



CENTER FOR NATIVE ECOSYSTEMS

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Selma Sierra
Bureau of Land Management
Utah State Office
PO Box 45155
Salt Lake City, Utah 84145

December 4, 2008

BY HAND-DELIVERY

Re: Protest of the Bureau of Land Management's Notice of Competitive Oil and Gas Lease Sale of Parcels with High Conservation Value

Dear Director Sierra:

I. Protested Parcels and Affected Resources

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Center for Native Ecosystems ("CNE") protests the December 19th, 2008 sale of the following parcels:

We protest the following parcels that overlap completely or partially with, or are directly adjacent to crucial value Gunnison sage-grouse brooding and/or winter use areas:

Moab Field Office
UT1108-201
UT1108-202
UT1108-203

We protest the following parcels that may be within 4 miles of a Gunnison sage-grouse lek, and that might potentially require creation of new access routes, or use of existing access routes, that travel through crucial value Gunnison sage-grouse brooding and/or winter use areas.

Moab Field Office
UT1108-204
UT1108-205
UT1108-206
UT1108-207
UT1108-208
UT1108-231

We protest the following parcels that overlap completely or partially with crucial value greater sage-grouse brooding use areas (as determined by Utah Division of Wildlife Resources field biologists in spring 1999):

Moab Field Office

UT1108-201
UT1108-202
UT1108-232

Price Field Office

UT1108-350
UT1108-058
UT1108-319
UT1108-320
UT1108-323
UT1108-324
UT1108-325
UT1108-326
UT1108-330
UT1108-331
UT1108-332
UT1108-333
UT1108-340
UT1108-348
UT1108-355

Vernal Field Office

UT1108-101
UT1108-106
UT1108-112
UT1108-112A
UT1108-115
UT1108-116
UT1108-117
UT1108-119
UT1108-121
UT1108-122
UT1108-124
UT1108-125
UT1108-130
UT1108-131
UT1108-134
UT1108-135
UT1108-137
UT1108-139
UT1108-140
UT1108-141
UT1108-142

UT1108-143
UT1108-144
UT1108-146
UT1108-147
UT1108-149
UT1108-150
UT1108-151
UT1108-152
UT1108-153
UT1108-154
UT1108-155
UT1108-80
UT1108-81
UT1108-81B
UT1108-89
UT1108-90
UT1108-90A
UT1108-91
UT1108-92
UT1108-93
UT1108-94
UT1108-96
UT1108-97
UT1108-98

We protest the following parcels that overlap completely or partially with crucial value greater sage-grouse winter use areas (as determined by Utah Division of Wildlife Resources field biologists in spring 1999):

Moab Field Office

UT1108-201
UT1108-202

Price Field Office

UT1108-058
UT1108-319
UT1108-320
UT1108-323
UT1108-324
UT1108-325
UT1108-326
UT1108-330
UT1108-331
UT1108-332
UT1108-333
UT1108-338
UT1108-339
UT1108-340
UT1108-341
UT1108-342

UT1108-345
UT1108-348
UT1108-349
UT1108-355

Vernal Field Office

UT1108-101
UT1108-102
UT1108-103
UT1108-119
UT1108-121
UT1108-122
UT1108-124
UT1108-125
UT1108-129
UT1108-130
UT1108-131
UT1108-134
UT1108-135
UT1108-137
UT1108-137
UT1108-143
UT1108-144
UT1108-146
UT1108-147
UT1108-149
UT1108-150
UT1108-151
UT1108-152
UT1108-153
UT1108-154
UT1108-155
UT1108-80
UT1108-81
UT1108-81B
UT1108-81B
UT1108-90A
UT1108-152
UT1108-154
UT1108-81
UT1108-81B

Fillmore Field Office

UT1108-018
UT1108-019
UT1108-024
UT1108-025
UT1108-027
UT1108-029
UT1108-030

UT1108-031
UT1108-032

Crucial value habitat is defined as habitat on which the local population of a wildlife species depends for survival because there are no alternative ranges of habitats available. Crucial valued habitat is essential to the life history requirements of a wildlife species. Degradation or unavailability of crucial habitat will lead to significant declines in carrying capacity and/or numbers of wildlife species in question.

We protest the following parcels that that overlap completely or partially with substantial value greater sage-grouse brooding use areas (as determined by Utah Division of Wildlife Resources field biologists in spring 1999):

Vernal Field Office
UT1108-102
UT1108-103
UT1108-119
UT1108-121
UT1108-129
UT1108-130
UT1108-131
UT1108-132
UT1108-85

We protest the following parcels that that overlap completely or partially with substantial value greater sage-grouse winter use areas (as determined by Utah Division of Wildlife Resources field biologists in spring 1999):

Vernal Field Office
UT1108-131
UT1108-132
UT1108-134
UT1108-144
UT1108-155
UT1108-80
UT1108-81B
UT1108-106
UT1108-130

Substantial value habitat is defined as habitat that is used by a wildlife species but is not crucial for population survival.

We also protest the following parcels that contain one or more occurrences of the greater sage-grouse, last observed between 1989 and 2006, according to the Utah Natural Heritage Program's database.

Moab Field Office

UT1108-201
UT1108-202
UT1108-205
UT1108-206
UT1108-207
UT1108-208
UT1108-231
UT1108-232
UT1108-295

Price Field Office

UT1108-058
UT1108-319
UT1108-320
UT1108-321
UT1108-322
UT1108-323
UT1108-324
UT1108-325
UT1108-326
UT1108-327
UT1108-328
UT1108-329
UT1108-330
UT1108-331
UT1108-332
UT1108-333
UT1108-334
UT1108-335
UT1108-336
UT1108-337
UT1108-338
UT1108-339
UT1108-340
UT1108-341
UT1108-342
UT1108-343
UT1108-344
UT1108-345
UT1108-348
UT1108-349
UT1108-352
UT1108-355

Vernal Field Office

UT1108-059
UT1108-81
UT1108-83
UT1108-84
UT1108-85

UT1108-86
UT1108-87
UT1108-88
UT1108-89
UT1108-90
UT1108-91
UT1108-92
UT1108-93
UT1108-94
UT1108-96
UT1108-97
UT1108-98
UT1108-99
UT1108-101
UT1108-102
UT1108-103
UT1108-104
UT1108-105
UT1108-112
UT1108-115
UT1108-116
UT1108-117
UT1108-119
UT1108-121
UT1108-122
UT1108-124
UT1108-125
UT1108-128
UT1108-129
UT1108-130
UT1108-131
UT1108-132
UT1108-134
UT1108-135
UT1108-139
UT1108-140
UT1108-141
UT1108-142
UT1108-143
UT1108-144
UT1108-145
UT1108-146
UT1108-147
UT1108-148
UT1108-149
UT1108-150
UT1108-151
UT1108-152
UT1108-153
UT1108-154

UT1108-155
UT1108-156
UT1108-112A
UT1108-81B
UT1108-90A

Fillmore Field Office

UT1108-017
UT1108-018
UT1108-019
UT1108-020
UT1108-024
UT1108-025
UT1108-026
UT1108-027
UT1108-028
UT1108-029
UT1108-030
UT1108-031
UT1108-032
UT1108-033
UT1108-035
UT1108-036
UT1108-036
UT1108-037
UT1108-038
UT1108-039
UT1108-040
UT1108-041
UT1108-042
UT1108-048
UT1108-049
UT1108-050

Monticello Field Office

UT1108-203
UT1108-204

Richfield Field Office

UT1108-055

Graham's penstemon (*Penstemon grahamii*)

We protest the following parcels that overlap with proposed critical habitat for Graham's penstemon:

Vernal Field Office

UT1108-157
UT1108-158

UT1108-91
UT1108-92
UT1108-93
UT1108-94
UT1108-96

We protest the following parcels that contain occurrences of *Penstemon grahmi*, according to the Utah Natural Heritage Program's database:

Vernal Field Office

UT1108-156	Little Dicks Bottom
UT1108-157	Rainbow
UT1108-158	Rainbow
UT1108-91	Seep Ridge Road a
UT1108-92	Seep Ridge Road a
UT1108-93	Buck Canyon/Seep Ridge Road Junction
UT1108-93	Seep Ridge Road a
UT1108-93	Sunday School Canyon
UT1108-94	Seep Ridge Road a
UT1108-94	Sunday School Canyon
UT1108-96	Seep Ridge Road a
UT1108-96	Seep Ridge Road b(?)
UT1108-96	North of Jims Reservoir Canyon
UT1108-96	Sunday School Canyon (East)
UT1108-96	McCoy Reservoir #2 - Klondike Canyon
UT1108-97	Seep Ridge Road b(?)
UT1108-97	North of Jims Reservoir Canyon
UT1108-97	Sunday School Canyon (East)
UT1108-93	Seep Ridge Road a
UT1108-93	Sunday School Canyon
UT1108-94	Seep Ridge Road a
UT1108-94	Sunday School Canyon
UT1108-96	Seep Ridge Road b(?)
UT1108-96	North of Jims Reservoir Canyon
UT1108-96	Seep Ridge Road b(?)
UT1108-96	Sunday School Canyon (East)
UT1108-96	North of Jims Reservoir Canyon
UT1108-96	Sunday School Canyon (East)
UT1108-97	Seep Ridge Road b(?)
UT1108-97	North of Jims Reservoir Canyon
UT1108-97	Seep Ridge Road b(?)
UT1108-97	Sunday School Canyon (East)

We protest the following parcels that are in habitat for the white-tailed prairie dog, and potential or current habitat for the black-footed ferret, and that are within areas that Center for Native Ecosystems nominated as white-tailed prairie dog Areas of Critical Environmental Concern, through the RMP revision process.

Moab Field Office

UT1108-169
UT1108-181
UT1108-189
UT1108-190
UT1108-191
UT1108-192
UT1108-198
UT1108-270
UT1108-271
UT1108-273

Price Field Office

UT1108-356
UT1108-357
UT1108-358
UT1108-359
UT1108-360
UT1108-363
UT1108-364
UT1108-365
UT1108-368

Vernal Field Office

UT1108-101
UT1108-121
UT1108-122
UT1108-124
UT1108-125
UT1108-134
UT1108-135
UT1108-148
UT1108-149
UT1108-150
UT1108-155

We protest the following parcels that overlap partially or completely with the black-footed ferret management area.

Vernal Field Office

UT1108-059
UT1108-102
UT1108-103

UT1108-104
UT1108-105
UT1108-129
UT1108-130
UT1108-131
UT1108-132
UT1108-134
UT1108-135
UT1108-146
UT1108-147
UT1108-148
UT1108-149
UT1108-150
UT1108-151
UT1108-152
UT1108-153
UT1108-154
UT1108-155

We protest the following parcels that overlap with the black-footed ferret PMZ.

Vernal Field Office
UT1108-134
UT1108-135
UT1108-155

We protest the following parcels that overlap partially or completely with records of one or more occurrences of the endangered black-footed ferret between 1960 and 2005, according to the Utah Natural Heritage program database:

Moab Field Office	UT1108-159
Moab Field Office	UT1108-161
Moab Field Office	UT1108-164
Moab Field Office	UT1108-165
Moab Field Office	UT1108-169
Moab Field Office	UT1108-172
Moab Field Office	UT1108-174
Moab Field Office	UT1108-178
Moab Field Office	UT1108-179
Moab Field Office	UT1108-180
Moab Field Office	UT1108-181
Moab Field Office	UT1108-182
Moab Field Office	UT1108-189
Moab Field Office	UT1108-192
Moab Field Office	UT1108-194
Moab Field Office	UT1108-209
Moab Field Office	UT1108-210
Moab Field Office	UT1108-211
Moab Field Office	UT1108-212

Moab Field Office	UT1108-213
Moab Field Office	UT1108-223
Moab Field Office	UT1108-224
Moab Field Office	UT1108-225
Moab Field Office	UT1108-271
Moab Field Office	UT1108-273
Moab Field Office	UT1108-177A

Vernal Field Office

UT1108-81
UT1108-101
UT1108-102
UT1108-103
UT1108-104
UT1108-105
UT1108-129
UT1108-130
UT1108-131
UT1108-132
UT1108-134
UT1108-135
UT1108-147
UT1108-148
UT1108-149
UT1108-150
UT1108-151
UT1108-152
UT1108-153
UT1108-154
UT1108-155
UT1108-156
UT1108-81B

Price Field Office

UT1108-352
UT1108-356
UT1108-357
UT1108-358
UT1108-359
UT1108-360
UT1108-361
UT1108-362
UT1108-363
UT1108-364
UT1108-365
UT1108-366
UT1108-367
UT1108-368
UT1108-369
UT1108-370

We protest the following parcels that are in designated critical habitat for the endangered Colorado pikeminnow:

Moab Field Office

UT1108-217 Colorado River
UT1108-219 Colorado River
UT1108-221 Colorado River
UT1108-222 Colorado River
UT1108-223 Colorado River

Price Field Office

UT1108-368 Green River

Vernal Field Office

UT1108-059 Green River
UT1108-102 Green River
UT1108-106 White River
UT1108-109 White River
UT1108-110 White River
UT1108-129 Green River
UT1108-136 White River
UT1108-137 White River

We protest the following parcels that are in designated critical habitat for the endangered razorback sucker:

Moab Field Office

UT1108-217 Colorado River
UT1108-219 Colorado River
UT1108-221 Colorado River
UT1108-222 Colorado River
UT1108-223 Colorado River

Price Field Office

UT1108-368 Green River

Vernal Field Office

UT1108-059 Green River
UT1108-102 Green River
UT1108-129 Green River

We protest the following parcels that contain one or more records of occurrences of one or more of the four endangered Colorado River fish species (Colorado pikeminnow, razorback sucker, bonytail, humpback chub), including a handful of historical records of occurrence, but primarily recent records of occurrence in 1996, 2005 and 2006:

Moab Field Office

UT1108-159	Bonytail
UT1108-163	Bonytail
UT1108-164	Bonytail
UT1108-200	Bonytail
UT1108-216	Bonytail
UT1108-217	Bonytail
UT1108-218	Bonytail
UT1108-219	Bonytail
UT1108-221	Bonytail
UT1108-222	Bonytail
UT1108-223	Bonytail
UT1108-224	Bonytail
UT1108-225	Bonytail
UT1108-242	Bonytail
UT1108-243	Bonytail
UT1108-244	Bonytail

Moab Field Office

UT1108-159	Colorado Pikeminnow
UT1108-164	Colorado Pikeminnow
UT1108-200	Colorado Pikeminnow
UT1108-205	Colorado Pikeminnow
UT1108-206	Colorado Pikeminnow
UT1108-208	Colorado Pikeminnow
UT1108-216	Colorado Pikeminnow
UT1108-217	Colorado Pikeminnow
UT1108-218	Colorado Pikeminnow
UT1108-219	Colorado Pikeminnow
UT1108-221	Colorado Pikeminnow
UT1108-222	Colorado Pikeminnow
UT1108-223	Colorado Pikeminnow
UT1108-223	Colorado Pikeminnow
UT1108-224	Colorado Pikeminnow
UT1108-225	Colorado Pikeminnow
UT1108-242	Colorado Pikeminnow
UT1108-243	Colorado Pikeminnow
UT1108-244	Colorado Pikeminnow
UT1108-270	Colorado Pikeminnow
UT1108-271	Colorado Pikeminnow
UT1108-273	Colorado Pikeminnow

Moab Field Office

UT1108-200	Humpback Chub
UT1108-216	Humpback Chub
UT1108-217	Humpback Chub
UT1108-218	Humpback Chub
UT1108-219	Humpback Chub
UT1108-221	Humpback Chub

UT1108-222	Humpback Chub
UT1108-223	Humpback Chub
UT1108-224	Humpback Chub
UT1108-225	Humpback Chub
UT1108-242	Humpback Chub
UT1108-243	Humpback Chub
UT1108-244	Humpback Chub
UT1108-270	Humpback Chub
UT1108-271	Humpback Chub
UT1108-273	Humpback Chub

Moab Field Office

UT1108-200	Razorback Sucker
UT1108-216	Razorback Sucker
UT1108-217	Razorback Sucker
UT1108-218	Razorback Sucker
UT1108-219	Razorback Sucker
UT1108-221	Razorback Sucker
UT1108-222	Razorback Sucker
UT1108-223	Razorback Sucker
UT1108-224	Razorback Sucker
UT1108-225	Razorback Sucker
UT1108-242	Razorback Sucker
UT1108-243	Razorback Sucker
UT1108-244	Razorback Sucker
UT1108-270	Razorback Sucker
UT1108-271	Razorback Sucker
UT1108-273	Razorback Sucker

Vernal Field Office

UT1108-059	Bonytail
UT1108-101	Bonytail
UT1108-102	Bonytail
UT1108-103	Bonytail
UT1108-104	Bonytail
UT1108-129	Bonytail
UT1108-059	Colorado Pikeminnow
UT1108-101	Colorado Pikeminnow
UT1108-102	Colorado Pikeminnow
UT1108-103	Colorado Pikeminnow
UT1108-103	Colorado Pikeminnow
UT1108-104	Colorado Pikeminnow
UT1108-106	Colorado Pikeminnow
UT1108-109	Colorado Pikeminnow
UT1108-110	Colorado Pikeminnow
UT1108-111	Colorado Pikeminnow
UT1108-119	Colorado Pikeminnow
UT1108-121	Colorado Pikeminnow
UT1108-122	Colorado Pikeminnow

UT1108-124	Colorado Pikeminnow
UT1108-125	Colorado Pikeminnow
UT1108-128	Colorado Pikeminnow
UT1108-129	Colorado Pikeminnow
UT1108-130	Colorado Pikeminnow
UT1108-136	Colorado Pikeminnow
UT1108-137	Colorado Pikeminnow
UT1108-145	Colorado Pikeminnow
UT1108-147	Colorado Pikeminnow
UT1108-156	Colorado Pikeminnow
UT1108-136	Humpback Chub
UT1108-137	Humpback Chub
UT1108-156	Humpback Chub
UT1108-059	Razorback Sucker
UT1108-101	Razorback Sucker
UT1108-102	Razorback Sucker
UT1108-103	Razorback Sucker
UT1108-104	Razorback Sucker
UT1108-106	Razorback Sucker
UT1108-109	Razorback Sucker
UT1108-110	Razorback Sucker
UT1108-111	Razorback Sucker
UT1108-128	Razorback Sucker
UT1108-129	Razorback Sucker
UT1108-130	Razorback Sucker
UT1108-137	Razorback Sucker
UT1108-145	Razorback Sucker
UT1108-147	Razorback Sucker

Monticello Field Office

UT1108-203	Colorado Pikeminnow
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Price Field Office

UT1108-356	Bonytail
UT1108-358	Bonytail
UT1108-359	Bonytail
UT1108-361	Bonytail
UT1108-362	Bonytail
UT1108-364	Bonytail
UT1108-365	Bonytail
UT1108-366	Bonytail
UT1108-367	Bonytail
UT1108-368	Bonytail
UT1108-369	Bonytail
UT1108-370	Bonytail
UT1108-342	Colorado Pikeminnow
UT1108-344	Colorado Pikeminnow
UT1108-349	Colorado Pikeminnow
UT1108-355	Colorado Pikeminnow
UT1108-356	Colorado Pikeminnow

UT1108-342 Humpback Chub
UT1108-344 Humpback Chub
UT1108-349 Humpback Chub
UT1108-355 Humpback Chub

We protest the following parcels that contain designated critical habitat for the Mexican spotted owl:

Moab Field Office

UT1108-201
UT1108-202
UT1108-205
UT1108-207
UT1108-208
UT1108-231

Price Field Office

UT1108-344
UT1108-345
UT1108-349
UT1108-355

Monticello Field Office

UT1108-203
UT1108-204

We protest the following parcels that contain occurrences of Uintah Basin hookless cactus or Pariette cactus, according to the Utah Natural Heritage Program database:

Vernal Field Office

UT1108-84
UT1108-86
UT1108-87
UT1108-88

Price Field Office

UT1108-335
UT1108-336
UT1108-337
UT1108-338
UT1108-339
UT1108-340
UT1108-341
UT1108-342
UT1108-343
UT1108-344
UT1108-345

II. Protesting Parties

Center for Native Ecosystems has a well-established history of participation in Bureau of Land Management (“BLM”) planning and management activities, including participation in Utah BLM oil and gas leasing decisions and the planning processes for the various Utah BLM Field Offices. CNE’s mission is to use the best available science to participate in policy and administrative processes, legal actions, and public outreach and education to protect and restore native plants and animals in the Greater Southern Rockies.

CNE's members visit, recreate on, and use lands on or near the parcels proposed for leasing. The staff and members of CNE enjoy various activities on or near land proposed for leasing, including viewing and studying rare and imperiled wildlife and native ecosystems, hiking, camping, taking photographs, and experiencing solitude. CNE's staff and members plan to return to the subject lands in the future to engage in these activities, and to observe and monitor rare and imperiled species and native ecosystems. We are collectively committed to ensuring that federal agencies properly manage rare and imperiled species and native ecosystems. Members and professional staff of CNE are conducting research and advocacy to protect the populations and habitat of rare and imperiled species discussed herein. CNE's members and staff value the important role that areas of high conservation value, should play in safeguarding rare species and communities and other unique resources on public land. Our members’ interests in rare and imperiled species and ecosystems on BLM lands will be adversely affected if the sale of these parcels proceeds as proposed. Oil and gas leasing and subsequent mineral development on the protested parcels, if approved without adequate environmental analysis and appropriate safeguards to minimize negative impacts, is likely to result in significant, unnecessary and undue harm to rare and imperiled species, native ecosystems. The proposed leasing of the protested parcels will harm our members’ interests in the continued use of those public lands and the rare and imperiled species they support. Therefore protestors have legally recognizable interests that will be affected and impacted by the proposed action.

Megan Mueller, CNE's staff biologist, like all other CNE employees, is authorized to file this protest on behalf of CNE.

III. Statement of Reasons

For the reasons set forth below, the Bureau of Land Management should withdraw all of the protested parcels pending completion of an adequate National Environmental Policy Act (“NEPA”) analysis of the environmental impacts of the proposed leasing. BLM should withdraw from the sale all protested parcels because there is credible evidence of resource conflicts and potentially significant environmental impacts which have not been properly analyzed. Oil and gas development authorized by the leasing of the protested parcels is likely to have significant impacts on several special status species, including Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback

chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl. CNE and others have protested the Moab, Price, Vernal, and Monticello proposed Resource Management Plans and Final Environmental Impact Statements. These Resource Management Plans do not constitute adequate consideration of a range of alternatives for management of habitat for special status species, nominated Areas of Critical Environmental Concern and other sensitive resources, nor do they contain an adequate analysis of the potential impacts of oil and gas exploration and development over the next 15-20 years, on all of the aforementioned resources. The BLM's conclusions in their resolution of our protests are arbitrary and capricious. We hereby incorporate our protests of these RMPs by reference. In addition, the Fillmore and Richfield Final Resource Management Plans do not constitute adequate consideration of a range of alternatives for management of habitat for special status species, nominated Areas of Critical Environmental Concern and other sensitive resources, nor do they contain an adequate analysis of the potential impacts of oil and gas exploration and development over the next 15-20 years, on all of the aforementioned resources. We also incorporate by reference all of the information contained within any previous protests or appeals to the Interior Board of Land Appeals, that we have filed in opposition to leasing of any of the lands included in this lease sale, and all of the information contained within our October 1, 2008 comments on Environmental Assessments UT-USO-08-002 and UT-USO-08-003 (February 2003 Suspended Oil and Gas Leases: Diamond Mountain and Book Cliffs Resource Areas).

The BLM should withdraw the protested parcels pending completion of an adequate NEPA analysis of the impacts of the proposed leasing on special status species, nominated ACECs, and other sensitive resources. In addition, the BLM should suspend the protested leases until it has met its obligations under the Administrative Procedure Act, Endangered Species Act, and the Federal Land and Policy Management Act, and until it has met its obligations outlined in the BLM Manual with respect to special status species.

A. National Environmental Policy Act

1. BLM Has Not Taken the Required 'Hard Look' at the Environmental Effects of the Proposed Leasing

NEPA requires agencies to take a “hard look” at the environmental effects of major federal actions. The National Environmental Policy Act, 42 U.S.C. § 4332(C) (2008); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The Supreme Court stated that “NEPA does not mandate particular results, but simply prescribes the necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). “Federal agencies shall use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. §1500.2 (e). Agencies are required to consider alternatives to a proposed action and must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C. § 4332(C). The courts have made clear that the discussion of alternatives is “the heart” of the NEPA process. *See* 40 C.F.R. §1502.14.

The BLM has not taken the required "hard look" at the potential impacts of the proposed action on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl. The BLM has not considered an adequate range of alternatives to minimize impacts to these species, including a 'No Surface Occupancy' alternative, or alternatives with lease stipulations and notices that provide varying degrees of protection; in any of the documents to which the proposed leasing is tiered.

None of the NEPA documents to which the proposed leasing is tiered, take the required "hard look at the potential impacts of the proposed leasing of the protested parcels. The EA does not take a 'hard look' at the potential impacts of the proposed leasing on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl.

a. Significant New Information

None of the NEPA documents, to which the leasing is tiered, adequately address the significant new information now available on the status of the Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl. An "agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effect of [its] planned action, even after a proposal has received initial approval.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000), quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 374 (1989).

The BLM must supplement its existing environmental analyses when new circumstances "raise[] significant new information relevant to environmental concerns[.]" *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708-09 (9th Cir. 2000). An agency "shall prepare supplements to either draft or final environmental impact statements if . . . there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). "If there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental Environmental Impact Statement ("EIS") must be prepared. *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851, 1859 (1989); see 42 U.S.C. § 4332(2)(C).

The BLM has been provided with significant new information relevant to the potential impacts of the proposed leasing on a number of the special status species at issue here, including, Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-

footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl. Center for Native Ecosystems has provided BLM with significant new information on a number of these special status species, in each of our previous protests of BLM oil and gas lease sales. Though the BLM has completed new Resource Management Plans or Environmental Assessments, the BLM has still failed to adequately consider all of the significant new information that has been provided to them through our previous protests of oil and gas lease sales, our comments on Environmental Assessments and Resource Management Plans etc. For the most part, none of the significant new information provided in previous protests has been considered in any NEPA document that the proposed leasing is tiered to. We hereby incorporate the significant new information section in each of our past protests of UT BLM oil and gas lease sales by reference, as well as significant new information provided to BLM in our comments and protests throughout the RMP revision process, and provided to BLM as comments on oil and gas leasing environmental assessments. The BLM must address the significant new information on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl in order to comply with NEPA.

b. Inadequate Direct, Indirect, Cumulative Impacts Analysis

None of the NEPA documents, to which the leasing is tiered, adequately consider the potential direct, indirect, and cumulative effects of oil and gas drilling on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl and their habitat. At bottom, "the agency's [Environmental Assessment] must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002). "An environmental impact statement must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002) citing *Custer County Action Ass'n v. Garvey*, 256 F.3d at 1024, 1035 (10th Cir. 2001) (internal quotation omitted); *see also* 40 C.F.R. § 1508.25(a)(2) (scope of EIS is influenced by cumulative actions and impact).

Cumulative impact is the impact on the environment, which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7.

For example, the NEPA documents to which the proposed leasing is tiered, do not provide adequate analysis of the potential direct and indirect effects of oil and gas exploration and development on the protested parcels on greater sage-grouse. In addition, the BLM has not adequately analyzed the potential cumulative impacts of oil and gas development, grazing, climate change, oil shale and tar sands development, geothermal development, alternative energy development, off-road vehicle use, and other

activities on greater sage-grouse over the life of the Resource Management Plans. The BLM National Sage-Grouse Habitat Conservation Strategy (Nov. 2004) has failed, and BLM has contributed to significant declines in sage-grouse populations across the species' range, and has contributed to the need to list the species under the Endangered Species Act. On December 4, 2007, the Federal District Court for the District of Idaho reversed and remanded the U.S. Fish and Wildlife Service's ("FWS") decision not to list the sage grouse as "threatened" or "endangered" under the ESA. *Western Watersheds Project v. U.S. Forest Service*, 535 F. Sup. 2d 1173 (D. Idaho 2007). The court explained the perilous condition of the sage grouse and the impact suffered by its habitats to date. *Id.* at 1173. Further elaborating on the current state of grouse habitat, the court noted: "Nowhere is sage-grouse habitat described as stable. By all accounts, it is deteriorating, and that deterioration is caused by factors that are on the increase." *Id.* at 1186. The court specifically focused on the impact of oil and gas development on grouse habitat as identified by an independent expert team. *Id.* at 1179. The court noted "a singular lack of data on measures taken by the BLM to protect the sage-grouse from energy development, the single largest risk in the eastern region." *Id.* at 1188. The BLM has failed to adequately protect greater sage-grouse from significant declines on BLM lands across its range, in large part because it has systematically failed to adequately analyze the direct, indirect and cumulative impacts of oil and gas development, and a variety of other BLM authorized activities, on the greater sage-grouse. An emerging scientific consensus amongst sage-grouse experts suggests that, in order to avoid significant continued declines of greater sage-grouse, BLM must: 1) set aside substantial areas of sage-grouse habitat as reserves free from oil and gas development, and 2) avoid development within breeding, summer and winter habitats, which are essential to the survival of populations, and 3) apply adequate mitigation measures as lease stipulations, to ensure against significant declines in response to energy development in areas outside of core reserves. In this instance the BLM is authorizing leasing of roughly 62,500 acres of crucial and substantial greater sage-grouse brood areas, and 53,145 acres of crucial and substantial greater sage-grouse winter habitat. Experts recommend avoiding development within breeding and winter habitats, particularly crucial breeding and winter habitats that have been identified as key to the survival of populations. BLM is authorizing oil and gas development within these key habitats, with lease stipulations that are unlikely to prevent significant declines in greater sage-grouse populations in these areas. The best available science on the greater sage-grouse suggests that BLM's lease stipulations (including those attached to the leases at issue here, are inadequate to prevent significant declines of greater sage-grouse in response to large-scale oil and gas development. Please see Attachment 1 for a sampling of studies and research reviews that substantiate the above claims. BLM failed to conduct an adequate NEPA analysis of the proposed leasing. BLM's conclusion that sale of the leases at issue here, will not significantly impact the greater sage-grouse, is arbitrary and capricious.

Similarly, the BLM has not adequately consider the direct, indirect and cumulative impacts of oil and gas leasing and subsequent development on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl. The BLM must address the

effects of direct, indirect, and cumulative impacts of oil and gas leasing on the all of these special status species, in a NEPA document in order to comply with NEPA.

2. Site-Specific NEPA Required at the Leasing Stage

“The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public land for oil and gas purposes . . .” *Center for Native Ecosystems*, 170 IBLA 332, 345 (2006) (emphasis added); see *Southern Utah Wilderness Alliance (SUWA)*, 166 IBLA 270, 276-77 (2005). As the Tenth Circuit clarified, *Park County Resource Council v. United States Dept. of Agriculture* does not excuse BLM from its obligation to analyze consequences of a major federal action prior to leasing. *Pennaco Energy Inc. v. United States Dept. of Interior*, 377 F.3d 1147, 1162 (10th Cir. 2004). *Park County* may allow the agency to forego preparation of an EIS if and when it has prepared an extensive environmental assessment covering the leases in question. This, however, is not the case. The BLM has not prepared adequate site-specific NEPA for the leasing of any of the protested parcels. The BLM has not conducted a detailed site specific NEPA analysis of the impacts of oil and gas development in and adjacent to each protested parcel, on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl.

a. Irreversible and Irretrievable Commitment of Resources

The appropriate time for preparing an EIS is prior to a decision “when the decision-maker retains a maximum range of options” prior to an action, which constitutes an “irreversible and irretrievable commitment of resources.” *Mobile Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2d Cir. 1977). Leasing without a No Surface Occupancy stipulation (“NSO”) has on-the-ground consequences and is an “irreversible and irretrievable commitment of resources,” which requires a NEPA document. *SUWA*, 166 IBLA 270, 276-77 (2005). The court in *Conner v. Burford* addressed oil and gas leasing in the Flathead and Gallatin National Forests. 848 F.2d 1441 (9th Cir. 1988). It held that leases with NSO stipulations did not require an EIS, whereas, leases without NSO stipulations did require an EIS. *Id.* at 1447-51. The Tenth Circuit stated that the critical stage for environmental analysis is the leasing stage, not the APD stage. *Pennaco Energy v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004) (“In the fluid minerals program, this commitment occurs at the point of lease issuance.”) Thus, the BLM must complete its NEPA analysis, in which it considers all stages of oil and gas production, at the leasing stage.

The BLM cannot adequately analyze the indirect and cumulative impacts of oil and gas development on the protested parcels on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette

cactus, and Mexican spotted owl without conducting a site-specific Environmental Impact Statement at the leasing stage.

b. Resource Management Plans Do Not Constitute Consideration of the Adequate Range of Alternatives

None of the NEPA documents that the proposed leasing is tiered to consider an adequate range of alternatives to leasing the protested parcels. The NEPA documents that the proposed leasing is tiered to, do not contain an adequate range of alternatives to explore the best ways to minimize impacts of the proposed leasing to special status species, including Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl. The purpose of NEPA's alternatives requirement is to ensure that agencies do not undertake projects "without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." *Env'tl Defense Fund, Inc. v. U.S. Army Corps of Eng'rs*, 492 F.2d 1123, 1135 (5th Cir. 1974); *see also Or. Env'tl Council v. Kunzman*, 614 F.Supp. 657, 660 (D. Or. 1985) (stating that the alternatives that must be considered under NEPA are those that would 'avoid or minimize' adverse environmental effects). "Federal agencies shall use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. §1500.2 (e). Alternatives should include reasonable alternatives to a proposed action that will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466-67 (10th Cir. 1984).

Pennaco Energy, Inc. v. Department of the Interior, was a challenge to an IBLA ruling overturning the BLM's decision to lease certain oil and gas parcels. 377 F.3d 1147, 1150 (10th Cir. 2004) The IBLA found the NEPA requirements were not satisfied and remanded the case to the BLM after Pennaco successfully bid on three of the plots. *Id.* The district court reversed the IBLA, ruling for Pennaco. *Id.* The IBLA decision was appealed to the 10th Circuit. *Id.* The court stated that for proposed "major Federal actions significantly affecting the quality of the human environment," agencies must prepare an environmental impact statement (EIS) in which they consider the environmental impact of the proposed action and compare this impact with that of "alternatives to the proposed action." *Id.*; *see* 42 U.S.C. § 4332(2)(C). Further, "in order to provide 'a clear basis for choice among options by the decision maker and the public,' an agency's EIS must consider the "no action" alternative." *Id.*; 40 C.F.R. § 1502.14 ; *see id.* at (d) (EIS shall "[i]nclude the alternative of no action"). *Pennaco*, 377 F.3d at 1150. The court found that because "the leasing decisions had already been made and the leases issued, the EIS did not consider reasonable alternatives available in a leasing decision, including whether specific parcels should be leased, appropriate lease stipulations, and NSO [no surface occupancy] and non-NSO areas." *Id.* at 1154. The court upheld the IBLA's determination

that the BLM did not take the required “hard look” at the environmental impacts of coal bed methane in its existing NEPA documents. *Id.* at 1152, 1162.

BLM must consider a “reasonable range of alternatives,” in a site specific NEPA analysis of leasing of each of the protested parcels.

For example, none of the RMPs to which the proposed leasing is tiered, consider setting aside large core reserves for greater sage-grouse that will remain free from oil and gas development for the life of the RMPs. Nor do any of the RMPs consider an alternative in which oil and gas development activities are prohibited within 3.3 miles of active leks and associated nesting areas, as recommended by Braun (2006, attached as Appendix 1). The best available science suggests that these alternatives may better protect greater sage-grouse in the face of oil and gas development, and that adoption of more protective alternatives may be necessary in order to ensure that BLM does not continue to contribute to the need to list the greater sage-grouse under the Endangered Species Act.

c. DNA’s Cannot Substitute for Site-specific NEPA Analysis

“DNAs, unlike EAs and [Findings of No Significant Impact], are not mentioned in [] NEPA or in the regulations implementing [] NEPA’ . . . Thus, DNAs are not themselves documents that may be tiered to NEPA documents, *but are used to determine the sufficiency of previously issued NEPA documents.*” *SUWA v. Norton*, 457 F. Supp. 2d 1253, 1262 (2006) (emphasis supplied); *Southern Utah Wilderness Alliance*, 164 IBLA at 123 (quoting *Pennaco*, 377 F.3d at 1162).

3. NEPA Requires Analysis of Effectiveness of Mitigation Measures, BLMs FONSI is Arbitrary and Capricious.

d. FONSI Must be Based on NEPA Analysis of Effectiveness Unless the Leases Have NSO Stipulations

When a proposed action will result in impacts to resources, the Agency is obligated to describe what mitigating efforts it could pursue to off-set the damages that would result from the proposed action. *See* 40 C.F.R. § 1502.16(h) (stating that an EIS “shall include discussions of . . . [m]eans to mitigate adverse environmental impacts”). “Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'” *Carmel-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir 1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)).

Agencies must “analyze the mitigation measures in detail [and] explain how effective the measures would be . . . [a] mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Northwest Indian*

Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 588 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988). When an agency acknowledges that a proposed project will negatively impact a species, the agency must identify mitigation measures that decrease the negative impacts to the species in the area in question, provide and estimate of how effective the mitigation measures would be if adopted, or give a reasoned explanation as to why such an estimate is not possible. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998). Further, the agency must make it clear that the mitigating measures in question will be adopted. *Id.*

In *Neighbors of Cuddy Mountain v. United States Forest Service* the court found that while the U.S. Forest Service (“USFS”) had acknowledged that a proposed timber sale would negatively impact the redband trout by increasing sedimentation levels, the EIS prepared by the USFS did not identify which (or whether) mitigation measures might decrease sedimentation in the creeks affected by the sale. *Id.* Further, the court noted that “it is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted, or given a reasoned explanation as to why such an estimate is not possible.” *Id.* Further, the court found that “The Forest Service's broad generalizations and vague references to mitigation measures in relation to the streams affected by the Grand/Dukes project do not constitute detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required provide.”

None of the NEPA documents that the proposed leasing is tiered to contain an analysis of the likely effectiveness of mitigation measures applied as lease stipulations, lease notices, or conditions of approval of APDs, in mitigating impacts to Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl, to insignificance.

Merely listing mitigation measures, without analyzing the effectiveness of the measures, is contrary to NEPA. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988). The BLM must evaluate the effectiveness of the mitigation measures used in oil and gas leasing with the best available science. “The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. §1500.1(b). The BLM is required to use “best available science and supporting studies conducted in accordance with sound and objective scientific practices.” Thus, if there is scientific uncertainty NEPA imposes the mandatory duties to (1) disclose the scientific uncertainty; (2) complete independent research and gather information if no adequate information exists unless costs are exorbitant or the means of obtaining the information are not known; and (3) evaluate the potential, reasonably foreseeable impacts in the absence of relevant information. *See* 40 C.F.R. §1502.22.

The BLM is “proceeding in the face of uncertainty,” contrary to the NEPA regulations. *Save Our Ecosystems v. Clark*, 747 F.2d at 1244.

None of the NEPA documents to which the proposed leasing is tiered, include an adequate analysis of likely effectiveness of the mitigation measures applied as lease notices and stipulations to protect the special status species, ACECs and other sensitive resources that occur in the protested parcels. For example, the BLM proposes the following lease stipulations and lease notices to mitigate impacts to greater sage-grouse to insignificance:

FFO-LN-06	<p style="text-align: center;">GREATER SAGE-GROUSE NESTING AND EARLY BROOD-REARING</p> <p>The lessee/operator is given notice that this lease has been identified as containing sage grouse nesting and early brooding habitat. Exploration, drilling and other development activities would be restricted from March 15 through July 15 within 2.0 miles of an occupied lek, or in mapped and identified greater sage-grouse nesting and early brood-rearing habitat. This notice may be waived, accepted, or modified by the authorized officer if either the resource values change or the lessee/operator demonstrates that adverse impacts can be mitigated.</p>
FFO-LN-07	<p style="text-align: center;">GREATER SAGE-GROUSE WINTER CONCENTRATION AREAS</p> <p>The lessee/operator is given notice that this lease has been identified as containing sage grouse winter concentration area. Exploration, drilling and other development activities would be restricted from November 15 through March 1 in identified greater sage-grouse winter concentration areas. This notice may be waived, accepted, or modified by the authorized officer if either the resource values change or the lessee/operator demonstrates that adverse impacts can be mitigated.</p>
FFO-LN-08	<p style="text-align: center;">GREATER SAGE-GROUSE LEKS</p> <p>Exploration, drilling, and other associated development should not be allowed from March 1st to July 15th in order to minimize disturbance to breeding sage grouse. Surface occupancy with historic or presently occupied habitat should be avoided. Permanent development near active or historically active leks should be avoided as they are often considered the focal point of year round activities for non-migratory populations (Braun et. al. 1977. Habitat surrounding the breeding grounds provides the majority of the nesting and early brood rearing habitat. Surveys to determine presence/absence of sage grouse prior to commencing work. This notice may be waived, accepted, or modified by the authorized officer if either the resource values change or the lessee/operator demonstrates that adverse impacts can be mitigated.</p>
FFO-LN-18	<p style="text-align: center;">GREATER SAGE-GROUSE LEKS</p> <p>The lessee/operator is given notice that surface use or otherwise disruptive activity would not be allowed which would result in an aboveground facility within 0.5 mile of any active greater sage-grouse lek. This notice may be waived, accepted, or modified by the authorized officer if either the resource values change or the lessee/operator demonstrates that adverse impacts can be mitigated.</p>
PFO-NSO-1	<p style="text-align: center;">NSO within 1/2 mile of greater sage-grouse leks.</p> <p>Exception: The AO may grant an exception if an environmental analysis demonstrates that the action would not impair the function or utility of the site for current or subsequent reproductive display, including daytime loafing/staging activities, and/or would not result in development of a permanent aboveground structure within 1/2 mile of a lek.</p> <p>Modification: The AO may modify the NSO area in extent if an environmental analysis finds that a portion of the NSO area is nonessential to site utility or function, or if further analysis shows that the size or location of the lek has changed, or that the proposed action could be conditioned to not impair the function or utility of the site for current or subsequent reproductive display including daytime loafing/staging activities.</p> <p>Waiver: A waiver may be granted if there are no active lek sites and it is determined the sites have been completely abandoned or destroyed or occur outside the initial identified area, as determined by BLM.</p>

PFO-TL-15	<p>Allow no surface disturbing or otherwise disruptive activities within 2 miles of a known greater sage-grouse lek from March 15 to July 15.</p> <p>Exception: The AO may grant an exception if an environmental analysis demonstrates that the action would not impair the function or utility of the habitat for nesting or early brood-rearing activities.</p> <p>Modification: Season may be adjusted depending on climatic and habitat conditions. Disturbance could occur if the activity were proposed to occur within the buffer, but would occur in non-sagebrush habitat, i.e., the activity could be allowed if it was not in sage-grouse habitat and did not in some other way disturb nesting or brood-rearing activity.</p> <p>Waiver: This stipulation may be waived if, in cooperation with UDWR, it is determined that the site has been permanently abandoned or unoccupied for a minimum of 5 years.</p>
PFO-TL-16	<p>Sage-grouse wintering areas would be closed seasonally from December 1 to March 14.</p> <p>Exception: Upon review and monitoring, the AO may grant exceptions because of climatic and/or habitat conditions if certain criteria are met and if activities would not cause undue stress to wintering greater sage-grouse</p> <p>Modification: Season may be adjusted depending on climatic and habitat conditions.</p> <p>Waiver: This stipulation may be waived if, in cooperation with the State wildlife agency, it is determined that the site has been permanently abandoned or unoccupied for a minimum of 5 years.</p>
UT-LN-52	<p style="text-align: center;">UTAH SENSITIVE SPECIES</p> <p>The lessee/operator is given notice that lands in this parcel have been identified as containing habitat for named species on the Utah Sensitive Species List. Modifications to the Surface Use Plan of Operations may be required in order to protect these resources from surface disturbing activities in accordance with Section 6 of the lease terms, Endangered Species Act, Migratory Bird Treaty Act and 43 CFR 3101.1-2.</p>

VFO-08	<p>Special Status Species: Sage Grouse No surface-disturbing activities within 2 miles of active sage grouse leks within _____ from March 1 - June 15. Exception: None Modification: None Waiver: None</p>
VFO-09	<p>Special Status Species: Sage Grouse Within ½ mile of known active leks within _____, use the best available technology such as installation of multi-cylinder pumps, hospital sound reducing mufflers, and placement of exhaust systems to reduce noise. Exception: None Modification: None Waiver: None</p>
VFO-10	<p>Special Status Species: Sage Grouse Within _____ of Sec. 30, no surface-disturbing activities within 1/4 mile of active sage grouse leks year round and no permanent facilities or structures would be allowed within 2 miles when possible. Exception: None Modification: None Waiver: None</p>

Several of the above lease stipulations for greater sage-grouse consist of timing limitations that restrict surface disturbance during the breeding season in breeding habitat, and during winter in winter concentration areas. These stipulations allow surface disturbance and construction of facilities associated oil and gas development activities to

occur in this crucial breeding and winter habitat outside of the breeding season. The resulting loss and fragmentation of habitat may make these habitats unusable in the breeding and winter seasons, in the years following development activity that takes place in previous years outside of these seasons. These timing limitations are unlikely to protect the greater sage-grouse from significant declines in response to oil and gas development in crucial breeding and winter habitat. See the documents included in Appendix 1 for details on the ineffectiveness of timing limitations at mitigating impacts of oil and gas development on greater sage-grouse to insignificance. The remaining lease notices and stipulations seeking to prevent significant impacts to breeding habitats near active leks, are also likely to be ineffective at mitigating impacts to insignificance. One consists of a notice that encourages operators to avoid surface occupancy and construction of permanent facilities in breeding habitat near leks. This mitigation measure is vague, and it is unclear how likely it is that the measure will actually be implemented. The remaining lease stipulations require 1) prohibition of surface disturbance resulting in a permanent aboveground facility within ½ mile of a lek, and 2) prohibition of surface within ¼ mile of a lek, and no construction of permanent facilities within 2 miles when possible. WAFWA (See Attachment 1) reviewed available literature from 2003-2008 and identified the following persistence levels resulting from application of different “no surface occupancy” or “NSO” buffer sizes:

NSO Buffer Size	Lek Persistence	Lek Loss
0.25 mi.	4%	96%
0.5 mi.	5%	95%
1.0 mi.	10%	90%
2.0 mi.	28%	72%

Thus, the notices and stipulations outlined above are likely to result in a 95-96% loss of leks across the 62,500 acres of greater sage-grouse brood habitat that is proposed for leasing in this sale. None of the NEPA documents to which the proposed leasing is tiered, provide an adequate analysis of the effectiveness of the mitigation measures proposed to protect greater sage-grouse from significant impacts associated with oil and gas development, particularly given the scientific consensus that these mitigation measures are inadequate. The BLM's conclusion that these mitigation measures will mitigate impacts of the oil and gas development authorized by this lease sale on greater sage-grouse to insignificance, is arbitrary and capricious.

Similarly, the lease notices and stipulations attached to oil and gas leases in brooding and winter habitat for Gunnison sage-grouse are unlikely to mitigate impacts to this species to insignificance. None of the NEPA documents to which the proposed leasing is tiered provide an adequate analysis of the likely effectiveness of the following mitigation measures proposed to protect the Gunnison sage-grouse from the impacts of oil and gas development:

<p>UT-LN-52</p>	<p style="text-align: center;">UTAH SENSITIVE SPECIES</p> <p>The lessee/operator is given notice that lands in this parcel have been identified as containing habitat for named species on the Utah Sensitive Species List. Modifications to the Surface Use Plan of Operations may be required in order to protect these resources from surface disturbing activities in accordance with Section 6 of the lease terms, Endangered Species Act, Migratory Bird Treaty Act and 43 CFR 3101.1-2.</p>
<p>MBFO-CSU-5</p>	<p style="text-align: center;">CONDITIONAL SURFACE USE STIPULATION-SAGE GROUSE STEPPE</p> <p style="text-align: center;">Purpose: To protect sagebrush/sage steppe communities</p> <p>Exception: An exception may be granted by the Field Manager if the operator submits a plan which demonstrates that impacts from the action would not result in any net loss of habitat.</p> <p>Modification: The Field Manager may modify the boundaries of the stipulation area if portions of the area do not include habitat or are outside the current defined area, as determined by the BLM.</p> <p>Waiver: May be granted to the stipulation area if it is determined the habitat no longer exists or has been destroyed.</p>
<p>MBFO-CSUTL-8</p>	<p style="text-align: center;">CONTROLLED SURFACE USE AND TIMING CONDITIONAL SURFACE USE AND TIMING LIMITATIONS STIPULATION –GUNNISON SAGE GROUSE LEKS</p> <p>If Gunnison sage-grouse leks are discovered, no surface-disturbing activities will be allowed within , 0.6 miles of a lek from March 20th through May 15th, and (2) no permanent aboveground facilities would be allowed within the 0.6 mile buffer on a year-round basis.</p> <p style="text-align: center;">Purpose: To protect occupied lek sites within Gunnison sage-grouse habitat.</p> <p>Exception: An exception may be granted by the Field Manager if the operator submits a plan which demonstrates that impacts from the proposed action can be adequately mitigated.</p> <p>Modification: The Field Manager may modify the boundaries of the stipulation area if (1) portions of the area do not include lek sites, or (2) the lek site(s) have been completely abandoned or destroyed, or (3) occupied lek site(s) occur outside the current defined area; as determined by the BLM.</p> <p>Waiver: A waiver may be granted if there are no active lek site(s) in the leasehold and it is determined the site(s) have been completely abandoned or destroyed or occur outside current defined area, as determined by the BLM.</p>

The Gunnison sage-grouse is closely related to the greater sage-grouse, and is likely to experience a response to oil and gas development activities that is similar to that of the greater sage-grouse. Thus, all of the critiques of the lease notices and stipulations applied to parcels occupied by greater sage-grouse, applies to the lease stipulations listed above.

The BLM also fails to apply adequate lease notices and stipulations to mitigate the Graham's penstemon to insignificance.

<p>VFO-11</p>	<p>Special Status Species Graham's Beardtongue (<i>Penstemon grahamii</i>) Allow no new surface-disturbing activities in the areas proposed as critical habitat for Graham's Beardtongue from the Federal Register Notice dated January 19, 2006, present within the _____.</p> <p>Exception: None.</p> <p>Modification: The stipulation could be modified based on the completion of a habitat assessment to determine if suitable habitat is present, implementation of developed conservation measures, and consultation with the U.S. Fish and Wildlife Service prior to surface disturbing activities.</p> <p>Waiver: None</p>
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<p>VFO-21</p>	<p style="text-align: center;">Graham's beardtongue (<i>Penstemon grahamii</i>)</p> <p>In order to minimize effects to the federally proposed Graham's beardtongue, the Bureau of Land Management (BLM) in coordination with the U.S. Fish and Wildlife Service (Service) developed the following avoidance and minimization measures. Integration of and adherence to these measures will help ensure the activities carried out during oil and gas development (including but not limited to drilling, production, and maintenance) are in compliance with the Endangered Species Act</p>
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	<p>(ESA) and will not result in a trend toward federal listing of the species. The following avoidance and minimization measures should be included in the Plan of Development:</p> <ol style="list-style-type: none"> 1. Pre-project habitat assessments will be completed across 100% of the project disturbance area within potential habitat¹ prior to any ground disturbing activities to determine if suitable Graham's beardtongue habitat is present. 2. All surface disturbing activities having potential direct or indirect impacts on proposed critical habitat² are prohibited. 3. Within suitable habitat³, site inventories will be conducted to determine occupancy. Inventories: <ol style="list-style-type: none"> a. Must be conducted by qualified individual(s) and according to BLM and Service accepted survey protocols, b. Will be conducted in suitable and occupied habitat⁴ for all areas proposed for surface disturbance prior to initiation of project activities and within the same growing season, at a time when the plant can be detected (usually April 15th to May 20th in the Uintah Basin; however, surveyors should verify that the plant is flowering by contacting a BLM or FWS botanist or demonstrating that the nearest known population is in flower), c. Will occur within 300' from the centerline of the proposed right-of-way for surface pipelines or roads; and within 300' from the perimeter of disturbance for the proposed well pad including the well pad, d. Will include, but not be limited to, plant species lists and habitat characteristics, and e. Will be valid until April 15th the following year. 4. Design project infrastructure to minimize impacts within suitable habitat²: <ol style="list-style-type: none"> a. Reduce well pad size to the minimum needed, without compromising safety, b. Limit new access routes created by the project, c. Roads and utilities should share common right-of-ways where possible, d. Reduce the width of right-of-ways and minimize the depth of excavation needed for the road bed; where feasible, use the natural ground surface for the road within habitat, e. Place signing to limit off-road travel in sensitive areas, and f. Stay on designated routes and other cleared/approved areas. 5. Within occupied habitat⁴, project infrastructure will be designed to avoid direct disturbance and minimize indirect impacts to populations and to individual plants: <ol style="list-style-type: none"> a. Follow the above (#3) recommendations for project design within suitable habitats, b. Construction of roads will occur such that the edge of the right of way is at least 300' from any plant, c. Roads will be graveled within occupied habitat; the operator is encouraged to apply water for dust abatement to such areas from April 15th to May 20th (flowering period); dust abatement applications will be comprised of water only, d. The edge of the well pad should be located at least 300' away from plants, e. Surface pipelines will be laid such that a 300 foot buffer exists between the edge of the right of way and the plants, use stabilizing and anchoring techniques when the pipeline crosses the habitat (exposed raw shale knolls and slopes derived from the Parachute Creek and Evacuation Creek members of the geologic Green River Formation) to ensure pipelines don't move towards the population, f. Construction activities will not occur from April 15th through May 30th within occupied habitat, g. Before and during construction, areas for avoidance should be visually identifiable in the field, e.g., flagging, temporary fencing, rebar, etc., h. Where technically and economically feasible, use directional drilling or multiple wells from the same pad, i. Designs will avoid concentrating water flows or sediments into occupied habitat, j. Place produced oil, water, or condensate tanks in centralized locations, away from occupied habitat, and
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¹ *Potential habitat* is defined as areas which satisfy the broad criteria of the species habitat description; usually determined by preliminary, in-house assessment.

² *Proposed critical habitat* is defined as habitat proposed in the Federal Register (71 FR 3158) to be designated as critical habitat under Section 4 of the Endangered Species Act.

³ *Suitable habitat* is defined as areas which contain or exhibit the specific components or constituents necessary for plant persistence; determined by field inspection and/or surveys; may or may not contain Graham's beardtongue plants; detailed habitat and plant descriptions can be found in the Federal Register 71 (12): 3158-3196.

⁴ *Occupied habitat* is defined as areas currently or historically known to support Graham's beardtongue; synonymous with "known habitat."

	<p>k. Minimize the disturbed area of producing well locations through interim and final reclamation. Reclaim well pads following drilling to the smallest area possible.</p> <p>6. Occupied Graham's beardtongue habitats within 300' of the edge of the surface pipelines' right-of-ways, 300' of the edge of the roads' right-of-ways, and 300' from the edge of well pads shall be monitored for a period of three years after ground disturbing activities. Monitoring will include annual plant surveys to determine plant and habitat impacts relative to project facilities. Annual reports shall be provided to the BLM and the Service. To ensure desired results are being achieved, minimization measures will be evaluated and may be changed after a thorough review of the monitoring results and annual reports during annual meetings between the BLM and the Service.</p> <p>7. Reinitiation of section 7 consultation with the Service will be sought immediately if any loss of plants or occupied habitat for the Graham's beardtongue is anticipated as a result of project activities.</p> <p>Additional site-specific measures may also be employed to avoid or minimize effects to the species. These additional measures will be developed and implemented in consultation with the U.S. Fish and Wildlife Service to ensure continued compliance with the ESA.</p>
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The Graham's penstemon is not currently listed under the Endangered Species Act. The penstemon is a sensitive species, and thus, there is no legal obligation for BLM to enter into ESA consultation with the U.S. Fish and Wildlife Service when a project may impact Graham's penstemon. Accordingly, any protections BLM provides are purely voluntary. BLM has chosen not to issue the leases in Graham's penstemon habitat with blanket NSO (no surface occupancy) stipulations. While the stipulations above provide some protections to the plant, including barring surface disturbance within 300 feet of known plants, in allowing drilling in penstemon habitat, BLM will contribute to the plant's decline. FWS made this point recently when listing the Pariette hookless cactus, which also grows near oil and gas deposits. As a BLM sensitive species, BLM "provided reasonable and prudent measures related to conserving *S. brevispinus*; however, these measures result in protecting individual plants, and tend to not limit the extent of drilling within the range of the species." 12-month Finding on a Petition To List *Sclerocactus brevispinus* (Pariette cactus) as an Endangered or Threatened Species; Taxonomic Change From *Sclerocactus glaucus* to *Sclerocactus brevispinus*, *S. glaucus*, and *S. wetlandicus*, 72 Fed. Reg. 53211, 53217 (Sept. 18, 2007). For this reason, and because BLM had not stipulated a blanket NSO in the plant's habitat, FWS found that, "existing regulatory mechanisms are insufficient to conserve the species." *Id.* at 53217. That reasoning applies here as well.

Generally speaking, BLM's lease notices and stipulations may begin to minimize direct impacts, but are utterly incapable of preventing significant cumulative impacts to all of the special status species at issue here. In the case of all of the sensitive plant species at issue here, including Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and other special status plant species, BLM proposes measures that do not limit drilling within the range of the species, and thus do not address the indirect and cumulative impacts of oil and gas development.

Due to concern that increasing oil and gas development in the Vernal Field Office may result in contamination of critical habitat for the four endangered Colorado Fish Species, FWS suggested that BLM require contaminant monitoring at major drainage intersections upstream from and within critical habitat for these species, as part of the lease stipulation for oil and gas lease parcels proposed for sale upstream of critical habitat. BLM has failed to require the contaminant monitoring requested by FWS.

It is also doubtful that the mitigation measures proposed to mitigate impacts to white-tailed prairie dogs and black-footed ferrets will be effective.

Despite evidence that suggests mitigation measures may not mitigate impacts to insignificance, BLM provides little or no rational for its assertion that assorted lease stipulations, notices and COAs will mitigate impacts to insignificance. The record is devoid of support for BLM's assertion that the lease stipulations and notices applied to the protested parcels, will mitigate impacts to special status species to insignificance.

e. BLM Must Demonstrate That Mitigation Measures Will Actually Be Implemented

NEPA requires that the “possibility of mitigation” should not be relied upon as a means to avoid further environmental analysis. *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*; see *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002). The Tenth Circuit found that the “Forty Questions” are “persuasive authority offering interpretive guidance” on NEPA. *Id.*

Many of the lease notices and stipulations applied to protect special status species at issue here contain language that allows them to be waived, but the conditions under which they may be waived are not clearly spelled out in the lease stipulations, leaving the public with little certainty regarding whether and under what circumstances the mitigation measures will actually be implemented. For example, the mitigation measures for greater sage-grouse can be waived if “...the lessee/operator demonstrates that adverse impacts can be mitigated.” This language is so general that it may allow notices and stipulations to be waived under a wide range of circumstances, making it unclear when exactly the mitigation measures will be required, and under what specific circumstances they might be waived.

f. BLM Must Appropriately Deal With Expert Comments

The BLM does not address the current expert opinions in the NEPA documents on which it relies. Failure to disclose and thoroughly respond to differing scientific views violates NEPA. The agency is required to perform an environmental analysis that includes this information prior to approving any proposed action, in this case the lease sale. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 334, 354 (1989) (EIS should reflect critical views of others to whom copies of the draft were provided and respond to opposing views); *Seattle Audubon Society v. Lyons*, 871 F.Supp. 1291, 1381 (W.D. Wash. 1994) (An EIS must “disclose scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it.”). The BLM has not appropriately dealt with expert comments on the potential impacts of the proposed leasing and the inadequacy of mitigation measures proposed to protect special status species.

We have provided BLM with information on the inadequacy of mitigation measures proposed for the species at issue here at numerous instances in the past, including information developed by experts on these species. BLM has failed to appropriately deal with expert comments on the impacts of oil and gas development on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback

sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl, in the NEPA documents to which the proposed leasing is tiered.

g. BLM Must Use Adequate Science

The BLM must use adequate science in their environmental analysis. The BLM must “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24; 40 C.F.R. § 1500.1(b); *see also* The Data Quality Act; BLM Information Quality Guidelines, http://www.blm.gov/nhp/efoia/data_quality/guidelines.pdf.\

The BLM is ignoring the best available science on the impacts of oil and gas development on special status species, and the adequacy of proposed mitigation measures, with respect to Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl

B. Federal Land Policy and Management Act

1. Unnecessary and Undue Degradation

The BLM has a duty under the Federal Land Policy and Management Act (“FLPMA”) to prevent unnecessary and undue degradation to the lands under its management. “In managing the public lands the [Secretary of Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). “The court in *Mineral Policy Center v. Norton* [found] that in enacting FLPMA, Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary . . . is undue or excessive.”) *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 43 (D.D.C. 2003).

Leasing the protested parcels will result in unnecessary and undue degradation to special status species and their habitats.

2. Minimize Adverse Effects

The BLM must minimize the adverse effects on the special status species Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl order to comply with FLPMA. “[T]he using department shall . . . minimize adverse impacts on the natural, environmental, scientific, cultural, and other resources and values (including fish and wildlife habitat) of the public lands involved. 43 U.S.C. §1732(d)(2)(a). “If there are significant environmental effects that cannot be mitigated, an EIS must be prepared even if there is no unnecessary or undue degradation of the public lands.” *Kendall’s*

Concerned Area Residents, 129 IBLA 130, 138 (1994); 42 U.S.C. § 4332(2)(C) (1988). “If there is unnecessary or undue degradation, it must be mitigated.” *Kendall’s Concerned Area Residents*, at 138; see 43 CFR 3809.2-1(b). “If unnecessary or undue degradation cannot be prevented by mitigating measures, BLM is required to deny approval of the plan.” *Kendall’s Concerned Area Residents*, at 138; see 43 CFR § 3809.0-3(b); *Department of the Navy*, 108 IBLA 334, 336 (1989); see 43 U.S.C. § 1732(b) (1988); 43 CFR § 3809.0-5(k).

The BLM has failed to do so.

3. BLM Has Failed to Protect Sensitive Species as Required

Instruction Memorandum 97-118, issued by the national BLM office, governs BLM Special Status Species management and requires that actions authorized, funded, or carried out by BLM do not contribute to the need for any species to become listed as a candidate, or for any candidate species to become listed as threatened or endangered. It recognizes that early identification of BLM sensitive species is advised in efforts to prevent species endangerment, and encourages state directors to collect information on species of concern to determine if BLM sensitive species designation and special management are needed.

If Sensitive Species are designated by a State Director, the protection provided by the policy for candidate species shall be used as the minimum level of protection. BLM Manual 6840.06. The policy for candidate species states that the "BLM shall carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species as threatened/endangered." BLM Manual 6840.06. Specifically, BLM shall:

- (1) Determine the distribution, abundance, reasons for the current status, and habitat needs for candidate species occurring on lands administered by BLM, and evaluate the significance of lands administered by BLM or actions in maintaining those species.
- (2) For those species where lands administered by BLM or actions have a significant affect on their status, manage the habitat to conserve the species by:
 - a. Including candidate species as priority species in land use plans.
 - b. Developing and implementing rangewide and/or site-specific management plans for candidate species that include specific habitat and population management objectives designed for recovery, as well as the management strategies necessary to meet those objectives.
 - c. Ensuring that BLM activities affecting the habitat of candidate species are carried out in a manner that is consistent with the objectives for those species.
 - d. Monitoring populations and habitats of candidate species to determine whether management objectives are being met.

- (3) Request any technical assistance from FWS/NMFS, and any other qualified source, on any planned action that may contribute to the need to list a candidate species as threatened/endangered.

BLM Manual 6840.06. Despite this clear guidance, there is little evidence that BLM is fulfilling these obligations. Specifically, BLM failed to: 1) conduct surveys and/or inventories necessary to determine the distribution and abundance of Sensitive Species; 2) failed to assess the reasons for the current status of Sensitive Species; 3) failed to evaluate the potential impacts of leasing and subsequent oil and gas activities on Sensitive Species; 4) develop conservation strategies for Sensitive Species and ensure that the activities in question are consistent with those strategies; 5) monitor populations and habitats of Sensitive Species; and 6) request appropriate technical assistance from all other qualified sources; for any of the sensitive species at issue here. This failure has compromised BLM's NEPA analyses of the likely impacts of oil and gas development authorized by the leasing of the protested parcels, on Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Graham's penstemon, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl

a. BLM failed to adequately consider sensitive species in its NEPA documents to which the leasing is tiered

BLM Manual § 1622.1 refers to "Fish and Wildlife Habitat Management" and contains specific language requiring the BLM in the RMP process to, among other things:

- 1) Identify priority species and habitats . . .
- 2) [E]stablish objectives for habitat maintenance, improvement, and expansion for priority species and habitats. Express objectives in measurable terms that can be evaluated through monitoring.
- 3) Identify priority areas for HMPs [Habitat Management Plans] . . .
- 4) Establish priority habitat monitoring objectives . . .
- 5) Determine affirmative conservation measures to improve habitat conditions and resolve conflicts for listed, proposed, and candidate species.

BLM Manual § 1622.11(A)(1) – (A)(3). The RMPs and other NEPA documents to which this leasing is tiered do not meet these obligations, and BLM did not take appropriate steps to remedy these failings before initiating this lease sale.

As a result, oil and gas development authorized by the leasing of the protested parcels will contribute to the need to list the Gunnison sage-grouse, greater sage-grouse, white-tailed prairie dog, black-footed ferret and Graham's penstemon.

4. BLM has failed to adequately consider ACEC nominations

This protest includes areas that have been nominated as Areas of Critical Environmental Concern (“ACEC”). CNE nominated several areas included in this lease sale as ACECs to protect white-tailed prairie dog habitat, and Graham's penstemon habitat. These areas were nominated as ACECs because of their relevance and importance as key habitat for white-tailed prairie dog, black-footed ferret and Graham's penstemon and because of their value as recovery habitat for this species. Here we incorporate by reference white-tailed prairie dog ACEC nominations, the Graham's penstemon ACEC nominations and all the references they contain. The BLM Manual is clear that Field Managers are required to determine whether nominated areas meet the relevance and significance criteria for ACEC designation and then decide whether interim management is necessary. The BLM did not respond to all of our ACEC nominations, and has not considered the impacts of oil and gas leasing and development on the resources for which these ACECs would be designated. We incorporate all of our comments on and protests of the relevant Resource Management Plans by reference. By not protecting this habitat, the BLM is contributing to the need to list the white-tailed prairie dog, black-footed ferret and Graham's penstemon, and is in violation of the BLM Manual.

NEPA regulations require that, while BLM is in the process of an EIS, such as during revision or amendment of a RMP, the agency must not take any action concerning a proposal that would “[l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1. *See also* 40 C.F.R. § 1502.2(f) (while preparing environmental impact statements, federal agencies “shall not commit resources prejudicing selection of alternatives before making a final decision”). BLM has historically interpreted this NEPA regulation to require that proposed actions that could prejudice selection of any alternatives under consideration “should be postponed or denied” in order to comply with 40 C.F.R. § 1506.1, and the Land Use Planning Handbook previously contained this direction. Another section of this same regulation directs that while BLM is preparing a required EIS “and the [proposed] action is not covered by an existing program statement,” then BLM must not take any actions that may “prejudice the ultimate decision on the program.” 40 C.F.R. § 1506.1(c). The regulation continues that “[i]nterim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.” *Id.* (emphasis added).

Granting valid and existing rights in these parcels before ACEC designation is fully considered and management prescriptions are developed could both adversely impact the environment and limit the choice of reasonable alternatives for the management of these areas. These parcels should be withdrawn until the nominated ACECs are evaluated and management prescriptions are developed.

ACECs may be nominated even when plan revision is not in progress, and a preliminary evaluation should take place after receiving such a nomination. The District Manager may determine that either a plan amendment or temporary management are required.

If an area is identified for consideration as an ACEC and a planning effort is not underway or imminent, the District Manager or Area Manager must make a preliminary evaluation on a timely basis to determine if the relevance and importance criteria are met. If so, the District Manager **must** initiate either a plan amendment to further evaluate the potential ACEC or provide temporary management until an evaluation is completed through resource management planning. Temporary management includes those reasonable measures necessary to protect human life and safety or significant resource values from degradation until the area is fully evaluated through the resource management planning process. BLM Manual 1613.21.E (emphasis added).

The public has an opportunity to submit nominations or recommendations for areas to be considered for ACEC designation. Such recommendations are actively solicited at the beginning of a planning effort. However, nominations may be made at any time and must receive a preliminary evaluation to determine if they meet the relevance and importance criteria, and, therefore, warrant further consideration in the planning process....BLM Manual 1613.41 (emphasis added).

The presence of oil and gas leases should have no bearing on whether an area meets the criteria for ACEC designation, but may prejudice the development of ACEC management prescriptions. BLM Manual 1613.22.A states:

Identify Factors Which Influence Management Prescriptions....These factors are important to the development of management prescriptions for potential ACEC's. Factors to consider include, but are not limited to, the following:....

8. Relationship to existing rights. What is the status of existing mining claims or pre-FLPMA leases? How will existing rights affect management of the resource or hazard?

CNE strongly believes that temporary management is required to preserve the values of these areas as potential ACECs. Instead of approving leasing of key wildlife habitat -- and opening the floodgates for a wave of new APDs on these sensitive lands, the BLM should focus on evaluating our ACEC nominations in a timely fashion and managing exploration and development under *existing* leases.

It simply makes no sense for the BLM to waste its opportunity to designate ACECs that could help conserve white-tailed prairie dogs, black-footed ferrets and Graham's penstemon. Not only is this poor judgment, it is also a violation of NEPA, FLPMA, and the BLM Manual.

BLM presently has the opportunity to plan for rational, environmentally sound development of energy resources in the nominated ACECs while protecting other uses of these lands—as required by law. Allowing leasing prior to ACEC evaluation and RMP

revision will sacrifice this opportunity – without taking a hard look at the consequences. BLM and the public will have lost the chance to prevent the haphazard, poorly planned development that has characterized other federal lands in the Rockies. As an irretrievable commitment of resources, leasing will severely limit the range of management prescriptions.

Our protest of the Vernal Resource Management Plan was upheld on the grounds that BLM violated FLPMA and the BLM manual by failing to consider our ACEC nominations. BLM has stated that it will address our ACEC nominations in the next RMP revision process. However, in the meantime, BLM must not issue leases within these nominated ACECs, as this will limit the range of alternatives that can be considered for these areas in the next RMP revision.

C. Endangered Species Act

1. Consultation

Under the Endangered Species Act (“ESA”), the BLM must consult with FWS before offering parcels for lease because several species listed under the Endangered Species Act, including black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl may be jeopardized by oil and gas development authorized through leasing of the protested parcels.

The ESA consultation process is triggered when the surface agency is notified of the pending lease sale. *Connor v. Buford*, 848 F.2d 1441,1452 (1988). In *Connor*, the BLM could not issue oil and gas leases until the Fish and Wildlife Service (“FWS”) analyzed consequences of all stages of the leasing plan in the Biological Opinion (“BO”). *Id.* at 1455. ESA’s consultation requirement is not met by “incremental steps” and by mere notification of the potential presence of endangered species. *Id.* at 1452-58; The court held that “agency action [for purposes of developing a biological opinion] . . . entails not only leasing but leasing and all post-leasing activities through production and abandonment.” *Id.* at 1453. Contrary to the BLM position that relies upon the *Wyoming Outdoor Council v. Bosworth*, the Tenth Circuit stated that the critical stage for environmental analysis is the leasing stage, not the APD stage. *Pennaco Energy v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004).

The FWS issued Biological Opinions for the recently released Resource Management Plans to which the leasing of the majority of the protested parcels is tiered. These BO's conclude that oil and gas development authorized under the Resource Management Plans will not jeopardize species listed under the Endangered Species Act. However, this conclusion is arbitrary and capricious. The BOs do not provide an adequate analysis of the indirect and cumulative impacts of oil and gas leasing on the survival and recovery of listed species, including black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl. Such an analysis must include the cumulative impacts of oil and gas development that occurs not only on parcels occupied by listed species, but also on adjacent parcels. In addition, the BOs do not include an adequate analysis of the likely effectiveness of mitigation measures applied through lease stipulations and lease

notices, at mitigating impacts such jeopardy to the survival or recovery of these species is avoided. In addition, the BO's largely rely on lease stipulations and notices that were developed as part of earlier consultation processes done at a time when the reasonable foreseeable oil and gas development in the region was expected to be much lower, and there was less information suggesting that oil and gas development might jeopardize listed species. The BO's did not adequately update the lease notices and stipulations in response to new circumstances and new information.

Finally, in addition to the programmatic consultation provided by the BOs, the BLM and FWS must conduct site-specific consultation at the leasing stage that considers not only direct impacts to species on lease parcels, but also indirect and cumulative impacts to listed species and their habitat both on lease parcels and on adjacent lands. The BLM and FWS must consider not only impacts to survival of the species, but also impacts to recovery. The BLM and FWS have failed to meet these requirements under the ESA with respect to black-footed ferret, razorback sucker, Colorado pikeminnow, bonytail, humpback chub, Uintah Basin hookless cactus, Pariette cactus, and Mexican spotted owl.

D. BLM Has the Discretion Not to Lease

Under the statutory and regulatory provisions authorizing this lease sale, the BLM has full discretion whether or not to offer the lease parcels for sale. The Mineral Leasing Act ("MLA"), 30 U.S.C. § 226(a), provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil and gas deposits may be leased by the Secretary." (emphasis added). The Supreme Court has concluded that this "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1,4 (1965); see also *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory."); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975).

Submitting a leasing application vests no rights to the applicant or potential bidders. The BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966); see also *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Pease v. Udall*, 332 F.2d 62 (9th Cir. 1964); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839 (D.C. Wyo. 1981).

The arguments laid out in detail above demonstrate that exercise of the discretion not to lease the protested parcels, is appropriate and necessary. Withdrawing the protested parcels from the lease sale until BLM has met its legal obligations to conduct an adequate NEPA analysis, and meet its legal obligations under the Administrative Procedure Act, Endangered Species Act, Federal Land and Policy Management Act, and the BLM Manual, is a proper exercise of BLM's discretion under the MLA. The BLM

has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law.

V. CONCLUSION & REQUEST FOR RELIEF

CNE therefore requests that the BLM withdraw the protested parcels from the December Sale.

Sincerely,

Megan Mueller
Staff Biologist
Center for Native Ecosystems

Appendix 1