Wyoming Outdoor Council ▪ National Audubon Society ▪ The Wilderness Society

November 8, 2019

Delivered via USPS Express Mail

Acting State Director Duane Spencer
Bureau of Land Management
Wyoming State Office
5353 Yellowstone Road
Cheyenne, WY 82009
(307) 775-6203 (Fax)

Re: Protest of the BLM's December 10-11, 2019 Competitive Oil-and-Gas Lease Sale for Wyoming

Dear Duane,

The Bureau of Land Management's December 2019 lease sale for the State of Wyoming threatens wildlife habitat that is relied upon by a variety of species, most notably greater sage-grouse and mule deer. On behalf of the Wyoming Outdoor Council, National Audubon Society, and The Wilderness Society, we accordingly submit this protest to the sale under 43 C.F.R. § 3120.1-3.[1]

In this lease sale, the BLM is proposing to lease 160 parcels that would cover approximately 173,254.63 acres of federal land, much of it in sensitive wildlife habitat. All but six of the parcels are in designated greater sage-grouse habitat, and 48 percent of the parcels are in sage-grouse priority habitat management areas. The BLM has not identified how many parcels are in sagebrush focal areas. Further, 32 of the parcels intersect crucial mule deer winter range and one parcel intersects a mule-deer migration corridor. For reasons discussed below, the State Director should defer leasing any parcels in designated sage-grouse habitat and in mule-deer migration corridors and crucial winter range.

I. ISSUES OF CONCERN

The parties are concerned that BLM has violated the National Environmental Policy Act (NEPA) by failing to analyze a reasonable range of alternatives, failing to take a hard look at impacts, and failing to adequately analyze cumulative impacts. We are concerned that BLM has violated the Federal Land Policy and Management Act (FLPMA) by the agency's failure to adhere to the 2015 ARMPAs/ARMPs for the Rocky Mountain Greater Sage-Grouse Sub-Regions—which is again the applicable RMP—as well as by failing to manage for multiple use. BLM's proposal does not prioritize leasing outside of core greater sage-grouse habitat, violating the 2015 core area protection strategy of the State of Wyoming. We are also concerned about the

[1] The environmental assessment prepared for this lease sale was numbered DOI-BLM-WY-0000-2019-0009-EA.

lack of effective protections for mule deer corridors and crucial winter range in the face of dramatic population level declines for this species.

II. LEASE PARCELS PROTESTED

For the reasons discussed below, we protest the BLM's decision to offer parcels WY-194Q-001 through WY-194Q-160. A list of protested parcels is attached as Exhibit 1.

III. INTERESTS OF THE PARTIES

The Wilderness Society, Wyoming Outdoor Council, and National Audubon Society have a long-standing interest in the BLM's management of public lands in Wyoming, and engage frequently in the decision-making processes for land-use planning and project proposals that could potentially affect our public lands and minerals, including the oil-and-gas leasing process. Our members and staff enjoy many 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 protects birds and the places they need, today and tomorrow. A nonprofit conservation organization since 1905, Audubon works throughout the Americas using science, advocacy, education, and on-the-ground conservation. Audubon Rockies is a regional office of National Audubon Society, working in Wyoming.

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.

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. I have also been given like authority to file this protest on behalf of The Wilderness Society and National Audubon Society.

V. STATEMENT OF REASONS

A. Because the BLM's environmental assessment failed to satisfy the requirements of the National Environmental Policy Act, the agency may not go forward with its December 2019 lease sale.

The NEPA requires federal agencies to evaluate and disclose the environmental impacts that would result from proposed actions. In its environmental assessment for the challenged lease sale, the BLM fell short of NEPA's requirements by failing (1) to analyze a reasonable range of alternatives to the lease sale; (2) to take a hard look at the climate and sage-grouse impacts of the sale; (3) to take a hard look at the sale's impacts on mule deer; and (4) to adequately analyze cumulative impacts.

1. The BLM's EA failed to analyze a reasonable range of alternatives.

NEPA requires federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives" to a proposed action, so as to "provid[e] a clear basis for choice among options." 40 C.F.R. § 1502.14; *see also id.* § 1508.9(b) (noting that an environmental assessment must discuss "the environmental impacts of the proposed action and alternatives"). The consideration of alternatives is the heart of a NEPA analysis. "Without 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). In order to be adequate, an analysis of alternatives must include "'every reasonable alternative'" so that an agency can make an informed choice from the full range of options. *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1038 (9th Cir. 2019) (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)).

In its environmental analysis, the BLM effectively analyzed only two alternatives: a no-action alternative, which would exclude all lease parcels from the sale, and a "lease everything" alternative, which would offer for lease nearly all of the parcels that had been proposed for leasing. Fourth Quarter Competitive Oil and Natural Gas Lease Sale Environmental Assessment of the BLM Wyoming State Office, DOI-BLM-WY-000-2019-0009-EA, at 2-1. The BLM did analyze a "Modified" alternative that would defer five entire parcels and portions of two others for various reasons, but it was so similar as to be practically identical to the lease-everything alternative. EA at 2-3. (noting that "the BLM-Modified alternative [wa]s identical to the Proposed Action Alternative, but include[d] the deferral of [certain] parcels or portions of parcels").

An environmental assessment that offers a choice between leasing every proposed parcel and leasing nothing at all does not present agency decisionmakers with a reasonable range of alternatives. *See Wilderness Soc'y v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (holding that the 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) (holding that a NEPA analysis failed to evaluate a reasonable range of alternatives where it "considered only a no action alternative along with two virtually identical alternatives"); *LaCounte*, 939 F.3d at 1029 (reaffirming the holding in *Muckleshoot Indian Tribe*). The BLM's EA was similar to the NEPA analysis held inadequate in *Muckleshoot Indian Tribe*: the agency only considered a no-action

alternative and "two virtually identical alternatives." *See Muckleshoot Indian Tribe*, 177 F.3d at 813. Therefore, the BLM's EA failed to consider the reasonable range of alternatives required under NEPA.

The recent preliminary injunction that bars the BLM from implementing its 2019 BLM Sage-Grouse Plan Amendments in seven Western states—including Wyoming—underscores the inadequacy of the agency's environmental analysis. *See* Mem. Order and Decision, *Western Watersheds Project v. Schneider*, Case No. 16-CV-83-BLW (D. Idaho Oct. 16, 2019). Attached as Exhibit 2. As a result of the court's decision that the NEPA analysis for the 2019 BLM Plan Amendments was likely to be found insufficient for lack of reasonable alternatives, the 2015 plan for Wyoming is in effect again. *Id.* At 21. "The BLM is enjoined from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, *Wyoming,* Colorado, Utah, Nevada/Northeastern California, and Oregon, until such time as the Court can adjudicate the claims on the merits. *The 2015 Plans remain in effect* during this time. *Id.* at 28-29 (emphasis added) A reasonable range of alternatives under the 2015 plan requires an alternative prioritizing leasing outside of greater sage-grouse priority habitat management areas and general habitat management areas (PHMA and/or GHMA) pursuant to the requirements of the Wyoming 2015 plan.[2]

Even under the 2019 plans that the agency's sale relies on, the BLM was required to consider a greater range of alternatives to comply with NEPA. In particular, there was a need to consider deferring leasing in core sage-grouse habitat, which was opened to leasing under the BLM's action. The BLM has done no NEPA analysis whatsoever to ensure this lease sale comports with the 2015 plans that are now in effect. Before proceeding with the sale, the BLM must analyze a reasonable range of alternatives under the 2015 plans that are again in effect.

2. BLM has failed to take the necessary "hard look" at the lease sale's potential sage-grouse and climate-change impacts.

The BLM also failed to take a hard look at the environmental impacts of this lease sale, as NEPA requires.

The BLM's failure to evaluate reasonably foreseeable impacts to sage-grouse and their habitat before making an irretrievable commitment of resources is of particular concern. Under NEPA, the BLM must evaluate the "reasonably foreseeable" site-specific impacts of oil-and-gas leasing prior to making an "irretrievable commitment of resources." 40 C.F.R. § 1502.22; 42 U.S.C. § 4332(2)(c)(v); *New Mexico ex rel. Richardson*, 565 F.3d at 708; *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (holding that agencies are to perform a hard-look NEPA analysis "before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values"); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) (holding that NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action"). Courts have held that the BLM makes such an irretrievable commitment of resources when it issues an oil-and-gas lease without reserving the right to later prohibit all development. *New Mexico ex rel. Richardson*, 565 F.3d at 708; *Pennaco Energy, Inc. v. U.S.*

[2] *See infra* at B.1.

Dep't of the Interior, 377 F.3d 1147, 1160 (10th Cir. 2004). Here, the 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 must be analyzed now, rather than waiting until a leaseholder submits an application for a permit to drill (APD).

The agency's assessment of the lease sale's climate impacts was also inadequate in light of the recent decision in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). In that case, an environmental organization challenged the BLM's failure to evaluate the impacts of greenhouse-gas emissions that would result from nine oil-and-gas lease sales in Wyoming. The court held that the BLM's findings of no significant impact for the sales were inadequate because the agency had failed to consider the lease sales' reasonably foreseeable climate impacts. The BLM has previously argued the agency could not reasonably foresee the impacts of oil-and-gas development without "a discrete proposal for surface occupancy." BLM-Wyoming Response to Public Comment No. 51 for the 2nd Quarter, June 2019 Lease Sale. Under the court's opinion in *WildEarth Guardians*, however, the BLM could provide a range of potential climate impacts based on the wealth of available data. Here, as in that case, the BLM has ample data to forecast a range of reasonably foreseeable climate impacts from oil-and gas-development and must explain where there is uncertainty in order to meet its hard look obligation.

The BLM's failure to take a hard look at the lease sale's potential environmental impacts, especially on sage-grouse and their habitats, is further underscored by the District of Idaho's recent order in the *Western Watersheds Project* case. *See* Exhibit 2. The court preliminarily enjoined the BLM's implementation of its 2019 Sage-Grouse Plan Amendments; as a result, the agency's 2015 plan is again in effect, reinstating protections that were weakened by the 2019 amendments. *Western Watersheds Project v. Schneider*, Case No. 16-CV-83-BLW (D. Idaho Oct. 16, 2019). These protections in the 2015 plan include prioritizing oil-and-gas leasing and development outside of core habitat management areas; implementing net-conservation-gain mitigation requirements; protecting sagebrush focal areas; and demanding compensatory mitigation. 2015 ROD and ARMPAs/ARMPs for the Rocky Mountain GRSG Sub-Regions, at 1-25-27 ("2015 ROD"). The EA for this lease sale was based on the 2019 amendments to the sage-grouse plans, but as the 2015 plan is again in force, its more stringent protections must be evaluated and applied. NEPA analyses must include a discussion of "[p]ossible conflicts between the proposed action and the objectives of Federal … land use plans, policies and controls for the area concerned[.]" 40 C.F.R. 1502.16(c). Here, the BLM's EA has failed to evaluate the conflicts between leasing the proposed parcels and the requirements of the 2015 plans. Before moving forward with this lease sale, the BLM must take a hard look at the action's environmental impacts in light of the 2015 plan—something the agency's environmental assessment did not do.

The BLM in Wyoming should recognize that other BLM offices are seeking to abide by the Preliminary Injunction issued in the Idaho case. For example, in Nevada the BLM has modified the November 2019 oil and gas lease sale reducing the acreage of the lease sale from 547,959 acres to 245,711 acres "[t]o comply with Western Watersheds Project v. Schneider." *See* Errata #3 posted at https://www.blm.gov/sites/blm.gov/files/NV_OG_20191112_Ely_Errata2_0.pdf. In addition in Nevada BLM has cancelled a public comment period on the February and March 2020 lease sales in order to comply with the Idaho court's order. "The Bureau of Land Management Ely District has postponed the public comment

period for the February 2020 and March 2020 Competitive Oil and Gas Lease Sales in response to the U.S. District Court, District of Idaho Preliminary Injunction in W. Watersheds Project v. BLM (No. 1:16-cv-00083-BLW). The Preliminary Injunction on October 16, 2019 orders the BLM enjoined from implementing the 2019 BLM Sage-Grouse Plan Amendments." https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=1502035&dctmId=0b0003e8814fada7.

3. The BLM has not taken a hard look at the lease sale's impacts on mule deer.

The BLM has also failed to take a hard look at the impacts on mule deer from oil-and-gas leasing within designated mule-deer migration corridors and crucial winter range. Leasing itself is an irretrievable commitment of resources that will foreseeably impact mule deer. *See New Mexico ex rel. Richardson*, 565 F.3d at 718. Therefore, contrary to the BLM's response to the Wyoming Outdoor Council's comments on the EA, a hard look at the impacts of oil-and-gas development on mule deer must be completed before the lease sale goes forward. BLM-Wyoming Response to Public Comment No. 31 for the 4th Quarter, December 2019 Lease Sale. Moreover, the analysis the BLM did undertake was not based on the best-available science, and, as such, the BLM inadequately disclosed impacts from the lease sale on migration corridors and crucial winter range for mule deer.

(a) Impacts to mule-deer migration corridors were not adequately evaluated and disclosed in the BLM's environmental assessment.

The BLM's environmental assessment failed to adequately disclose the impacts of oil-and-gas development on mule-deer migration corridors, in violation of NEPA's hard-look mandate. Recent lease sales in Wyoming have ignored the best available science on mule deer behavior and leased extensively within mule deer migration corridors and crucial winter range. *See* Maps of oil and gas leases in the Sublette, Baggs, and Platte Valley mule deer migration corridors (attached as Exhibits 3,4, and 5 respectively). This lease sale includes one parcel within the Baggs mule-deer corridor. In order to act as consistently as possible with Wyoming's Ungulate Migration Corridor Strategy—as is required under FLPMA's mandate to coordinate with state land-use planning and management programs—the BLM must maintain corridor functionality to support population objectives established by the Wyoming Game and Fish Department (WGFD). *See* 43 U.S.C. § 1712(c)(9). Yet today, Wyoming's herds are significantly below WGFD targets. EA at 3-33. The BLM's continued leasing within mule deer migration corridors threatens their continued functionality and could lead to further declines or even extirpation of our mule deer herds.

The BLM has finally begun to cite the new studies on mule-deer migrations that have been published by Wyoming researchers after repeated appeals from the public to consider this significant new information. EA at 3-33, 4-22. Much of this information is available in the Wyoming Migration Initiative's excellent publication "Wild Migration: Atlas of Wyoming's Ungulates" (hard copy submitted by protesters to BLM state office previously, and incorporated fully by reference herein), and protesters have brought more recent studies to the BLM's

attention in comments and protests of prior lease sales. Despite the consistent message from these studies that impacts to mule deer from development are more severe than previously assumed, the BLM's environmental assessment again asserted, based on the agency's previous analyses, that "no new significant impacts are expected and existing conditions are expected to continue." EA at 4-24.

However, the analyses cited in the environmental assessment did not consider or disclose the extent of the impacts to mule deer from oil-and-gas leasing that we can reasonably anticipate given the new science. In fact, many of the environmental impact statements referenced by the BLM were prepared before this new science was available. As a result, the EA's assertion that "[i]mpacts to vital wildlife habitats [we]re also addressed in detail in the RMP EISs to which the EA tiers" arbitrarily disregarded more recent studies. BLM-Wyoming Response to Public Comment No. 31 for the 4th Quarter, December 2019 Lease Sale. Before moving forward with the lease sale, the agency must acknowledge and assess the increased risk to Wyoming's herds that these studies document.

In its EA, the BLM acknowledged that avoidance behavior, which was poorly understood when the underlying resource management plan impact statements were drafted, causes mule deer to detour around development and to reduce foraging, "thus constricting their migration both temporally and spatially"; that migratory behavior can be lost, leading to "sudden and dramatic" population declines; and that migratory behavior "may be difficult to reestablish once lost or diminished." EA at 3-34, 35. This research suggests that development within migration corridors could lead to their complete and permanent loss. The underlying impact statements, cited extensively by the BLM in support of this and other lease sales, do not consider the potential for loss of corridor functionality across our migration corridors, and the resulting extirpation of our herds. Thus, despite knowing of significant new information concerning migration corridors, the BLM relied on out of date impact statements that were not based on the best science available. The BLM's reliance on those outdated impact statements rather than the updated studies it acknowledges in its EA is arbitrary.

The BLM also relied on WGFD's ill-conceived 90 percent strategy, under which WGFD requests deferral of parcels that overlap designated corridors by 90 percent or more and requests that the BLM lease remaining parcels in corridors with an unenforceable "special lease notice" attached. EA at 2-3. Commenters have repeatedly addressed the inadequacy of this strategy and the legal insignificance of the special lease notice in previous comments and protests regarding leases in corridors. *See* WOC's Comments on the Fourth Quarter Competitive Oil and Natural Gas Lease Sale Environmental Assessment of the BLM Wyoming State Office (September 12, 2018). Generally, the strategy presumes that operators will site development outside of corridors when parcels overlap them by less than 90 percent but provides no legal basis to ensure that happens on the ground. The strategy has no scientific basis and relies on the unfounded assumption that operators will voluntarily site development outside of corridors. *Id.* Such an approach is not sufficient to protect Wyoming's declining mule-deer herds.

In relying on the 90 percent strategy rather than the best-available science, the BLM has not adequately disclosed impacts to mule-deer migration corridors. Moreover, the BLM has failed to take a hard look at impacts to mule-deer migration corridors in violation of NEPA. As such, until proper environmental analyses of the effects of leasing and development on mule-deer

migration corridors are undertaken, any parcels intersecting these migration corridors should be deferred.

Deferral of these parcels in the December sale is particularly prudent, as Wyoming Governor Mark Gordon works towards releasing an executive order (EO) to protect mule-deer migration corridors. We anticipate the release of Governor Gordon's EO in December. The BLM should acknowledge the changing policy landscape and defer all leases that would be affected by Wyoming's state policies, in order to comport with state law to the fullest extent possible as FLPMA requires. By doing this, the BLM would ensure that any leasing does not conflict with state laws and policies, creating a clearer regulatory landscape for oil-and-gas developers while respecting Wyoming's wildlife management priorities.

(b) Impacts to crucial winter range for mule deer were not adequately disclosed in the BLM's environmental assessment.

The BLM's environmental assessment also failed to adequately evaluate and disclose the lease sale's likely impacts to crucial winter range for mule deer. The sale includes 32 parcels that contain approximately 31,263 acres of crucial winter range. EA at 4-23. The EA omitted studies cited in support of the previous lease sale, which acknowledge that "mule deer are not habituating even as large parts of the field are being reclaimed." BLM WY Third Quarter September, 2019 EA at 52. The fact that mule deer do not habituate to oil-and-gas development within their winter range, even after reclamation, is significant information that should have been addressed in the environmental assessment. Without this analysis, the BLM could not adequately disclose the impacts to crucial winter range that could be caused by the lease sale. As explained above, analysis of environmental impacts and disclosure to the public must occur at the leasing stage. *New Mexico ex rel. Richardson*, 565 F.3d at 718.

In its environmental assessment, the BLM implied that stipulations designed for greater sage-grouse may protect winter range for mule deer where those habitats overlap. EA at 4-23. This fails to satisfy the BLM's duty to protect mule-deer habitat—which is discussed further below. Sage-grouse stipulations are based on a density threshold specifically designed for sage-grouse—they are not designed for mule deer. The development density permitted in sage-grouse habitat may still cause avoidance behavior in mule deer, with possible negative population-level effects on herds. Reliance on sage-grouse stipulations to protect this habitat had no scientific basis and was accordingly arbitrary.

Moreover, the BLM should not be leasing in crucial winter range while the WGFD is in the process of updating their 2010 oil and gas recommendations. The current TLS stipulations on parcels in crucial winter range are admittedly insufficient to protect that habitat and are explicitly based on those outdated recommendations. BLM should defer all leasing in crucial winter range until WGFD finalizes recommendations that are based on the best available science and are adequate to protect our herds.

Particularly, the BLM should not lease parcels within crucial winter range for the imperiled Sublette herd. This lease sale offers 24,054 acres within the Sublette herd's crucial winter range. BLM WY 4th Quarter December EA at 4-23. The Sublette herd is 38 percent below WGFD's target. Cumulatively, the BLM's extensive leasing in crucial winter range, in

this and other lease sales, could have significant adverse impacts on Wyoming's mule-deer herds. The BLM is required to manage public lands, however, "in a manner that will provide food and habitat" for mule deer and all wildlife. 43 U.S.C. § 1701(a)(8). Instead, the BLM is restricting habitat which provides necessary winter forage for a herd whose population is already a third lower than it should be. By deferring parcels in crucial winter range, the BLM can uphold its duty to provide food and habitat for mule deer without neglecting its duty to "recognize the Nation's need for domestic sources of minerals," such as oil and gas, thereby complying with the multiple use mandate. 43 U.S.C. § 1701(a)(7), (12). While highly productive oil and gas fields exist elsewhere on BLM lands, the parcels in this lease sale typically have low production potential and the Sublette herd will be further harmed if it is unable to use the crucial winter range in these leases. Therefore, conserving crucial winter range is the best use of these parcels of public land.

4. *In its environmental assessment, the BLM failed to consider the cumulative impacts of leasing on sage-grouse.*

The BLM has not considered the cumulative impacts of this lease sale in the context of other local, state, and regional development, substantial revisions to federal sage-grouse policy, and the recent reinstatement of the 2015 sage-grouse plan. NEPA requires the agency to evaluate the cumulative impacts "resulting from the incremental impact of the … [lease sale] when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7; *see also Kern v. BLM*, 282 F.3d 1062, 1075-77 (9th Cir. 2002). To satisfy this requirement, the BLM's NEPA analysis must consider the cumulative impact of all the recent and currently planned oil-and-gas auctions in which the agency has offered hundreds of leases affecting sage-grouse habitats protected under its resource management plans.

In its environmental assessment, the BLM argued 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." EA at 4-28. However, the EA tiered to the 2019 RMP FEISs and now must rely on the 2015 RMP FEIS due to the District of Idaho's recent order in *Western Watersheds Project* enjoining the BLM from implementing the 2019 plans. Mem. Order and Decision, *Western Watersheds Project v. Schneider*, Case No. 16-CV-83-BLW (D. Idaho Oct. 16, 2019). Exhibit 2. Furthermore, neither the 2019 plans nor the 2015 plans address the impacts of these specific leases—no leasing was even proposed in these areas when either of the plans were developed. 2015 ROD and ARMPAs/ARMPs for the Rocky Mountain GRSG Sub-Regions. The 2019 plans only considered leasing in a general sense, and not in the context of other local and regional lease sales and projects. 2019 ARMPAs/ARMPs and ROD for the Rocky Mountain GRSG Sub-Regions. The BLM has therefore not addressed the potential cumulative effects of this lease sale.

The impacts of this lease sale on sage-grouse, in particular, must be analyzed in the context of other local and regional development. The recent order in *Western Watersheds Project* highlights a major issue: the 2019 plans tier to six separate EISs for individual states, splitting up the sage-grouse range and not considering the cumulative impacts of the BLM actions across states. Exhibit 2 at 23. The court highlighted that "sage grouse range covers multiple states and that a key factor—connectivity of habitat—requires a large-scale analysis that transcends any single state." *Id.* In assessing the impacts of this lease sale on the sage-grouse, the BLM must

consider the broader context of impacts from past, present, and reasonably foreseeable federal actions. Otherwise, members of the public and decision-makers have no context for the BLM's conclusion that impacts beyond those analyzed in RMPs are not expected. Before moving forward with the lease sale, the BLM must set forth with reasonable specificity the cumulative effect of the leasing, improve the analysis in its EA, and make decisions accordingly.

With respect to sage-grouse, the change in policy between the 2015 sage-grouse plans and the 2019 amendments has led to uncertainty in how reverting to the 2015 plan will impact the prioritization of leasing outside of core habitat. The BLM must analyze the cumulative impacts based on the 2015 plans currently in effect and consider these impacts in the context of other local, state, and regional lease sales and projects.

B. The BLM failed to comply with the Federal Land Policy and Management Act and the Mineral Leasing Act in approving the lease sale.

The BLM's oil-and-gas lease sales must conform to the requirements of FLPMA and the Mineral Leasing Act (MLA). The BLM has not satisfied the requirements of these statutes in the following ways: (1) the lease sale violates FLPMA because it is not consistent with the 2015 sage-grouse plan's prioritization mandate; (2) the BLM is not complying with FLPMA's multiple-use mandate; (3) facilitating speculative leasing is inconsistent with the MLA and FLPMA, and there is a need to consider option value before leasing; (4) the BLM must ensure that compensatory-mitigation requirements for greater sage-grouse habitat are incorporated into leases; and (5) the BLM must incorporate protocols for ambient-noise monitoring in order to avoid understating impacts to sage-grouse.

1. The lease sale violates FLPMA because it is not consistent with the 2015 sage-grouse plan's prioritization mandate.

As the BLM is currently enjoined from implementing the 2019 sage-grouse amendments, it now must adhere to the prioritization mandates in the 2015 plan. Exhibit 2 at 28. This lease sale fails to do so, in violation of FLPMA. The BLM should accordingly defer leasing parcels for oil-and-gas development in any designated sage-grouse habitat.

The BLM must manage public lands in accordance with applicable land-use plans. 43 U.S.C. § 1732(a); *see also* 43 C.F.R. § 1610.5-3(a) (stating that all resource management "shall" conform to the approved RMP). As such, the BLM violates FLPMA when it takes actions inconsistent with an RMP. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004). Further, where an activity is expressly contemplated in an RMP—like oil-and-gas leasing—FLPMA requires the execution of that activity to be "clearly consistent" with the RMP. *See, e.g.*, *Rags Over the Arkansas River, Inc. v. BLM*, 77 F. Supp. 3d 1038, 1053 (D. Colo 2015).

As a result of the District of Idaho's recent order, the 2015 plan is now the applicable RMP. Memorandum Decision and Order, *Western Watersheds Project*. Exhibit 2. The BLM, in failing to prioritize leasing outside of sage-grouse habitat, is not acting consistently with the 2015 plan, which requires the BLM to prioritize oil-and-gas leasing outside of PHMAs and GHMAs. 2015 ROD and ARMPAs/ARMPs for the Rocky Mountain GRSG Sub-Regions, at 1-25 ("2015 ROD"). Further, the sagebrush focal area (SFA) designation—the highest-priority

habitat designation that was eliminated in the 2019 amendments—is now back in effect. 2015 ROD at 1-17.

The 2015 plan does contemplate oil-and-gas leasing in PHMAs. *Id.* at 1-22. However, the plan is clear in its requirement that new oil-and-gas leasing should first occur in areas *outside* of sage-grouse core habitat; this prioritization mandate applies even when lands are designated as open for leasing under the applicable RMP. *Id*. at 1-25; *see also* 2015 Plan, Management Objective No. 14, at 25 ("Priority will be given to leasing and development of fluid mineral resources … outside of PHMAs and GHMAs[.]"). In order to fulfill FLPMA's requirement that the BLM take action clearly consistent with the 2015 ARMPA, the BLM must first lease parcels outside of core sage-grouse habitat. *Rags Over the Arkansas River*, 77 F. Supp. 3d at 1049; 43 C.F.R. § 1610.5-3(a). In particular, the BLM must consider how proposed lease parcels overlap with SFA-designated habitat, which the BLM did not do in its EA. 2015 ROD at 1-17.

Leasing parcels for oil-and-gas development in designated sage-grouse habitat areas would contravene the 2015 plan's goal of avoiding the listing of the greater sage-grouse under the Endangered Species Act. *See* 2015 ROD at 1-14. The 2015 plan requires the BLM to reduce, eliminate, or minimize threats to sage-grouse habitat in order to maintain the "robust regulatory mechanisms" that make an ESA listing unnecessary. *Id.* at 1-9. By offering leases in designated habitat, this sale undermines those regulatory mechanisms, putting the sage-grouse at risk of ESA listing.

In fact, 48 percent of the parcels in this lease sale are in designated sage-grouse habitat. EA at 4-22. In Wyoming, there are 15,910,253 acres of PHMA, of which almost two million acres—over 12.5 percent—have already been leased. EA at 3-32. Given the 2019 amendments' diminution of protections for sage-grouse habitat, many of these parcels have already been developed in a manner inconsistent with the 2015 plan's core-habitat protections. For example, the 2015 plan required that all development activities provide no-surface-occupancy buffers around occupied leks.[3] 2015 ROD at 1-19. The 2019 amendments, while retaining these buffers, greatly expanded the circumstances in which the BLM could grant exceptions to the buffer requirements, thereby increasing pressures on lekking sage-grouse. *See* 2018 FEIS at A-10. Developing parcels in core habitat would compound the harms to sage-grouse experienced in the wake of the 2019 amendments. Allowing this lease sale to go forward would violate FLPMA by further undermining the 2015 plan's goal of minimizing threats to the greater sage-grouse.

In its environmental assessment, the BLM relies on an instruction memorandum—IM 2018-026—in claiming that it does *not* need to lease outside of sage-grouse habitat before leasing within sage-grouse habitat. EA at 3-31. However, the 2015 plan's prioritization mandate is binding on the BLM; the memorandum's effort to encourage "lessees to voluntarily prioritize leasing" outside of core habitat areas does not fulfill that mandate. *See* IM 2018-026 at 3. In fact, the memorandum was inconsistent with the 2019 amendments, which retained the 2015 plan's prioritization mandate. *See* 2019 amendments at 6 Thus, the BLM's decision to disregard the prioritization requirement of the 2019 amendments was in itself arbitrary and capricious. Further, because an instruction memorandum cannot supersede an RMP and IM 2018-026 cannot be

[3] The 2015 plan and 2019 amendments require buffers of 0.6 miles in PHMA and 0.25 miles in GHMA, extended to two miles during breeding, brooding, and nest-rearing season. 2015 ROD at 1-19, 1-25.

reconciled with the 2019 amendments—let alone the more stringent prioritization requirements of the 2015 plan—the BLM's reliance on IM 2018-026 violates FLPMA. The BLM should recognize that the effect of the Idaho court decision is to deem IM-2018-026 illegal and to reinstate the IM for prioritization of leasing that was put in place under the 2015 plans, IM 2016-143. The court's order explicitly reinstated the 2015 sage-grouse plans so that applies as well to these IMs.

In short, the BLM's lease sale is inconsistent with the requirements of the 2015 plan. As the 2015 plan is now the applicable RMP, the lease sale violates FLPMA's requirement that the BLM act consistently with the governing RMP. Leasing in designated habitat will not only harm sage-grouse; it will also lead to regulatory uncertainty that is harmful to industry. In order to ensure compliance with the 2015 plan, the BLM should defer leasing any parcels in designated greater sage-grouse habitat.

2. *The BLM's approval of the lease sale was not consistent with FLPMA's multiple-use mandate.*

In pursuing an "energy dominance" agenda, the BLM neglected to consider other possible values before approving this lease sale—in violation of FLPMA's multiple-use mandate. *See* Exec. Order 13783 (March 28, 2017) and Exec. Order 13868 (April 10, 2019) (collectively establishing the current energy dominance focus of public land management).

Under FLPMA, the BLM must manage the public lands on the basis of "multiple-use and sustained yield." 43 U.S.C. §§ 1712(c)(1); 1732(a). "Multiple-use" is understood to require the BLM to strike a balance between competing uses, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and … natural scenic, scientific and historical values." *S. Utah Wilderness Alliance*, 542 U.S. at 58. The BLM need not *allow* all competing uses on a single parcel of land. *Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982). However, the BLM must *consider* all possible uses of a given parcel, including conservation to protect environmental values. *New Mexico ex rel. Richardson*, 565 F.3d at 710. Courts have repeatedly held that multiple-use does not require development, but instead requires considering development as one possible use among many. *Id* (citing *Rocky Mountain Oil and Gas Ass'n*, 696 F.2d at 738 n.4; *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1299).

In carrying out a national "energy dominance" policy, the BLM is violating FLPMA's multiple-use mandate by elevating energy development above other uses and precluding consideration of alternative uses of public lands. The BLM may not manage for oil-and-gas development primarily; it must "strike a balance among the many competing uses to which the land can be put." *S. Utah Wilderness Alliance*, 542 U.S. at 58. Other courts have agreed that, under FLPMA, oil and gas cannot be the sole basis for public-lands management. *See, e.g.*, *WildEarth Guardians*, 368 F. Supp. 3d at 41 (holding that the agency's energy-dominance policy contravenes FLPMA); *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233 (D. Colo. 2012) (rejecting an oil-and-gas leasing plan that failed to adequately consider other uses of public lands).

To fulfill its multiple-use mandate, the BLM must fully consider—and, where reasonable, manage for—alternatives to oil-and-gas development, particularly in parcels with low potential for oil-and-gas yield. *See, e.g.*, *Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145, 1166 (D. Colo. 2018) (holding that the BLM failed to adequately consider other values by deciding to lease every possible low-yield parcel). Of the 174,148 acres initially proposed for leasing in this sale, 83 percent were in areas with low or very low potential for oil and gas.[4] Many of these low-potential parcels are in or near cold-water fisheries, sage-grouse habitat, or mule-deer migration corridors. The BLM, in prioritizing using these parcels for oil-and-gas leasing in spite of their low potential yield and high ecological value, has failed strike the balance that FLPMA requires. *See Wilderness Workshop*, 342 F.Supp.3d at 1161; *WildEarth Guardians*, 368 F.Supp.3d at 73.

The BLM has argued that it is fulfilling its multiple-use mandate by providing certain stipulations for these parcels. EA at 4-3. However, the BLM cannot comply with the multiple-use mandate by prioritizing oil-and-gas leasing and then carving out accommodations for other uses; such prioritization remains incompatible with multiple-use principles. *New Mexico ex rel. Richardson*, 565 F.3d at 710.

The administration's "energy dominance" policy does not supplant the BLM's statutory mandate to judiciously manage for a breadth of competing values. Multiple-use does not require the BLM to maximize oil-and-gas leasing; it does not require the BLM to issue oil-and-gas leases at all. Rather, FLPMA requires the BLM to manage for "a combination of balance and diverse resource uses." 43 U.S.C. § 1702(c). By embracing an "energy dominance" policy, this lease sale fails to strike that balance, violating FLPMA's multiple-use mandate.

3. *The BLM's facilitation of speculative leasing is inconsistent with the MLA and FLPMA, and the agency should consider option value before leasing.*

The BLM continues to facilitate speculative leasing in violation of FLPMA and the Mineral Leasing Act (MLA), and the agency has also failed to consider option value prior to leasing.

The MLA is structured to facilitate actual production of federal minerals, and thus its faithful application should focus on areas with known potential for development while discouraging speculative leasing of low-potential lands. The BLM's December 2019 lease sale contravenes this core principle in three ways: (1) it fails to prioritize the leasing of lands with high potential for development; (2) it continues a long trend of leasing lands with little or no potential for productive mineral development, which encourages speculative leasing and produces administrative waste rather than oil and gas; and (3) it eliminates important option values by hamstringing decisional flexibility in future management. In order to avoid violating the MLA and FLPMA, the BLM should avoid offering parcels with low potential for mineral development in this lease sale.

(a) *The agency should prioritize the leasing of lands with high potential for development.*

[4] Data prepared by Trout Unlimited's science team. *See* Trout Unlimited comments on WY BLM2019 Fourth Quarter Oil and Gas Lease Sale EA, at 2.

The MLA grants the Secretary of the Interior the authority to determine which parcels of land may be leased. As the Tenth Circuit has explained:

> Under 30 U.S.C. § 226(a), "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may be leased* by the Secretary," (emphasis added) and the Secretary still retains the authority to determine which lands are "to be leased" under § 226(b)(1)(A).

W. Energy All. v. Salazar, 709 F.3d 1040, 1044 (10th Cir. 2013).

In order to effectuate the MLA's purpose of facilitating production of federal minerals, the BLM should focus on areas with known potential for development while discouraging speculative leasing of low-potential lands. The Interior Department has, through the Interior Board of Land Appeals (IBLA), recognized its obligation to prioritize leases that will result in actual mineral development. *See Vessels Coal Gas, Inc.,* 175 IBLA 8, 25 (2008) (noting that "[i]t is well-settled under the MLA that competitive leasing is to be based upon reasonable assurance of an existing mineral deposit"). Here, however, the BLM has provided no evidence that the proposed parcels contain oil or gas deposits, as the MLA requires. *See* 30 U.S.C. § 226(a) (providing that lands subject to oil-and-gas leasing must be "known or believed to contain oil or gas deposits"). In addition, under the MLA, the BLM is to ensure that each lease contains provisions for "reasonable diligence, skill, and care in the operation of said property," and "for the protection of the interests of the United States" and "for safeguarding of the public welfare." 30 U.S.C. § 187.

In fact, based on the pattern of lease sales in Wyoming, there is evidence to the contrary—that the lands encompassed by the parcels in the BLM's lease sale generally lack oil-and-gas resources. Of the approximately 8 million acres of land under lease in Wyoming, only 50 percent is in production. EA at 3-19. The rate of production success can be as low as 13 percent. *Id.* at 4-13. Additionally, of the 174,148 acres considered for oil-and-gas leasing this quarter, 83 percent (144,398 acres) are in areas with low or very low potential for oil and gas.[5]

The BLM has claimed in past responses to comments that the MLA's requirement to lease on lands known or believed to contain oil or gas deposits was nullified by the passage of the Federal Onshore Oil and Gas Leasing Reform Act of 1987. According to the agency:

> "The Reform Act significantly changed the way BLM leases onshore federal lands for oil and gas development. Previously, only lands that BLM had determined to have known oil and gas potential were leased competitively using sealed bidding to determine bonuses to be paid. Most leases were issued noncompetitively, with payment of a filing fee but no bonuses, BLM is now required to offer competitively at oral auction all federal lands available for leasing. Lands not sold at auction are available for noncompetitive leasing." (GAO, Report to Congress 1989 at 2). Offering the subject lands irrespective of their proven potential is compliant with Federal Law.

[5] *See supra*, note 5.

This argument is incorrect. While the Reform Act did abolish the pre-1987 "known geological structure" standard, the plain language of the statute limits the leasing authority of the Interior Secretary to lands known or believed to contain oil or gas deposits. 30 U.S.C. § 226(a). In the words of the Reform Act, "[a]ll lands subject to disposition … *which are known or believed to contain oil or gas deposits* may be leased by the Secretary." *Id.* (emphasis added). This language closely tracks the language in the MLA limiting competitive leasing to lands known or believed to contain oil or gas. *See* 30 U.S.C. § 226(a); 30 U.S.C. § 226(b). In context, the GAO passage that the BLM cites describes a transition from non-competitive to competitive lease sales—not the elimination of the requirement to lease on lands where the BLM at least believes minerals are located. *See* GAO, Report to Congress, *Mineral Revenues: Implementation of the Federal Onshore Oil and Gas Leasing Reform Act of 1987* at 2 (May 1989). And the BLM's argument ignores the IBLA's 2008 decision in *Vessels Coal Gas*, which held that "competitive leasing is to be based upon reasonable assurance of an existing mineral deposit." *Vessels Coal Gas, Inc.*, 175 IBLA 8, 25 (2008) (citing *American Gilsonite Company*, 111 IBLA 1, 24 (1989)).

(b) This sale continues a long-existing trend of leasing lands with little or no potential for productive mineral development, which encourages speculative leasing and creates administrative waste.

According to the BLM, approximately 26 million federal acres were under lease to oil-and-gas developers at the end of the 2018 fiscal year. *See* BLM, About the BLM Oil and Gas Program, *available at* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about. Of those 26 million acres, only 12.8 million acres were producing oil and gas "in economic quantities." *Id.* While these numbers alone suggest high rates of speculative leasing, there is more direct evidence of the practice.

In Montana, for example, a speculator was able to nominate about 200,000 acres for a December 2017 lease sale, but when the lease sale took place he offered no competitive bids, instead sitting by and then snapping up nearly 67,000 acres the next day via a noncompetitive sale in which he only had to pay $1.50 an acre. *See* Eric Lipton & Hiroko Tabuchi, *Energy Speculators Jump on Chance to Lease Public Lands at Bargain Rates*, N.Y. Times, Nov. 27, 2018. As an article on the sale noted, this is "one of many loopholes that energy speculators … are using as the Trump administration undertakes a burst of lease sales on federal lands in the West." *Id.* These speculators are often unable to muster the financial resources to develop the lands they have leased, so the lands sit idle.

A study by Taxpayers for Common Sense shows that these speculative, noncompetitive sales have surged to the highest level in over a decade. *Id.* This has led to "major drops in the price companies pay per acre in certain states, like Montana, where the average bid has fallen by 80 percent compared to the final years of the Obama administration." *Id.* This is cutting taxpayers out of the royalties they should be getting, often leaving them with only trivial rent payments. It has led to more than 11 million acres of leased land sitting idle, about half of all the federal land under lease to oil-and-gas developers. *Id.* In addition to frustrating the purposes of

the MLA to facilitate development of actual minerals, this speculative leasing prevents many lands from being used for other multiple uses, as discussed in another section of these comments.

(c) *The lease sale would eliminate important option values by hamstringing decisional flexibility in future management.*

The BLM has failed to respond to our previous comments regarding option value—a consideration of options that can be lost if an area is leased prematurely—and the need to consider it. Consistent with FLPMA and the MLA's prohibition on speculative leasing, the BLM should analyze the "option value" of offering parcels with low or nonexistent development potential. In addition to the concerns above, leasing lands with low potential for oil-and-gas development gives preference to development at the expense of other uses while undermining the BLM's ability to make other management decisions down the road. This is because the presence of oil-and-gas leases can limit the BLM's ability and willingness to manage for other resources in the future. For example, in the Colorado River Valley RMP, the BLM decided against managing lands in the Grand Hogback area for protection of wilderness characteristics based specifically on the presence of oil-and-gas leases, even though the leases were non-producing. According to the agency:

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

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

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

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

Proposed Grand Junction Proposed RMP (2015), at 4-289 to 4-290.

The presence of leases can also limit the BLM's ability to manage for other important, non-wilderness values, like renewable-energy projects. *See, e.g.,* Proposed White River Res. Mgmt. Plan, at 4-498 (acknowledging "the potential for oil and gas developments to preclude other land use authorizations not related to oil and gas (e.g., renewable energy developments, transmission lines)"). In offering the parcels involved in this sale, the BLM runs a similar risk of precluding future management decisions for other resources and uses such as wilderness, recreation, and renewable-energy development.

In this context, the BLM can and should apply the principles of "option value" or "informational values," which permit the agency to look at the benefits of delaying irreversible decisions. *See* Jayni Foley Hein, *Harmonizing Preservation and Production* at 13 (June 2015) (noting that "[o]ption value derives from the ability to delay decisions until later, when more information is available[,]" and that "[i]n the leasing context, the value associated with the option to delay can be large, especially when there is a high degree of uncertainty about resource price, extraction costs, and/or the social and environmental costs of drilling"), *available at* https://policyintegrity.org/files/publications/DOI_LeasingReport.pdf.

It is well-established that the issuance of an oil-and-gas lease involves an irreversible commitment of resources. As the D.C. Circuit held in the context of considering the informational value of delaying leasing on the Outer Continental Shelf, "[t]here is … a tangible present economic benefit to delaying the decision to drill for fossil fuels to preserve the opportunity to see what new technologies develop and what new information comes to light." *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 610 (D.C. Cir. 2015). Thus, before moving forward with this lease sale, the BLM must evaluate "option value"—the economic benefits that could arise from delaying leasing, or exploration and development, based on improvements in technology, additional benefits that could come from managing these lands for other uses, and additional information on the impacts of climate change and ways to avoid or mitigate impacts on the environment. This is essential, in particular, for lands with low or nonexistent development potential.

4. *The BLM must ensure that compensatory-mitigation requirements for sage-grouse habitat are incorporated into any leases.*

Under the 2015 sage-grouse plan that is again in place, the BLM must include compensatory-mitigation requirements for any lease parcels in core habitat areas. The BLM's current sale fails to do so.

The 2015 plan requires that all new development in sage-grouse core habitat provide a "net conservation gain" to the species. 2015 ROD at 1-25. Where on-site avoidance and minimization measures cannot yield a net conservation gain, the 2015 plan requires off-site compensatory mitigation. *Id.* at 1-27.

The 2019 amendments rescinded the 2015 plan's compensatory-mitigation strategy. The amendments prohibited the BLM from requiring compensatory mitigation, and downgraded the "net conservation gain" standard to a "no net loss" standard. BLM, Wyoming Greater Sage-Grouse Proposed RMP Amendment and FEIS, November 2018 ("2018 FEIS"), at A-7, A-8. In enjoining the 2019 amendments, the *Western Watersheds* court suggested that plaintiffs were likely to prevail on the merits of their claim that this change violated NEPA: "BLM's elimination of mandatory compensatory mitigation through the Final EISs appears to constitute both a 'substantial change' to its proposed action and 'significant new circumstances' under 40 C.F.R. § 1502.9(c), requiring that BLM have issued a supplemental draft EIS." Exhibit 2 at 24.

In internal guidance, the BLM has concluded that FLPMA does not grant the agency authority to require compensatory mitigation. IM 2018-093; IM 2019-018. Acting under this interpretation contravenes the 2015 plan's mitigation requirements, which in turn violates

FLPMA's requirement that the BLM adhere to its RMPs. 43 U.S.C. § 1732(a); *see also* 43 C.F.R. § 1610.5-3(a) (stating that all resource management "shall" conform to the approved RMP). As discussed above relative to the prioritization IMs, the BLM needs to view IMs 2018-093 and 2019-018 as repealed under the terms of the Idaho court's preliminary injunction and ensure compensatory mitigation is fully required, as the 2015 plan mandates, and which if now fully back in force.

Further, this direction—in both IM 2019-018 and the 2019 amendments—is arbitrary. The interpretation is predicated upon a bare assertion that FLPMA "cannot reasonably be read to allow BLM to require mandatory compensatory mitigation[.]" IM 2018-093. This is a plain misreading of FLPMA, which grants the BLM broad discretion in determining how to balance values and whether to develop or conserve resources. 43 U.S.C. § 1732(a); *see* Justin Pidot, *The Bureau of Land Management's Infirm Compensatory Mitigation Policy*, 30 Fordham Envt'l L. Rev. 1 (2018) (demonstrating that the BLM's compensatory-mitigation policy is a novel and unsupported legal interpretation). This discretion includes imposing mitigation requirements—like compensatory mitigation—on project applicants. 43 U.S.C. § 1732(b), (c). Indeed, FLPMA requires the BLM to prevent "unnecessary or undue degradation" of public lands through various mechanisms, including, as courts have held, compensatory mitigation. 43 U.S.C. § 1732(b); *see, e.g.*, *Biodiversity Conservation Alliance v. BLM*, 2010 WL 3209444, 28 (D. Wyo. June 10, 2010) (holding that the BLM can require compensatory mitigation as a protection against unnecessary or undue degradation).

The BLM should defer leasing any parcels in designated sage-grouse habitat, as many of the parcels in this sale overlap priority habitat management areas (PHMA) and general habitat management areas (GHMA) in violation of FLPMA.[6] However, if the BLM leases any parcels in PHMA or GHMA, the 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. 2015 ROD at 1-25. Applying these requirements as terms of any leases in designated sage-grouse habitat is necessary to prevent unnecessary or undue degradation of PHMA and GHMA lands.

5. *The BLM must incorporate protocols for ambient-noise monitoring in order to avoid understating impacts to sage-grouse.*

Under FLPMA, the BLM's lease sale must comply to maximum extent possible with state law and policy. *See* 43 U.S.C. § 1701(a)(2) (stating that the national interest will be best served "through a land use planning process coordinated with other Federal and State planning efforts"); 43 U.S.C. § 1712(c)(8) (requiring that FLPMA land-use plans comply with "State and Federal air, water, noise, or other pollution standards or implementation plans"); 43 U.S.C. § 1712(c)(9) (requiring that FLPMA land-use plans be consistent with state and local plans to the maximum extent possible). Wyoming Governor Mark Gordon's recent Executive Order, "Greater Sage-Grouse Core Area Protection," outlines a number of stipulations that state agencies must apply when reviewing projects located in greater sage-grouse habitat. State of Wyoming Executive Order, Order Number 2019-3, Aug. 21, 2019. App. E, at 8-9. These

[6] *See supra* at B.1.

stipulations are "designed and intended to maintain existing suitable greater sage-grouse habitat." *Id.*

The Executive Order's noise stipulation states that:

> Sound levels at leks, due to new project noise individually or cumulatively from anthropogenic sources, should not exceed 10 decibels (dB) above baseline sound levels at the perimeter of a lek during the breeding season (March 1 to May 15), 6 pm to 8 am. Baseline sound levels should be determined prior to project initiation. Sound level measurement and monitoring protocols available from the WGFD should be used to measure and report sound levels.

Id. In addition, the Wyoming Game and Fish Department published protocols in July 2019 for measuring and reporting sound levels near sage-grouse leks. Wyoming Game and Fish Department, Protocols for Measuring and Reporting Sound Levels at Greater Sage-grouse Leks (July 16, 2019) https://wgfd.wyo.gov/WGFD/media/content/PDF/Habitat/Sage%20Grouse/WGFD-Protocols-for-Measuring-and-Reporting-Sound-Levels-20190716.pdf. The protocols provide detailed instructions on how to measure sound levels, including how to collect and analyze the data. *Id.*

BLM must incorporate these state developed protocols into its monitoring requirements. Historically, BLM's refusal to develop appropriate protocols results in artificially inflated estimates of background noise levels. Inaccurate, artificially inflated, baseline noise levels increase the threshold for noise during operations, adversely impacting sage-grouse in violation of Wyoming's Core Area Protection strategy. We have previously brought the best-available science to BLM's attention in comments and protests, yet the BLM has repeatedly refused to adopt standards to facilitate compliance with Wyoming's strategy. It must do so now.

In prior responses to public comments, the BLM has stated that it believes "the issue of noise … [was] adequately addressed in the 2019 GSG FEIS and ROD." BLM-Wyoming Response to Public Comment No. 26 for the 2nd Quarter, June 2019 Lease Sale. But the inclusion of state wildlife agencies in the review process for the 2019 amendments did not result in protocols for measuring background noise levels, despite calls for standards from leading scientists in reports to both state wildlife agencies and Wyoming's petroleum industry.[7] The 2019 amendments were ineffective in addressing both increased adverse impacts to sage-grouse from inflated background noise levels and in providing regulatory certainty to industry. In order to comply with FLPMA, the BLM should develop protocols for measuring background noise levels that are consistent with Wyoming's state policy.

The 2019 executive order limits the noise level of operations in core sage-grouse habitat to 10 dB above background noise levels. Best practices for measuring background noise levels are clearly relevant to the purpose and need of bringing federal policy in line with Wyoming's

[7] *See, e.g.* Ambrose, S., C. Florian, and J. MacDonald. 2014a. Ambient Sound Levels in Sage Habitats in Wyoming, April 2014, Unpublished report to Wyoming Department of Game and Fish, Cheyenne, WY; Ambrose et al. Sound Levels in Sagebrush in Wyoming, and Acoustic Impacts to Greater Sage-grouse, April 2014 Presentation to SGIT; Noise Monitoring in the Pinedale and Jeffery City Area (2014), Hayden-Wing Associates LLC, Prepared for Wyoming Game and Fish Department.

requirements. The BLM must accordingly apply standard protocols for establishing background noise levels and for noise monitoring. Wyoming's noise restrictions cannot be effectively implemented absent reliable data regarding background-noise levels.

Where monitoring data collected under Wyoming's protocols is unavailable, BLM should adopt a statewide presumption of ambient noise levels at 16 dBA,[8] and a requirement ensuring that noise levels do not exceed 26 dBA during lekking hours. This 16 dBA presumption of ambient noise levels and 26 dBA cap on noise levels during lekking hours is consistent with the 10 dBA increase over background noise levels that is allowed under Wyoming's Core Area Protection Strategy.[9] Outside of lekking hours, reasonable efforts should be made to keep noise levels as close to these limits as possible. Based on Wyoming's protocols, compliance should be monitored with equipment capable of accurately measuring background noise levels, at a microphone height of 12 inches, during lekking hours, during the breeding season, for a minimum of 10 days. *See* Protocols for Measuring and Reporting Sound Levels at Greater Sage-grouse Leks (July 16, 2019). Sounds of strutting birds should not be considered background noise. Measurement methods should follow published ANSI standards. *See id.* The BLM must ensure accurately recorded ambient noise levels and accurately monitor compliance to ensure the prescribed standards are met.

VI. CONCLUSION

For the foregoing reasons, we protest all parcels offered in this lease sale, WY-194-001 through WY-194-160, principally because these parcels are located in crucial sage- grouse habitats as well as big game migration corridors and crucial winter ranges. 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, failing to adequately consider cumulative impacts, facilitating speculative leasing in violation of the MLA and FOOGLRA, and failing to meet the multiple use obligation of the Federal Land Policy and Management Act.

Sincerely,

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[8] *See* Ambrose et al. report, April 2014.
[9] STATE OF WYOMING EXECUTIVE ORDER, Greater Sage-grouse Core Area Protection 2015-4 Avoidance, Minimization and Compensatory Mitigation for Development in Core vs. Non-Core (Oct. 29, 2018) https://wgfd.wyo.gov/WGFD/media/content/PDF/Habitat/Sage%20Grouse/Avoidance,-Minimization-and-Compensatory-Mitigation-for-Development-in-Core-vs-Non-Core_1.pdf

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Exhibits:

1. List of Protested Parcels
2. Mem. Order and Decision, *Western Watersheds Project v. Schneider*, Case No. 16-CV-83-BLW (D. Idaho Oct. 16, 2019)
3. Sublette migration corridor leasing map
4. Baggs migration corridor leasing map
5. Platte Valley migration corridor leasing map