMA, mineral withdrawals in sagebrush focal areas, compliance with required design features, etc. For the analysis of impacts to be accurate, it must examine the direct, indirect and cumulative effects of habitat-disturbing actions in sage-grouse habitat without the implementation of those conservation measures, which have recently been abandoned by BLM or may be abandoned in the near future. *See, e.g.*, Instruction Memorandum (IM) 2018-093 (eliminating the compensatory mitigation requirement). *See also* Wyoming Greater Sage-Grouse Resource Management Plan Amendment and Final Environmental Impact Statement (proposing many imminent weakenings of the 2015 sage-grouse plans in Wyoming).

Moreover, BLM cannot properly rely on the plan-level analysis conducted for the ARMPA to satisfy NEPA's requirements to disclose impacts of this lease sale. 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 ARMPA does not address the site-specific impacts associated with issuing these particular lease parcels. On the contrary, by requiring a prioritization analysis the ARMPA contemplates 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"). *See also* Exhibit 2 at 3 (Dr. Holloran points out how the ARMPAs cannot be the sole basis for this analysis).

BLM offered a response to these concerns, essentially asserting that the RMPs had considered impacts and that it is complying with the RODs. *See e.g.*, BLM response to comment #19. But the RMPs clearly did not consider the potential impacts that could result from issuing these particular leases. BLM recognizes that operations on leases can "result in surface-disturbance and other impacts." EA at 1-3. BLM also recognizes that under *N.M. ex rel. Richardson* reasonably foreseeable site-specific impacts must be considered in a NEPA analysis. *Id.* It also recognized it can "impose reasonable measures not otherwise provided for in lease stipulations, to minimize adverse impacts on other resource values." *Id.* BLM asserts that there is "uncertainty" regarding impacts when BLM offers a lease and these are "crucial factors that will affect potential impacts." *Id.* at 4-1. Relative to wildlife and special status species, "operations could result in population impacts and habitat fragmentation and loss." *Id.* at 4-20. Relative to sage-grouse, BLM claims "To the extent reasonably foreseeable at the lease sale stage, the EA... and RMP EISs ... address potential impacts from oil and gas development on Greater sage-grouse and their habitat" but it offers no analysis supporting that claim. *See* BLM response to public comment 15. Relative to big game migration corridors and crucial winter range, BLM claims underlying RMPs sufficiently address impacts and that "The EA and the RMPs to which it tiers acknowledge that big game habitats on BLM-administered public lands, if leased and if oil and gas development occurs, may be adversely affected." *See* BLM response to public comment 3. The inappropriateness of these claims were discussed in detail above in the migration corridor and crucial winter range section of this protest.

Additionally, BLM failed to properly describe the affected environment for sage grouse. Because the agency lacked and failed to present information about *baseline environmental conditions*, it could not have adequately considered potential impacts to the affected environment. Courts have held that agencies violate NEPA when their environmental analyses fail to take a "hard look" at existing baseline data. *See, e.g. Oregon Nat. Desert Ass'n v. Jewell* 823 F.3d 1258 (9th Cir. 2016) (without accurate baseline information the agency cannot accurately assess project impacts); *N. Plains Resource Council v. Surface Transp. Board*, 668 F.3d 1067 (9th Cir. 2011) (reversing decision because of inadequate baseline information); *American Rivers*, 201 F.3d at 1195 n. 15 (same); *Idaho Conservation League v. U.S. Forest Service*, 2012 WL 3758161 (D. Idaho 2012)(applying the rule to groundwater resources). Courts have further held that this same principle applies to baseline data for sage grouse specifically, and that agencies cannot rely on mitigation measures to protect sage grouse when baseline data has not been adequately considered. *See Northern Plains Resource*

Council, Inc. v. Surface Transportation Board, 668 F.3d 1067 (9th Cir. 2011) (holding “[W]ithout this data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency ‘fail[s] to consider an important aspect of the problem,’ resulting in an arbitrary and capricious decision.”).

Here, the EA lacks any information about baseline environmental conditions for sage grouse and sage grouse habitat on these parcels, which is critical for understanding the potential effects from leasing and developing these leases. For example, the EA fails to disclose whether leks are found on the parcels and if so the number of breeding males attending those leks, nesting success, population trends etc.; a description of the condition of sage grouse and their habitat within designated core habitat areas that the parcels overlap including effects from wildfire, invasive weeds (e.g. cheatgrass), disease (e.g. West Nile virus) and other factors that could influence the health and population of greater sage-grouse; and existing and reasonably foreseeable activities on the specific parcels that could have adverse impacts to sage grouse such as oil and gas development, mining, agriculture, residential development and other factors. Without a thorough analysis of this baseline environmental data it is impossible to understand the health of sage grouse populations and their habitat and thus impossible to evaluate potential adverse impacts. Not only does a lack of baseline data foreclose the possibility of evaluating impacts, it also subverts NEPA’s public process requirements. When the EA fails to disclose baseline environmental conditions, the public has not been made aware of those conditions and cannot comment on them or evaluate risks. BLM fails to fulfill either of NEPA’s “twin aims” --to consider impacts and inform the public.

Additionally, 31 parcels in the special February and this March 2019 lease sale fall in the most important sage-grouse habitats recognized, parcels in the “golden triangle” near South Pass. Parcels WY-191Q-110 to 130 in the March sale are found in this area which has the most robust sage-grouse populations. In a February 22, 2019 letter to Governor Mark Gordon we requested that he ask that these parcels be deferred from leasing due to their values. Mary Jo Rugwell with BLM was copied on this letter so it and the map are in the possession of BLM. Exhibit 8. We hereby reiterate this request to defer these parcels in this most important sage-grouse habitat in Wyoming.

Overall, while it is clear that BLM has the capacity and resources to provide a hard look at potential environmental impacts that could result from leasing the proposed parcels, it has refused to do so. *See, e.g.*, BLM response to comment #5: “Without a site-specific proposal for lease operations, it would be speculative for the EA to assume whether, how, and to what extent oil and gas operations may affect big game on the proposed lease sale parcels.” BLM has extensive data on wildlife impacts from oil and gas operations, and should be required to apply this information to the analysis for these proposed leases.

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 and June 2018 Montana sales, as well as the Montana March 2019 lease sale;²⁸
- December 2017 and March, June and September 2018 Wyoming sales, as well as the special February lease sale in Wyoming;²⁹

²⁸ <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/montana-dakotas>.

²⁹ <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/wyoming>.

- Utah 2018 and 2019 lease sales,³⁰ and
- Nevada 2018 and 2019 lease sales.³¹

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.

In addition, the cumulative impacts from the following oil and gas projects have not been considered in the EA:

- Continental Divide-Creston Oil and Gas Project (8,950 new wells proposed),
- Normally Pressured Lance Oil and Gas Project (3,500 new wells proposed),
- Converse County Oil and Gas Project (5,000 new wells proposed),
- Moneta Divide Natural Gas and Oil Development Project (4,250 new wells proposed), and
- Greater Crossbow Oil and Gas Project (1,500 new wells proposed).

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

BLM must analyze and disclose the cumulative impacts of this wave of leasing and oil and gas projects on the Greater sage-grouse and its habitat. BLM (in the Rocky Mountain Region Record of Decision and Wyoming “Nine Plan” Amendments and Revisions) and numerous authorities, such as Dr. Holloran (see Exhibit 2), have recognized the importance of addressing sage-grouse conservation on a comprehensive range-wide basis, and accounting for connectivity between state and regional populations and habitats, habitat fragmentation, and other impacts. As stated in the Rocky Mountain ROD, for the grouse plans collectively: “The cumulative effect of these measures is to conserve, enhance, and restore 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.

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 23,000 new oil and gas wells that are proposed to be drilled in Wyoming.

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 148,909 acres (over 230 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 EIS, not just an EA. Issuing a FONSI for this lease sale would be arbitrary and capricious and violate NEPA.

³⁰ <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/utah>.

³¹ <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada>.

BLM claims “[c]umulative impacts are addressed in the underlying RMP FEIS’.” EA at 4-22. But the RMPs did not consider the impacts of these specific leases—no leasing was even proposed in these areas when the RMPs were developed. *See also* Exhibit 2 (raising this issue). The RMPs only considered leasing in a general sense, not at a site or lease-specific level. The EA claims relative to both sage-grouse and big game crucial winter range cumulative impacts that, “[i]mpacts (direct and/or indirect) beyond those analyzed in the underlying RMP FEIS’ and the ARMPA FEIS, are not expected due to the continual expiration of existing federal leases whether because they lack production in paying quantities or are never explored.” *Id.* But this contention ignores the millions of acres of new leases that BLM is proposing to issue, and the potential for impacts from those leases. BLM cannot rely on projections that leases will expire to avoid a cumulative impacts analysis when it provides no data showing the level of expirations, and just as important, the acreages that are kept under lease despite a lack of development activities through actions such as lease suspensions which have caused millions of acres of leases to be “stockpiled” at a cost to taxpayers.³²

BLM’s response to our cumulative impacts concerns was contained in response number 58 in the Comment Response. It had nothing to say about our concerns other than directing us to response 15. BLM says the cumulative impacts analysis was done in the RMPs, particularly the Rocky Mountain ROD. It also says proposed leasing actions in other states are not reasonably foreseeable; only the parcels in this lease sale matter. But the leasing in other states has already occurred in many instances, there is nothing hypothetical about it. And as discussed, the earlier RMPs did not consider the impacts that might occur from issuing these specific lease parcels; there was no consideration of the “uncertainty” that exists regarding impacts when BLM offers a lease or the “crucial factors that will affect potential impacts.” EA at 4-1.

BLM’s contention that the RMPs to which the March lease sale is tiered adequately address cumulative impacts is absurd. In particular, the 2015 sage-grouse ARMPA on which BLM purports to rely cannot have sufficiently reviewed cumulative impacts for oil and gas leasing in 2019. Numerous key provisions of the 2015 amendments will soon be eliminated by the 2019 RMP revisions, and the 2019 revisions themselves rely solely on the environmental analysis conducted for the 2015 amendments. If BLM has not evaluated the on the ground effects of the 2015 amendments, and accordingly lacks the baseline environmental data necessary to understand the potential impacts of the 2019 revisions, how can it understand the potential cumulative impacts of additional leasing? The 2015 ARMPA could not possibly have fully considered the cumulative impacts of a yet to be contemplated complete overhaul of federal sage grouse policy accompanied by a surge of federal minerals leasing. For instance, the 2015 ARMPA relied on compensatory mitigation of impacts to sage grouse, but BLM has since disclaimed its authority to require compensatory mitigation. This shift in policy undoubtedly changes potential impacts, but has not been evaluated in the EA. Other examples abound, from the elimination of sagebrush focal areas to the removal of the net conservation gain standard. How too could RMPs written before 2015 have considered the cumulative impacts of massive projects approved in 2016, like the Continental Divide-Creston Project or in 2018, like the Normally Pressured Lance Project? The RMPs BLM relies on were issued before our current federal energy dominance policy was implemented, and could not have foreseen the scale and scope of energy development on federal lands we have witnessed since. To comply with NEPA, BLM must analyze the potential cumulative impacts of the March sale in the context of dramatic shifts in both federal sage grouse policy and federal minerals leasing more generally. Analysis from decades old RMPs and outdated sage grouse revisions will not suffice.

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

³² *See* The Wilderness Society, Land Hoarders: How Stockpiling Leases is Costing Taxpayers.” <https://www.wilderness.org/articles/blog/land-hoarders-oil-and-gas-companies-are-stockpiling-your-public-lands>.

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-specific decisions, it is clear the leasing stage is when decisions should be made about whether issuing a lease parcel would meet BLM’s multiple use responsibilities, and this must be reflected in the NEPA analysis at the leasing stage, which has not occurred here.

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

Federal courts have consistently rejected efforts to affirmatively elevate energy development over other uses of public lands. In the seminal case, *New Mexico ex rel. Richardson v. BLM*, the Tenth Circuit put to rest the notion that BLM can manage chiefly for energy development, declaring that “[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.” 565 F.3d 683, 710 (10th Cir. 2009); *see also S. Utah Wilderness Alliance v. Norton*, 542 U.S. 52, 58 (2004) (defining “multiple use management” as “striking a balance among the many competing uses to which land can be

put”). Other federal courts have agreed. *See, e.g., Colo. Envtl. Coalition v. Salazar*, 875 F. Supp. 2d 1233, 1249 (D. Colo. 2012) (rejecting oil and gas leasing plan that failed to adequately consider other uses of public lands). Thus, any action by BLM that seeks to prioritize oil and gas leasing and development as the dominant use of public lands would violate FLPMA. BLM must therefore consider a reasonable range of alternatives for this lease sale that considers and balances the multiple uses of our public lands, consistent with NEPA and FLPMA.

BLM’s energy dominance thrust removes the public from decision making. Moreover, it fails to recognize that natural resources protection, particularly for support hunting opportunities, is a multi-billion-dollar industry in Wyoming. *See, e.g. "Big Money: Big Game Hunting and Outfitting Economic Contributions in Wyoming," Southwick Associates (2017)*. 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 7 (New York Times article on massive increase in speculators garnering massive lease holdings through unscrupulous noncompetitive sale gambits)*.³³

In various responses to public comments, BLM claims that the RMPs considered multiple use in making certain lands available for oil and gas leasing and that those decisions will not be reviewed again in this EA. *See, e.g., BLM’s response to comment #35*: “Decisions about multiple use of resources on public lands have been made in the approved RMPs, to which the EA tiers and the alternatives considered in detail conform.” *See also, BLM response to comment #1*: “The EA acknowledges that oil and gas development on the lands described in the EA, if leased and if future development is proposed to the BLM, could result in adverse effects to various natural resources (EA at Sections 4.2 and 4.3). However, the BLM has allocated these lands as open to oil and gas leasing, with appropriate stipulations to mitigate effects to other resource values and users, in order to fulfill its multiple- use and sustained yield mandates under FLPMA.” As noted elsewhere in this protest, the fact that an RMP makes certain lands available for leasing does not compel BLM to lease those lands. And even if multiple use decisions identifying lands available for leasing were made in the RMPs, that planning level decision does excuse BLM from compliance with FLPMA’s multiple use mandate as it goes about the important task of implementing the RMP. The BLM is to “*manage*” the public lands to achieve multiple use, 43 U.S.C. § 1732(a) (emphasis added), not just *plan* for multiple use. *See also id.* at § 1702(c) (defining multiple use as “the management of the public lands”). Decisions to lease or not to lease lands for oil and gas development should be screened via a multiple use filter, and certainly new policies, such as the energy dominance theory of the President were not considered in the RMPs, so they must be considered now in the context of meeting BLM’s multiple use mandate, which has not occurred.

G. Issues Related to Wilderness Quality Lands and Historic Trails.

1. The EA lacks appropriate leasing stipulations to parcels overlapping the Cherokee Trail, in violation of the Approved Rawlins RMP and NEPA.

The EA and Notice of Competitive Oil & Gas Lease Sale do not accurately attach leasing stipulations for the Cherokee Trail. The 2008 signed ROD for the Rawlins RMP states: “An area within one-quarter mile or the visual horizon of the trails, whichever is closer, is open to oil and gas leasing with an NSO stipulation.” 2008 Approved Rawlins RMP at page 2-13. When the shape file for the final parcel list is overlaid with the shape file for the Cherokee Trail (provided by the state BLM office), we identify the following parcels that are

³³ <https://www.nytimes.com/2018/11/27/business/energy-speculators-public-land-leases.html>

1/4 mile or less from the Cherokee Trail: 2, 39,40, 41, 49, 50, 51, 63, 84, 88, and 103, all of which should have the NSO stipulation that states: protecting historic values within 1/4 mile of contributing segments of the Cherokee Trail. However, the Notice of Competitive Oil & Gas Lease Sale notes the following parcels as having the NSO stipulation within 1/4 mile of the Cherokee trail: 2, 51, 56, 57, 58, 65, and 71. We are wondering why the sale notice applies the NSO stipulation to parcels not even near the Cherokee Trail and why parcels 39-50, 63, 84, 88, and 103 are missing the NSO stipulation altogether. We request that the BLM attach the correct stipulation as outlined in the Rawlins RMP for parcels 39-50, 63, 84, 88, and 103 or simply defer the parcels due to this inaccuracy.

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

We have reviewed the BLM's response to our First Quarter 2019 Competitive Oil & Gas Lease Sale comment for lease parcels that conflict with Lands With Wilderness Characteristics (LWCs). *See* BLM Wyoming Response to Public Comment, Comments No. 63, 64. We identified major concerns with the EA in our initial comment: 1.) impacts to BLM and Citizen identified LWC were not analyzed in the EA; and 2.) parcels are within areas that have ongoing plan amendments. We thank the BLM for responding to our concerns. However, our concerns have yet to be resolved.

a. Impacts to BLM and Citizen lands with wilderness characteristics were not analyzed in the EA.

The EA identifies 2 parcels (104 in the Rawlins Field Office and 131 in the Pinedale Field Office) as possessing LWC. EA at page 24. This sale also impacts several citizen identified LWCs: 107, 133, and 134. Parcel 107 (unique identifier WY-030-4412) overlaps the Rawlins and Rock Springs Field Office (RSFO) and parcels 133 and 134 (WY040-2011-144 and WY040-2011-002) are located in the RSFO.

The EA did not analyze the impacts that leasing would have on the Wilderness resource. Nowhere in the EA does the BLM analyze the impacts to LWCs. The BLM has responded to this concern by stating:

“The EA tiers to the applicable RMP FEISs (EA at pages 1-5 to 1-6), which considered impacts to wilderness resources.” BLM comment at page 27.

However, all the citizen- and BLM-identified LWCs for the Pinedale, Rawlins, and Rock Springs Field offices were identified after the RMPs were finalized. How can the RMPs analyze something that did not exist at the time the plans were completed? This does not constitute an adequate analysis and the BLM is in violation of NEPA. LWCs are significant new information and the BLM should delay leasing in citizen and BLM LWC units until the affiliated RMPs are amended to address LWCs specifically.

The purpose of an EA is to evaluate and minimize adverse environmental effects before they occur. *See*, 40 C.F.R. §§ 1508.8, 1508.9. An EA should provide “sufficient evidence and analysis” to justify this determination, in part by taking a “hard look” at potential direct, indirect and cumulative impacts of the proposed action. *See, e.g. Wilderness Soc. v. Forest Serv.*, 850 F. Supp. 2d 1144, 1155 (D. Idaho 2012). BLM must fully evaluate the impacts of leasing on LWCs in the EA.

Simply listing the LWC units that overlap with the proposed lease parcels and referencing the NEPA analysis to the applicable RMPs, as the BLM has done for this EA, does not constitute environmental impact analysis under NEPA. NEPA requires federal agencies to consider “any adverse environmental effects which cannot be avoided.” 42 U.S.C. § 4332(C)(ii). Effects that must be considered include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8.

Federal agencies must comply with NEPA before there are “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332(C)(v); *see also* 40 C.F.R. §§ 1501.2, 1502.5(a). Federal courts have held that site-specific analysis is required prior to issuing oil and gas leases where there is surface that is not protected by NSO stipulations and where there is reasonable foreseeability of environmental impacts. *See e.g., New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009); *Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147, 1160 (10th Cir. 2004). This is because oil and gas leases confer “the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold” and therefore would constitute an “irreversible and irretrievable commitment of resources.” *New Mexico ex rel. Richardson*, 565 F.3d at 718; 40 C.F.R. § 3101.1-2; *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”).

b. Parcels are within areas that have ongoing plan amendments.

Two parcels (133 and 134) in the RSFO conflict with decisions pending the completion of a plan amendment. These parcels lie on the boundary of the Twin Buttes WSA and fall inside the citizen’s LWCs noted above. The RSFO is undergoing a management revision process that will decide their future management and does not have management direction for the LWCs. We respectfully ask that the BLM not take away the opportunity for the public to decide how these lands should be managed in the next plan. The Green River RMP is over 20 years old and does not contain management direction for LWCs. The LWC inventories are new information that should be considered during this lease sale and incorporated in the next plan. We request that the BLM defer leasing in LWCs in the RSFO until completion of the RMP.

H. The Lease Sale is Void Because it Violates the Antideficiency Act

The lease sale is void because BLM began processing applications to drill and preparing authorizations for the March 2019 lease sale, including responses to public comments, during a government shutdown in violation of federal law. BLM must postpone the March lease sale until it can complete its statutory duties in compliance with all federal statutes, including 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/yZCfj>. 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.³⁴

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’s Wyoming office 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 draft environmental assessment (EA) for the March 2019 lease sale. *Id.*

This work 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.

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 states that 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.” *See, e.g.*, Wyoming March 2019 EA at 1-3.

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. BLM’s attempt to move ahead with leasing based on work that violates the Antideficiency Act or other federal appropriations laws also puts agency employees in legal jeopardy. *See* 31 U.S.C. § 1349(a).

³⁴ 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).

Because it violates federal law, BLM's planned March 2019 oil and gas lease sale is void. BLM must 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.

VI. CONCLUSION.

For the reasons stated above, we protest the sale of all 140 parcels (Appendix A) proposed for sale at the March 19-20, 2019 oil and gas lease sale, principally because development on these parcels would have significant and long-term impacts to important sage-grouse habitats as well as big game migration corridors and crucial winter ranges, and lands with wilderness characteristics. The proposed leasing would also improperly impact wilderness quality lands. Moreover, 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 adequately consider cumulative impacts, and a failure to meet the multiple use obligation of the Federal Land Policy and Management Act. Finally, the BLM has violated the Antideficiency Act by unlawfully engaging in non-essential activities connected with and in preparation of this lease sale during the government shutdown.

Sincerely,



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List of Exhibits:

1. List of parcels protested in mule deer migration corridors and crucial winter ranges.
2. Sage-grouse comments of Dr. Matt Holloran.
3. Solicitor's Memorandum M-37039.
4. WOC's December 3, 2018, letter to Wyoming BLM State Director Mary Jo Rugwell, which was attached to our comments on the EA.
5. Exhibit on file with BLM: "Wild Migrations: Atlas of Wyoming's Ungulates".
6. Maps of parcels in migration corridors and crucial winter ranges.
7. New York Times article on massive speculative leasing that is occurring.
8. Letter (with attachment) to Governor Gordon dated February 22, 2019 (copied to Wyoming BLM State Director) requesting deferral of parcels in the Golden Triangle.

Appendix A

Lease Parcels Protested—As Listed in the BLM Wyoming Notice of Competitive Oil and Gas Lease Sale, March 19-20, 2019

WY-191Q-001	WY-191Q-048	WY-191Q-095
WY-191Q-002	WY-191Q-049	WY-191Q-096
WY-191Q-003	WY-191Q-050	WY-191Q-097
WY-191Q-004	WY-191Q-051	WY-191Q-098
WY-191Q-005	WY-191Q-052	WY-191Q-099
WY-191Q-006	WY-191Q-053	WY-191Q-100
WY-191Q-007	WY-191Q-054	WY-191Q-101
WY-191Q-008	WY-191Q-055	WY-191Q-102
WY-191Q-009	WY-191Q-056	WY-191Q-103
WY-191Q-010	WY-191Q-057	WY-191Q-104
WY-191Q-011	WY-191Q-058	WY-191Q-105
WY-191Q-012	WY-191Q-059	WY-191Q-106
WY-191Q-013	WY-191Q-060	WY-191Q-107
WY-191Q-014	WY-191Q-061	WY-191Q-108
WY-191Q-015	WY-191Q-062	WY-191Q-109
WY-191Q-016	WY-191Q-063	WY-191Q-110
WY-191Q-017	WY-191Q-064	WY-191Q-111
WY-191Q-018	WY-191Q-065	WY-191Q-112
WY-191Q-019	WY-191Q-066	WY-191Q-113
WY-191Q-020	WY-191Q-067	WY-191Q-114
WY-191Q-021	WY-191Q-068	WY-191Q-115
WY-191Q-022	WY-191Q-069	WY-191Q-116
WY-191Q-023	WY-191Q-070	WY-191Q-117
WY-191Q-024	WY-191Q-071	WY-191Q-118
WY-191Q-025	WY-191Q-072	WY-191Q-119
WY-191Q-026	WY-191Q-073	WY-191Q-120
WY-191Q-027	WY-191Q-074	WY-191Q-121
WY-191Q-028	WY-191Q-075	WY-191Q-122
WY-191Q-029	WY-191Q-076	WY-191Q-123
WY-191Q-030	WY-191Q-077	WY-191Q-124
WY-191Q-031	WY-191Q-078	WY-191Q-125
WY-191Q-032	WY-191Q-079	WY-191Q-126
WY-191Q-033	WY-191Q-080	WY-191Q-127
WY-191Q-034	WY-191Q-081	WY-191Q-128
WY-191Q-035	WY-191Q-082	WY-191Q-129
WY-191Q-036	WY-191Q-083	WY-191Q-130
WY-191Q-037	WY-191Q-084	WY-191Q-131
WY-191Q-038	WY-191Q-085	WY-191Q-132
WY-191Q-039	WY-191Q-086	WY-191Q-133
WY-191Q-040	WY-191Q-087	WY-191Q-134
WY-191Q-041	WY-191Q-088	WY-191Q-135
WY-191Q-042	WY-191Q-089	WY-191Q-136
WY-191Q-043	WY-191Q-090	WY-191Q-137
WY-191Q-044	WY-191Q-091	WY-191Q-138
WY-191Q-045	WY-191Q-092	WY-191Q-139
WY-191Q-046	WY-191Q-093	WY-191Q-140
WY-191Q-047	WY-191Q-094	